



WAYNE STATE  
UNIVERSITY

Center for Urban Studies

## Legislative Oversight in North Carolina

### Capacity and Usage Assessment

Oversight through Analytic Bureaucracies:	High
Oversight through the Appropriations Process:	High
Oversight through Committees:	Limited
Oversight through Administrative Rule Review:	Moderate
Oversight through Advice and Consent:	Moderate
Oversight through Monitoring Contracts:	Limited
Judgment of Overall Institutional Capacity for Oversight:	Moderate
Judgment of Overall Use of Institutional Capacity for Oversight:	Moderate

### Summary Assessment

The North Carolina legislature has developed exceptionally strong analytic bureaucracies to facilitate oversight of the executive branch. It has expansive powers of advice and consent to check gubernatorial initiatives and nominations, although it sometimes uses these for partisan rather than good government purposes. The legislature lacks its own audit agency and its own administrative rules review committee. Recognizing its need for information that might often be provided in performance audits, the legislature recently (2007) created a Program Evaluation Division to produce multiple high quality program evaluations working closely with an oversight committee, the Joint Legislative Program Evaluation Oversight Committee. The legislature uses its lawmaking authority as a tool to conduct oversight often sponsoring legislation rather than directly seeking compliance from evaluated programs and agencies. The legislature also seeks assistance from other agencies to request oversight, including agencies in the executive branch such as a state auditor and the executive branch rule review commission.

### Major Strengths

Oversight through the appropriation process appears to be thorough and effective. Work of the Fiscal Research Division (FRD) supports an essential legislative budget tool, the continuation review or CR. Selected programs must justify continued funding through the CR process. Although the CR process has resulted in the discontinuation or reduction of funding for some programs, it has also resulted in funding increases for programs when necessary. Even through the legislature does not have an audit division, it still investigates program performance. The Program Evaluation Division (PED) was created to assess the efficiency and effectiveness of government programs. It has shown the value in the reports generated through tracking

legislative recommendations to agencies and legislation enacted as a result of these recommendations. Although the PED is not an audit agency, its high quality program evaluations often lead directly to legislative action. Legislation can be a more powerful check on executive agencies than audit recommendations. The quantifiable cost savings associated with the evaluations performed by PED can be directly connected to appropriations decisions. The legislature exhibits interest in the use of state contracts to deliver public programs, and it has passed legislation to reduce misuse of personal services contracts.

## Challenges

The North Carolina Legislature does not have oversight authority in areas typically seen in other states. The audit function is under the authority of the executive branch in the form of an elected official, the state auditor. Although the legislature has been able to leverage a relationship with the state auditor that has allowed it to request audits of an executive branch agency in the past, this is not typical and depends on the willingness of the state auditor to facilitate the legislature. The PED became embroiled in a political battle during which the state senate failed to appoint members to the committee that sets its work plan, the Joint Legislative Program Evaluation Oversight Committee. This impasse lasted for a year, undermining the ability of the legislature to use evidence to oversee the work of state agencies. The legislature also has limited authority over the administrative rulemaking process. The Rules Review Commission (RRC) is appointed by the legislature, but it is organized under an executive agency, and the legislature has no authority over it. Partisan conflict characterizes the legislature's use of its extensive advice and consent powers.

## Relevant Institutional Characteristics

North Carolina has a hybrid legislature. This designation indicates that legislators work approximately 2/3<sup>rd</sup>s of a full-time job legislating and receive an income that is not substantial enough for it to be their sole income. There are 120 representatives in the state house and 50 senators in the state senate. They all serve two-year terms with no limits on the number of terms they may service despite an effort from members in the legislature in 2017 to put a four-year, three-term limit on both chambers (Horsch, 2017). Legislators receive \$13,951 per year, plus an additional \$104 per session day and a monthly expense allowance. This low compensation is one of the characteristics that lends to the mid-level ranking for North Carolina in legislative professionalism, ranking 18<sup>st</sup> out of the 50 states (Squire, 2017). The legislative staff size has increased over the past decade. In 2015 there was a permanent staff of 370, a fairly modest number given the size of the legislature and the state, but an increase from a staff of 168 in 1996 (NCSL). Additionally session-only staff numbered 308 in 2015, which is almost the same size as the 1996 session-only staff of 298.

Although the legislature is scheduled to meet in odd-numbered years for a regular session and for a shorter session during even years, in practice North Carolina's legislature seems to be drifting toward a full-time schedule. The 2015 session lasted three months longer than anticipated, the 2016 session had five extra sessions, the 2017 session had four special sessions,

and the 2018 session has already included one special session (Osborne, 2017; NCSL, 2017).<sup>1</sup> The regular session for 2019 is scheduled to last six months.<sup>2</sup> This can occur because there is no constitutional or statutory requirement for the length of sessions. The dynamic of regularly extended sessions means that some legislators cannot maintain the balance between their professional or financial needs and their legislative service demands. For example, “former Rep. Charles Jeter resigned in 2016 after two terms because he was unable to legislate and run his trucking business, which supported his family financially. Rep. Carla Cunningham lost her nursing credentials because she went more than six months without practicing during the 2015-2016 session” (Osborne, 2017). These decisions change characteristics of individuals in the legislature from “regular” citizens to those who can financially afford to work so much for such a small legislative salary, such as retirees, the wealthy, business owners, and other highly paid professionals.

