

# **In the Dead of the Night: Examining the Constitutionality and Precedent for the North Carolina General Assembly’s Infamous “Midnight Session”\***

## **INTRODUCTION**

“Unprecedented,”<sup>1</sup> “unethical,”<sup>2</sup> “pure chicanery,”<sup>3</sup> “fundamentally unconstitutional”<sup>4</sup>: all of these phrases were used to denounce the now-infamous “midnight session” held by the North Carolina General Assembly on January 5, 2012. After being called into session by Governor Beverly Perdue on January 4 to consider overruling a gubernatorial veto of Senate Bill 9—a reformation of the Racial Justice Act (“RJA”)—the Republican leaders of the House of Representatives employed procedural gymnastics to permit the House to vote on and override the veto of another bill: Senate Bill 727 (“SB 727”), pertaining to the North Carolina Association of Educators’ (NCAE) ability to collect dues through payroll deductions.<sup>5</sup> Without question, the House leadership’s procedural<sup>6</sup> maneuvering (passing a resolution to commence a new legislative session in the dead of night) was surreptitious and lacking in transparency. But, after further inquiry, this Comment concludes that these actions were neither unconstitutional nor unprecedented.

This Comment will proceed as follows. Part I recounts the made-for-Hollywood tale of how SB 727 was ultimately passed. There are numerous players, factors, and underlying motivations, which must be unpacked for readers to fully appreciate the allegations lodged against the Republican leadership of the House of Representatives. Part II considers the procedural

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1. Laura Leslie, *House Overrides NCAE Bill Veto in Unprecedented Midnight Session*, WRAL.COM (Jan. 5, 2012), <http://www.wral.com/news/state/nccapitol/blogpost/10563086/>.

2. *Id.*

3. *Id.*

4. *Perdue Calls Republican Move ‘Revenge’; GOP Defends Move*, NBC17 (Jan. 5, 2012, 5:06 PM), <http://www2.nbc17.com/news/2012/jan/05/13/nc-lawmakers-override-another-perdue-veto-ar-1780477>.

5. *See infra* Part I.

6. To date, there have been three primary challenges to the constitutionality of this “midnight vote.” Two of the challenges can be considered “procedural” arguments and will be discussed in full in this Comment. *See infra* Part II. The third challenge pertains to the substance of SB 727 and claims that the General Assembly’s action discriminates against the NCAE. *See Verified Complaint at 9–15, N.C. Ass’n of Educators v. North Carolina*, No. 12CV000404 (N.C. Super. Ct. Jan. 9, 2012), [http://www.wral.com/asset/news/state/nccapitol/2012/01/09/10579795/Complaint\\_File-Stamped\\_.pdf](http://www.wral.com/asset/news/state/nccapitol/2012/01/09/10579795/Complaint_File-Stamped_.pdf) [hereinafter *Verified Complaint*]. This Comment will not analyze the merits of this “substantive” claim; instead, it will focus only on the “procedural” constitutional challenges.

constitutionality of the “midnight vote” based on the arguments made by the NCAE in its legal challenge to the legislature’s action. Part III examines other recent controversial actions taken by the North Carolina General Assembly to determine whether the “midnight vote” was in fact “unprecedented” and “a new low” for the legislative body, as some of its critics have decried.<sup>7</sup> And finally, Part IV briefly summarizes and concludes this Comment’s arguments.

### I. THE PASSAGE OF SENATE BILL 727

The seed of the conflict between the Republican leadership in the General Assembly and the NCAE was planted long before the start of the 2011–2012 legislative session, but it sprouted in June 2011 amidst a contentious battle over the Republican-sponsored state budget proposal. The budget included significant education cuts and was opposed by many Democrats, including a very vocal Governor Perdue.<sup>8</sup> Despite the opposition, the proposal easily passed the Senate, where Republicans could maintain a veto-proof majority simply by voting along party lines,<sup>9</sup> but the House Republicans needed to obtain the votes of at least four Democrats to do the same.<sup>10</sup> Through negotiation and agreement, Republicans convinced five Democrats to join them in voting for the budget<sup>11</sup> and initially passed the bill with a super-majority on June 3, 2011.<sup>12</sup> Governor Perdue vetoed the budget on June 12,<sup>13</sup> and the House—with the continued help of the five Democrats—overturned the veto on June 15.<sup>14</sup>

7. John Frank, *Late-Night Vote Denounced*, NEWS & OBSERVER (Raleigh), Jan. 6, 2012, at 1A (quoting Governor Beverly Perdue and Democratic Rep. Beverly Earle, characterizing the tactic as “an unprecedented, unconstitutional power grab” and “a new low,” respectively).

