December 2022

SPECIAL JOINT SELECT COMMITTEE ON JUDICIAL ACCOUNTABILITY AND TRANSPARENCY

FINAL REPORT TO THE 68TH MONTANA LEGISLATURE

FINAL COMMITTEE REPORT FROM THE 67TH LEGISLATURE

Introduction. The President of the Senate and the Speaker of the House created the Special Joint Select Committee on Judicial Accountability and Transparency on April 14, 2021 in response to revelations concerning judicial lobbying practices and public records deletion that arose during the 2021 legislative session.

The Committee's work centered on matters of due process, public records management, ethics, and private organization lobbying within Montana's judicial branch of government. The Committee was not charged with and did not investigate broader concerns among many legislators about perceived judicial activism or political bias in the courts.

This Final Committee Report references and builds off the Committee's Initial Report to the 67th Montana Legislature. This report is presented to the incoming 68th Legislature for its information, background, and consideration moving forward. The potential remedies listed on each topic are observational and for consideration only; they do not necessarily reflect an idea endorsed by the committee as a whole nor any individual member.

Committee Members

Senate Members

Senator Greg Hertz, Chair
Polson, MT
(406) 253-9505
greg.hertz@legmt.gov

Senator Tom McGillvray
Billings, MT
(406) 698-4428
tom.mcgillvray@legmt.gov

Senator Diane Sands
Missoula, MT
(406) 251-2001
senatorsands@gmail.com

House Members

Representative Sue Vinton, Vice Chair
Billings, MT
(406) 855-2625
sue.vinton@legmt.gov

Representative Amy Regier
Kalispell, MT
(406) 253-8421
amy.regier@legmt.gov

Representative Kim Abbott
Helena, MT
(406) 439-8721
kim.k.abbott@gmail.com

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EXECUTIVE SUMMARY

The separation of powers among Montana's legislative, executive, and judicial branches of government are essential to keep a government that is limited in its powers, secures the rights of Montanans, and treats everyone justly under the rule of law. Each equal branch has its own distinct role and it is the responsibility of each branch to provide a check on the others when potential problems arise.

The Select Committee has several concerns about the operations, procedures, and policies of the judicial branch. Remedying these issues would help ensure the branch is functioning as it should in its judicial role and help it have the respect and confidence from Montanans that it should. The Committee's investigation into transparency and accountability issues within the judicial branch is intended to strengthen the integrity of the judiciary. The judicial branch's operations must be above reproach so that all Montanans have faith in the fairness and soundness of its legal decisions.

The Committee has reached the following key conclusions which are detailed further in this report:

- The judicial branch deleted public records that belong to the people of Montana
- The judiciary has for years comingled its official government functions with the advocacy interests of a private association
- At times, the branch has strayed from its judicial role into the legislature's policymaking role
    - This includes multiple judges commenting on the constitutionality and advisability of legislation before it was signed into law as well as lobbying practices and legislating from the bench
- Policies and procedures to address conflicts of interest and other ethical matters are inconsistently applied and insufficient
- Oversight and accountability of judges and justices is opaque at best and insufficient at worst
- When pressed on these issues, the Chief Justice of Montana and legal representatives of the judicial branch repeatedly lied to the legislature, the press, and the public rather than take responsibility to address the issues[1]

It is essential to the integrity of the judicial branch that these problems and other issues examined in this report be fixed. A combination of legislative solutions, internal rulemaking within the judiciary, and establishing new norms of judicial branch operations will be needed to resolve these issues and prevent them from occurring into the future.

[1] See pages 25-29 of this report

TIMELINE OF EVENTS

The below timeline briefly summarizes key events to assist in understanding the history of judicial and legislative activities that led to the publication of this report and the findings within it.

Events are in chronological order. Certain event types are color-coded as follows:

Blue: Public records requests and responses
Red: Litigation filings, decisions, and letters
Green: Committee hearings & activities

2021

Jan. 25
- Senate Bill 140 is introduced

Jan. 29
- Court Administrator Beth **McLaughlin** emails an MJA poll to every judge & justice asking whether they support or oppose SB 140

Jan. 29 - Feb. 1
- 58 judges respond to the poll by email/phone

Early March
- Chief Justice **McGrath** meets with Governor Gianforte to lobby against SB 140

March 16
- Governor Gianforte signs SB 140 into law

March 24
- Chief Justice **McGrath** recuses himself from the SB 140 case due to his lobbying against the bill

March 24
- **McGrath** chooses District Court Judge Kurt **Kreuger** to replace him on the SB 140 case

March 30	• Attorney General Austin **Knudsen** moves to disqualify **Krueger,** citing his email stating he "adamently opposed" SB 140
March 31	• Judge **Krueger** recuses himself from the SB 140 case after speaking with the (recused) Chief Justice
April 2	• The **Legislature** requests public records from **McLaughlin** about the MJA's SB 140 poll
April 6	• **McLaughlin** asks for an extension; the **Legislature** agrees to an April 9 deadline
April 7	• **McLaughlin** provides the Legislature with two emails, says judicial branch policy didn't require her to keep emails
April 8	• **Legislature** asks **McLaughlin** if she deleted the emails and asks for copy of judicial branch policy that allows for deletion
April 8	• **McLaughlin** admits to "sloppiness" and tells the Legislature she did delete public record emails about the SB 140 poll
April 8	• Sen. Judiciary Chair Keith **Regier** subpoenas **Dept. of Admin.** to obtain McLaughlin's deleted emails from DOA's servers
April 9	• **DOA** partially complies with the subpoena and provides the **Legislature** with emails (deleted ones not present in results)
April 10	• **McLaughlin** hires an attorney who files an "emergency" Saturday motion in the SB 140 case about the subpoena
April 10	• None of **McLaughlin, Legislature,** or **DOA** are parties to the SB 140 case. **Supreme Court** meets without giving notice to parties

