House of Representatives
HR 1363 Special Study Committee on Judicial Qualifications Commission Reform

Final Report

Committee Members

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Representative, 51st District,
Chairman

The Honorable Christian Coomer
Representative, 14th District

The Honorable Trey Kelley
Representative, 16th District

The Honorable Mary Margaret Oliver
Representative, 82nd District

The Honorable Earl Ehrhart
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INTRODUCTION

The Georgia House of Representatives created the House Special Study Committee on Judicial Qualifications Commission Reform in 2016 through the passage of House Resolution 1363. Actions by individual members of the Judicial Qualifications Commission (JQC) and of that body as a whole with regard to instances of coercive investigatory practices and failure to provide due process to members of the judiciary who had complaints filed against them had been called into question, which resulted in legislation[1] being passed by the General Assembly during the 2016 session to reform such errors and imbalances in a meaningful and comprehensive way. The House Special Study Committee on JQC Reform (committee) was formed to specifically investigate the operations of the JQC and undertake a study of the conditions, needs, issues, and problems therein, as well as to evaluate the issues relating to the investigatory methods, procedures, and decorum by members of the JQC so as to prevent any future dishonor being wrought on this important agency. The committee's findings with recommendations were required to be published by December 1, 2016.

The committee was chaired by Representative Wendell Willard (51st) and included six (6) additional members of the House: Representative Christian Coomer (14th), Representative Earl Ehrhart (36th), Representative Trey Kelley (16th), Representative John Meadows (5th), Representative Mary Margaret Oliver (82nd), and Representative Jay Powell (171st). The Office of Legislative Counsel attorneys assigned to the committee were Mr. Wayne Allen and Ms. Jill Travis. The House Budget and Research Office Legal Counsel assigned to the committee was Mr. Jourdan Read.

The committee held five public meetings in Atlanta in Room 406 of the Coverdell Legislative Office Building. The committee heard testimony from current and former members

[1] HR 1113 and HB 808 from the 2016 Legislative Session.

of the JQC (including two directors), two judges, and members of a special study committee created by Justice David Nahmias of the Georgia Supreme Court that seeks to reconstitute the JQC with additional members and remodel the JQC's rules to comport with due process requirements.

During the course of the public meetings, the following individuals presented testimony to the committee:

September 8th, 2016 – Atlanta, Georgia, in Room 406 Coverdell Legislative Office Building

Mr. Jeff Davis (JQC Director Fall 2010—Summer 2014 and member of Justice Nahmias's JQC reform study committee); Judge Ronnie Joe Lane (JQC Director Summer 2014—Spring 2015); and Mr. Richard Hyde (JQC Chief Investigator from January, 2007, until January, 2013; JQC member from January, 2013, until February, 2015; JQC Chief Investigator from February, 2015, until December, 2015; current JQC member since December, 2015; and member of Justice Nahmias's JQC reform study committee).

September 15th, 2016 – Atlanta, Georgia, in Room 406 Coverdell Legislative Office Building

Judge Cynthia Becker (retired DeKalb County Superior Court Judge) and Judge Mitchell Scoggins (retired Bartow County Probate Court Judge).

September 22nd, 2016 – Atlanta, Georgia, in Room 406 Coverdell Legislative Office Building

Mr. Richard Hyde (JQC Chief Investigator from January, 2007, until January, 2013; JQC member from January, 2013, until February, 2015; JQC Chief Investigator from February, 2015, until December, 2015; current JQC member since December, 2015; and member of Justice Nahmias's JQC reform study committee).

September 29th, 2016 – Atlanta, Georgia in Room 406 Coverdell Legislative Office Building

Mr. Edward Tolley (current JQC member since 2016 and member of Justice Nahmias's JQC reform study committee).

EXECUTIVE SUMMARY

The evidence in this report clearly demonstrates that the JQC lost its ability to perform its constitutional duties. The reasons for this failure include: due process imbalances; conflicts of interest by certain board members, such as coercive and retaliatory investigatory practices; intentional leaks to the media of ongoing JQC investigations; a total lack of transparency; appointment of members by an organization unaccountable to the people of Georgia; and other abuses of power. Prior to the passage of the 2016 constitutional amendment, the constitutional provision relating to the JQC made it an unaccountable and virtually autonomous agency. Despite all these inequities, total abolishment of the JQC, without reestablishing a commission through general legislation, was not appropriate because the JQC is a vital and important agency for ensuring proper judicial conduct and public protection. The current JQC was abolished and reconstituted. Going forward, the JQC should be made more transparent and implement a set of checks and balances through revisiting the general legislation passed in 2016, and adopting new rules and procedures addressing appointments, investigatory practices, and membership discipline so as to avoid any reoccurrence of incidents wherein a district attorney is pressured by the JQC to pursue an indictment against a judge, or a JQC member uses his or her position to attempt to intimidate a judge to acquiesce to his or her demands.