8. See Bruce Mildwurf, *Perdue Continues to Hammer on Education Cuts*, WRAL.COM (June 7, 2011), <http://www.wral.com/news/state/nccapitol/story/9697757> (discussing Governor Beverly Perdue’s objections to the proposed Republican budget).

9. Indeed, the Senate overrode Perdue’s veto by a party-line thirty-one to nineteen margin. Bruce Mildwurf, *Senate Completes Override of Budget Veto*, WRAL.COM (June 15, 2011), <http://www.wral.com/news/state/nccapitol/story/9732350/>.

10. Bruce Mildwurf, *Democratic Defectors Still Back Vetoed NC Budget*, WRAL.COM (June 13, 2011), <http://www.wral.com/news/state/nccapitol/story/9722961/>.

11. See Lynn Bonner, *Republicans Mistakenly Broadcast Private Meeting, Leak Strategy*, NEWSOBSERVER.COM (June 3, 2011, 1:57 PM), [http://projects.newsobserver.com/under\\_the\\_dome/republicans\\_mistakenly\\_broadcast\\_private\\_meeting](http://projects.newsobserver.com/under_the_dome/republicans_mistakenly_broadcast_private_meeting).

12. Lynn Bonner, *N.C. House Passes Budget with Super-Majority*, NEWSOBSERVER.COM (June 3, 2011, 4:35 PM), <http://www.newsobserver.com/2011/06/03/1246198/nc-house-passes-budget-with-super.html>.

13. Laura Leslie, *Perdue Vetoes Budget*, WRAL.COM (June 12, 2011), <http://www.wral.com/news/state/nccapitol/blogpost/9718959/>.

14. *House Republicans Override Perdue Veto with Midnight Vote*, NEWSOBSERVER.COM (June 14, 2011, 6:50 PM), [http://projects.newsobserver.com/under\\_the\\_dome/democrats\\_house\\_republicans\\_to\\_hold\\_midnight\\_vote\\_to\\_override\\_perdue\\_veto](http://projects.newsobserver.com/under_the_dome/democrats_house_republicans_to_hold_midnight_vote_to_override_perdue_veto); see also Mildwurf, *supra* note 9 (reporting that the House

The perceived defection of the five representatives was very unpopular in the eyes of most of the Democratic base, especially those of the left-leaning NCAE.<sup>15</sup> The NCAE is one of the state's largest and most powerful interest groups, although it is not a union because it lacks collective bargaining power.<sup>16</sup> With over 60,000 members, the NCAE spent \$300,000 in 2010<sup>17</sup> and \$267,000 in 2008<sup>18</sup> to help elect Democratic legislators. It also has a history of opposing Republican proposals on voucher programs and charter school policy, among other issues.<sup>19</sup> Consequently, in the time between the initial vote on the budget on June 3 and the ultimate veto-override on June 15, the NCAE made use of its considerable resources and influence to induce the budget-supporting Democrats not to side with the Republicans—most notably by sending harshly-worded mailers to the home districts of each Democrat who voted for the budget.<sup>20</sup> Ultimately, the NCAE's efforts were fruitless, but they did enough to incite the House Republican leadership to take retaliatory action.

The Republican leadership's plans to exact revenge on the NCAE were hatched at the same time as the override of the budget veto and revealed in an embarrassing manner. During a closed-door caucus meeting convened for the purpose of planning the override of Governor Perdue's budget veto, the microphones were unintentionally left on and the audio was broadcast live to the legislative press room.<sup>21</sup> At the meeting, House Speaker Thom Tillis explained to his party that the House Rules Committee would take up a pending bill—separate from the budget—that would “give [the NCAE] a little taste of what's about to come . . . and they're going to be mad.”<sup>22</sup> The bill to which Tillis was referring, SB 727, eliminated the ability of NCAE members to pay their dues automatically via paycheck

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Republicans overrode Perdue's veto by a seventy-three to forty-six margin, which included the override votes of five Democrats). The House leadership scheduled a midnight vote to overturn that veto as well, which was “rare” but not scrutinized and criticized to the extent that the midnight vote on SB 727 was. *Id.*

15. See Bonner, *supra* note 11 (describing the NCAE's attempts to inspire political backlash among the five representatives' constituencies).

