

IN THE SUPREME COURT OF NORTH CAROLINA

ADMINISTRATIVE ORDER ESTABLISHING
THE CHIEF JUSTICE'S COMMISSION ON
FAIRNESS AND EQUITY

In recognition of the need to continuously examine and improve the North Carolina judicial system in order to ensure that everyone, regardless of their race, gender or gender identification, sexual orientation, ethnicity, national origin, religious beliefs, or economic status, receives equal treatment under the law within our court system, the Supreme Court of North Carolina hereby creates **THE CHIEF JUSTICE'S COMMISSION ON FAIRNESS AND EQUITY**.

We recognize the inequalities within our judicial system that stem from a history of deeply rooted discriminatory policies and practices and the ongoing role of implicit and explicit racial, gender, and other biases. While progress has been made, we are cognizant of the persistence of discrimination in our judicial system, and its effects on those who come before our courts.

In recent years, we have documented declining public trust in the fairness and impartiality of our state courts. In 2017, the Final Report of the North Carolina Commission on the Administration of Law and Justice concluded that fifty-three percent of North Carolinians believe that courts are not always fair, and only forty-two percent of the public believes that the courts are “sensitive to the needs of the

average citizen.”¹ Restoring the trust and confidence of the people we serve will take concerted, proactive effort. Court officials must treat every person with respect and dignity, give proper notice and opportunity to be heard, and provide equal protection under the law, free from discrimination and disparate treatment, and be appropriately accountable for the role that we each play in our system of justice.

SECTION 1: STRUCTURE AND COMPOSITION OF THE COMMISSION

The structure and composition of the Commission shall be as follows:

Section 1.1: Commission Membership

The Commission shall consist of no more than thirty (30) members who reflect the racial, ethnic, gender, socioeconomic, and geographic diversity of North Carolina.

The Chief Justice or his or her designee shall serve as Chair.

Section 1.2: Selection of Members

The Chief Justice shall appoint the members of the Commission, which shall be drawn from the following stakeholder communities:

- a. judges representing the District Court, Superior Court, and Appellate Court divisions;
- b. district attorneys;
- c. public defenders;
- d. clerks of the superior court;

¹ N.C. Comm’n on the Admin. of Law and Justice, Final Report at 3–4 (2017), *available at* https://www.nccourts.gov/assets/documents/publications/nccalj_final_report.pdf?xahbJ_Q8O_XYD2w.IGCrOOoBeMSeDv2i.

- e. magistrates;
- f. court managers;
- g. family court or custody mediators;
- h. tribal court representatives;
- i. members of law enforcement, one of whom shall be an elected sheriff and one of whom shall be a chief of police or other law enforcement executive;
- j. probation officers;
- k. juvenile court counselors;
- l. social workers;
- m. law school deans;
- n. scholars or professors;
- o. individuals or organizations who advocate on behalf of historically marginalized groups, justice-involved persons, and victims of domestic violence or human trafficking;
- p. attorneys in private practice, selected in consultation with the North Carolina State Bar and North Carolina Bar Association, one of whom shall be a family attorney, DSS attorney, or parent attorney, and one of whom shall be employed by a legal aid program; and
- q. non-attorney residents of North Carolina.

The Chief Justice may appoint additional *ex officio* members.

Section 1.3: Terms of Commissioners

With the exception of the chairperson, the members of the Commission shall serve for a term of three years; provided, however, that in the discretion of the Chief Justice, initial appointments may be for a term of between two and four years so as to accomplish staggered terms for the membership of the Commission. No member shall serve more than two consecutive terms.

Section 1.4: Committees

The Commission may form standing or ad hoc committees, which may include additional members at the discretion of the Chair.

SECTION 2: RESPONSIBILITIES OF THE COMMISSION

By virtue of this Order, the Court issues the following charge to the Commission:

The Commission shall make recommendations and formulate plans to reduce and ultimately eliminate disparate treatment, impacts, and outcomes in the North Carolina judicial system based on identifiable demographics.

