

April 2021

SPECIAL JOINT SELECT COMMITTEE ON JUDICIAL
TRANSPARENCY AND ACCOUNTABILITY

INITIAL REPORT TO THE 67TH MONTANA LEGISLATURE

**INITIAL REPORT ON
JUDICIAL
TRANSPARENCY AND
ACCOUNTABILITY**

PAGE HELD FOR FINAL TABLE OF CONTENTS

DRAFT

SPECIAL JOINT SELECT COMMITTEE ON JUDICIAL ACCOUNTABILITY AND TRANSPARENCY COMMITTEE MEMBERS

The President of the Senate and the Speaker of the House created the Special Joint Select Committee on Judicial Transparency and Accountability on April 14, 2021.

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Introduction. This report is a summary of the work of the Special Joint Select Committee on Judicial Accountability and Transparency. Members received additional information and testimony during their investigation, and this report is an effort to highlight key information and the processes followed by the Select Committee in reaching its conclusions. To review additional information, including audio minutes, and exhibits, visit the Select Committee website: <https://leg.mt.gov/committees/other-groups/special-select-committee-jat/>.

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Chronology of Events

SB 140 TIMELINE

INVESTIGATION TIMELINE

- JANUARY 25** Senate Bill 140, modifying the nominations process for judicial vacancies is introduced.
- JANUARY 29** Supreme Court Admin. Beth McLaughlin emails a poll to every judge and justice asking whether the Montana Judges Assoc. lobby in support or opposition of SB140.
- JANUARY 29 - FEBRUARY 1** 38 Judges respond to the poll by phone/email
- EARLY MARCH** Chief Justice Mike McGrath meets with the Governor Gianforte to lobby against SB140
- MARCH 16** Governor Gianforte signs SB140 into law.
- MARCH 17** A petition for Original Jurisdiction challenging the constitutionality of SB140 is filed by Edwards/Goetz as *Bradley v. Gianforte*, the Legislature is not a party.
- MARCH 24** Chief Justice Mike McGrath recuses himself from *Bradley* due to his lobbying on SB140.
- MARCH 24** Chief Justice McGrath chooses District Court Judge Kurt Krueger to replace him on *Bradley* panel.
- MARCH 30** The Attorney General files a motion to disqualify Judge Krueger based on his response to the SB140 poll that he "adamantly" opposed the legislation at issue.
- MARCH 31** Judge Krueger recuses himself from the *Bradley* panel after speaking with the Chief Justice.
- APRIL 2** The Legislature sends a letter to Administrator McLaughlin asking for public records re: the SB140 poll.
- APRIL 6** Administrator McLaughlin seeks an extension; the Legislature agrees to a 4/9 deadline via email.
- APRIL 7** Administrator McLaughlin provides the Legislature with two e-mails, and tells staff that the judicial branch policy did not require her to retain the SB140 poll emails since they were "ministerial type" records.
- APRIL 8** Legislative staff asks Administrator McLaughlin if she deleted emails, and ask her to provide the judicial branch retention policy that allows for email deletion.
- APRIL 8** Administrator McLaughlin tells staff via email that she has to "acquiescence to sloppiness" but that she did delete the SB140 emails in violation of law and policy.
- APRIL 8** Senate Judiciary Chairman Keith Regier subpoenas Dept. of Administration in an effort to obtain Admin. McLaughlin's deleted emails from the server.
- APRIL 9** The Department partially complies with the subpoena providing 2,450 pages of emails related to SB140, the Montana Judges Assoc. and judicial branch lobbying.
- APRIL 10** Admin. McLaughlin hires an attorney, who files a Saturday "emergency" motion in *Bradley* to stop production of the emails. Neither Dept. of Admin. nor the Legislature is a party to that case.
- APRIL 11** On a Sunday, before any of the actual parties can respond, the Montana Supreme Court issues an order quashing the Legislature's subpoena.
- APRIL 12** The Legislature retains the Dept. of Justice to represent its interests. DOJ notifies the Supreme Court via letter that it does not recognize the Sunday order as valid.
- APRIL 12** Admin. Beth McLaughlin's attorney files a new emergency petition for Original Jurisdiction, *McLaughlin*, attempting to re-quash the subpoena..
- APRIL 14** The Legislature forms the Special Joint Select Committee on Judicial Accountability and Transparency to investigate document retention, legislative lobbying, and potential judicial impropriety.
- APRIL 14** DOJ files a motion to dismiss McLaughlin on the grounds that the Supreme Court has a conflict of interest, and cannot rule on its Administrator's case.

Chronology of Events

SB 140 TIMELINE

INVESTIGATION TIMELINE

- **APRIL 14**
The Legislature revises Admin. McLaughlin's subpoena requiring her to produce her state owned computer to retrieve deleted emails and testify at a hearing.
- **APRIL 15**
The Legislature subpoenas the Supreme Court Justices seeking production of documents.
- **APRIL 16**
Chief Justice McGrath sends a letter to the Legislature stating that the emails requested by the Legislature are privileged and that the Court will not produce them.
- **APRIL 16**
The Supreme Court issues another order in *McLaughlin* purporting to quash the Administrator's subpoena and stay the subpoenas issued to the Justices even though they are not a party to the case.
- **APRIL 16**
The Select Committee adopts draft rules and schedules a hearing for April 19th.
- **APRIL 18**
DOJ sends a letter to the Justices informing them that their *McLaughlin* order does not cover their subpoenas because they are not a party to the case, and advising them that the Select Committee expects them to produce the subpoenaed emails and documents.
- **APRIL 19**
The Select Committee meets at 9:00AM; Admin. McLaughlin does not appear.
- **APRIL 19**
Justice Jim Rice, who refused to rule on his own subpoena, files a petition in District Court asking his subpoena be quashed.
- **APRIL 19**
Justice Dirk Sandefur produces some of the requested documents, but not all. In a letter, he stated that he routinely deletes email to conserve space and that he was unaware of law or policy that required their retention. He also stated that he did not respond to legislative polls or read other judge's responses.
- **APRIL 19**
The Select Committee holds its 3:00PM hearing; all seven Justices appear to make statements and respond to some of the Committee's questions. None produces additional subpoenaed documents.
- **APRIL 22**
The Select Committee meets to discuss information revealed during the investigation, formulate additional questions for the Justices and Administrator, and begin drafting the initial Committee report.
- **APRIL 26**
The Select Committee poses questions to Chief Justice McGrath via letter asking him to address potential inconsistencies between the record and his testimony.
- **APRIL 29**
The Select Committee submits its Initial Findings and Committee Report. The Committee will continue its investigation through the remainder of the session.