16. Lynn Bonner & Jim Morrill, *Teachers Group Says It Was in GOP's Sights*, NEWS & OBSERVER (Raleigh), Jan. 6, 2012, at 1A.

17. Rob Christensen, *Unlike NCAE, SEANC Escapes GOP's Scorn*, NEWS & OBSERVER (Raleigh), June 7, 2011, at 1A. The group was especially active in 2010 because they were attempting to counteract the nearly \$2 million that Raleigh businessman Art Pope spent to help put the GOP in power. *Id.*

18. See Bonner & Morrill, *supra* note 16.

19. See *id.*

20. See Bonner, *supra* note 11 (describing the NCAE mail-flood tactic); Bonner & Morrill, *supra* note 16.

21. See Bonner, *supra* note 11.

22. *Id.* Tillis had previously claimed on the record that the NCAE “[does not] care about kids. . . . They only care about their jobs and their pensions.” Bonner & Morrill, *supra* note 16.

deductions.<sup>23</sup> Opponents of the legislation, such as House Minority Leader Joe Hackney, criticized the bill as “inflicting political punishment,”<sup>24</sup> because, presumably, fewer NCAE members would pay money to the association if doing so required some sort of annual, affirmative act. SB 727 was ratified on June 9 in the midst of the budget debate,<sup>25</sup> but was vetoed by Governor Perdue, who called it “unfair and illegal.”<sup>26</sup> The Senate overrode the veto in mid-July,<sup>27</sup> but the House did not take action on it before the 2011 legislative session concluded.<sup>28</sup> As such, the stage was set for the drama of the “midnight vote” to unfold.

Because the Governor has ten days to veto a bill once it is ratified,<sup>29</sup> the North Carolina Constitution provides a method for the legislature to override the veto if the Governor issues it after the legislature has adjourned: the Governor must reconvene the legislative session on an agreeable date if the legislature notifies the Governor that it has the votes to overturn the veto.<sup>30</sup> Seven months after vetoing SB 727, Governor Perdue convened a special session on January 4, 2012, in order to allow the General Assembly to reconsider her veto of SB 9, a bill reforming the RJA.<sup>31</sup> At 8:00 that evening, lacking the votes to overturn the veto, the

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23. Bonner & Morrill, *supra* note 16.

24. See Chris Jarvis, *Tillis Not Backing Down from NCAE Fight*, NEWSOBSERVER.COM (June 9, 2011, 11:45 AM), [http://projects.newsobserver.com/under\\_the\\_dome/tillis\\_not\\_backing\\_down\\_from\\_ncae\\_fight](http://projects.newsobserver.com/under_the_dome/tillis_not_backing_down_from_ncae_fight); see also Bonner and Morrill, *supra* note 16 (“Leaders of the [NCAE] said they will claim retaliation when they go to court to kill a law that could hurt membership in the influential organization.”). This sort of automatic dues deduction is not unique to the NCAE. In fact, the state’s largest employee organization, the State Employees Association of North Carolina (SEANC), also collects dues through payroll deductions. See Laura Leslie, *Legal Experts Split On NCAE Challenge*, WRAL.COM (Jan. 9, 2012), <http://www.wral.com/news/state/nccapitol/blogpost/10580263/>.

25. Univ. of N.C. at Chapel Hill Sch. of Gov., DAILY BULL., June 9, 2011, at 1, 2 (noting that SB 727 passed its third reading in the House and was ratified by the Senate).

26. See Craig Jarvis & Lynn Bonner, *N.C. Senate Overrides All 6 Vetoes*, NEWS & OBSERVER (Raleigh), July 14, 2011, at 1A; see also Memorandum from Governor Beverly Eaves Perdue to Clerk of the N.C. Senate (June 18, 2011) [hereinafter *Veto Message*], <http://www.ncleg.net/sessions/2011/S727Veto/govobjections.pdf>.

27. Jarvis & Bonner, *supra* note 26 (noting that the vote was thirty to eighteen to override). It should be noted that concerns regarding the timing of when the House is required to override a veto is one of the constitutional challenges that has been brought forward. See *infra* Part II(b). Opponents of the House’s action contend that there is an implied time limit establishing how quickly the legislature must take action to overturn a veto. See *infra* Part II(b).

28. See Leslie, *supra* note 1; see also S.J. Res. 793, 2011–2012 Gen. Assemb., Reg. Sess. (N.C. 2011) (adjourning the 2011 regular session on November 7, 2011).

29. See N.C. CONST. art. II, § 22(7); *id.* art. III, § 5(11).

30. *Id.* art. II, § 22(7); *id.* art. III, § 5(11).

