

FILED

STATE OF NORTH CAROLINA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

COUNTY OF WAKE

WAKE CO., C.S.C. 17 CVS 5084

BY _____

ROY A. COOPER, III, in his official
capacity as GOVERNOR OF THE
STATE OF NORTH CAROLINA,

Plaintiff,

vs.

PHILIP E. BERGER, in his official
capacity as PRESIDENT PRO
TEMPORE OF THE NORTH
CAROLINA SENATE; TIMOTHY K.
MOORE, in his official capacity as
SPEAKER OF THE NORTH
CAROLINA HOUSE OF
REPRESENTATIVES; and THE
STATE OF NORTH CAROLINA,

Defendants.

ORDER

THIS MATTER coming before the undersigned duly-appointed three-judge panel upon certification from the North Carolina Supreme Court, based on the Supreme Court's September 1, 2017 Order in this matter. In its September 1, 2017 Order, the Supreme Court directed this Court to enter a new order within 60 days that:

- (a) explains the basis for this Court's earlier determination that it lacked jurisdiction to reach the merits of the claims advanced in plaintiff's complaint, and
- (b) addresses the issues that plaintiff has raised on the merits.

On June 1, 2017, this Court heard dispositive motions and entered an order granting Defendants Berger and Moore's motion to dismiss for lack of subject matter jurisdiction pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1). Based on the certification from and directive of our Supreme Court, this Court hereby sets forth the following:

Explanation Of This Court's Ruling That It Lacks Jurisdiction To Reach The Merits Of Claims Advanced In Plaintiff's Complaint.

A. BACKGROUND FOR ORDER REGARDING SESSION LAW 2017-6.

1. Procedural Background

a. Session Law 2017-6 was enacted into law on April 25, 2017, reorganizing two statutorily-created bodies, the State Board of Elections (the "Board of Elections") and the State Ethics Commission (the "Ethics Commission"), into one independent, regulatory and quasi-judicial body, the Bipartisan State Board of Elections and Ethics Enforcement (the "Bipartisan Board").

b. Session Law 2017-6 repeals Part I of Session Law 2016-125, a law passed by the General Assembly at the end of 2016 that was an earlier effort to merge the Board of Elections and the Ethics Commission. In a prior proceeding, case number 16-CVS-15636, by Memorandum of Order on Cross-Motions for Summary Judgment entered on March 17, 2017, this Court concluded that Part I of Session

Law 2016-125 was unconstitutional. Defendants did not appeal this ruling of this Court.

c. On April 26, 2017, Plaintiff filed his Verified Complaint alleging that Sections 3 through 22 of Session Law 2017-6 are unconstitutional and seeking declaratory and injunctive relief.

d. On May 23, 2017, Defendants filed their Motion to Dismiss & Answer to Verified Complaint, and both parties filed their motions for summary judgment.

II. Summary of Session Law 2017-6

a. In reorganizing the Board of Elections and the Ethics Commission into the Bipartisan Board, Session Law 2017-6 establishes the following elements of governance and structure of the Bipartisan Board, among others:

1. All eight members of the Bipartisan Board are to be appointed by the Governor, four from each of the two largest political parties, which are currently the Democratic and Republican parties. The appointees are to be chosen from lists of six nominees submitted by the party chairs;

2. The Governor has the power to remove all members from the Bipartisan Board for misfeasance, malfeasance, or nonfeasance;

3. Any vacancy occurring on the Bipartisan Board is to be filled by the Governor with an individual affiliated with the same political party of the vacating member;

4. A majority of the Bipartisan Board constitutes a quorum for the transaction of business,

and an affirmative vote of at least five members of the Bipartisan Board (i.e., a simple majority) is required for the Bipartisan Board to act;

5. The Governor appoints members of the Bipartisan Board to serve as chair, vice-chair, and secretary until May 2019, at which time the Bipartisan Board shall select its own officers, with the offices of chair and vice chair rotating between the two major political parties every two years;

6. The Bipartisan Board appoints its own Executive Director beginning in May 2019. Until that time, the term of the Executive Director of the Board of Elections is extended, and she shall serve as the Executive Director of the Bipartisan Board; and

7. The Bipartisan Board appoints the members of the county boards of elections, with two members from each of the two major political parties.

