The Removal of Special Superior Court Judges: An Assault on Separation of Powers

By Representative Paul Stam[1]

I. Introduction

A recent proposal to remove nearly all of the sitting Special Superior Court Judges inspired debate on the constitutionality of the move.[2] Removing judges during the middle of their terms violates the separation of powers clause of the North Carolina Constitution. By removing a judge midterm, the legislature would impede judicial independence and expose judges and the judicial branch to retaliatory legislation. In addition to the separation of powers question, removing a judge from office during his or her term may also violate the due process clause of the Fourteenth Amendment. Even though judges do not have a property right in the office, they may have a property interest in the term of office. This paper provides a brief historical overview of these issues.

II. Separation of Powers

North Carolina has a robust separation of powers doctrine. Article I, Section 6 of the Declaration of Rights, provides as follows: "The legislative, executive, and supreme judicial powers of the State government shall be forever separate and distinct from each other."[3] The instructions Orange County constituents gave to their county delegation in 1776 participating in the drafting of the first North Carolina Constitution illustrates the reasoning behind separation of powers. Instructions to the delegation included the following:

> That no person shall be capable of acting the exercise of any more than one of these branches at the same time lest they should fail of being the proper checks on each other and by their united influence become dangerous to any individual who

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[2] *See* Appendix
[3] NC Const. art. 1,§ 6.

> might oppose the ambitious designs of the person who might be employed in such power. [4]

Court decisions have been protective of this Constitutional Doctrine. In 1787, 16 years before *Marbury vs. Madison*, 5 U.S. 137 (1803), the North Carolina Superior Court (acting as the final court) decided in *Bayard v. Singleton*. The judiciary would give no effect to a law passed by the Assembly that violated the Constitution:

> But that it was clear, that no act they could pass, could by any means repeal or alter the constitution, because if they could do this, they would at the same instant of time, destroy their own existence as a Legislature, and dissolve the government thereby established. Consequently the constitution (which the judicial power was bound to take notice of as much as of any other law whatever,) standing in full force as the fundamental law of the land, notwithstanding the act on which the present motion was grounded, the same act must of course, in that instance, stand as abrogated and without any effect.[5]

As far as we know this is the first such ruling in the western hemisphere.

It was quite a surprise then that one of the first bills passed in 2013 (SB 10) entitled "Government Reorganization and Efficiency Act" provided in Section 2.8 that the terms of 12 out of the 15 Special Superior Court Judges (all non-business court judges) would terminate well before the expiration of their stated five year terms.[6] That bill never became law. Although, proponents tried again in the appropriations bill, SB 402, Section 18.B.12.[7] The House refused because of the separation of powers doctrine that it found imbedded in the constitutional doctrines of the state.

Article IV, Section 8 of the North Carolina Constitution delegates the power to "provide by general law for the selection or appointment of special or emergency Special Superior Court

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[4] "Instructions from inhabitants of Orange County to their delegates for the Provincial Congress of North Carolina." (1776) http://docsouth.unc.edu/csr/index.html/document/csr10-0410.
[5] Bayard v. Singleton, 1 N.C. 5 (1787).
[6] S.B 10, 151th Gen. Assemb., Reg. Sess. (NC 2013), http://www.ncleg.net/Sessions/2013/Bills/Senate/PDF/S10v3.pdf; *See* Appendix.
[7] S.B. 402, 151th Gen. Assemb., Reg. Sess. (NC 2013), http://www.ncleg.net/Sessions/2013/Bills/Senate/PDF/S402v3.pdf

Judges not selected for a particular judicial district" to the General Assembly.[8] The Special Superior Court judgeships are not created by the Constitution (like most judicial positions); rather, they are created solely by the General Assembly. As a result the Research Division concluded that these judgeships could be terminated midterm, relying on *Efird v. Board of Commissioners*.[9] But that case is distinguishable in that the entire Forsyth County Court was abolished. There was no business left for the judge to conduct.