- April 11: • **Supreme Court** issues a surprise Sunday ex parte order quashing the subpoena before the **Legislature** or any parties can respond
- April 12: • **Legislature** retains the **Department of Justice** to represent its interests
- April 12: • **DOJ** notifies the Supreme Court via letter that it does not recognize the Sunday order as valid
- April 12: • **McLaughlin's** attorney files a new emergency petition to quash the subpoena. This becomes the *McLaughlin* case
- April 14: • The **Legislature** forms the **Special Select Committee on Judicial Accountability and Transparency**
- April 14: • Recognizing the new case as valid, **DOJ** files a motion to dismiss *McLaughlin* on conflict of interest grounds
- April 14: • **Legislature** revises McLaughlin's subpoena to produce her state-owned computer and testify at a hearing
- April 15: • **Legislature** subpoenas the **Supreme Court** Justices seeking the production of public records
- April 16: • **McGrath** tells the **Legislature** in a letter that the subpoenaed emails are privileged and the **Court** won't produce them
- April 16: • **Supreme Court** issues an order quashing McLaughlin's revised subpoena and quashing their own subpoenas
- April 16: • **Select Committee** adopts draft rules and schedules a hearing for April 19

April 18
- **DOJ** tells the **justices** that they're not parties in *McLaughlin*, Legislature expects subpoena compliance

April 19
- **Select Committee** meets at 9:00AM; **McLaughlin** does not appear

April 19
- Justice **Jim Rice** files in District Court to have his subpoena quashed, instead of ruling on his own subpoena

April 19
- Justice **Dirk Sandefur** partially complies with subpoena for documents, says he routinely deletes emails

April 19
- 5:00PM **Select Committee** meets; all **justices** appear and answer some questions. None respond further to subpoenas

April 22
- **Select Committee** meets and begins drafting its Initial Committee Report

April 26
- **Select Committee** asks **McGrath** via letter to explain inconsistencies between the record and his testimony

April 30
- **McGrath** provides a letter in response

May 5
- **Select Committee** publishes its Initial Report, minority publishes a separate report

May 12
- **Supreme Court** denies **DOJ's** request for the justices to recuse themselves from deciding their own subpoenas

May 18
- District Court Judge **McMahon** temporarily blocks the Legislature's subpoena to Justice **Jim Rice**

- **May 19** — AG **Knudsen** sends letter to **Supreme Court** defending his attorneys from what he saw as threats from the Court
- **June 10** — **Supreme Court** upholds SB 140 as constitutional
- **June 10** — Justice **Jim Rice** writes a concurring opinion in the SB 140 case about the *McLaughlin* case, from which he had recused himself
- **June 22** — **Legislature** withdraws all subpoenas, suggests solving the issues through negotation
- **June 29** — **Supreme Court** rules it will decide on the Legislature's subpoena powers despite subpoenas no longer existing
- **July 9** — **Supreme Court** denies **citizen's** public records request for emails about SB 140, because of the *McLaughlin* case
- **July 14** — **Supreme Court** rules the subpoenas were outside of the **Legislature's** authority; orders emails "returned"
- **Aug. 25** — Judge **McMahon** rules **Rice's** subpoena is also not moot despite it no longer existing
- **Sept. 1** — Judge **Gregory Todd**, the **MJA's** president, announces his retirement at the end of 2021
- **Sept. 7** — **Supreme Court** rejects **DOJ's** motion to reconsider its decision; clarifies a couple points
- **Sept.14** — **Law & Justice Interim Committee** questions **McGrath** and Judge **Menahan** about judges' emails

- **Sept. 14** • **Menahan** pledges to recuse himself from any JSC complaints about the MJA polling and email situation
- **Sept. 30** • Judge **Todd** is forced to recuse himself from a case after making disparaging comments against the Legislature
- **Oct. 7** • Judge **McMahon** rules **Legislature** exceeded its authority in Rice's subpoena, cites **Supreme Court** *Mclaughlin* ruling
- **Dec. 6** • **DOJ** appeals **Supreme Court's** decison to the **United States Supreme Court**

2022

- **Jan. 10** • Gov. **Gianforte** files an amicus curiae brief in support of the Legislature with the **United States Supreme Court**
- **Feb. 9** • **McLaughlin** files response to the Legislature's appeal, asking **United States Supreme Court** to reject it
- **March 2** • Legislative **staff** make a public records request to **McLaughlin** for emails about SB 140
- **March 3-7** • McLaughlin's **attorney** argues over the records request and advises **McLaughlin** not to fulfill it
- **March 21** • **United States Supreme Court** declines to take up the Legislature's appeal; *McLaughlin* case concludes
- **March 9-21** • Rep. **Sue Vinton** asks Justice **Ingrid Gustafson** to clarify whether she participated in MJA polls; **Gustafson** "believes" she did not