III. North Carolina Constitutional Provisions At Issue

a. The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other. Article I, Sec. 6.

b. The legislative power of the State shall be vested in the General Assembly, which shall consist of a Senate and a House of Representatives. Article II, Section 1.

c. The executive power of the State shall be vested in the Governor. Article III, Section 1.

d. The Governor shall take care that the laws be faithfully executed. Article III, Section 5(4).

e. The General Assembly shall prescribe the functions, powers, and duties of the administrative departments and agencies of the State and may alter them from time to time, but the Governor may make such changes in the allocation of offices and agencies and in the allocation of those functions, powers, and duties as he considers necessary for efficient administration. If those changes affect existing law, they shall be set forth in executive orders, which shall be submitted to the General Assembly not later than the sixtieth calendar day of its session, and shall become effective and shall have the force of law upon adjournment *sine die* of the session, unless specifically disapproved by resolution of either house of the General Assembly or specifically modified by joint resolution of both houses of the General Assembly. Article III, Section 5(10).

f. Not later than July 1, 1975, all administrative departments, agencies, and offices of the State and their respective functions, powers, and duties were allocated by law among and within not more than 25 principal administrative departments so as to group them as far as practicable according to major purposes. Regulatory, quasi-judicial, and temporary agencies may, but need not, be allocated within a principal department. Article III, Section 11.

IV. Standards of Review on Constitutional Challenge

When assessing a challenge to the constitutionality of legislation, this Court's duty is to determine whether the General Assembly has complied with the Constitution. If constitutional requirements are met, the wisdom of the legislation is a question for the General Assembly. *Hart v. State*, 368 N.C. 122, 126, 774 S.E.2d 281, 284 (2015).

B. BASIS FOR DETERMINATION REGARDING LACK OF SUBJECT MATTER JURISDICTION

a. This Court has personal jurisdiction over the parties; however, Defendants argued in their Motion for Summary Judgment that because the issues involved are nonjusticiable political questions, this Court does not have subject matter jurisdiction to consider and rule upon the issues, pursuant to Rule 12(b)(1) of the North Carolina Rules of Civil Procedure.

b. The United States Supreme Court recognized in *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962), any one of the following conditions may give rise to a non-justiciable political question:

... a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. (emphasis added).

c. The North Carolina Supreme Court has declared:

The political question doctrine controls, essentially, when a question becomes “not justiciable ... because of the separation of powers provided by the Constitution.” *Powell v. McCormack*, 395 U.S. 486, 517, 89 S.Ct. 1944, 1961, 23 L.Ed.2d 491, 514 (1969). “The ... doctrine excludes from judicial review those controversies which revolve around policy choices and value determinations constitutionally committed for resolution to the halls of Congress or the confines of the Executive Branch. The Judiciary is particularly ill-suited to make such decisions....” *Japan Whaling Ass’n v. American Cetacean Soc’y*, 478 U.S. 221, 230, 106 S.Ct. 2860, 2866, 92 L.Ed.2d 166, 178 (1986). “It is well established that the ... courts will not adjudicate political questions.” *Powell*, 395 U.S. at 518, 89 S.Ct. at 1962, 23 L.Ed.2d at 515. A question may be held nonjusticiable under this doctrine if it involves “a textually demonstrable constitutional commitment of the issue to a coordinate political department.”

Bacon v. Lee, 353 N.C. 696, 717, 549 S.E.2d 840, 854 (2001).

d. Because “issues of constitutional power between the nation and the states and between the executive and legislative branches turn more on matters of pragmatic operation than on those of principled interpretation (unlike questions of individual rights), there is a much sounder basis for vesting such decisions with the political rather than judicial organs of government.” Jesse H. Choper, *The Political Question Doctrine: Suggested Criteria*, 54 Duke L.J. 1457, 1466 (2005).

e. Article III, Section 5(10) expressly sets forth a mechanism for the Governor, through executive orders subject to approval or disapproval by the General Assembly, to make changes in the allocation of offices and agencies and in the allocation of the functions, powers, and duties of such agencies as established by the General Assembly.

f. The functions, powers, and duties of an agency encompass how a particular agency might work, its structure, and what role it may play in enforcement of the laws.

g. The text of the Constitution makes clear that the power to alter the functions and duties of state agencies is reserved to the Legislature through its law-making ability and to the Governor through executive order subject to review by the Legislature.

h. This Court cannot interject itself into a balance struck in the text of a Constitution specifically dealing with the organization and structure of a state agency. The merger of the Board of Elections and Ethics Commission into the Bipartisan Board in Session Law 2017-6 is a political question and therefore a nonjusticiable issue, and that this Court lacks authority to review. *Bacon*, 353 N.C. at 717, 549 S.E.2d at 854. That, accordingly, the Court lacks subject matter jurisdiction and therefore under Rule 12(b)(1), the Court grants Defendant's Motion for Summary Judgment.

i. Due to the existence of a nonjusticiable political question and the above-described lack of standing, Defendant's Motion to Dismiss is GRANTED, and this Court DISMISSES Plaintiff's challenges to the constitutionality of Sections 3 through 22 of Session Law 2017-6 under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure for lack of subject matter jurisdiction.

