

PURSUANT TO
RULE 5:

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5:36 PM
WAKE COUNTY

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
16 CVS 015636

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

Plaintiff,

v.

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

Defendants.

ORDER

THIS MATTER came on for hearing on February 10, 2017, before the undersigned three-judge panel upon the Plaintiff's Motion for Preliminary Injunction regarding Part III of House Bill 17 (Session Law 2016-126, §§ 38-39) ("the Advice and Consent Amendment"). Upon consideration of all matters of record, including the Amended Complaint, affidavits on file, arguments by counsel for Plaintiff and counsel for Defendants, the Court finds and concludes as follows:

1. This Court has personal and subject matter jurisdiction over this cause.
2. This cause is properly referred to the undersigned three-judge panel.
3. The Plaintiff, in his motion for preliminary injunction, seeks to restrain the operation of the Advice and Consent Amendment, which was enacted by the North Carolina General Assembly on December 19, 2016.
4. The Advice and Consent Amendment authorizes the Governor to fill vacancies for the heads of principal departments when the General Assembly is not in regular session.

Individuals who are appointed to fill those vacancies when the General Assembly is not in session are authorized under the Advice and Consent Amendment to serve without senatorial advice and consent for no longer than the earlier of the following: “(1) The date on which the Senate adopts a simple resolution that specifically disapproves the person appointed. (2) The date on which the General Assembly shall adjourn pursuant to a joint resolution for a period longer than 30 days without the Senate adopting a simple resolution specifically approving the person appointed.”

5. The eight nominees whose hearings were scheduled for confirmation by the Senate were all appointed to fill vacancies prior to 25 January 2017, the start of the 2017 regular session of the General Assembly.

6. Those eight appointees are currently serving without having been subject to senatorial advice and consent.

7. Plaintiff has not demonstrated that any of those eight appointees will be unable to continue serving in their current capacities under the Advice and Consent Amendment because either

a. The Senate is planning to adopt a simple resolution that specifically disapproves of any one of these eight persons appointed; or

b. The General Assembly is scheduled to adjourn pursuant to a joint resolution for a period longer than 30 days without the Senate adopting a simple resolution specifically approving the eight persons appointed.

8. Furthermore, the Advice and Consent Amendment provides a process for selection and qualification of the principal State department heads: “For each head of each principal State department covered by this subsection, the Governor shall notify the President of the

Senate of the name of each person to be appointed, and the appointment shall be subject to senatorial advice and consent”

9. The Advice and Consent Amendment require the Governor to begin the process by first notifying the Senate of the nominee, and the Senate cannot begin the advice and consent process until the Governor submits a nominee.

10. In contrast to other statutes requiring legislative consent, the Advice and Consent Amendment does not require a specific deadline for the Governor to notify the Senate of the nominee. See, e.g., N.C. Gen. Stat. §62-10(a) (“The names of commissioners to be appointed by the Governor shall be submitted by the Governor to the General Assembly for confirmation by the General Assembly on or before May 1”); (N.C. Gen. Stat. § 97-77 (a1) (“The names of commissioners to be appointed by the Governor shall be submitted by the Governor to the General Assembly for confirmation by the General Assembly on or before March 1 of the year of expiration of the term.”); N.C. Gen. Stat. §115C-10 (“The Governor shall transmit to the presiding officers of the Senate and the House of Representatives, on or before the sixtieth legislative day of the General Assembly, the names of the persons appointed by the Governor and submitted to the General Assembly for confirmation.”); N.C. Gen. Stat. §106-2(b) (“The members of the Board shall be appointed by the Governor by and with the consent of the Senate.”).

11. In the absence of a specific deadline for when the Governor must submit nominations to the Senate President under the Advice and Consent Amendment, N.C. Gen Stat. § 147-12 controls:

Notwithstanding any other provision of law, whenever a statute calls for the Governor to appoint a person to an office subject to confirmation by the Senate, the Governor shall notify the President of the Senate by May 15 of the year in which the appointment is to

be made of the name of the person the Governor is submitting to the General Assembly for confirmation. N.C. Gen. Stat. § 147-12(a)(3d).

12. Accordingly, the statutory deadline for the Governor to submit his nominees to the President of the North Carolina Senate and begin the senatorial confirmation and consent process under the Advice and Consent Amendment is May 15, 2017.

13. Plaintiff has not yet notified the President of the Senate of the names of his appointees. (Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction, ¶11).

14. Furthermore, under N.C. Gen. Stat. § 147-12(a)(3), "[I]n every case where the Governor is authorized by statute to appoint to fill a vacancy in an office in the executive branch of State government, the Governor may appoint an acting officer . . . to serve during a vacancy in an office pending the selection and qualification, in the manner prescribed by statute, of a person to serve for the unexpired term."