Section 2.1: Calendar Year 2021

The Court issues the following specific charge to the Commission for calendar year 2021:

- a. recommend such rules, policies, or procedures as are necessary to eliminate adverse consequences based solely on inability to pay a legal financial obligation;

- b. evaluate jury selection practices and procedures and recommend such changes to rules, policies, and procedures as are necessary to ensure that no person is prevented from serving on a jury as a result of explicit or implicit bias;
- c. develop and submit such plans as are necessary to fully implement the remaining recommendations contained in the Commission on the Administration of Law and Justice Committee on Criminal Investigation and Adjudication reports on Pretrial Justice and Criminal Case Management;
- d. make recommendations regarding the display of symbols and images in courthouses and judicial system buildings that have the effect of diminishing public trust and confidence in the impartiality and fairness of the judicial system; and
- e. in coordination with the School of Government and other education providers, develop effective, ongoing educational programming for elected and appointed officials, court system personnel, and the private bar to build cultural competency and understanding of systemic racism, implicit bias, disparate outcomes, the impacts of trauma and trauma informed practices, and procedural fairness.

Section 2.2: Calendar Year 2022

The Court issues the following specific charge to the Commission for calendar year 2022:

- a. develop and submit a plan to collect and disseminate data on court performance, including but not limited to criminal charging, intermediate and final case outcomes, case processing times, and racial and gender disparities;
- b. develop and submit a plan for eliminating racial and gender disparities in the administration of abuse, neglect, and dependency cases;
- c. develop and submit such plans as are necessary to fully implement the remaining recommendations contained in the Commission on the Administration of Law and Justice Committee on Criminal Investigation and Adjudication report on Improving Indigent Defense Services;
- d. develop a plan for obtaining and analyzing feedback from the public, jurors, litigants, witnesses, lawyers, victims, law enforcement, and system employees regarding the performance of the judicial system and system actors.

Section 2.3 Additional Recommendations

The Commission may make such other recommendations as are determined to be necessary or prudent to accomplish its charge.

Section 3: Coordination With Other Commissions

The Commission shall, as appropriate, solicit information and recommendations from, and coordinate with, the following:

- the North Carolina Equal Access to Justice Commission;
 - the North Carolina Sentencing and Policy Advisory Commission;
 - the Chief Justice’s Family Court Advisory Commission;
 - the Commission on Indigent Defense Services;
 - the North Carolina Judicial Standards Commission;
 - the North Carolina Human Trafficking Commission;
 - the Governor’s Crime Commission;
 - the Governor’s Task Force for Racial Equity in Criminal Justice;
 - the Legislative Task Force on Justice, Law Enforcement and Community Relations; and
- Such other commissions, associations, conferences, or agencies as the Commission deems appropriate.

Ordered by the Court in Conference, this the ____ day of October, 2020.

MARK A. DAVIS
For the Court

WITNESS my hand and the seal of the Supreme Court of North Carolina,
this the ____ day of October, 2020.

AMY FUNDERBURK
Clerk of the Supreme Court

RESPONSE OF SENIOR ASSOCIATE PAUL NEWBY
TO THE COURT'S ADMINISTRATIVE ORDER ESTABLISHING
THE CHIEF JUSTICE'S COMMISSION ON FAIRNESS AND EQUITY

Equal justice under the law is a bedrock principle of our judicial system. As recognized in our State Constitution, “justice shall be administered without favor, denial, or delay.”¹ If our courts fail to provide equal justice, they fail to accomplish one of their fundamental tasks. It is also important that North Carolinians believe in the judiciary’s commitment and ability to administer justice impartially and in accordance with the law. The formal legal authority of our courts will not mean very much if we ever reach a point where a large majority of citizens have lost faith in the judicial system.

Consistent with my devotion to these principles, I would like to support the majority’s administrative order establishing the Chief Justice’s Commission on Fairness and Equity. Unfortunately, however, the order is seriously flawed in ways that I cannot in good conscience overlook. First, the timing of this order appears political. Second, and perhaps most troublesome, the order makes factual findings without evidence, based solely on the subjective personal opinions of a majority of this Court, regarding matters which have and will come before the Court. Lastly, the order’s directives to the new commission improperly require it to invade the General Assembly’s lawmaking powers through the adoption of rules and policies on matters within the legislature’s authority.