According to Ferguson (2015) North Carolina’s governor is one of the weakest in the nation. Only the governor of Oregon is less powerful. This can be attributed to the structure of the executive branch and the governor’s limited constitutional powers. Many of the executive branch officials that would be appointed by the governor in most states are elected in North Carolina. These include the State Auditor, the State Treasurer, the Superintendent of Public Instruction, the Commissioner of Agriculture, the Commissioner of Labor, and the Commissioner of Insurance. The governor and lieutenant governor run separately, and currently they hail from different political parties. North Carolina’s governor was the last in the nation to be granted veto power. Voters amended the state’s constitution to provide their governor with this power for the first time in 1996. This reflects the state’s constitutional limits on executive power after harsh treatment by royal governors during the British colonial era.<sup>3</sup> North Carolina is one of the six states in the nation in which the governor cannot use the line-item veto. Despite this, the state is required to pass a balanced budget.<sup>4</sup>

In 2016, there was what the media dubbed a “legislative coup.”<sup>5</sup> After the Democrats took control of the governorship, the Republican-dominated general assembly passed legislation that weakened the power of the governor and reorganized the elections boards and commissions to be increasingly partisan (Graham, 2016). The outgoing Republican governor, defeated in his quest for reelection, signed these bills before leaving office. This effort to curtail executive control of the election commission could be viewed as a mechanism for legislative oversight of the executive, but the timing of the change and the partisan politics involved suggest that this was also a partisan power play. The state’s supreme court and the voters both weighed in on the side of the governor. The Supreme Court ruled that some of the “laws violated the separation of powers clause,”<sup>6</sup> and voters, who were given a chance in November of 2018 to amend the constitution to permit these changes to the governor’s power, rejected both amendments. This particular instance will be discussed further in the “Oversight Through Advice and Consent” section.

The percentage of local and state government employees as a percentage of the workforce in North Carolina is equal to the national average of 11.3% (CATO, 2006). The

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<sup>1</sup> <http://www.ncsl.org/research/about-state-legislatures/2017-state-legislative-session-calendar.aspx>, accessed 10/10/18.

<sup>2</sup> [https://ballotpedia.org/North\\_Carolina\\_General\\_Assembly](https://ballotpedia.org/North_Carolina_General_Assembly), accessed 12/17/18

<sup>3</sup> <https://www.lohud.com/story/news/2016/01/01/jan-1-1996-nc-last-state-grant-veto-power-governor/78188720/> accessed 12-16-18

<sup>4</sup> [https://ballotpedia.org/North\\_Carolina\\_General\\_Assembly#cite\\_note-process-21](https://ballotpedia.org/North_Carolina_General_Assembly#cite_note-process-21), accessed 12-16-18

<sup>5</sup> <https://www.theatlantic.com/politics/archive/2016/12/north-carolinas-republicans-succeed-in-power-grab/510950/>, accessed 12/17/18

<sup>6</sup> [https://ballotpedia.org/North\\_Carolina\\_General\\_Assembly](https://ballotpedia.org/North_Carolina_General_Assembly), accessed 12/17/18

CATO Institute does a comparison of the smallest and biggest bureaucracies for certain agencies. North Carolina is equal to or slightly under the national average for education workers (5.8%), safety workers (1.5%), service workers (1.1%), and other workers (.8%). North Carolina is above the national average for welfare workers (2.1%).

## Political Context

North Carolina has only recently seen Republican Party control of state government. Democrats were in control throughout most of the 1990s and into the 2000s. From 1993 through 2012 Democrats held the governor's office and from 1992 through 2010 they held the state senate. The Republican Party only controlled the house from 1995 through 1998 during the years 1992 through 2010. However, from 2013 onward Republicans held a trifecta until the 2017 victory of the current governor, Democrat Roy Cooper.

North Carolina ranks in the top five of the states with the least compact districts, which is a measure that indicates whether there is potential for gerrymandering. Based on a measure of district compactness, there is a high potential for gerrymandering in the state (Azavea, 2012).<sup>7</sup> Consequently, state legislative elections are only moderately competitive, ranking 27<sup>th</sup> in the nation during the 2016 election cycle.<sup>8</sup> Not surprisingly, without electoral competition to motivate politicians to attract independents, the political parties in the legislative chambers are fairly highly polarized. North Carolina has the 17<sup>th</sup> most polarized lower chamber and 21<sup>st</sup> most polarized upper chamber in the country (Shor and McCarty 2015).