LEGISLATIVE AUTHORITY

It has been consistently recognized by the courts and uniformly reflected in constitutional and parliamentary law that a legislative body has the clear and very broad authority to conduct legislative investigations to gather and evaluate information to make wise and timely policy judgments inherent and indispensable in the power of enacting law.¹² A legislative body's inherent power to investigate may be exercised directly or through a duly authorized committee.³ The presumption of constitutionality of legislative actions applies to legislative investigations.⁴

According to Mason's Manual:

"The legislature has the power to investigate any subject regarding which it may desire information in connection with the proper discharge of its function to enact, amend, or repeal statutes or to perform any other act delegated to it by the constitution."⁵

The power to investigate must be exercised for a proper legislative purpose. The exercise of the legislative investigation power must protect the rights of citizens and adhere to all constitutional protections related to privacy, life, liberty, and property.⁶

An investigation into the management of state institutions and the departments of state government is at all times a legitimate function of a legislative body.⁷

Here, the Special Joint Select Committee on Judicial Transparency and Accountability (the Committee), as a duly authorized legislative committee, is conducting an investigation of the judicial branch's public information and records retention protocols; whether members of the branch have made improper use of government time and resources by lobbying on behalf of a private entity; whether judges' and justices' statements on legislation have created judicial bias; and whether the courts have a conflict of interest in hearing these matters. These matters are within the Legislature's investigative authority.

RESPONSE TO SUBPOENAS

On April 14 and 15, 2021, Senate President Mark Blasdel and Speaker of the House Wylie Galt, issued subpoenas to appear and produce documents, pursuant to M.C.A. § 5-5-101, *et seq.*, to Supreme Court Administrator Beth McLaughlin, Supreme Court Chief Justice Mike McGrath, Justice Beth Baker, Justice Laurie McKinnon, Justice Ingrid Gustafson, Justice Jim Rice, Justice Dirk Sandefur, and Justice Jim Shea.

¹ Text borrowed from a memo by Mr. Todd Everts for the Select Committee on Settlement Accountability.

² *Mason's Manual of Legislative Procedure* (2010), p. 561; *Sutherland Statutory Construction* (2010), p. 596.

³ *Mason's Manual*, p. 569; *Sutherland*, p. 570.

⁴ *Sutherland*, p. 578.

⁵ *Mason's Manual*, p. 561.

⁶ *Mason's Manual*, p. 566; Article II, section 10, of the Montana Constitution.

⁷ *Mason's Manual*, p. 563.

Other than the subpoena to Ms. McLaughlin, the subpoenas issued to the Supreme Court Justices did not request their appearance to answer questions of the Committee.⁸

The subpoenas asked for three items delivered as hard copies and .pst files:

1. Communications regarding polls during the 2021 legislative session;
2. Communications regarding 2021 legislation; and
3. Communications indicating use of state time and resources on behalf of the Montana Judges Association, a private non-profit education and lobbying organization.

The subpoenas expressly excluded “any emails, documents, and information related to decisional case-related matters made by Montana justices or judges in the disposition of such matters.” Additionally, the subpoenas clarified that “[a]ny personal, confidential, or protected documents or information responsive to this request will be redacted and not subject to public disclosure.”

The subpoenaed witnesses responded as follows:

- Administrator McLaughlin failed to appear and refused to produce the requested information and her state-owned computers and hard drives for analysis.
- Justice Rice appeared at the April 19, 2021, hearing to notify the Committee that he had obtained a District Court order temporarily enjoining the Legislature’s subpoena. Justice Rice, at his own request, was not subject to the improper stay entered by the Court over itself. Recognizing the Legislature’s inherent subpoena power in his petition, Justice Rice sought relief from a possibly more independent tribunal as a typical recipient of a subpoena would be expected to do.
- Justice Sandefur appeared at the April 19, 2021, and provided a written response to his subpoena containing five responsive documents, but further explaining that “it has been [his] routine practice to immediately delete non-essential email traffic” presuming that Department of Administration (DOA) is retaining his emails in accordance with state law and policy. Justice Sandefur was temporarily excused based on his attempt to comply with the subpoena.⁹
- Justice Baker appeared at the April 19, 2021, hearing, but did not produce any requested information or otherwise comply with her subpoena.
- Justice McKinnon appeared at the April 19, 2021, hearing, but did not produce any requested information or otherwise comply with her subpoena.
- Justice Gustafson appeared at the April 19, 2021, hearing, but did not produce any requested information or otherwise comply with her subpoena.
- Justice Shea appeared at the April 19, 2021, hearing, but did not produce any requested information or otherwise comply with his subpoena.

⁸ Attached Committee Exhibit A – 4/15 Legislative Subpoenas

⁹ Attached Committee Exhibit B – Justice Sandefur production to Committee

- Chief Justice McGrath appeared at the April 19, 2021, hearing, but did not produce any requested information or otherwise comply with his subpoena.