COMMITTEE FINDINGS

Through the committee's four hearings, committee members were able to obtain a more comprehensive understanding as to how the JQC functioned, albeit in less than ideal fashion, and transformed from its intended purpose into, as one current JQC member put it, "an embarrassment" that is in need of reform. What follows is an overview of the committee's findings.

Breakdown of JQC effectiveness and loss of faith in the JQC by members of the judiciary

Recent acts by certain members of the JQC have caused the JQC to substantially lose its credibility and capacity to perform its work. Traditionally, when a complaint rose to a level worthy of inquiry by the JQC, that body would invite the accused to discuss the complaint and the circumstances surrounding it. It was an informal and effective process whereby minor infractions could be handled immediately and efficiently, often with the accused being able to correct the conduct or the complaint being dismissed. The process was collaborative, not combative. Alternatively, more serious matters could be brought to light through an investigation before the JQC recommended or proposed disciplinary action, or the matter could be addressed immediately when emergency action was necessary in accordance with the JQC's rules.

However, as discussed by current and former JQC members and directors, as well as the judges who were invited to appear before the JQC, the process appears to have, on occasion, devolved into skipping fact-finding, taking a complaint at face value, and accusing the judge of misconduct regardless of the judge's explanation or without a proper review of the legality or propriety of the judge's conduct, in violation of the JQC's adopted rules and procedures. Current JQC rules require the JQC to furnish a judge with the complaint or summary of the complaint and the judge to provide a written response to the complaint prior to formal hearing. In at least one instance, the JQC did not comply with these rules to the judge's detriment. Further, the JQC used statements made at informal meetings as leverage against judges by disseminating the statements to prosecutors to pursue criminal indictments against judges who did not agree with the JQC's accusations, even when the disagreement was over a matter of law rather than an ethical violation.

There was also testimony that JQC members initiated their own investigations via telephone calls to other members and directed staff to proceed with an investigation, in a nonemergency situation without commission approval and in violation of the JQC's rules, rather than presenting a proposal to the other members at a meeting or even informally contacting all members via telephone and obtaining a consensus of the whole. In that instance, a member used his position to attempt to intimidate the judge into submitting to that member's will for the benefit of that member's private client, and when that failed, he called other members to act as surrogates for his endeavor. There was no accountability for those JQC members who violated the JQC's own adopted rules and procedures. Moreover, the judge was without recourse to ameliorate the very situation the rules were enacted to prevent.

Consequently, many judges, understandably, no longer trust the JQC to fairly investigate and adjudicate complaints against them or to provide them any form of meaningful due process; specifically, they do not wish to appear and discuss a matter informally for fear of being criminally indicted should they disagree with JQC members in their assessment of a situation and wish to defend themselves. Judges ensure the public has a right to due process and should therefore also have the right to due process and not be pressured into dropping that right by extrajudicial means. The committee finds that some of these issues have been addressed by certain personnel stepping down or being replaced and acknowledges that this is only a partial solution to the problem, as the greater concern is that such persons' behaviors, practices, and personal vendettas were able to be pursued in the first instance.

Breakdown in JQC appointments, leadership and supervision of JQC members

The constitutional amendment resolved the issue of an organization, not accountable to the people but to its membership, appointing members to a constitutionally authorized body of this state. Importantly, since the State Bar of Georgia made JQC appointments, the public lacked

an ability to effectively remove those members from the JQC, an agency which is meant to serve the public by ensuring that the judiciary functions in an ethical manner. Under the JQC's rules, its members, counsel, and staff are absolutely immune from suit for all conduct in the course of their official duties. The JQC has taken the position that, although the Supreme Court has the authority to review a discipline case and adopt the Canon of Judicial Conduct for Georgia judges, the Supreme Court has no authority to review a JQC advisory opinion. This is problematic since the current Code of Judicial Conduct says that JQC advisory opinions have the force of law and judges are bound to follow them. This discrepancy was created by an unclear delegation of authority to the JQC in the Constitution regarding the JQC adopting advisory opinions. This issue evidences the systemic problem of the JQC having no oversight or checks and balances, especially when members fail to adhere to the JQC's adopted rules and procedures. The committee finds that the fashion in which the JQC was established, and had recently been able to act, caused an imbalance of oversight and control resulting in the degradation of the JQC as a whole due to its lack of accountability.

With regard to discipline, unlike other agencies, commissions, councils, or committees where members can remove or discipline fellow members for certain conduct, the JQC has no such mechanism. Given that JQC members each serve autonomously, since not even JQC members have any form of meaningful control within the JQC as to the conduct of other members of that body, the committee finds that this lack of oversight and accountability caused the poor practices of some individuals, which necessitated a total overhaul and restructuring of the JQC.