April 1	• Legislative **staff** renews records request to **McLaughlin,** continues to follow up
April 5	• **Supreme Court** issues new, improved records retention policy
April 13	• **Select Committee** holds meeting regarding public records policy with all three branches of government
April 13	• **McLaughlin** testifies she'll work with **SITSD** to recover deleted emails
April 13	• **SITSD** testifies that they don't exepct to be able to recover **McLaughlin's** deleted emails
July 1-11	• **McLaughlin** fulfills legislative **staff's** records request. Deleted SB 140 emails are not present in the results
July 13	• **McLaughlin** tells **staff** that she doesn't have any additional emails about SB 140, confirming permanent deletion
Sept. 19	• The **JSC** dismisses several relevant complaints against justices and judges
Oct. 7	• **Sen. Greg Hertz** files a public records request with the **JSC** seeking information about complaints it has received and decided
Nov. 17	• **JSC Chair Judge Mike Menahan** responds to **Sen. Hertz's** public records request
Dec. 22	• The Select Committee adopts this Final Report

Montana Judges Assoc. Polling

Issue Summary

During the 2021 Montana legislative session it came to light that justices and judges throughout the state were routinely polled to take a position for or against legislation. The Montana Judges Association (MJA) then used those responses to inform its lobbying efforts.

Why it Matters

Judges expressing an opinion on legislation creates due process and basic fairness concerns should that legislation be challenged in court as such a practice creates the real or perceived concern that the judge has reached a predetermined conclusion before all parties have had an opportunity to present their arguments. Montana's Code of Judicial Conduct contains several relevant rules[2] designed to protect impartiality and fairness in the courtroom and the integrity of the judicial branch which were likely violated by various judges' responses to MJA polls. MJA polling practices interfered in a court case, requiring the disqualification/recusal of a judge in the Senate Bill 140 case[3]. Similar due process concerns in another case required the recusal of another judge for prejudicial comments against the Legislature, creating what was called a "legal dumpster fire."[4]

Committee Findings

- At least six (6) Justices and judges remarked specifically on the constitutionality of legislation, something that even Chief Justice Mike McGrath said would be inappropriate[5].
    - Justice Mike McGrath commented on the constitutionality of the bill draft LC3213[6]
    - Judges Amy Eddy, Elizabeth Best, and Dusty Deschamps commented on the constitutionality of SB 140[7]
    - Judge Michael Menahan, the chair of the Judicial Standards Commission, also commented on the constitutionality of SB 140[8]
    - Judge Randal Spaulding, a member of the Judicial Standards Commission, called a bill "likely unconstitutional in its inception"[9]

[2] Committee's Initial Report to the 67th Legislature, pages 16-18
[3] *Daily Montanan*, 4/1/2021
[4] *Montana Public Radio*, 11/2/2021
[5] *KTVH*, 9/15/2021
[6] Publicly available judicial emails posted by NewsTalk 95.5
[7] Attorney General Motion to Disqualify Judge Kurt Krueger, 4/1/2021
[8] Publicly available judicial emails posted by NewsTalk 95.5
[9] Publicly available judicial emails posted by NewsTalk 95.5

- At least 15 Judges replied to emails stating their opposition to or support for legislation
    - Judges Leslie Haligan, John Brown, Bob Whelan, David Cybulski, Yvonne Laird, Katherine Bidegaray, James Manley, Jennifer Lint, Jon Oldenburg, Kurt Krueger, Ray Dayton, Brenda Gilbert, and Nickolas Murnion expressed opinions on SB 140[10]
    - Judge Michael Menahan called a bill "ridiculous"[11]
    - Judge Kelly Mantooth expressed opposition to a handful of bills[12]
- Several more judges voted in MJA polls without providing additional comments[13]
- Chief Justice McGrath personally lobbied the governor against SB 140 but recused himself from the deciding the case once the bill was challenged in court.

Potential Remedies

1. The MJA should discontinue the practice of polling members of the judiciary on legislative policy.
    a. Chief Justice McGrath informed the Legislature that he "anticipate[s] MJA will… discontinue polling the full membership for authorization on legislative positions."[14]
2. Judges who involve themselves in lobbying should be automatically disqualified from hearing cases related to that legislation. The members of the Montana Judges Association who direct the efforts of the group's lobbyist(s) during a particular session should recuse themselves from hearing any case related to any legislation passed during that session.
    a. This could be implemented by the judiciary as a matter of policy or by the Legislature as a matter of law.
3. Judicial Standards Commission complaints could be filed against any or all of the judges/justices who participated in the MJA polls.

Additional Observations

- There were likely additional judicial participants in MJA polling and additional commentary from judges expressing opinions on legislation that are not identified in this report because public records were deleted and the Montana Supreme Court quashed the Legislature's subpoenas attempting to gather records and understand the full scope of this issue.
- Other than Chief Justice Mike McGrath, this committee is unaware of evidence that Supreme Court justices participated in the polling and lobbying of the MJA. The justices (including McGrath, falsely) assured the committee that they do not take positions on matters pending before the Legislature. Because of deleted records and quashed subpoenas, the committee is forced to take the justices other than McGrath at their word.