LOBBYING ON STATE TIME USING STATE RESOURCES

A. State Officers and Employees

Pursuant to M.C.A. § 3-1-701 et seq., the Court Administrator is appointed by the Supreme Court and holds the position at the pleasure of the court. The duties of the Court Administrator include preparing and presenting judicial budget requests to the legislature, providing information to the legislature upon request, recommending to the Supreme Court improvements to the judiciary, administering the judicial branch personnel plan, and performing other duties that the Supreme Court may assign.

The Court Administrator is a "public employee" as defined in M.C.A. § 2-2-102(7). Supreme Court Justices and District Court Judges are "public officers" as defined in M.C.A. § 2-2-102(9).

"A public officer or employee may not engage in any activity, including lobbying, ... on behalf of an organization... of which the public officer or employee is a member while performing the public officer's or public employee's job duties.¹⁰" Further, Judicial Branch e-mail policy prohibits judicial officers and employees from using state e-mail for the benefit of a non-profit entity.

B. Lobbying by The Montana Judges Association (MJA)

The Montana Judges Association (MJA) is not a state entity. It is not part of the Supreme Court or the Judicial Branch. The MJA is registered with the Secretary of State's Office as a non-profit corporation with its registered agent listed as the District Judge, Department 1, at the office of the District Court, Helena, MT.¹¹ Its original registration paperwork from 1991 lists former Supreme Court Administrator Jim Oppedahl as its registered agent, and the Supreme Court address on Sanders as its address.¹²

The MJA Board of Directors and its membership are known to include Montana judges and justices whose membership dues are deducted from their state paychecks.

The MJA has no known employees but, as Chief Justice McGrath stated in his April 16th letter, the organization pools member dues to hire a "part-time lobbyist" to represent its interests.¹³ The MJA's founding documents state that it often coordinates with the Montana Bar Association, Montana Trial Lawyers Association, and the American Bar Association as organizations in "common cause."

Dozens of publicly available e-mails sent by the Court Administrator¹⁴ from her state email show the Administrator in regular contact with lobbyists and MJA officers to discuss lobbying work. These emails and the April 16th letter from the Chief Justice confirm that Judicial Branch public officers and employees

¹⁰ MCA 2-2-121(6)

¹¹ Attached Committee Exhibit C – Current MJA registration documents

¹² Attached Committee Exhibit D – Original MJA registration documents

¹³ Attached Committee Exhibit E – Chief Justice McGrath's 4/16 Letter

¹⁴ The publicly available emails can be found here: <https://bit.ly/2R5Pk7n>

improperly utilized state resources and time for the benefit of the MJA. The depth and breadth of the entanglement effectively turned Administrator McLaughlin into a de facto MJA employee.

It is worth noting, that there is a procedure by which state entities may lobby the Legislature. The Office of Public Instruction, the Public Service Commission, and many other state entities are registered with the Commissioner of Political Practices (COPP) as “registered principals.” Properly registered state employees may lobby on behalf of their department for policy changes, funding requests, and other legislative measures. The Montana Judges Association, its lobbyist Ed Bartlett, and its President Judge Greg Todd are all registered with COPP. Neither Administrator Beth McLaughlin nor the Montana Supreme Court are listed on the COPP’s registration page.¹⁵

C. Lobbying Directed by Chief Justice McGrath

In his April 16, 2021 letter, Chief Justice McGrath stated that the Court Administrator conducts polls “by e-mail” on behalf the MJA President Judge Todd. These polls and the resulting replies were sent from McLaughlin’s state e-mail account to the state e-mail accounts of Montana’s judges and justices presumably on state computers on state time.

In his April 19th testimony before the Committee, Chief Justice McGrath stated that MJA conducts polls on pending legislation to determine whether “the organization [will] support, oppose or stay neutral on [a] particular bill.”¹⁶ Thus, the results of the polls guide the MJA, its Legislative Committee and its lobbyist in their efforts throughout the Legislative Session.

When asked at the April 19th Committee hearing who authorized Administrator McLaughlin to conduct the MJA’s e-mail polls and coordinate related lobbying efforts on behalf of the MJA, Supreme Court Justice Beth Baker replied that “the Chief Justice works with [Beth McLaughlin] day in and day out” and that “on legislative matters, the Chief is the direct contact for the Court Administrator.”¹⁷

1. The Poll on HB 685

E-mails confirm that Chief Justice McGrath directed Administrator McLaughlin to coordinate lobbying efforts on behalf of the MJA on at least one, and potentially multiple occasions.

- On March 24th, Chief Justice McGrath e-mailed the Court Administrator, MJA President Judge Todd, MJA lobbyist Ed Bartlett, and two District Court Judges regarding a forthcoming hearing on House Bill 685. In the e-mail McGrath wrote, “[w]e should probably get a membership vote on this and ask who can make calls.”¹⁸
- Shortly after, Administrator McLaughlin responded, “I can send it out to the membership for a vote, but people need to not do the ‘reply to all.’ Can the legislative committee give a thumbs up or down instead given timeliness?”

¹⁵ The COPP registration database can be found here: <https://lobbyist-ext.mt.gov/LobbyistRegistration/>

¹⁶ A link to the April 19th Hearing can be found here: <https://bit.ly/3gLu4hU>

¹⁷ A link to...