15. Plaintiff's appointees under § 143B-9 can serve as acting officers pending the selection and qualification process and may appear before the General Assembly on matters related to their service.

16. Under N.C. Gen. Stat. 1A-1, Rule 65, the Court must make findings and conclusions regarding irreparable harm to the moving party seeking a Preliminary Injunction.

17. Plaintiff contends that because he has spent months identifying and recruiting experienced, effective leaders with appropriate subject matter expertise to run the respective Cabinet Agencies to which they are appointed in accordance with Plaintiff's policy priorities and goals, that for these individuals to appear before respective Senate

Committees would be burdensome to the appointees, and thus render the Plaintiff's work in selecting them meaningless. That the Court finds and concludes that this showing does not rise to the level of irreparable harm at this time.

18. That should the State Senate approve an appointee by simple resolution, neither the Plaintiff nor his appointees would suffer irreparable harm. Plaintiff argues that if the Senate fails to approve an appointee, that Plaintiff will suffer irreparable harm, by reason of the Plaintiff not being able to execute the law as he deems appropriate, and thus suffer a violation of separation of powers of the legislative and executive branches. That unless and until the State Senate specifically disapproves an appointee via simple resolution, Plaintiff's proffered harm is speculative.

19. That if an appointee is disapproved by the State Senate by simple resolution, then Plaintiff is in a position to argue irreparable harm and request a hearing for a Preliminary Injunction, and thus move this Court to enjoin the enactment of such resolution. That in their written and oral arguments, Defendants concede that in this event, the Plaintiff would be able to allege genuine and not speculative harm.

20. The Court finds and concludes that at this time, Plaintiff has not established a likelihood of irreparable harm. This finding is without prejudice to Plaintiff to subsequently move this Court for injunctive relief should an appointee fail to receive Senate confirmation, and thus seek to enjoin the enactment of such resolution.

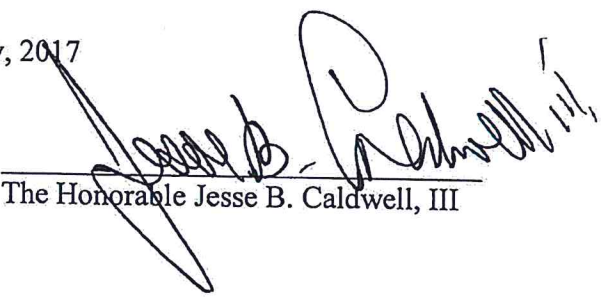
21. That the Court does not address in this Order the Constitutional issues raised, nor the Plaintiff's likelihood of success on the merits of his challenge, by reason of its findings and conclusions regarding the issue of irreparable harm.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS
FOLLOWS:

1. At this time the Court denies Plaintiff's Motion for Preliminary Injunction, and dissolves the Temporary Restraining Order previously entered in this matter.
2. This ruling is without prejudice to the Plaintiff to file a subsequent Motion for Temporary Restraining Order and Preliminary Injunction in the event the State Senate by resolution disapproves an appointee, for Plaintiff to at that time seek injunctive relief enjoining the enactment of such resolution.

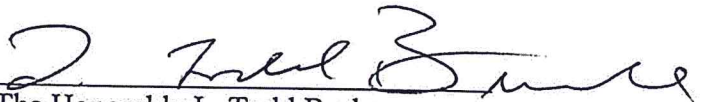
SO ORDERED, this the 13th day of February at 5:36 p.m.

SO ORDERED, this the 13th day of February, 2017

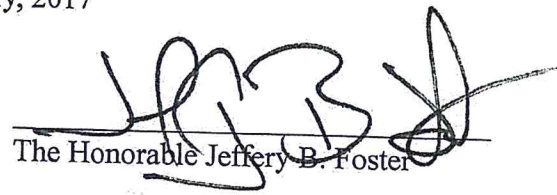


The Honorable Jesse B. Caldwell, III

SO ORDERED, this the 13th day of February, 2017


The Honorable L. Todd Burke

SO ORDERED, this the 13th day of February, 2017


The Honorable Jeffery B. Foster

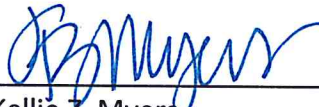
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served on the parties listed below by mailing a copy thereof to each of said parties, addressed, postage prepaid, as follows:

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This the 14th day of February, 2017.



Kellie Z. Myers
Wake County Trial Court Administrator
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