The timing of the order seems political: The Supreme Court’s current majority has been in place for over a year and a half and will remain in place for

two months after the election. However, the majority has chosen to create the commission only three weeks before the election, just as early voting begins. It begs the question of why now. The 2017 report that the order cites, *Final Report of the North Carolina Commission on the Administration of Law and Justice*, states that 76% of individuals polled believe judges' decisions are influenced by politics. Unfortunately, given its timing, today's order will only serve to increase the belief that judges make decisions with political considerations in mind.

Judges should not prejudge issues that are currently pending before the Court: The primary role of the judicial branch is to fairly and impartially decide the cases which come before it. Judges are not to make broad policy pronouncements which will call into question their impartiality. The order creating the commission makes findings based solely on the personal opinions of the majority of the Court. The order states that our judicial system perpetuates inequalities “that stem from a history of deeply rooted discriminatory policies and practices” and refers to “the ongoing role of implicit and explicit racial, gender, and other biases.” Further the order states, “we are cognizant of the persistence of discrimination in our judicial system and its effects on those who come before our courts.” These unsupported findings expose the majority's personal opinions and seem to prejudge matters at issue in criminal cases currently pending and likely to come before the Court. Those pending matters raise the issue of the improper role of racial bias in a particular case or within the justice system.² By their statements it seems the majority views the North Carolina judicial system and its current participants as biased. By

making these policy pronouncements, the majority wrongly tilts the scales of justice in favor of parties claiming discrimination in violation of this Court's duty to approach each case impartially and make decisions based on the applicable law and the evidence presented.

Lawmaking belongs to the legislative branch, not the judicial branch. When judges invade the lawmaking arena, no one is left to hear disputes: Under our constitutional system, the General Assembly, not the judiciary, establishes policies through laws, including the State's criminal justice policies. The order creating the commission seems to insert the judicial branch into the policymaking arena. Once the Court makes policy decisions by rulemaking and other administrative authority, it can no longer provide a fair and neutral review of that policy. If, for instance, this Court ultimately adopts administrative orders that significantly reduce fines in criminal cases,³ school funding would suffer because the clear proceeds of those fines go to the public schools.⁴ Local boards of education and public school systems would have no mechanism for disputing the lawfulness of those orders. When the Court takes a policymaking role, there is no one left to impartially decide a matter when a dispute arises.⁵

The goal of the judiciary is that every person will be afforded equal justice under the law, which is an ideal I wholeheartedly embrace. The order creating the Commission on Fairness and Equity, however, is flawed because of its political timing, its unsupported broad policy statements which prejudge issues raised in pending and future cases, and its improper placement of the judiciary in a

legislative policymaking role. I support the establishment of a commission properly tasked to perform a good faith examination of our judicial system, but the commission as established by this order exceeds the appropriate parameters of the judicial branch of government.

¹ N.C. Const. art. I, § 18.

² See, e.g., *State v. Crump*, No. 151PA18 (N.C. argued Oct. 12, 2020) (deals in part with questioning during jury selection on racial bias); see also *State v. Augustine*, No. 130A03-2, 2020 WL 5742626 (N.C. Sept. 25, 2020) (Racial Justice Act case); *State v. Golphin*, 847 S.E.2d 400 (N.C. Sept. 25, 2020) (Racial Justice Act case); *State v. Walters*, 847 S.E.2d 399 (N.C. Sept. 25, 2020) (Racial Justice Act case); *State v. Robinson*, 375 N.C. 173, 846 S.E.2d 711 (Aug. 14, 2020) (Racial Justice Act case); *State v. Bennett*, 374 N.C. 579, 843 S.E.2d 222 (June 5, 2020) (*Batson*-related case, which is a legal principle on racial discrimination in jury selection practices); *State v. Ramseur*, 374 N.C. 658, 843 S.E.2d 106 (June 5, 2020) (Racial Justice Act case); *State v. Burke*, 374 N.C. 617, 843 S.E.2d 246 (June 5, 2020) (Racial Justice Act case); *State v. Hobbs*, 374 N.C. 345, 841 S.E.2d 492 (May 1, 2020) (*Batson*-related case).

³ Section 2.1.a of the order directs the commission to recommend rules and policies regarding legal financial obligations.

⁴ N.C. Const. art. IX, § 7.

⁵ Other examples where the order embroils the commission in policy matters include section 2.1.b, “jury selection practices and procedures,” and section 2.2.a, “criminal charging.”