¹⁸ Publicly available emails can be viewed via this link: <https://bit.ly/32YeEi0>

- Within minutes of the Chief Justice’s request, Administrator McLaughlin e-mailed the members of MJA’s Legislative Committee polling them for opposition or support to HB685. All members voted in opposition. Chief Justice McGrath and the MJA lobbyist were copied on the e-mail chain.
- After HB685 failed to pass, Chief Justice McGrath used his personal email to send a message to Administrator McLaughlin, and lobbyists Ed Bartlett and Bruce Spencer, stating *“This could not have ended any better. Great effort. Thanks again for your hard work these last few months. What a challenge this session has been. I think it is fair to say we have been able to protect nothing less than the independence of the judicial branch and uphold the basic principles of our state democracy. No small accomplishment in these difficult times. Congratulations.”*

2. Committee Testimony

During Committee testimony, Chief Justice McGrath repeatedly conflated the work of the Judicial Branch with the work of the Montana Judges Association. In response to questioning, he stated that the MJA *“polls are conducted by email, which is the primary manner that the Judicial Branch conducts its internal business and communications.”*

Chief Justice McGrath defended the use of state e-mail and state time for MJA lobbying efforts. In testimony, he stated that *“as statewide elected officials, [judges and justices] are always on the clock.”* The Chief testified that because the MJA only comments on bills related to *“the judiciary and judicial business”* conducting MJA lobbying efforts utilizing state time and resources was *“entirely proper.”* Quite to the contrary, no other state elected official, or state employee, would be permitted to use state resources in this manner as it is a direct violation of the law.¹⁹

Despite being the sender of several of MJA-related e-mails and being copied on several more, Chief Justice McGrath repeatedly professed ignorance to the content of the e-mails at the hearing. Despite being copied on the SB 140 e-mail, Chief Justice McGrath stated that he was unaware of Judge Krueger’s reply stating his adamant opposition to the bill prior to appointing him to fill a vacancy on the Court.²⁰

Chief Justice McGrath also testified that he had not seen many of the *“colorful”* comments other e-mails contained, despite being copied on them, and making several comments himself as seen below:

- On March 24, 2021, Administrator McLaughlin used her state email to send a message to Chief Justice McGrath, Judge Menahan, Judge Spaulding, and lobbyist Ed Bartlett with the subject line *“fyi.”* The message contained as an attachment LC 3213 (HB685), a proposed Constitutional Amendment regarding the composition of the Judicial Standards Commission.
 - McLaughlin’s original message stated *“[w]ell this is goofy.”*
 - In response directly to McLaughlin, Judge Spaulding stated *“[w]ow, likely unconstitutional in its inception. Has this been introduced? Isn’t there a transmittal deadline or something?”*
 - McLaughlin responded to Judge Spaulding and stated *“[i]t’s a proposed constitutional amendment so it would need 2/3 of both Houses and to be approved by the voters. I’ve never seen an unconstitutional constitutional amendment but it sure seems to conflict with the Supreme Court’s ultimate authority in statute. It will be a doozy.”*

¹⁹ MCA § 2-2-121, et seq.

²⁰ Attached Committee Exhibit F – The Attorney General’s filing in *Bradley*.

- In response to McLaughlin’s original message, Chief Justice McGrath stated “[t]hey don’t seem to care much for Judicial Standards now that they have found out about it. We will need to pick off some votes here to keep it below 100. Might be easier in the House. Are there rules regarding timelines that apply?”
- Chief Justice McGrath responded to McLaughlin’s original message “[w]e should probably get a membership vote on this and ask who can make calls. Probably need the bar to do the same. Of course the problem here is it allows a citizen’s commission to discipline or remove judges. Not clear who appoints them but God forbid they put any judges on it or more than one atty. Then there is the problem that it would be entirely inconsistent with other provisions of the constitution...”
- Chief Justice McGrath responded yet again “[j]ust noticed the new name will be ‘The Judicial Inquiry Commission’. Think this straight out of the book ‘Where Democracies Go To Die.’”²¹

D. Lobbying Directed by MJA President Judge Todd

E-mails also reveal that Administrator McLaughlin coordinated lobbying efforts with MJA President Todd, MJA lobbyist Ed Bartlett, Montana Bar Association lobbyist Bruce Spencer, and Montana Magistrates Association lobbyist Rebecca Meyers. McLaughlin’s communications include her opinions and personal comments about legislation, legislators, and the legislature’s work.²²

- On February 5, 2021, Administrator McLaughlin used her state email to send a message regarding HB 325 to all Montana Supreme Court Justices and District Court Judges stating “[j]udge Todd would like a MJA vote on supporting or opposing HB325 (attached), which would elect the Supreme Court by districts. Judge Todd is recommending the MJA oppose the bill. It is schedule [sic] for a hearing on Wednesday, February 10th so you could review and vote by Tuesday that would be great.”
- On February 8, 2021, Administrator McLaughlin used her state email to send a message regarding HB342 to all Montana Supreme Court Justices and District Court Judges stating “[j]udge Todd is asking for a vote on HB342, which would make Supreme Court and District Court elections partisan. The bill is attached. Again, vote using the buttons or send an e-mail to me. Please either vote to Approve or Reject the bill.”
- On March 4, 2021, Judge Todd used his state email to send a message to Chief Justice McGrath, Administrator McLaughlin, and lobbyist Ed Bartlett with the subject line “Status Report of MJA Bills at the Legislature.” Judge Todd’s message stated “[s]o is the partisan judge bill dead or will there be some Zombie like resurrection in the Senate.” In response to Judge Todd’s message, Chief Justice McGrath used his state email to send a reply-all message stating “[n]o resurrection this session.”
- On March 26, 2021, lobbyist Rebecca Meyers emailed Administrator McLaughlin and Judge Mantooth at their state email addresses to discuss an amendment brought by Senator Manzella. The message stated “Ok sounds good. I’ll plan on speaking and we’ll work out what the specifics are later. I swear this session will NEVER end. Though, in all seriousness, I heard from legislators last night that the goal is to take a 1 week recess after Easter to deal with budget stuff and then come

²¹ These publicly available emails can be viewed via this link: <https://bit.ly/32YeEi0>

²² These publicly available emails can be viewed via this link: <https://bit.ly/3a1CIK4>

back, power through and wrap up by May 1. The farmers/ranchers are starting to flip out about pushing the session back and have basically said they won't be coming back over the summer."