[10] Attorney General Motion to Disqualify Judge Kurt Krueger, 4/1/2021
[11] Publicly available judicial emails posted by NewsTalk 95.5
[12] Publicly available judicial emails posted by NewsTalk 95.5
[13] Publicly available judicial emails posted by NewsTalk 95.5
[14] McGrath letter to the Legislature, 4/30/2021

MJA Lobbying Using State Resources

Issue Summary

Most of the Montana Judges Association's polling and lobbying efforts during the 2021 legislative session appears to have been coordinated through state employees and using state time and resources (namely, government email accounts)[15].

Why it Matters

The Montana Judges Association (MJA) is a private nonprofit entity. The judicial branch of government exists to serve the interests of the Montana public, but as a private nonprofit, the MJA exists to further the interests of judges, which may or may not be aligned with the interests of the public at large. Further, state officials and employees are typically prohibited by Montana's ethics laws from using state time and resources to conduct the work of non-state entities or lobby on behalf of organizations, with specific exemptions[16].

Committee Findings

- The Court Administrator, a public employee, routinely used her state email account to coordinate lobbying activities of the MJA during the 2021 legislative session.
    - Some of this activity was directed by Chief Justice McGrath[17]
    - Some of this activity was directed by Judge Gregory Todd, who at the time was the president of the MJA[18]
- Multiple judges, including the Chief Justice, frequently used their government email accounts to discuss and participate in MJA lobbying activities[19].
- As noted in the committee's Initial Report to the 67th Legislature, Montana judges seem to conflate the private MJA and the public judicial branch of government as one and the same, using their respective resources interchangeably. In practice, there appears to be no distinction between the MJA and Montana's judicial branch of government[20].

[15] Publicly available judicial emails posted by NewsTalk 95.5
[16] Montana Code Annotated 2-2-121
[17] Committee's Initial Report to the 67th Legislature, page 11
[18] Committee's Initial Report to the 67th Legislature, page 13
[19] Publicly available judicial emails posted by NewsTalk 95.5
[20] Montana Supreme Court opinion in *McLaughlin v. Legislature*

- Chief Justice McGrath has repeatedly asserted all MJA lobbying activities referred to were legal and proper[21].
- The Montana Supreme Court appears to have preemptively ruled that the Court Administrator's activities on behalf of the Montana Judges Association were legal and in fact part of her job duties, despite there being no case over that matter[22].

Potential Remedies

1. The Montana judiciary should cease its apparently longstanding practice of comingling the MJA and its branch of government. The judicial branch could lobby on its own behalf as many executive branch agencies do, or the judicial branch could refrain from lobbying and leave it to the MJA using only MJA funds without the involvement of state funds or resources. This seems unlikely given the branch's statements and court rulings.
2. Ethics complaints could be filed with the Commissioner of Political Practices or suit could be filed in district court, but both avenues may have been precluded by the Montana Supreme Court's improperly preemptive opinion on this topic.
3. The committee recommends legislative committees make it a regular practice to ask representatives of the MJA or judicial branch of government which entity they are appearing on behalf of during legislative testimony and lobbying.
4. Legislation is likely needed to clarify Montana's ethics and lobbying statutes to prevent this type of comingling of state and private activities in the future.

[21] McGrath letter to the Legislature, 4/30/2021
[22] Montana Supreme Court opinion in *McLaughlin v. Legislature*

Public Records Retention

Issue Summary

Montanans have a broad constitutional "right to know" under the State Constitution which includes the right to examine public documents with very limited exceptions. The judicial branch of government for years routinely deleted public records.

Why it Matters

For Montanans' constitutional right to know to exist in practice, documents must be retained for a long enough duration so that the public has an ability to examine them. The Secretary of State and the State Records Committee set retention guidelines to aid in this effort. The judiciary's practice of deleting records after a very short time flies in the face of Montanans' constitutional right to know, obscured potential violations of judicial ethics rules and laws, and removed controversial emails of statewide concern from the public record.

Committee Findings

- The judicial branch's email policy in effect prior to and during the 2021 legislative session did not require the retention of public record emails[23].
- The court administrator deleted public record emails
    - She told legislative staff on April 8, 2021 that she did not retain emails related to SB 140 and other MJA polls and related issues[24]
    - The Legislature's later-quashed subpoenas did not turn up emails related to SB 140 known[25] to have been in the court administrator's possession
    - Emails related to SB 140 known[26] to have been in the court administrator's possession did not appear in the copies of emails provided to legislative staff in response to a public records request intended to gather those records.
        - The public records request was fulfilled in early July 2022. The court administrator confirmed to legislative staff on July 13, 2022 that she did not have any additional emails about SB 140

[23] McGrath letter to the Legislature, 4/30/2021 and attached copy of the policy
[24] Exhibit K to the committee's Initial Report to the 67th Legislature
[25] Exhibits attached to the Attorney General's motion to disqualify judge Krueger
[26] Exhibits attached to the Attorney General's motion to disqualify judge Krueger

- Justice Dirk Sandefur routinely deleted public record emails[27]
- Due to the lack of an email retention policy and statements by judicial branch officials, it is likely that many additional judges and staff deleted public record emails, although the true extent of the public records destruction is unknown to the committee

Potential Remedies

1. The judicial branch adopted a new records retention policy on April 5, 2022 to address the shortcomings in its former policy[28]. The new policy requires the retention of the types of emails that had been previously deleted. The Committee commends the judicial branch for proactively working to fix its email retention policy.
2. The Legislature could pursue legislation to strengthen and clarify Montana's public records and records retention laws. This would likely be a major legislative undertaking given the complexity of the topic and could be well suited for an interim committee study.