Does the power to establish an office also bestow upon the General Assembly the power to abolish an office? In *Queen v. Com'rs of Haywood*, the court stated, "If the Legislature had the right to create the court, it had the right to abolish."[10] However, that power is not without limitation. The separation of powers provision in Article I, Section 6 of the North Carolina Constitution states that all three branches of state government shall be separate and distinct from one another.[11] In *State v. Friedley*, the court explains how legislating a judge out of office infringes upon separation of powers when it said:

> To construe [separation of powers] to mean that the legislature can, at its own will, abolish the circuit, and thus legislate the judge and prosecuting attorney out of office . . . would subject the judiciary to the legislative power and utterly destroy all judicial independence.[12]

Justice Faircloth, quoting Daniel Webster, described a government in *Caldwell v. Wilson* (dissenting) without separation of powers:

> Everything which may pass under the form of an enactment is not therefore to be considered the law of the land. If this were so . . . acts directly transferring one man's estate to another, legislative judgments . . . would be the law of the land. Such a strange construction would render constitutional provisions of the highest importance completely inoperative and void. It would tend to establish the union of all powers in the legislature. There would be no general permanent law for

[8]NC Const. art. 4,§ 8.
[9] Efird v. Board of Commissioners, 219. N.C. 96 (1941).
[10]Queen v. Board of Com'rs of Haywood County. 193. N.C. 821 (1927).
[11]NC Const. art. 1,§ 6.
[12]State v. Friedley, 34 N.E. 872 (Ind. 1893).

> courts to administer or men to live under. The administration of justice would be an empty form, an idle ceremony. Judges would sit to execute legislative judgments and decrees, not to declare the law or administer the justice of the country.[13]

The asserted power to remove a judge from office by legislation violates the distinct independence of the judiciary. If the legislature's judgments were the supreme law of the land, there would be no point for judges to declare the law.[14]

Moreover, if a legislature has the power to legislate a judge out of office by abolishing said office, then judicial officers are exposed to retaliatory legislation for unpopular decisions. As a result, the judicial branch becomes a less objective and independent component of government. In *State of Indiana v. Monfort*, the court supports this contention when it explains:

> If the legislature can remove a sitting judge, it has the power to 'direct, control, or impede' the judiciary by the threat of removing judges who make unpopular decision, or by delivering on that threat. The resulting intimidation and potential disruption of courts concerning issues that may be unpopular in legislative circles constitutes an impermissible intrusion of judicial independence.[15]

Article IV, Section 21 states, "[T]he salaries of Judges shall not be diminished during their continuance in office. In no case shall the compensation of any Judge or Magistrate be dependent upon his decision or upon the collection of costs."[16] Clearly, the framers foresaw the possibility of retaliatory legislation aimed at judges. As a result, they included this section to forestall attacks on them economically.

Senate Bill 10 would have effectively removed twelve (12) superior court judges from office during their term.[17] This would also have violated the due process clause of the

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[13] Caldwell v. Wilson, 121 N.C. 425 (1897). (quoting Daniel Webster, "Works of Webster." vol. 5, p. 487)
[14] Daniel Webster "Works of Webster" vol. 5, p. 487
[15] State of Indiana v. Robert V. Monfort. 723. N.E.2d 407 (Ind. 2000).
[16] NC Const. art. 4,§ 21.
[17] S.B 10, 151th Gen. Assemb., Reg. Sess. (NC 2013), http://www.ncleg.net/Sessions/2013/Bills/Senate/PDF/S10v3.pdf; *See* Appendix.

14th Amendment.[18] If this bill had been enacted it would not have been the first of its kind. In *State Prison v. Day*, the plaintiff had been appointed by the governor as superintendent of the North Carolina State Prison, a position created by previous legislation. On January 26, 1899, the General Assembly, passed legislation that abolished the position of superintendent and all functions of the superintendent were immediately transferred to a Board of Directors.[19] As a result, the court ruled:

> All the reported cases from Hoke vs. Henderson down to and including Wood vs. Bellamay, hold that to have the effect of ousting the incumbent before his term expires, the office must be abolished. It is not sufficient to declare that it is abolished when it is not abolished. The discussion comes down to this: Are the duties of the office of the defendant held abolished or are they transferred to others?[20]

In *Greene v. Owen*, the legislature abolished the Davidson County Board of Education and replaced it with a new board (named differently) that had the same duty. Justice Douglas said, "The only restriction upon the Legislature's power is that after the officer has accepted office upon the term specified in the act creating the office, this being a contract between him and the state, the Legislature cannot run him out by an act purporting to abolish the office, but which in effect continues the same office in existence."[21] SB 10 abolished the offices of twelve Special Superior Court Judges, but did not abolish the Superior Court. This is the same type of action the court in *State Prison v. Day* and *Greene v. Owen* held to be unconstitutional.