- Administrator McLaughlin responded using her state email stating *"I'm thrilled you're hearing the same rumor about May 1 – maybe that will make it true."*
- On March 31, 2021, Judge Mike Menahan used his state email to send a message to Judge Greg Todd, Administrator McLaughlin, and lobbyist Ed Bartlett regarding HB 685 stating *"I'm happy that a few Republicans voted against the bill. As a constitutional amendment, the bill will need two-thirds of the legislature to pass and be placed on the ballot for voter approval. I think we should ask judges to contact their representatives to oppose the bill when it is heard on second reading before the entire House. I'm unsure how that happened when judges contacted legislators regarding the partisan elected bills, but I think we should employ a similar strategy. The district court judges need to know about this bill. If enacted, an appointed citizen commission with no knowledge of the law will have absolute power to remove judges for any reason."*
 - Judge Greg Todd used his state email to respond stating *"You are right. We are mobilizing judges to call their representatives. Thanks Greg."*

Though it appears the emails have been deleted, poll tally sheets indicate that at least Judge Elizabeth Best, Judge Katherine Bidegaray, Judge John Brown, Judge Matthew Cuffe, Judge David Cybulski, Judge Ray Dayton, Judge Dusty Deschamps, Judge Amy Eddy, Judge Brenda Gilbert, Judge Leslie Halligan, Judge Kurt Krueger, Judge Yvonne Laird, Judge Jennifer Lint, Judge James Manley, Judge Nickolas Murnion, Judge Jon Oldenburg, Judge Howard Recht, and Judge Robert Whelan all responded to Administrator McLaughlin's request for a vote regarding Senate Bill 140, which is now before the Supreme Court for decision. It is unknown whether the tally was taken by email or telephone.²³

It is unclear how many other judges and justices weighed in on how many other legislative actions pending before the legislature because the Court Administrator and the Justices have refused to cooperate with the legislative subpoenas seeking further documents and Ms. McLaughlin's computer equipment. It is also unclear how many responsive documents have been deleted by other members of the judicial branch.

E. Coordinating Support for Judicial Nominees

In addition to the prohibition on lobbying on state time, the law also prohibits lobbying for nominees. "A public officer or employee may not use or permit the use of public time, facilities, equipment, supplies, personnel, or funds to solicit support for or opposition to the nomination...of any person to public office...."²⁴

The following emails show that Administrator McLaughlin and several judges, including the nominees themselves, used their state email, and presumably their state-owned computers, to coordinate testimony and support for yet-unconfirmed judicial nominees.

- On January 21, 2021, Administrator McLaughlin used her state email to send a message to yet-unconfirmed Judge Ohman, Judge Levine, and Judge Abbott, with Chief Justice McGrath carbon-

²³ Attached Committee Exhibit G – Email contained in the Supreme Court's Order Denying Relief on 4/7

²⁴ MCA 2-2-121(3)

copied, stating *“I’m going to defer to the Chief about his thoughts but I don’t think it would hurt to make sure you have support from your local Bar. All three of the districts would be harmed if these positions were vacated again because of the caseloads so local Bars should have a vested interest [sic] the confirmations. I suspect it might be more important this session to have that support articulated at the [sic] confirmation hearings, which have been pretty dull in the past. I will keep you posted as I learn more. The Chief may have additional thoughts as well.”*

- On January 22, 2021, Chief Justice McGrath used his state email to send a message to Administrator McLaughlin and, referencing the yet-unconfirmed judicial nominees, stated *“[s]hould we have them start poking around? This would be such a cluster if they aren’t confirmed – entire dockets would essentially be stranded including pending cases. Ed is close with the Lt. governor so maybe it’s time for him to ask directly if they are opposing them.”*
- On February 16, 2021, yet-unconfirmed Judge Abbott used his state email to send a message to Administrator McLaughlin, Judge Ohman, and Judge Levine stating *“[t]hanks for the update. I think we’re all plugging away at trying to line up support.”*
- On February 24, 2021, Administrator McLaughlin used her state email to send a message to Judges Abbott, Levine, and Ohman stating *“Yes, we were too but the Chair wants to push it through – he tried to ram it through yesterday. MJA and the Bar will be there in opposition as well as Judge Brown on behalf of the Commission. Ed continues to work the governor’s office on the appointments. Continuing to gather local support is importana [sic].”*
- On March 8, 2021, Judge McElyea used her state email to send a message to Administrator McLaughlin stating *“Thanks, Beth. Any strategic problem with me reaching out to encourage our local paper to do a piece on our new judge – Peter Ohman.”*
- On March 12, 2021, yet-unconfirmed Judge Abbott used his personal email to send a message to Administrator McLaughlin, Chief Justice McGrath, and lobbyist Ed Bartlett, stating *“[f]or when the time is right, here are the letters of support I’ve collected to date. There have been a few that were sent independently to Regier or the committee, and a few that haven’t come in yet, but here’s what I have to date. I’ll supplement as more come in. Thanks again for all you do.”*
- On March 17, 2021, Administrator McLaughlin used her state email to send a message to yet-unconfirmed Judges Abbott, Levine, and Ohman, with lobbyist Ed Bartlett carbon-copied, stating *“As you have probably seen, the Governor signed SB 140 yesterday. I am assuming the confirmation hearings will be set in the near future. Either Ed or I will talk with the chairman about his timeline. It’s crucial to start thinking about who you want to testify on your behalf (or have letters of support in hand). It’s also crucial to have calls going to your local Senators from your supporters or directly from you. Please be aware, to accommodate the new federal dollars, the end date of the session is now May 11th. This does provide a few extra weeks but we should still assume the confirmation hearings will happen in the next few weeks. I’ll keep you posted with any additional information.”*
- Several emails also show Administrator McLaughlin working with judicial nominees Michelle Reinhart and Chris Abbott to coordinate lobbying efforts and testimony for their nomination hearings. Mr. Abbott utilized his personal email for the communications; Ms. Reinhart used both her state account and personal account.