[27] Statement by Justice Sandefur, committee's Initial Report to the 67th Legislature, page 19
[28] *Helena Independent Record*, 4/5/2022

Conflicts of Interest

Issue Summary

Throughout litigation over the Legislature's subpoenas and investigation into the topics contained in this report, the Montana Supreme Court continually overruled the Legislature's concerns that it had conflicts of interest in the case and could not decide the case fairly.

Why it Matters

Justice cannot be blindly administered if the judge(s) deciding the case has a vested interest in the outcome.

Committee Findings

- Every Montana Supreme Court justice, except Acting Justice Donald Harris, had a vested interest in the outcome of the *McLaughlin v. Legislature* case because their own public records, policies, actions, and their employee were central to the case.
- Supreme Court justices, like most judges in Montana, are politicians by virtue of having to run for office. As politicians, they have a vested interest in obscuring matters that may negatively impact their elections.
- The justices' conflicts of interests led to several instances where normal processes in place to ensure fairness were ignored
    - The Montana Supreme Court issued a surprise weekend order following ex parte communications with attorneys representing their employee, who was not a party to the case at hand, against the Legislature and the Department of Administration, which were also not parties to the case at hand[29]. To the committee's knowledge, these actions outside the bounds of normal judicial procedure were unprecedented in Montana.
    - The Montana Supreme Court preemptively ruled in its employee's favor and for its own interests on matters concerning public records deletion, MJA lobbying, and use of state resources, despite none of those things being under litigation and the parties having no opportunity to submit arguments on those topics[30].

[29] *Helena Independent Record*, 4/12/2021
[30] Montana Supreme Court opinion in *McLaughlin v. Legislature*

- Justice Jim Rice "recused" himself from the *McLaughlin* case (committee chair Sen. Greg Hertz praised him for doing so) but then authored a concurring opinion about the *McLaughlin* case in the SB 140 case.
- The rest of the justices refused to recuse themselves, despite repeated pleas to do so and despite having the ability to appoint other judges to hear the case or send it to district court

Potential Remedies

1. The Legislature could pursue legislation to put key portions of Montana's Code of Judicial Conduct into law
2. The Legislature could pursue legislation to mandate the disqualification/recusal of judges with conflicts of interest in cases (with clear definitions of "conflicts of interest").

Judicial Standards Commission

Issue Summary

The Judicial Standards Commission (JSC) is the body mandated in the State Constitution[31] to investigate complaints against judges.

Why it Matters

The JSC should be a key component of judicial oversight and accountability. However, its current operations are opaque with many of its activities and decision not subject to public disclosure[32]. Further, three-fifths of its membership is currently decided by members of the judicial branch of government[33], and ultimate decision-making over its findings lies with the Montana Supreme Court. The combination of these factors opens the door to improper influence over and biases within the JSC in favor of judges and against complainants. One attorney alleging ethical violations recently called the JSC "[the place] where ethics complaints go to die."[34]

Committee Findings

- The current appointment structure of the JSC ensures the judicial branch of government appoints a controlling majority of the commissioners entrusted to oversee officers of the judicial branch
- Much of the JSC's work and findings are not currently subject to public disclosure
- The two judges currently serving on the JSC, Judge Menahan and Judge Spaulding, participated in the MJA's polling[35], necessitating their recusals from any JSC complaints on that topic
    - Judge Menahan pledged to the Legislature when testifying in front of the Law & Justice Interim Committee on September 14, 2021 that he would recuse himself

Potential remedies

- The Legislature could pursue legislation to change the appointing authorities of JSC members. Currently the judicial branch appoints a controlling majority (3 of 5 votes) of its

[31] Montana Constitution, Article VII, Part VII, Section 11
[32] JSC Rules
[33] JSC website
[34] *Daily Montanan*, 9/30/2022
[35] Publicly available emails posted by NewsTalk 95.5

own oversight body while the Governor appoints the remaining two. At minimum, entities other than the judiciary should appoint a controlling majority of JSC commissioners.

- The Legislature or the people could pursue a constitutional amendment to change the makeup and operations of the JSC
- The Legislature could pursue legislation to increase the transparency and recusal policies of the JSC

JSC Complaints and Decisions

Issue Summary

The Committee sought public information from the Judicial Standards Commission and a known citizen complainant to understand, as much possible under the commission's strict confidentiality procedures, the JSC's actions to date on matters contained within this report. Chair Hertz and staff filed a public records request[36] with the JSC and asked complainant Jake Eaton to share his complaints and responses to them with the Committee. After a couple months, JSC Chair Judge Mike Menahan responded to the records request with a letter[37] and Eaton provided copies of his complaints and responses from the JSC[38].