Questionable investigatory practices, lack of transparency, and due process for the accused

Individuals who appeared before the committee as well as affidavits submitted to the committee provided testimony that on at least one occasion an attorney member of the JQC abused his authority by threatening to launch an ethics investigation when that member could not obtain what he wanted on behalf of his private client. Evidence was presented that members of the JQC caused an investigation to begin over complaints stemming from a disagreement of law, rather than a violation of ethics, or began an investigation in retaliation against a judge speaking out against JQC investigatory practices. There was discussion that on several occasions members of the JQC intentionally, and in some instances "accidentally," contacted members of the media in order to disseminate information to the public about ongoing JQC investigations to put pressure on a judge under their review. Specifically, in one such instance, a judge publicly spoke out against such tactics and had a seemingly retaliatory complaint filed against her and an investigation begun for voicing her dismay at the way the JQC was attempting to try her in the media.

Such tactics, where intentional, are unacceptable and wholly unbecoming of the role of the JQC and its interaction with the judiciary. Such tactics demonstrate the JQC's failure to adhere to its adopted rules and procedures. It should go without saying, but nonetheless, it is the unfortunate task of this committee to admonish and address this behavior. Furthermore, when leaks to the media were accidental, such behavior was so careless and irresponsible as to make the committee question how such a member could have felt himself or herself capable of or suitable to continue being a member of the JQC, which has a duty of nondisclosure so paramount that the JQC felt the need to hire outside counsel to determine whether or not it could disclose documents to this study committee at a cost to the taxpayers of Georgia of $20,338.00.

Evidence was presented that when members of the judiciary had concerns regarding the JQC's investigatory practices and sought to obtain information or guidance from the JQC, those requests were rebuffed or categorically ignored. There was testimony that judges who sought information on whether there was an ongoing investigation of himself or herself, or an update on the status of an inquiry, were summarily ignored or given an obscure response that the JQC would be in touch, with no follow-up, leaving these judges in limbo. By contrast, when the JQC requested an informal hearing, the practice of nontransparency appeared to continue. On at least one occasion, the JQC merely provided the judge a docket number on its correspondence, requiring the judge to decipher to which previous correspondence the JQC was referring. When the judge informed the JQC at her informal hearing that she was under the impression the meeting was about a different matter, she was greeted with incredulity and berated by questioning members, who nevertheless acknowledged "we dropped the ball" and the judge was "caught off guard."

In addition to the investigatory due process imbalances, there is a structural deficiency: the JQC is one body, which, as a whole, both conducts the investigation and then determines the guilt or innocence of the judge. In a criminal case, this would be akin to having the grand jury, which investigates potential criminal conduct and determines whether enough evidence exists to bring criminal charges against the accused, make such a determination and then act as the trial jury and judge of that defendant; determine whether the defendant committed the crime as charged, and if convicted impose a sentence. This fundamental structural problem necessitated the JQC being reformed.

RECOMMENDATIONS

This study committee has considered ways of addressing the negative impacts of recent JQC activities and overall structural deficiencies to ensure that going forward the JQC's membership is accountable and the process of discipline is transparent and equitable and makes the following recommendations as provided below.

1. **Accountability:** JQC members should no longer be unanswerable to other JQC members and should be subject to discipline for improper conduct as defined by the rules of the JQC. Specifically, whether by rule or by law, JQC members should be subject to some form of disciplinary action for intentionally or accidentally engaging in efforts to pressure judges by leaking information to the media.

   The JQC should not be an autonomous unelected fourth branch of government whose advisory opinions are not subject to Supreme Court review.

   Member term limits should be created by law because currently none are codified and are only provided for by the JQC's rules.

2. **Transparency:** JQC meetings should not be exempt from all open meetings requirements. Findings and records of the JQC during an open meeting, discussion of use of JQC funds, and a JQC decision to file a judicial complaint should be subject to disclosure requirements under the Open Records Act; provided, however, that by a majority vote of those members of the JQC present, the JQC should be allowed to go into executive session for specific purposes so other records during that session would be exempt from disclosure under the Open Records Act. The following purposes would be proper for an executive session: discussing personnel matters, investigating and fact-finding sessions in connection with a judicial complaint, meeting with a judge or attorneys representing a judge in adversarial or potentially adversarial situations, and any

other purpose authorized by and consistent with the protection of executive sessions set forth in Chapter 14 of Title 50 of the O.C.G.A.

3. **Process equitable:** No individual JQC member should be able to initiate an investigation without presenting such proposal to the other members of the JQC at a JQC meeting, except in cases of an emergency.
4. **Removal:** JQC members should be subject to removal from the JQC by JQC rules and general legislation for misconduct.

Mr. Speaker, these are the findings and recommendations of your Special Study Committee on Judicial Qualifications Commission Reform.

Respectfully Submitted,

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Chairman

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