F. Emails Indicating Judicial Bias

Montana has recognized that an independent, fair, and impartial judiciary is indispensable to our system of justice. Consistent with this recognition, Montana has adopted a Code of Judicial Conduct.²⁵ The Code of Conduct prescribes the behavior of judges to protect the integrity of the judiciary. These canons of conduct discuss when judges should recuse themselves, limit their statements on pending and impending matters, and provide guidance for their interactions with other government officials, and govern their conduct as they go about their work and their personal lives.

Four important Rules regarding bias appear to have been violated through communications amongst the judges and the Court Administrator.

1. Rule 2.11 Judicial Statements on Pending and Impending Cases

Rule 2.11 of the Code provides that “[a] judge shall not make any public statements that might reasonably be expected to affect the outcome or impair the fairness of a matter pending or impending in any court, or make any nonpublic statement that might substantially interfere with a fair trial or hearing.”

Email statements referenced throughout this report indicate numerous judges and justices of the judiciary have made comments highly likely to interfere with a trial or hearing.

2. Rule 1.2 Promoting Confidence in the Judiciary

Rule 1.2 of the Code provides that “[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.”

The judiciary’s routine engagement in polls and email discussions regarding legislation, legislators, and the citizens of Montana, while using state email and presumably state computers on state work time, does not instill confidence in the independence, integrity, and impartiality of the judiciary. To the contrary, this conduct creates an appearance of bias and potentially disqualifies judicial officers from presiding over cases involving certain issues, certain legislators, or potentially certain citizens.

During the April 19, 2021, hearing Chief Justice McGrath offered a statement regarding the Judicial Branch’s use of email and stated “[t]here has been no improper use of the state email system.”²⁶ To the contrary, the state email system has been repeatedly misused by members of the judiciary—including Chief Justice McGrath – in violation of both law, state rule, and judicial branch policy.

3. Rule 2.2 Impartiality and Fairness

Rule 2.2 of the Code provides that “[a] judge shall uphold and apply the law and shall perform all duties of judicial office fairly and impartially.”

²⁵ Attached Committee Exhibit H – Code of Judicial Conduct

²⁶ Committee Hearing, April 19, 2021 at 16:01:34-38 viewed here <https://bit.ly/3gLu4hU>

An illustration of a likely violation of this Rule comes from the Chief Justice. Chief Justice McGrath recused himself from a matter concerning the constitutionality of SB 140 because he had discussed the legislation with the Governor and Lt. Governor. This was appropriate under the Rules. However, after his recusal, the Chief Justice selected Judge Krueger as his replacement on the panel presiding over the case even though recusal means you will have no further involvement.

At the committee hearing the Chief stated, “I contacted Judge Krueger to sit in my place. I didn’t ask him if he’d participated in any poll. I forgot there was a poll. Didn’t even consider that. I just asked him if he would be available to sit in that case, and he said he would. That was the extent of our discussion.”²⁷ The Chief still named his own replacement even after he had recused himself from the case, and after he was copied on the email from Judge Krueger on February 1, 2021 which stated Judge Krueger’s “adamant” opposition to SB 140.

It is also problematic that Judge Krueger accepted appointment to preside over the case despite having made his “adamant” opposition to SB 140 known to all Montana judicial officers by broadcasting his position via the state email system.

4. Rule 2.3 Bias, Prejudice, and Harassment

Rule 2.3 of the Code provides that “[a] judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.”

- a. Six of the Supreme Court Justices have violated a fundamental principle of law which states that “no man should be a judge in his own case.” The Justices have issued an Order that “stays” enforcement of the subpoenas until they can give themselves “due process.”
- b. On March 12, 2021, Administrator McLaughlin sent an email to the Chief Justice, Justice Shea, and Judge Krueger. The email contained a link to an article that made condescending comments about anti-vaxxers and legislators while opposing a judicial reform bill. McLaughlin’s email was titled “Thought you might enjoy this.”
- c. On January 25, 2021, Administrator McLaughlin used her state email to send a message to Chief Justice McGrath, and lobbyists Ed Bartlett and Bruce Spencer, with the subject line “Judicial Nomination.” Attached to the message was LC1094, which later became Senate Bill 140. McLaughlin’s message stated “[w]ell, this is certainly a change.”

Other emails may have existed as part of this string of emails or regarding MJA’s lobbying efforts on SB 140, but the Court Administrator and the Justices have refused to produce any additional records to that effect and have admitted deleting them. Senate Bill 140 is currently pending in front of the Supreme Court as a constitutional challenge.
- d. On March 30, 2021, lobbyist Bruce Spencer sent a message to the state email addresses for Chief Justice McGrath, Judge Mike Menahan, and Administrator McLaughlin, with the subject line “HB380.” The message stated “[o]ne more for the great unconstitutional void. (sigh). How’s the budget?”