WHEREAS this Court, having set forth the explanation for its ruling that it lacks jurisdiction to review the merits of claims advanced in Plaintiff's Complaint, would under normal circumstance bring to an end this panel's work on this matter. To go further and address the merits of the claims of the Plaintiff would constitute an advisory opinion, which would not be appropriate for this Court.

The Supreme Court, In Tryon v. Duke Power Co., 222 N.C. 200 (1942), Justice Seawell, writing for the Court, stated:

"It is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter." *Stacy, C. J.*, writing the opinion of the Court in Poore v. Poore, supra, cited in Annotation, 87 A. L. R., 1211.

However, this Three Judge Panel respectfully seeks to comply with the North Carolina Supreme Court's Order of September 1, 2017, in which the Court stated that it has the constitutional authority to issue any remedial writs necessary to give it general supervision and control over the proceedings of the other courts in this state. N.C. Const. Art. IV, § 12(1); The Court stated it also has the inherent authority to do what is reasonably necessary to ensure the proper administration of justice during the consideration of a case that is properly before it; and The Court further stated that in light of the importance of the issues presented by this case and the fact that a municipal election cycle is in progress, it invoked its authority to order this Court to, notwithstanding its ruling that it lacked jurisdiction to reach the merits of the Plaintiff's claim advanced in the Complaint, "to address the issues Plaintiff has raised on the merits."

ACCORDINGLY, this Court makes the following Findings, Conclusions, and Ruling:

INDICATIVE RULING ON THE CONSTITUTIONALITY OF SESSION LAW 2017-6¹

- a. The General Assembly is vested with the constitutional power to make laws, N.C. Const. Article II, Section 1, and the Governor has a constitutional duty to “take care that the laws be faithfully executed,” N.C. Const. Article III, Section 5(4).
- b. “The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other.” N.C. Const. Article I, Section 6.
- c. The General Assembly has the authority and power to create and modify the duties of state agencies. *See, e.g., Adams v. N. Carolina Dep’t of Nat. & Econ. Res.*, 295 N.C. 683, 696–97, 249 S.E.2d 402, 410 (1978).
- d. By enacting Session Law 2017-6, the General Assembly merged the Board of Elections and Ethics Commission into a new body, the Bipartisan Board.
- e. Like the Board of Elections, the Bipartisan Board “shall be and remain an independent regulatory and quasi-judicial agency and shall not be placed within any principal administrative department. [The Bipartisan Board] shall exercise its

¹ Plaintiff originally raised a non-delegation argument about the role of the Revisor of Statutes. Notably, though, Plaintiff did not seek review of his arguments about the Revisor of Statutes before the appellate courts through briefing or oral argument. Therefore, we will omit any discussion of the Revisor of Statutes from our “merits” review required by the September 1, 2017 Order, and only consider the constitutionality of Session Law 2017-6 from a separation-of-powers perspective, as was briefed and argued to our Supreme Court.

statutory powers, duties, functions, authority, and shall have all powers and duties conferred upon the heads of principal departments under G.S. 143B-10.” Session Law 2017-6, § 4.(c).

f. Based on the applicable structure of Session Law 2017-6, pursuant to which all members of the Bipartisan Board are appointed by the Governor, the cases of *State ex rel. Wallace v. Bone*, 304 N.C. 591, 608, 286 S.E.2d 79, 88 (1982) (in which sitting legislators were appointed by the General Assembly to a commission within the Department of Natural Resources) and *State v. Berger*, 368 N.C. 633, 645, 781 S.E.2d 248, 256 (2016) (in which the General Assembly appointed the majority of members to commissions with final executive authority over certain Department of Environment and Natural Resources decisions), are not controlling separation-of-powers cases in this matter.

g. To the extent the holding in *State v. Berger*—that (1) the Governor had to have enough control over the three commissions at issue to perform his constitutional duty, and (2) the degree of control that the Governor has over the commissions depends on his ability to appoint, supervise, and remove the members from the commission—may be instructive, this Court finds and concludes that the Governor has adequate control over the Bipartisan Board.

h. Under Session Law 2017-6, all appointees to the Bipartisan Board will be appointed by the Governor. The General Assembly does not appoint any of the members of the Bipartisan Board.

i. There are to be eight members of the Bipartisan Board, four Democrats and four Republicans. The possibility of deadlock is too speculative to render Session Law 2017-6 invalid on a facial challenge. *State v. Bryant*, 359 N.C. 554, 564, 614 S.E.2d 479, 486 (2005) (citations omitted).

j. Furthermore, Plaintiff has produced no authority that a commission or board with an even number of members is unconstitutional as a matter of law. Plaintiff has also produced no authority that “deadlock” on a particular issue constitutes a separation of powers violation.