## Dimensions of Oversight

### Oversight Through Analytic Bureaucracies

The state auditor is the principal analytic bureaucracy tasked with engaging in oversight of North Carolina's executive branch. The state auditor is a constitutional officer who is elected by state-wide partisan ballot. The state auditor is part of the executive branch. Neither the governor nor the legislature is able to commission specific investigations of executive agencies through the Office of the State Auditor (OSA). The state auditor oversees a staff of 49 professionals, which includes the state's comptroller, numerous CPAs, legal professionals, and information technology specialists. The OSA received a state appropriation of \$11.7 million and had a staff of 136 in 2015 (NASACT 2015). There are six types of audits performed by the office. In 2017, the office conducted 58 CPA Audits, seven Investigative Reports, five Information System Audits, two Performance Audits, 29 Financial Related Audits, 81 and Financial Statement Audits. The financially related audits cover county clerks of various superior courts, state agencies, universities and community colleges, licensing boards, and non-profits.

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<sup>7</sup> [https://cdn.azavea.com/com.redistrictingthenation/pdfs/Redistricting\\_The\\_Nation\\_Addendum.pdf](https://cdn.azavea.com/com.redistrictingthenation/pdfs/Redistricting_The_Nation_Addendum.pdf), accessed 10/10/18. North Carolina has a Polsby-Popper ratio of four, which indicates that the districts are probably gerrymandered.

<sup>8</sup> [https://ballotpedia.org/State\\_legislatures\\_compared\\_by\\_extent\\_of\\_electoral\\_competitiveness\\_in\\_2016](https://ballotpedia.org/State_legislatures_compared_by_extent_of_electoral_competitiveness_in_2016), accessed 10/10/18.

These audits cover the work performed by these entities as well as their appropriate use of financial resources.

Performance audits, which are important for legislative oversight, are rarely conducted by OSA: two in 2017, three in 2016 and two in 2015. One of the two performance audits conducted in 2017 examined the performance of the Department of Agriculture and Consumer Services with respect to inspections to determine the quality of milk—meeting Grade A standards. The other examined the performance of a managed care organization (MCO) that provides mental health, disability and substance abuse services through a contract with the North Carolina Department of Health and Human Services. The focus of that audit was whether the MCO fulfilled its statutory mission and was a “good steward of state and federal resources.”<sup>9</sup>

Investigative reports are more narrowly targeted than performance audits and appear to be conducted somewhat more frequently: seven completed in 2017. The 2017 investigations included examination of the behavior of, amongst others, the Wake County Sheriff’s Office, the Carteret County Humane Society, and The UNC school of Arts (NC Office of the State Auditor, 2017). These investigations appeared to be in response to alleged instances of public malfeasance. This preference for audits that protect the public interest may be because the state auditor is elected. Non-audit investigative reports are generally more salient to the electorate than are the more specialized performance audits. The reports conducted by the Office of the State Auditor (OSA) are available to the public. Some reports are sent to the legislature, but it is clear from the distribution of the reports and the emphasis on public access that the North Carolina State Auditor is a publicly elected position that is accountable to the voters. The OSA even includes links to news reports that highlight the activity of the state auditor

Another analytic bureaucracy, the Program Evaluation Division (PED), is the primary legislative agency that supports oversight. The PED’s mission is to determine whether government services are delivered efficiently and effectively. The budget for fiscal year 2018-2019 allocates 14 full-time employees and \$1.7 million to the division. Its website lists of reports produced annually. In 2018 it produced 13 reports of which 11 appear to be assessments of agency and program performance.<sup>10</sup> The PED is not an auditor, but rather non-partisan legislative support staff. “Audits are the realm of the AG. We do findings and recommendations; we find sometimes they are doing good things, and we report those things too” (interview notes, 2018). After listening to audio recordings of presentations based on these reports, it appears that these reports could be described as program evaluations.

In 2007, North Carolina was one of the few states that did not have a program assessment unit to support the work of its legislature (interview notes, 2018). To remedy this, the legislature created the PED and a legislative committee to supervise it, the Joint Legislative Program Evaluation Oversight Committee (JLPEOC), through Session Law 2007-78. The JLPEOC has co-chairs (one from each chamber) and 16 other members (eight from each chamber). The JLPEOC is responsible for establishing the work plan for the PED, approving PED reports, and to “recommend to the General Assembly any changes needed to implement a recommendation that is included in a report of the Program Evaluation Division and is endorsed by the Committee” (S.L. 2007-78).<sup>11</sup> Additionally, the PED presents its reports to the JLPEOC. There are four subcommittees listed under the JLPEOC: Economic Development Subcommittee, Medicaid and Health Administration Subcommittee, Personal Services Contracts Subcommittee, and the Real Property Subcommittee, but it does not appear that these subcommittees have met since 2015.

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<sup>9</sup> <http://www.ncauditor.net/EPSWeb/Reports/Performance/PER-2017-4445.pdf>, accessed 1/23/18.

<sup>10</sup> <https://www.ncleg.net/PED/Reports/reports.html>, accessed 12/28/18

<sup>11</sup> <https://www.ncleg.net/EnactedLegislation/SessionLaws/PDF/2007-2008/SL2007-78.pdf>, accessed 10/10/18.