Why it Matters

The Montana Supreme Court in court rulings, Chief Justice Mike McGrath in letters and testimony, and representatives of the judicial branch in numerous news articles all pointed to the JSC as the proper entity to resolve many of the issues examined in this report. Due to the lack of transparency within the JSC, the Committee sought to understand to the extent possible the commission's work to date in resolving relevant complaints.

Committee Findings

- The JSC received 73 complaints between Jan. 1, 2022 and November 14, 2022
- At its November 14, 2022 meeting, the JSC discussed those 73 complaints and 2 additional complaints it received in 2021
- The JSC dismissed all but 6 of the complaints it received in 2021 and 2022. Of the 6 complaints it did not dismiss, their statuses were as follows as of November 14, 2022:
    - 2 remain under review
    - 3 are awaiting a response from a judge
    - 1 is awaiting the JSC to appoint an investigator
- Judge Mike Menahan recused himself from hearing two matters in 2022
- No other JSC members recused themselves from hearing any matters in 2022
- The JSC members other than Judge Menahan unanimously dismissed the two complaints that Menahan recused himself from

[36] Exhibit 1 to Final Report
[37] Exhibit 2 to Final Report
[38] Exhibit 3 to Final Report

- **Eaton Complaints**
    - Jake Eaton filed similar complaints against Justices Beth Baker, Laurie McKinnon, Dirk Sandefur, and Jim Shea for not recusing themselves from hearing the *McLaughlin v. Legislature* case and asked that JSC members Menahan, Spaulding, and Gerdrum recuse themselves from hearing the complaint
        - The JSC dismissed the complaints by majority vote (exact vote unknown) on September 19, 2022. The dismissal letters did not directly address any of the points Eaton had made in his complaints.
        - Spaulding and Gerdrum did not recuse themselves. Menahan also did not recuse himself based on his total of two recusals and those recusals being known below.
    - Eaton filed three complaints against Justice Ingrid Gustafson for not recusing herself from the *McLaughlin* case (date filed unknown) and not recusing from the *McDonald v. Jacobsen* case (two complaints filed October 14, 2022)
        - Two Eaton complaints against Gustafson were dismissed by the JSC on September 19, 2022 (before the complaints regarding the *McDonald* case were filed)
            - It is unclear to the Committee which complaints were dismissed. Neither dismissal letter contains any information about the specific allegations.
            - One dismissal letter notes the complaint was dismissed by majority vote. The other letter doesn't state whether the vote to dismiss was a majority vote, unanimous, or otherwise.
    - Eaton filed two complaints against Chief Justice Mike McGrath, one for not recusing in the *McLaughlin* case and one related to alleged ethical violations by Judge Menahan
        - The JSC dismissed one Eaton complaint against McGrath on September 19, 2022. Judge Menahan recused himself from this complaint.
            - The Committee presumes Menahan recused himself from the complaint that discussed himself.
    - Eaton filed a complaint against Judge Menahan related to alleged ethical violations expressed in email traffic
        - The JSC dismissed the complaint on September 19, 2022. Menahan recused himself.
- It is unclear to the committee if additional JSC complaints related to the topics discussed in this report have been filed or not

Potential remedies

- The available information at the time of the publication of this report is insufficient to determine whether the JSC is resolving serious ethical matters described in this report. See the potential remedies listed in the above section about the Judicial Standards Commission for possible solutions to gather more sufficient information regarding future matters.

Attorney Ethics

Issue Summary

Attorneys are required follow rules of professional conduct to ensure the ethical practice of the law and fairness in court proceedings.

Why it Matters

An attorney (paid by the judiciary) representing a judicial branch employee against the Legislature engaged in ethically questionable activities that impacted court cases and press coverage to the benefit of the judicial branch of government and to the detriment of the legislative branch.

Committee Findings

- The attorney representing the court administrator in the *McLaughlin* case used a procedural tool to fight the Legislature's subpoena without giving the Legislature the opportunity to be heard in court, leading to an unnoticed, ex parte, surprise weekend court order against the Legislature, which was not a party to the case in which the matter was heard (the SB 140 case).
- The court administrator deleted public record emails
    - She told legislative staff on April 8, 2021 that she did not retain emails related to SB 140 and other MJA polls and related issues[39]
    - The Legislature's later-quashed subpoenas did not turn up emails related to SB 140 known[40] to have been in the court administrator's possession
    - Emails related to SB 140 known[41] to have been in the court administrator's possession did not appear in the copies of emails provided to legislative staff in response to a public records request intended to gather those records.
        - The public records request was fulfilled in early July 2022. The court administrator confirmed to legislative staff on July 13, 2022 that she did not have any additional emails about SB 140
- The court administrator's attorney, while being paid by the judicial branch, repeatedly misrepresented and lied about the issue of public records destruction, both in court and in the press.