Hoke v. Henderson, which set the legal precedent for State Prison v. Day, *Greene v. Owen*, and others, was overturned by *Mial v. Ellington*.[22] In 1903, it had been held in *Hoke v. Henderson* that an official appointed or elected to public office held a property right in the office,

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[18] US Const. Amm. 14.
[19] Act of February 1899
[20] State Prison v. Day, 124 N.C. 362 (1899).
[21] Geene v. Owen, 125 N.C. 212 (1899).
[22] *see also* White v. Worth 126 N.C. 570 (1900), Wood v. Bellamy 120 N.C. 212 (1897), State Prison v. Day 124 N.C. 362 (1899), Wilson v. Jordan 124 N.C. 683 (1899), Greene v. Owen 125 N.C. 212 (1899), Abbot v. Beddingfield 125 N.C. 256 (1899).

unless the office was completely abolished.[23] However, in *Mial v. Ellington* the court declared that a public office is a part of the sovereignty of the State, "If it is true that a public office is private property, the state, instead of being sovereign, finds herself, in effort to perform her governmental functions, bereft of her sovereignty…no officer can have a property right in the sovereignty of the state."[24]

While this precedent holds, more recent case law suggests that a public official may have a property interest in the term of a particular office. In *Martin v. Preston,* the court distinguished public office from the term length for the office when it stated, "A term of office is one thing. An office holder is something else. The incumbent may go out, nobody come in and the term goes on…A term may come to an end, but the incumbent may rightfully carry on."[25] A public official does not have a property right in the office,[26] but may have a property interest in the pending term. The Special Superior Court judges that would have been removed by SB 10, may have had a property interest in their respective terms. However, the property interest would not have been absolute. Public office holders, such as judges, can still be removed, regardless of their property interests, for misfeasance, malfeasance, and nonfeasance.[27] This can be accomplished either through impeachment by the House and conviction by the Senate or even by the Supreme Court on recommendation from the Judicial Standards Commission.[28]

III. Conclusion

[23] Hoke v. Henderson 15 N.C. 1 (1833); *see also* White v. Worth 126 N.C. 570 (1900), Wood v. Bellamy 120 N.C. 212 (1897), State Prison v. Day 124 N.C. 362 (1899), Wilson v. Jordan 124 N.C. 683 (1899), Greene v. Owen 125 N.C. 212 (1899), Abbot v. Beddingfield 125 N.C. 256 (1899).
[24] Mial v. Ellington, 134 N.C. 131 (1903).
[25] Martin v. Preston, 325 N.C. 438 (1989).
[26] Mial v. Ellington, 134 N.C. 131 (1903).
[27] NC Const. art. 4,§ 17.
[28] NC Const. art. 4,§ 17; NC Gen. Stat. §§ 7A-376, 377 (2011).

The attempt to remove twelve sitting Special Superior Court Judges, runs contrary to the constitutional mandate of separation of powers and the due process clause in the Fourteenth Amendment.

IV. Appendix

Special Superior Court Judges in North Carolina[29]

There are 16 Special Superior Court Judge positions, 15 of which are currently filled. Three of these special judges are designated by the Chief Justice as Business Court judges. Special Superior Court Judges are appointed by the Governor for a term of five years. The first two were appointed in 1993 (one of which was abolished in 2000), with subsequent additions in various years up through 2008, when the last two were added. The statutory authority can be found in G.S. 7A-45.1. As of January 9, 2013, the sitting Special Superior Court Judges are:

Judge	Home District	County	Appointment Date	Term Expiration
Jack Jenkins	3B	Carteret	01/26/2001	01/26/2016
Gary Trawick	5	Pender	04/01/1999	10/20/2015
Kendra Hill	10	Wake	12/31/2012	12/31/2017
Lucy Inman	10	Wake	04/30/2010	04/29/2015
Shannon Joseph	10	Wake	01/09/2009	01/08/2014
Bill Pittman	10	Wake	01/09/2009	01/08/2014
Reuben Young	10	Wake	12/31/2012	12/31/2017
Ebern Watson	13A	Columbus	05/02/2013	05/02/2018
Andrew Robinson Hassell	18	Guilford	03/31/2009	01/26/2016
Richard Doughton	23	Alleghany	02/26/2013	02/26/2018
Lisa Bell	26	Mecklenburg	03/18/2013	03/18/2018
Jeffrey Hunt	28	Buncombe	05/16/2013	05/16/2018
BUSINESS COURT:				
John Jolly	10	Wake	01/23/2001	01/23/2016
James Gale	18	Guilford	03/01/2011	02/27/2016
Calvin Murphy	26	Mecklenburg	07/01/2009	06/30/2014

Special judges are commissioned to hold court each week, often handling special sessions of court for lengthy or complex cases, covering regular judges who are holding over in regular sessions of court, or covering emergency situations. They are fill-in judges who take assignments statewide and enable the court system to run without disruption to any court calendar. Current annual salary for special superior court judges is $125,875.

[29] Provided by William Childs, Fiscal Research Division, North Carolina General Assembly, February 5, 2013.