The PED website is well organized and provides links to information on meetings by the JLPEOC including agendas, minutes, handouts, and archived audio recordings. Based on listening to audio recordings of meetings of the JLPEOC available through links on the PED website,<sup>12</sup> it appears that PED reports are thorough and professional evaluations of state programs. During the April 2018 meeting, which lasted nearly four hours, of the JLPEOC legislators listened to several reports at monthly meetings and ask PED staff questions. Legislators' questions do not demonstrate extensive knowledge of evaluations in general or the programs in particular. For example, one legislator wanted to know what "evidence-based measurement" meant. PED staff responded professionally and clearly to these sorts of questions. The meeting chair explained that the evaluations would be presented at the current meeting, but would not be voted on until the next meeting so that legislators would have time to gain more information and understanding of the evaluations being presented.

In 2017, the JLPEOC could not meet because the senate did not appoint anyone to serve. It is not clear why the senate did not make these appointments; but there was speculation within the legislature that it was political fallout from a PED report (interview notes, 2018). PED reports do not become public unless the JLPEOC approves them, so no reports were released until JLPEOC appointments were made. Moreover the PED did not have a work plan. However, there were previously assigned projects to complete and projects required by a state law or budget items. On June 26, 2018, the North Carolina general assembly passed HB646,<sup>13</sup> which requires that the JLPEOC chairs establish the work plan for the PED, subject to the approval of the JLPEOC (interview notes, 2018). The JLPEOC once again is operating. Legislators can request that the PED conduct an evaluation by submitting a request to the JLPEOC chairs, and PED will even help legislators write these requests.<sup>14</sup> But the JLPEOC through HB646 controls the work of the PED except when the general assembly passes a bill requiring a PED report (interview notes 2018).

PED investigations determine "what state agency programs are really doing, at what cost, and to what effect, if any."<sup>15</sup> Based on these findings, the JLPEOC makes recommendations to the general assembly rather than to the agency being investigated, which is the case in many other states. In North Carolina, recommendations from the PED reports are used by the JLPEOC to introduce legislation. The PED tracks the enacted and failed legislation following the conclusion of each legislative session. Between 2008 and 2016 the legislature enacted legislation on 38 of the reports generated by the PED.<sup>16</sup> PED recommendations result in quantifiable cost savings, approximately \$25.2 million annually.

Despite this legislative approach, there are times that the JLPEOC discusses a PED report with the agency involved and decides that the agency needs to take action. This happened in a hearing held on October 8, 2018<sup>17</sup> when the JLPEOC met about a PED report, *Improvements to Inmate Healthcare Reimbursements and Internal Processes Could Save \$5.6 Million Annually*. The first recommendation that PED made in that report was for the general assembly to establish a new position in the Health Services division of the Department of Public Safety (DPS) tasked with improving its use of performance measurement data and managing inmate healthcare costs. A JLPEOC committee member noted that it seemed like a good manager of DPS could already

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<sup>12</sup> <https://www.ncleg.net/DocumentSites/committees/JLPEOC/Audio/2018/04-09-18.mp3>, accessed 12/28/18

<sup>13</sup> <https://trackbill.com/bill/north-carolina-house-bill-646-apprenticeshipnc/1446720/>, accessed 10/10/18.

<sup>14</sup> [https://www.ncleg.net/PED/Documents/Legislative\\_Assistant\\_Guide.pdf](https://www.ncleg.net/PED/Documents/Legislative_Assistant_Guide.pdf), accessed 12/18/18

<sup>15</sup> <https://www.ncleg.net/PED/AboutUs/mission.html>, accessed 1/23/18.

<sup>16</sup> <https://www.ncleg.net/PED/LegislativeTracking/Legislation.html>, accessed 10/10/18.

<sup>17</sup> <https://www.ncleg.net/DocumentSites/committees/JLPEOC/Minutes%20and%20Handouts/2018/10-08-18/Draft%20Minutes%20June%202011,%202018.pdf>, accessed 12/19/18



have done this under general statute 143b-10. The agency agreed, but said they were waiting to meet with the JLPEOC to assess committee support before creating the position. The committee encouraged DPS to act, concluding that legislation was not needed.

A third analytic bureaucracy, the Fiscal Research Division (FRD), is a non-partisan staff agency of the general assembly that provides fiscal and policy analysis of budgetary and taxation issues and provides staff to the appropriations and finance committees in each chamber. When the legislature is not in session, the FRD is still responsible for work associated with the fiscal policy of the state, but it is also responsible for monitoring “executive branch compliance with enacted legislative initiatives.”<sup>18</sup> Prior to the creation of the PED, the FRD tried to do some of the evaluation work the PED handles. However, the FRD was only available to do this type of work when the general assembly was not in session. This was not enough time for the type of detailed evaluation required (interview notes, 2018). The FRD has 37 staff members and a budget for the 2017-2019 biennium of over \$10 million. The publications available on the website include annual budget summaries, fiscal briefs and reports, a glossary of commonly used budget terms, continuation reviews, economic incentive programs, and workforce development offered by the state. There are various other presentations, revenue forecasts, budget legislation information, statistics and data available on the FRD website.<sup>19</sup> More information about the FRD is provided in the next section, *Oversight Through the Appropriations Process*.