[39] Exhibit K to the committee's Initial Report to the 67th Legislature
[40] Exhibits attached to the Attorney General's motion to disqualify judge Krueger
[41] Exhibits attached to the Attorney General's motion to disqualify judge Krueger

    - The attorney falsely told the Montana Supreme Court in a filing: "The Legislature makes noise about deleted emails, a known red herring. Not a single email was lost."[42]
    - The attorney falsely told the U.S. Supreme Court that McLaughlin still possessed records that she had in fact deleted: "The subpoenas to the Justices sought information McLaughlin would have had anyway."[43]
    - The attorney falsely told the press: "Of course, we know [McLaughlin's] emails were not deleted."[44]
    - The attorney falsely told the press that McLaughlin never refused to turn over the records[45], when in fact McLaughlin told legislative staff that she couldn't provide the records because she did not retain them[46].
- The above false statements appear to violate several of the Montana Rules of Professional Conduct.
- The judicial branch of government paid the attorney around $100,000[47] for his work on behalf the judiciary, which included these apparent violations of the Rules of Professional Conduct.

Potential remedies

- Grievances could be filed against the attorney through the Office of Disciplinary Counsel
- The Legislature could examine the funding used to pay for unethical behavior by and for the judicial branch against the legislative branch

[42] Petitioner's Response to Motion to Disqualify Justices, 5/10/2021
[43] Brief Opposing Writ of Certiorari, 2/9/2022
[44] *Daily Montanan*, 4/28/2021
[45] *Daily Montanan*, 5/3/2021
[46] Committee's Initial Report to the 67th Legislature, page 19
[47] Exhibit 4 to Final Report

Chief Justice Mike McGrath's Role

Issue Summary

Chief Justice Mike McGrath played a central role in nearly all the matters examined in this report.

Why it Matters

As Chief Justice, Mike McGrath is the head of Montana's judicial branch of government. He bears ultimate responsibility for the administration and actions of the judicial branch. McGrath's central role in the matters of MJA polling, private association lobbying using state resources, inadequate records retention policies, and conflicts of interest is concerning. Further, as findings by the Judicial Standards Commission are ultimately referred to the Supreme Court, and the Chief Justice leads the Supreme Court, the Chief Justice plays an outsized role in determining consequences for any judicial malfeasance.

Committee Findings

- Chief Justice McGrath showed a lack of candor with the Legislature and the public on multiple occasions. The Chief Justice repeatedly misled and was untruthful with legislative committees:
    - On April 19, 2021 McGrath testified to the Special Select Committee on Judicial Accountability and Transparency that: "I think if a judge did express an opinion whether legislation is unconstitutional, the judge should not sit on a case where the question is the constitutionality of that particular legislation...I think you will find that is very seldom that one of us, if ever, would render such kind of an advisory opinion regarding whether something is unconstitutional or not… Nobody does a poll on the constitutionality of a bill… We don't decide ahead of time whether something is constitutional or not…"[48]
    - In his April 30, 2021 letter to the Legislature, McGrath wrote: "On rare occasions I have testified on specific bills. I participated in a forum conducted early in the session regarding the Judicial Branch; otherwise I have not testified this session on any matter other than the Judicial Branch budget… Justices do not take positions on, nor do we meet or confer, on matters pending before the Legislature. Justices make a sincere effort to refrain from involvement in or discussion of matters pending before the Legislature."

[48] *Helena Independent Record*, 4/19/2021

- On September 14, 2021 McGrath testified to the Law and Justice Interim Committee that: "I'm not sure it would be appropriate for me to make a comment on legislation… in case it's litigated."[49]
- On September 14, 2021 McGrath testified to the Law and Justice Interim Committee that: "I think it's highly unlikely that judges would have actually made comments on whether something was constitutional or not. If they did, that would be inappropriate. I think judges go out of their way not to do that, but if they did… they would probably and should recuse themselves. I think judges go out of their way to not talk about pending legislation as much as possible…"[50]
- McGrath made all the above statements even after emails demonstrating their falsity were available to the public[51]
    - In dozens of emails Chief Justice McGrath takes a leading role in the judicial branch's and MJA's lobbying preparation and strategy during the 2021 legislative session and is one of the primary players coordinating opposition to legislation.
    - Chief Justice McGrath personally lobbied Governor Gianforte against SB 140.
    - McGrath himself weighed in on the constitutionality of a bill before it had even had its first hearing, writing that HB 685 "would be entirely inconsistent with other provisions of the constitution" to the chair and vice chair of the Judicial Standards Commission as well as a lobbyist and staff.
    - In an email to McGrath and other judges before the bill had even had its first hearing, Judge Dusty Deschamps wrote that SB 140 was "unconstitutional in violation of Mont. Const. Art. VII…"
    - Judge Michael Menahan expressed (correctly, as the Supreme Court would later rule) that "The constitution leaves it to the legislature" when discussing SB 140.
    - In an email to McGrath and other judges, Judge Amy Eddy wrote that the process SB 140 sought to change was "the hallmark of a Constitution for the people."
    - In the same email thread, Judge Elizabeth Best agreed with Eddy and added that the entity SB 140 would eliminate "is a constitutional body…"
    - Judge Randal Spaulding called a bill "likely unconstitutional in its inception"
    - Emails from Judge Kelly Mantooth demonstrate how frequently multiple judges and Supreme Court employees were engaged in lobbying against and expressing opinions on pending legislation:
        - "Judge Swingley will be testifying tomorrow morning against HB685…"
        - "Beth [McLaughlin] has lined up some powerful hitters…"
        - "I will be testifying against the amendment (Malfeasance) on HB318 Thursday morning…"