k. The requirement that the Governor must make his appointments from lists provided by the state party chairs does not constrain his execution of the laws or otherwise violate separation of powers, as the Governor (and not the General Assembly) has a choice among the names on the lists and is making the decision about who will ultimately serve. *See, e.g., Weissman v. Workers’ Comp. Bd.*, 93AP-941, 1993 WL 540278, at *6 (Ohio Ct. App. Dec. 28, 1993) (“[L]egislation [requiring appointment from a list of names] neither grants the legislature the power of appointment, nor does it grant the power of appointment to private organizations. Instead, the legislation only provides the manner in which the appointments are to be made[.]”). The law which Plaintiff seeks to keep in place—N.C. Gen. Stat. § 163-19—also requires that the Governor appoint members to the Board of Elections from lists provided by the party chairs. This requirement was first added by Session Law 1985-62 after the election of Governor James Martin. Other statutory changes to the Board of Elections (including the extension of the term of the Executive Director, *see* S.L.

1973-1409, § 2 ; S.L. 1985-62), may have coincided with a change in the political party of the Governor but have not resulted in constitutional challenges.

l. The General Assembly has the constitutional ability to appoint statutory officers via law because there is no constitutional grant of power solely to the Governor for the appointment of statutory officers. *State v. Berger*, 368 N.C. at 644, 781 S.E.2d at 255.

m. The Executive Director of the Bipartisan Board is to be, beginning in May 2019, chosen by the Bipartisan Board. Until that time, the current Executive Director of the Board of Elections, whose term is extended by Session Law 2017-6, will serve as the Executive Director of the Bipartisan Board. Such a statutory extension of a term of office has been found to be constitutional. See *Crump v. Snead*, 134 N.C. App. 353, 355, 517 S.E.2d 384, 386 (1999); *Penny v. Board of Elections*, 217 N.C. 276, 7 S.E.2d 559 (1940). Furthermore, the General Assembly has twice extended the term of the Executive Secretary-Director or Executive Director of the Board of Elections, and there was no evidence presented that those statutory extensions thwarted the then-sitting Governors' ability to execute the election laws during the years of extended service. See S.L. 1973-1409, § 2 ; S.L. 1985-62.

n. The chair of the Bipartisan Board will initially be chosen by the Governor and will, thereafter, be chosen by the Bipartisan Board. The chair will alternate between members of the two largest political parties and will be chosen from the membership of the Bipartisan Board appointed by the Governor. The General Assembly does not select the chair.

o. The Governor also has the ability to remove any or all members from the Bipartisan Board for misfeasance, malfeasance, or nonfeasance. The General Assembly has no ability to remove members.

p. The Governor has adequate supervision over the Bipartisan Board, given the Bipartisan Board's role in and impact on state government as the oversight authority for ethics, elections, and lobbying. Additionally, Session Law 2017-6 expressly states that the Bipartisan Board must comply with the duties under N.C. Gen. Stat. § 143B-10, which includes reporting duties to the Governor. The General Assembly does not retain the ability to supervise the Bipartisan Board.

q. Session Law 2017-6 reserves no ongoing control to the General Assembly, and, therefore, the General Assembly neither exercises power that the constitution vests exclusively in the executive branch nor prevents the Governor from performing his constitutional duties. Were the Governor given the degree of control he seeks over either the Board of Elections or Bipartisan Board in this case, neither Board could continue to function as "an independent regulatory and quasi-judicial agency" as the Board of Elections has under prior law, N.C. Gen. Stat. § 163-28, and the Bipartisan Board would under Session Law 2017-6 (enacting N.C. Gen. Stat. § 163A-5(a)).

Based on these findings and conclusions, this Court would hold that Session Law 2017-6 is **NOT UNCONSTITUTIONAL**.

Having been instructed to take up no other business by the North Carolina Supreme Court in its September 1, 2017 Order, this Court hereby certifies this Order to the North Carolina Supreme Court for its further review.

SO ORDERED, this the 31 day of October, 2017.

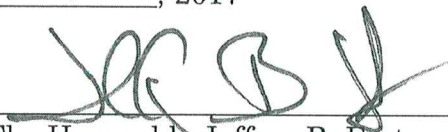


The Honorable Jesse B. Caldwell, III

SO ORDERED, this the 31st day of October, 2017.


The Honorable L. Todd Burke

SO ORDERED, this the 31st day of October, 2017


The Honorable Jeffery B. Foster

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served on all parties by serving counsel as indicated below by U.S. Mail, postage prepaid, addressed as follows, with a courtesy copy sent via email:

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This the 31st day of October, 2017.



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