## Oversight Through the Appropriations Process

Per the State Budget Act (Chapter 143C, Art 4), North Carolina has a biennial budget cycle. The biennial budget is enacted during the long session, which occur during any odd-numbered year and necessary adjustments occur during the short session (even-numbered years). Per the state constitution, the governor is responsible for preparing a budget for submission to the general assembly. However, the legislature has the power of the purse and is responsible for authorizing appropriations through the enactment of the State Budget Act. The distinction between the State Budget Act and the Appropriations Act is that the former establishes the procedures for preparing, enacting, and administering the state budget,<sup>20</sup> whilst the latter grants the funds described in the budget.<sup>21</sup>

As a result of legislative action, North Carolina does use performance measures as a part of the budget process. A major change in the budget law in 2006 required the governor to include line-item information for each program.<sup>22</sup> As a result, the Office of State Budget and Management began including program descriptions and some outcome measures with the line-item detail.

The continuation review (CR) program is an oversight program created by the 2007 Appropriations Act (S.L. 2007-323, Section 6.21). The program requires state agencies to complete program evaluations to argue for continued funding. It originally eliminated reoccurring funding for eight programs during FY2007-2008. The agencies had to submit written reports to the appropriations committees. The reports were used by committees to

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<sup>18</sup> [https://www.ncleg.net/fiscalresearch/about\\_us.html](https://www.ncleg.net/fiscalresearch/about_us.html), accessed 10/10/18.

<sup>19</sup> <https://www.ncleg.net/fiscalresearch/index.html>, accessed 12/18/18.

<sup>20</sup> [https://www.ncleg.net/EnactedLegislation/Statutes/PDF/ByChapter/Chapter\\_143C.pdf](https://www.ncleg.net/EnactedLegislation/Statutes/PDF/ByChapter/Chapter_143C.pdf), accessed 10/10/18.

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[https://www.ncleg.net/fiscalresearch/budget\\_legislation/budget\\_legislation\\_pdfs/2007\\_%20Appropriations\\_%20Act.pdf](https://www.ncleg.net/fiscalresearch/budget_legislation/budget_legislation_pdfs/2007_%20Appropriations_%20Act.pdf), accessed 10/10/18; <https://www.ncleg.net/Sessions/2017/Bills/Senate/PDF/S99v6.pdf>, accessed 10/10/18.

<sup>22</sup> <https://www.ncleg.net/EnactedLegislation/SessionLaws/PDF/2005-2006/SL2006-203.pdf>, accessed 10/10/18.

“determine whether to increase, continue, reduce, or eliminate funding for the selected programs”.<sup>23</sup> Each CR in subsequent appropriations bills provides specific instructions on what the report should include.<sup>24</sup> These reports are presented to the oversight and appropriations committees responsible for oversight of the specific program. Analysts from the FRD coordinate the CR program with the agency and the appropriation committees. The appropriations committees make recommendations for funding based off of the CR during the appropriations process. The FRD subsequently provides a report that analyzes the evaluation provided by the agency and includes information on the legislative action that followed.<sup>25</sup> A summary of the results of the CR initiative since its implementation in 2007 includes the following categories on program funding following the review:<sup>26</sup>

- Funding Restored and Increased – five programs
- Funding Restored at Prior-Year Level – 20 programs
- Funding Partially Restored – seven programs
- Funding Eliminated – seven programs

North Carolina organizes its chambers into specialized appropriations committees. The house and the senate have appropriations subcommittees who are responsible for areas of specialty. These subcommittees are responsible for facilitating public hearings where fiscal staff makes presentations about agency budgets. Some hearings are held before joint subcommittees. State agencies may also answer questions or make presentations. Joint meetings cease when the chamber originating the bill starts to make specific budget decisions. Subcommittee decisions are compiled into one report and an appropriations act. This is then argued before the full appropriations committee. If necessary, amendments occur in the full committee. The full committee reports out the final proposed appropriations act to the chamber floor for debate.<sup>27</sup>

Appropriations battles between the Democratic governor and Republican legislature occur regularly and reflect partisan priorities. Without the power to veto specific line-items in the budget, the governor can only veto the entire bill. However, Republicans have a supermajority in the legislature and can override gubernatorial vetoes. The Republican majority legislature voted to override Governor Cooper’s (D) veto of the 2018 Appropriations Act, which is the adjustment of the 2017-2019 biennium budget approved in 2017 (Sherrill, 2018). The original 2017-2019 budget was also passed using an override vote.

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<sup>23</sup> [https://www.ncleg.net/fiscalresearch/continuation\\_reviews/overview\\_continuation\\_reviews.html](https://www.ncleg.net/fiscalresearch/continuation_reviews/overview_continuation_reviews.html), accessed 12/27/18

<sup>24</sup> For example, 2015-2016 Continuation Review Legislation: <https://www.ncleg.net/Sessions/2015/Bills/House/PDF/H97v9.pdf#page=15>, accessed 10/10/18.