[49] Law & Justice Interim Committee 9/14/2021 archived recording approx.. 09:09:00
[50] Law & Justice Interim Committee 9/14/2021 archived recording approx.. 09:22:00
[51] Publicly available emails posted by NewsTalk 95.5 were published on April 11, 2021

        - "[Bills] just keep popping back like the 'Whack a Mole' game… I'm going to need a bigger gavel."
        - At least six (6) justices and judges remarked on the constitutionality of legislation and at least 14 additional judges wrote their opposition to or support for specific bills that were in process. On the MJA's poll about HB 342 alone, at least 18 additional judges expressed opposition to legislation[52].
            - Put another way, more than 11% of Montana's 53 justices and district court judges, including McGrath himself, did something that McGrath told the Legislature was "highly unlikely" and "inappropriate."
                - Over 70% of Montana's justices and district court judges did something that McGrath told the Legislature they "go out of their way" not to do.
- Chief Justice McGrath engaged in multiple matters where he had a conflict of interest.
    - Even though McGrath had recused himself from the SB 140 case, he then appointed Judge Kurt Krueger to take his place. Krueger had expressed to McGrath and others that he, like McGrath, opposed SB 140.
    - McGrath did not recuse himself from the *McLaughlin* case even when requested to do so, and the case centered on his own emails (among others) and his employee.
    - McGrath did not recuse himself from the case over HB 325, even when requested to do so, despite that the fact that the case would impact McGrath's own reelection[53]
- As Chief Justice, McGrath bears some responsibility for the judicial branch's lack of a records retention policy and the destruction of public records.
- As Chief Justice, McGrath bears responsibility for the judicial branch paying an attorney that employed unethical tactics against the Legislature.
- McGrath directed and oversaw the improper use of state time and resources to assist the lobbying efforts of a private nonprofit association.
- Chief Justice McGrath's actions appear to violate several sections of the Montana Code of Judicial Conduct.
- Chief Justice McGrath's gross mismanagement of the above issues has led to a loss in public confidence of the impartiality and integrity of Montana's judicial branch of government.

Potential remedies

- Complaints could be filed with the Judicial Standards Commission.
- The Legislature could pursue legislation amending Montana's ethics rules regarding state resources, judicial lobbying, recusal requirements, and oversight of judicial branch staff.

[52] Publicly available emails pages 26-27

[53] Attorney General Knudsen column explaining the matter

Court Ruling Against the Legislature

Issue Summary

The Montana Supreme Court issued several orders against the Legislature in the *McLaughlin* case[54].

Why it Matters

The court quashed the Legislature's subpoenas and said the Legislature could not re-issue subpoenas for the same documents. The court ordered that "The Montana Legislature and its counsel are permanently enjoined from disseminating, publishing, re-producing, or disclosing in any manner, internally or otherwise, any documents produced pursuant to the subject subpoenas; and the Montana Legislature is ordered to immediately return any materials produced pursuant to the subject subpoenas, or any copies or reproductions thereof, to Court Administrator Beth McLaughlin." In its order the court also attempted to broadly legislate from the bench the scope of the Legislature's subpoena powers.

Committee Findings

- The Legislature returned the documents obtained via subpoena to the court administrator.
- The Legislature has in several forums since the order referenced and used publicly available emails that were originally produced from the subpoena without protest from the court administrator or the court.

Potential remedies

- The Legislature should not refrain from referencing, discussing, or sharing emails that were already available to the public before the court issued its order.
- The Legislature should pursue legislation to clarify its own subpoena powers.

[54] Court opinion

SUMMARY OF POTENTIAL LEGISLATIVE SOLUTIONS

The below list is a merely a summary of potential options for the Legislature to consider. The ideas expressed below are not necessarily endorsed by any individual member of the committee or the committee as a whole.

1. Automatically disqualify judges who have expressed opinions on legislation from hearing cases about said legislation (see page 13)

2. Clarify Montana's ethics and lobbying statutes to prevent private associations from making use of state time and resources for their lobbying efforts (see page 15)

3. Re-write Montana's public records laws to standardize retention schedules across state government, clarify what types of information are and are not subject to public disclosure, and standardize processes and timelines for responding to public records requests (see page 17)

4. Codify all or portions of Montana's Code of Judicial Conduct and provide more guidance to the Judicial Standards Commission and any other entities on the enforcement of judicial ethics, within the constitutional requirements of the Legislature and JSC (see page 19)

5. Clearly define what constitutes a conflict of interest for a judge or justice and mandate disqualification/recusal from cases where a conflict of interest is present (see page 19)

6. Change the appointment process and transparency rules governing the Judicial Standards Commission to ensure the judicial branch has more independent oversight and the public has more insight into the activities and decisions of the JSC (see page 20)

7. Examine the funding used to pay for legal counsel that employed unethical tactics against the Legislature in violation of the professional conduct rules (see page 26)

8. Amend Montana's ethics statutes to be clearer on judicial lobbying activities and recusal requirements (see page 29)

9. Change the oversight and management of certain judicial branch staff (see page 29)

10. Clarify the Legislature's constitutional subpoena powers in statute (see page 30)