²⁷ Committee Hearing, 16:27:48 viewed here <https://bit.ly/3gLu4hU>

- e. On March 24, 2021, Administrator McLaughlin used her state email to send a message regarding LC 3213 to all Montana Justices and District Court Judges stating “[w]e need the legislative committee to weigh in on this on behalf of the MJA. It will come up for a hearing quickly so MJA will need to act quickly. Please let me know if you oppose the attached bill. I’ve added Judge Spaulding to this list because he is on the JSC.”
- Judge Dan Wilson used his state email to respond stating “Oppose.”
 - Judge Luke Berger used his state email to respond stating “Oppose.”
 - Retired Judge Mike Salvagni used his state email to respond stating “Oppose.”
 - Judge Kelly Mantooth used his state email to respond stating “The [sic] just keep popping back up like the ‘Whack a Mole’ game ... I’m going to need a bigger gavel.”
 - Judge Gregory Todd used his state email to respond stating “I oppose.” McLaughlin responded to Judge Todd stating “Weird – I thought you’d be in favor.”
 - Judge John Larson used his state email to respond stating “I also oppose this bill.”
 - Judge Mary Jane Knisely used her state email to respond stating “I oppose.”
 - Judge Kelly Mantooth used his state email to respond again stating “[a]fter killing an earlier bill that is similar, this bill pops in out of the blue ... **YOU** do need to contact your representative to vote no on this and kill the bill. We have got to get ahead of this bill and start working on it now.” In response, Administrator McLaughlin stated “[t]hanks Kelly. I can’t imagine a large citizen committee deciding whether a judge violated a canon [sic] – yikes.” Judge Mantooth responded again stating “Agreed! It will be a trial of a judge with a jury.”
 - Judge Kathy Seeley used her state email to respond stating “Oppose.”
- f. On March 24, 2021, Administrator McLaughlin used her state email to send a message to Chief Justice McGrath, Judge Menahan, Judge Spaulding, and lobbyist Ed Bartlett with the subject line “fyi.” The message contained as an attachment LC 3213, a proposed change to the composition of the Judicial Standards Commission.
- McLaughlin’s original message stated “[w]ell this is goofy.”
 - In response directly to McLaughlin, Judge Spaulding stated “[w]ow, likely unconstitutional in its inception. Has this been introduced? Isn’t there a transmittal deadline or something?”
 - McLaughlin responded to Judge Spaulding and stated “[i]t’s a proposed constitutional amendment so it would need 2/3 of both Houses and to be approved by the voters. I’ve never seen an unconstitutional constitutional amendment but it sure seems to conflict with the Supreme Court’s ultimate authority in statute. It will be a doozy.”
 - Chief Justice McGrath responded to McLaughlin’s original message again stating “[w]e should probably get a membership vote on this and ask who can make calls. Probably need the bar to do the same. Of course the problem here is it allows a citizen’s commission to discipline or remove judges. Not clear who appoints them but God forbid they put any judges on it or more than one atty. Then there is the problem that it would be entirely inconsistent with other provisions of the constitution...”
 - Chief Justice McGrath responded yet again stating “[j]ust noticed the new name will be ‘The Judicial Inquiry Commission’. Think this straight out of the book ‘Where Democracies Go To Die.’”

PUBLIC INFORMATION AND RECORDS RETENTION

The individual right to examine public documents and observe public deliberations is enshrined in Article II, Section 9 of the Montana Constitution and is defined and protected by state law and policy.

“Public information” is “information prepared, owned, used, or retained by any public agency related to the transaction of official business, regardless of form, except for confidential information that must be protected against public disclosure under applicable law.”²⁸ A “public record” is “public information that is: (a) fixed in any medium and is retrievable in usable form for future reference; and (b) designated for retention by the state records committee, judicial branch, legislative branch, or local government records committee.”²⁹

Montana’s records retention schedules, which are available on the Secretary of State’s website and are provided to all state office, require “Routine: non-permanent” email correspondence to be retained by public officers and employees for 3 years.³⁰

Judicial Branch policy³¹:

- creates no exemption for “ministerial-type” emails;
- state that privacy of e-mail is not guaranteed;
- informs employees they should not have the expectation of privacy for any messages;
- states that there is the expectation that any message sent is subject to public scrutiny;
- explains that using the state email system for “non-profit” or professional organizations is misuse of state email resources;
- and reiterates that all messages created, sent or retrieved, over the state’s systems are the property of the State of Montana.

Administrator McLaughlin stated that she did not retain her emails related to SB 140 and other judicial branch polls and records.³² Administrator McLaughlin confessed to “sloppiness” and claimed that these public records were “ministerial” in nature to her, and on that basis, she deleted them.³³

Justice Sandefur attempted to comply with the public records production request in his subpoena.³⁴ However, Justice Sandefur stated in hearing testimony that “it has been [his] routine practice to immediately delete non-essential email traffic”³⁵ presuming that DOA is retaining his emails in accordance with state law and policy. Initial conversations with State IT personnel conducted by Senate staff suggest that judicial branch emails are not automatically archived and only temporarily retained once deleted by the recipient/sender.

²⁸ M.C.A. § 2-6-1002(11)

²⁹ M.C.A. § 2-6-1002(13)

³⁰ Attached Committee Exhibit I – Sec’y of State Records Retention Schedule

³¹ Attached Committee Exhibit J – Judicial Branch Email Policy provided to a legislative drafter in March 2021

³² Attached Committee Exhibit K – McLaughlin email to Senate Staff.

³³ Attached Committee Exhibit K – McLaughlin email to Senate Staff.

³⁴ Attached Committee Exhibit B – Justice Sandefur production to Committee

³⁵ A link to the April 19th Hearing can be found here: <https://bit.ly/3gLu4hU>

Five of the remaining Supreme Court Justices—McKinnon, Baker, Shea, Gustafson, and McGrath— failed to produce any documents requested in their subpoenas. However, during testimony at the hearing, several Justices stated that they deleted emails which they deemed “unsolicited” or “non-essential.”

During testimony at the April 19, 2021, hearing, Chief Justice McGrath stated “our policy regarding retention is that we’re to clear our email boxes periodically because they fill up and our IT people don’t have the capacity.”³⁶ Staff conversations with Jerry Marks, an SITSD employee, indicate that judicial branch email has the same storage limits as legislative and executive email.

CONFLICT OF INTEREST

Throughout the course of the legal proceeding arising from the passage of SB 140 (which terminated use of the Judicial Nomination Commission), and the subsequent Original Petitions filed by the Court Administrator, the Court has engaged in a number of procedural irregularities that merit mentioning.