<sup>25</sup> An example of a FRD Continuation Review Report of the 2016 Mercury Pollution Prevention Account Continuation Review: [https://www.ncleg.net/FiscalResearch/continuation\\_reviews/2015-16%20Continuation%20Reviews/FRD%20Analysis%20and%20Summary/FRD\\_Analysis\\_CR\\_Mercury\\_Pollution-FRD-2017-01.pdf](https://www.ncleg.net/FiscalResearch/continuation_reviews/2015-16%20Continuation%20Reviews/FRD%20Analysis%20and%20Summary/FRD_Analysis_CR_Mercury_Pollution-FRD-2017-01.pdf), accessed 10/10/18.

<sup>26</sup> Data on summary of results is available on the FRD website: [https://www.ncleg.net/fiscalresearch/continuation\\_reviews/results\\_continuation\\_reviews.html](https://www.ncleg.net/fiscalresearch/continuation_reviews/results_continuation_reviews.html), accessed 10/10/18.

<sup>27</sup> [https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course\\_materials/Trogdon%20Budget%20Process.pdf](https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/Trogdon%20Budget%20Process.pdf), accessed 10/10/18.



## Oversight Through Committees

In addition to many substantive committees, NC has organized multiple joint oversight committees, which meet irregularly, some yearly, some biannually, some more often (NC General Assembly, 2017). A review of committee agendas reveal meetings are often specific and contain numerous presentations on projects and agency performance. Lawmaking does not appear to occur in these committees. The purpose of the committees appears to be to facilitate testimony from agencies to both chambers concurrently. A review of 22 bills presented to the Joint Oversight Committee on Transportation and the Transportation standing committees in both chambers indicate two of the bills addressed executive agencies. One bill proposed training and increased instruction for police officers interacting with mentally disabled motorists. The second created a new “transportation credit” program through the North Carolina Department of Transportation (NC General Assembly, 2017).

North Carolina’s legislature does not have committee meeting videos nor transcripts readily available on its website, however, a specific date of meeting minutes can be requested from their legislative library (interview notes, 2018). The PED provides readily accessible information on the meetings and activities of the JLPEOC. Similar information does not appear to be available for other committees according to our interview respondents. An interviewee said that audit reports go out to all members of the house, and the chairs decide what to do with them. This source did not recall an instance of an audit report being used to question an executive branch agency, but said clarification would be pursued if there was an issue. The same interviewee could not recall an instance of an auditor presenting to a committee. Although, this source said that if a committee chair asked for a presentation, it would be provided (interview notes, 2018).

PED reports and the work of the JLPEOC appear to be the primary source of legislative oversight through the committee system. The work of PED through the JLPEOC led to the passage of 9 laws during 2018.<sup>28</sup> The JLPEOC meets during the interim and during the session, except during 2017 when the senate did not appoint members to the committee. The driving force for this oversight appears to be the analytic support agency even though the legislative committee manages this agency and sets its work plan. The legislature, however, deserves credit for recognizing in 2007 that it needed the information that the PED provides.

## Oversight Through the Administrative Rules Process

The governor’s Rules Review Commission (RRC), is an independent agency whose members are appointed by the legislature. It is organized under the Office of Administrative Hearing, which is a quasi-judicial agency. Five of the commissioners are appointed by the speaker of the house and five appointed by the senate pro-tempore. The RRC provides reports to committees in the legislature, however, there is no legislative authority over the commission.

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<sup>28</sup> <https://www.ncleg.net/PED/Reports/documents/2018%20Legislation/2018Legislation.pdf>, accessed 12/28/18

The commission has one charge, which is to review executive agency rules. The RRC is forbidden from reviewing rules using efficacy or quality criteria. The scope for review is narrow. The RRC uses four standards to review rules (G.S. 150B-21.9)<sup>29</sup>:

- Authority – does the agency have delegated authority for rulemaking from the legislature
- Clarity – is the rule clear
- Necessity – is the rule necessary for the agency to fulfil its duties
- Compliance – did the agency comply with procedural requirements for rulemaking

The organization of the RRC, appointed by the legislature but housed in an executive agency, has come under scrutiny as a separation of powers issue. It has been argued that the RRC is not a hybrid agency, but a legislative agency and should not be allowed to review rules for the executive branch. This was challenged in a case that went to the North Carolina Supreme Court in case between the governor and legislative leadership (*McCrory v. Berger*).<sup>30</sup> The focus of the case was on the legislative authority to make appointments to executive branch agencies. However, the court also determined, in what is referred to as ‘Footnote 7,’ that the RRC passes constitutional muster (interview notes, 2018).

The RRC has the authority to block the filing of new rules and regulations independently. However, agencies may rewrite and resubmit a rule to the RRC to address the objectionable concerns. It is not typical for the RRC to issue rejections (interview notes, 2018). When a rule is rejected, the commission is required to write a letter to the agency indicating the exact reason for the objection. If an agency does receive a rejection, it is typical for them to submit a rewrite. In the last five years, there have only been two times that an agency decided not to rewrite a rule (interview notes, 2018).

The RRC holds public meetings where rules are considered. Although the public can attend, there is no statutory requirement for the commission to allow the public to participate. The RRC does have rules in place for individuals to follow if they would like to speak at a scheduled meeting. If someone would like to speak, who has not followed the process, it is typical for the RRC to still allow him or her to speak. “The RRC loves when the public comes” (interview notes, 2018). At times, the public input has been the driver of the final decision on a rule (interview notes, 2018). In June 2018, the commission was reviewing a set of rules for the Division of Health and Human Services Division of Medical Assistance, which manages the State Medicaid program. A staff attorney previously reviewed the rules and recommended adopting them. Someone from the public attended the meeting and indicated that there was a problem with 12 of the rules. The RRC subsequently objected to eight of the rules.<sup>31</sup>

The Office of Administrative Hearings produces reports on administrative rules reviewed in the present fiscal year. During the 2017-2018 fiscal year, 863 permanent administrative rules were reviewed, either as new rules or via a mandatory reauthorization process. Of the 863 reviews, a sizable minority 382 were rule changes, which resulted in 102 being adopted. The remaining 481 rules were existing rules considered for re-adoption by the RRC: 267 of which were repealed, 142 were amended, and 72 were readopted. Only 12 rules required additional legislative approval.

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<sup>29</sup> [https://www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter\\_150B/GS\\_150B-21.9.pdf](https://www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_150B/GS_150B-21.9.pdf), accessed 10/10/18.

<sup>30</sup> <https://appellate.nccourts.org/opinions/?c=1&pdf=33969>, accessed 10/10/18.

<sup>31</sup> <https://www.ncoah.com/rules/rrc/Minutes%20June%202018%20-%20Signed.pdf>, accessed 10/10/18.

When the RRC blocks a rule from being implemented because it is not within the statutory authority of the agency, the rule is referred to the Joint Administrative Procedure Oversight Committee. That committee considers what statutory changes they want to make, if any.

In addition to their regular role of oversight through lawmaking, administrative rules are subject to legislative review if any 10 people file written objections to the rule. The signatures are not verified and there is no check to see if the persons are real or reside in the state. The receipt of 10 letters is communicated to the legislature as the whole or to the oversight committee. The legislature has to act. The letters are submitted to the legislature as a report. The receipt of the letters makes a rule eligible for legislative review; it does not mean the legislature will review it. Usually an individual or organization will use a lobbyist to find a legislator to sponsor the rule(s) to get killed. A kill bill must be introduced. However, it is very rare for a kill bill to be introduced (interview notes, 2018).

### Oversight Through Advice and Consent

The 2016 “legislative coup” previously discussed entailed an extensive conflict between the current governor (even before he obtained governorship) and the legislature. Much of the conflict involved gubernatorial appointments to the State Board of Elections, which the legislature tried to merge with the Ethics Enforcement Commission. From 2016 to 2018, Governor Roy Cooper issued four lawsuits against the legislature— all of which challenged the various provisions of bills that limited the governor’s appointment powers. The courts on some counts judged these legislative actions to be an unconstitutional violation of the separation of powers clause of the constitution. The legislature in response attempted to amend the state’s constitution through ballot initiatives, which voters rejected in 2018.

Despite the ongoing political conflict between the legislature and the governor, the legislature in 2018 acted on some - although still a minority - of the governor’s appointments. For instance, after a year of waiting the legislature voted on three appointments to the State Board of Education: two were voted down and one, a reappointment, was confirmed. The governor’s nominees for the special superior court and for the North Carolina Industrial Commission were rejected. A nominee to the Industrial Commission was confirmed (Fain, 2018). This appears to be unusual because, as an interviewee told us, “more often than not” gubernatorial appointees are confirmed (interview notes, 2018).

North Carolina does not keep archived videos of legislative meetings, which makes it difficult to gauge why the legislature chose to reject these appointments. On the note of the rejected superior court and Industrial Commission appointees, a legislator remarked that, since the governor’s administration did not “consult legislators before naming his appointees... [it] ‘bothered a number of people’” (Fain, 2018).

The legislature is also being sued over a law that grants some of the State Board of Education’s authority to Superintendent Mark Johnson (R) (Bonner, 2018). It is apparent that the legislature is currently using its lawmaking authority as well as its advice and consent powers in an attempt to weaken the power of the governor and the executive branch more generally. Although these actions may be viewed as a form of oversight, their motivation and timing suggest that they are partisan actions.

North Carolina’s governor can issue executive orders to accomplish a wide range of the purposes, including emergencies, executive branch reorganization, and policy goals. The only restriction on the governor’s authority to issue these orders is that he or she must submit copies

of these orders to the leaders of each legislative chamber. As an example, in October of 2018, Gov. Cooper issued executive order 80, which sets a target of a 40 percent reduction in the state's greenhouse gas emissions by 2025.