These irregularities appear to stem from the potential conflict of interest that the Court has in hearing and deciding a matter in which its own appointed Administrator is the Plaintiff, and the Court’s own email communications and practices are at issue. It is important for the Committee to be apprised of how these irregularities may impact how the constitutionality of legislative subpoenas and SB 140 are ultimately addressed by the Court. The known procedural irregularities are as follows:

1. Email indicates attempted *ex parte* communications by the Goetz Law Firm and the Edwards and Culver law firm representing the Petitioners in the SB140 matter;
2. Chief Justice McGrath admitted in testimony that, though recused, he appointed Judge Krueger to fill his seat on the *Bradley* panel and that he called Judge Krueger immediately after the Attorney General filed a motion to disqualify the latter;
3. The Constitution, Article VII, Section 3(2) and the Court’s operating rules require seven members of the Court to hear an Original Petition. The Court initially stated only six members will sit in the SB 140 matter due to the Chief Justice’s conflict.³⁷ However, on April 27, 2021, the Court reversed itself appointing Judge Wald to fill the vacancy.³⁸;
4. The Court appears to have engaged in *ex parte* communication with Administrator McLaughlin’s attorney, Randy Cox, to allow him to file a motion when the Court was closed on Saturday and then schedule a Sunday hearing where the Court decided Cox’s motion on McLaughlin’s behalf;
5. The Court entered an order outside of business hours on a Sunday afternoon without notice or opportunity for argument, favoring Administrator McLaughlin when McLaughlin was not a party to the case under which the motion was filed;
6. The Court has preliminarily acted upon an Original Petition from the Court Administrator to quash a legislative subpoena when McLaughlin could and should have filed her motion in district court like any other litigant;

³⁶ *Committee Hearing, April 19, 2021* at 16:08:48-16:09:03 viewed here: <https://bit.ly/3gLu4hU>

³⁷ Link to AP Article detailing that the *Bradley* petition will be heard with six judges. <https://bit.ly/3xv0Aeg>

³⁸ Attached Committee Exhibit L – 4/27 Order in *Bradley* Limiting Briefing

7. The Court has issued Joint Orders in both Original Petitions when the cases aren't related;
8. The Court has issued an Order effectively claiming the Legislature is unable to provide due process to witnesses subpoenaed to appear before it;
9. The Court has issued an Order that gives members of the Court relief from the legislative subpoenas issued to the Justices themselves in a case to which the Justices are not parties;
10. The Court has refused to consider or acknowledge that under the Judicial Code of Conduct it cannot hear a case in which their Administrator is a party, specifically acting on their behalf or act on subpoenas issued to the Justices directly.
11. Chief Justice McGrath appears to have violated recusal rules in continuing to make decisions about how the SB 140 proceedings would be conducted after he recused himself.

These substantial deviations from standard litigation procedure should give any court observer reason to question the integrity of the process and the motivation for the consistently irregularities.

CONCLUSION

The testimony and information collected by the Committee over the past weeks raise serious concerns about the practices of the judicial branch concerning the topics highlighted above.

The use of state time and resources by multiple branch employees, including judges, to facilitate a complex lobbying effort on behalf of the Montana Judges Association, a private non-profit educational and lobbying entity, is a serious violation of Montana's laws. These violations have not been acknowledged by judicial branch officials or employees as violations at all. Improper use of state time and resources is a serious issue. State law and policy regarding proper use of state time and resources applies to all state employees and public officials, including judges and justices.

The Judicial Code of Conduct provides strong rules defining acceptable conduct for judges and employees supervised by judges. In an email from Chief Justice McGrath, he openly states his disrespect for Montana citizens' ability to understand and apply the law, and in another email openly states his disdain for the idea that Montana citizens could read the Code of Conduct and apply it. He also was copied on emails by other judges that contained potential violations of the Code yet, he expressed no concerns about their "colorful" comments or remarks that indicated potential bias.

At the same time, it appears that multiple canons of the Code of Conduct have been violated by judges and court employees who either directly or indirectly report to the Chief Justice. Yet, in his statement to the Committee, the Chief Justice attempted to distance himself from these responsibilities by stating that the court administrator is "independent" of his supervision or the supervision of the court. Whether this is abdication of responsibility or intentional distancing on the part of the Chief Justice, failure to supervise Court employees or remind other Judges of the responsibilities under the Code of Conduct are concerning.

The branch's failure to comply with its own email and public records policies has not been adequately or consistently explained by either the Court Administrator or the Chief Justice. What is clear is that the justices themselves are grossly misinformed about their personal responsibilities for maintenance of records versus what the branch's IT staff is responsible for. Emails are routinely deleted by court employees and judges in violation of state law and policy, and the IT department does not appear to be retaining these emails in an archived format once they are deleted.

RECOMMENDATIONS

1. That this Committee continue into the interim, with proper funding, in order for the Committee to complete its investigation.
2. That the Committee complete its work on the same schedule as that of regular interim committees and produce a final report to the 68th Legislature.
3. That the Committee examine whether legislation is necessary to address Committee findings.
4. That the Committee determine whether evidence indicates that the conduct of state employees or officials should be referred to the appropriate authorities for further investigation.
5. That the Committee submit complaints to disciplinary bodies of the judicial or legal profession if facts and evidence indicate such complaints are warranted.
6. That the Committee, through Counsel, work with the Justices to resolve their non-compliance with document production on the original subpoenas.
7. That the Committee issue further subpoenas deemed necessary to complete its investigation.
8. That the Committee consider whether the current lobbying practices of the Montana Judges Association negatively impact public confidence in the branch or compromise the integrity of the judicial branch by creating the appearance of bias for or against legislation that may later be challenged in the courts.
9. That the Committee consider whether the Montana Judges Association should remain the primary education and ethics provider to the Montana judiciary, or whether a third-party would be better suited to provide such services to the branch.