The power to reorganize state government is shared by both the legislative and executive branches. The General Assembly establishes the functions, powers and duties of administrative departments and agencies, but the governor can change the allocation of those functions, powers and duties to improve administrative efficiency. If any gubernatorial change affects existing laws, then the governor issues an executive order making the change and submits the order to the general assembly on or before the sixth day the legislative session. This executive order has the force of law at the end of the legislative session unless it is rejected by either chamber or modified by a joint resolution of both chambers (Article III, Section 5(10) of the State Constitution). Gov. Cooper's announcement that he planned to expand Medicaid through executive action triggered legal action by the legislature, which was later dropped when the governor did not file a plan to implement such an expansion.<sup>32</sup>

## Oversight Through Monitoring of State Contracts

The Secretary of Administration and the State Chief Information Office are responsible for purchasing oversight.<sup>33</sup> However, there are mechanisms in place that stipulate legislative review of contracts that meet certain criteria. The State Procurement Officer is required by statute to report all contract awards greater than \$25,000 and the number of contracts that are anticipated to be performed outside of the United States to the Joint Legislative Committee on Governmental Operations ((G.S. 143-52.1(e); G.S. 143-59.4(b)).<sup>34</sup> For contracts greater than \$25,000, the report must include "the amount of the award, the award recipient, the using agency, and a short description of the nature of the award" (G.S. 143-52.1(e)).

Outside of these reporting requirements, the legislature has no oversight authority over contracts in the state. However, the legislature has used other means to facilitate oversight over state contracts. In 2015, the work plan of the Program Evaluation Division (PED) required an examination of the use of personal services contracts<sup>35</sup> by state agencies and the University of North Carolina institutions. Because of the evaluation, the PED recommended the State eliminate the use of Personal Services Contracts in favor of using existing mechanisms and recommended to the general assembly that it pass legislation necessary to prohibit this form of purchasing.<sup>36</sup> The outcome was enacted legislation that mandates that personal services contracts for executive branch agencies be subject to the same procurement rules in place for services, that renewal of information technology contracts require review, and that agencies utilize temporary employees through the Temporary Solutions Program administered through the Office of State Human Resources (S.L. 2015-241, Section 26.2).<sup>37</sup>

A 2015-2016 audit of the Department of Health and Human Services revealed that one third of contracts during 2011-2014 were awarded as no-bid contracts. These contracts have a

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<sup>32</sup> <https://www.advisory.com/daily-briefing/resources/primers/medicaidmap>, accessed 12/27/18

<sup>33</sup> [https://files.nc.gov/ncdoa/pandc/Documents/Contract-Administration-and-Monitoring-Guide/Procurement\\_Manual\\_5\\_8\\_2013\\_interactive.pdf](https://files.nc.gov/ncdoa/pandc/Documents/Contract-Administration-and-Monitoring-Guide/Procurement_Manual_5_8_2013_interactive.pdf), accessed 10/10/18.

<sup>34</sup> [https://www.ncleg.net/EnactedLegislation/Statutes/PDF/ByArticle/Chapter\\_143/Article\\_3.pdf](https://www.ncleg.net/EnactedLegislation/Statutes/PDF/ByArticle/Chapter_143/Article_3.pdf), accessed 10/10/18.

<sup>35</sup> Personal services contracts are contracts for services with an individual on a temporary or occasional basis and, in most cases, are exempt from procurement rules.

<sup>36</sup> [https://www.ncleg.net/PED/Reports/documents/PSC/Personal\\_Services\\_Contracts\\_Final.pdf](https://www.ncleg.net/PED/Reports/documents/PSC/Personal_Services_Contracts_Final.pdf), accessed 10/10/18.

<sup>37</sup> [https://www.ncleg.net/PED/Reports/2017/PSC\\_Follow.html](https://www.ncleg.net/PED/Reports/2017/PSC_Follow.html), accessed 10/10/18.

total value of \$2.4 billion. The audit was completed by the State Auditor, as the PED has no audit authority. However, the audit was initiated by a request from the Joint Legislative Program Evaluation Oversight Committee (Craver, 2016).

These actions indicate legislative interest in overseeing the effective and efficient use of state contracts to deliver government services. Recently passed legislation provides the legislature with more prerogatives in this area than is true in most states. But this is still an area that is primarily under the jurisdiction of the executive branch, in this case the state auditor.

### Oversight Through Automatic Mechanisms

Sunset laws put in place in North Carolina in 1977 were repealed in 1981 and the subsequent Legislative Committee on Agency Review ended in 1983 (Baugus and Bose 2015). However, a regulatory reform passed in 2013 did add a sunset provision with a periodic review (S.L. 2013-413, 150B-21.3A(c)).<sup>38</sup> The statute indicates that each agency must conduct a review of existing rules at least once every 10 years and provide a report to the RCC. Any rules for which a scheduled review has not been conducted, will expire on the date set in the schedule. This change was enacted through legislation; however, it is under the auspices of the RCC, which is structured under the executive branch.

## Methods and Limitations

Out of the 10 people that we contacted, we interviewed 3 people about oversight in North Carolina. There are no archived recordings available for committee hearings in either legislative chamber, so it is difficult to be confident of our assessment of the quality of the oversight.

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<sup>38</sup> <https://www.ncleg.net/Sessions/2013/Bills/House/PDF/H74v5.pdf>, accessed 10/10/18.

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