31. Proclamation of Reconvened Session from Governor Beverly Eaves Perdue to Clerk of the N.C. Senate (Dec. 20, 2011) [hereinafter *Proclamation*], <http://www.ncleg.net/News/SB9ProclamationForReconvene.pdf>.

House voted to send the RJA to a committee for further study,<sup>32</sup> but the legislature did not adjourn.<sup>33</sup> Over the next several hours the legislature was idle, and the legislators watched a college football game on the monitors in the House chamber.<sup>34</sup> At 10:30, two Democrats went home for the night,<sup>35</sup> giving the Republicans an opening to act.

Technically, the North Carolina Constitution prevents the legislature from considering any other bills during a special session besides those for which the session was specifically convened.<sup>36</sup> Consequently, the House was prohibited from considering any other bills during the special session except for the RJA reform bill. To maneuver around this, the House passed a resolution at 11 PM on January 4 to commence a new session at 12:45 AM on January 5,<sup>37</sup> intended to allow the legislature to vote and attempt to override the Governor's veto of SB 727—the NCAE dues bill.<sup>38</sup> The legislature then adjourned, “reconvening” for the new special session a few hours later at 12:45 AM.<sup>39</sup> Taking advantage of the departure of the two aforementioned Democrats, the Republicans gathered the necessary supermajority<sup>40</sup> to overturn the veto on the NCAE bill.<sup>41</sup> At an early-

32. See Bonner & Morrill, *supra* note 16. The Senate easily overturned the veto, but the House did not have the necessary votes to follow suit. See *id.* An additional factor adding to the drama of the day was Governor Perdue's confirmation of Republican Representative Trudi Walend. John Frank, *GOP Overrides Veto of Bill to Weaken Teachers Group*, NEWSOBSERVER.COM (Jan. 5, 2012), <http://www.newsobserver.com/2012/01/05/1754535/gop-passes-late-night-bill-to.html>. Walend was previously appointed to replace another Republican who had resigned. *Id.* The Republican leadership was eager to get Walend appointed to give them the necessary votes to overturn the RJA. *Id.* Democrats have since claimed that they agreed to petition Governor Perdue to speed up her appointment timeline if the Republicans would agree to only consider the RJA. *Id.*

33. See Bonner & Morrill, *supra* note 16.

34. *Id.*

35. *Id.* One of the Democrats was eighty-six years old and went home because of exhaustion; the other left because of an illness. *Id.*

36. See *infra* Part II(A).

37. S.J. Res. 794, 2011–2012 Gen. Assemb., Spec. Sess. (N.C. 2012) (“[d]uring the regular session that reconvenes on Thursday, January 5, 2012, at 12:45 . . .”).

38. See *id.* (limiting the purpose of the reconvened session to a consideration of “[b]ills returned by the governor with her objections under Section 22 of Article II of the North Carolina Constitution, but solely for the purpose of considering overriding the veto upon reconsideration of the bill”). At 12:15 AM, Republican leadership published the calendar for the session listing several vetoed bills they would consider overriding. Bonner & Morrill, *supra* note 16. Apparently, they only had the numbers to address SB 727. *Id.*

39. See Bonner & Morrill, *supra* note 16.

40. N.C. CONST. art. II, § 22(1) (“If after [a veto] three-fifths of the members of [one] house present and voting agree to pass the bill, it shall be sent . . . to the other house . . . and if approved by three-fifths of the members of that house . . . it shall become a law notwithstanding the objections of the governor.”).

41. Bonner & Morrill, *supra* note 16. The bill passed by a sixty-nine to forty-five vote. *Id.* If there had been two more nay votes, which is presumably how the absent Democrats would have voted, the vote would have been sixty-nine to forty-seven, which does not produce the required three-fifths ratio. See *infra* note 77.

morning press conference, both Governor Perdue and the Democratic leadership issued statements lambasting the Republicans' tactics.<sup>42</sup> Four days later, on January 9, 2012, the NCAE filed a complaint in Wake County Superior Court alleging that SB 727 and the legislative tactics employed on January 4 and January 5 violated the North Carolina Constitution.<sup>43</sup>

## II. THE CONSTITUTIONALITY OF THE GENERAL ASSEMBLY'S ACTIONS

### A. *Resolution v. Bill*

The first allegation brought forth in NCAE's complaint is based on article II, section 22(7) of the North Carolina Constitution. The complaint argues that the constitution limits action in special sessions, asserting that "the General Assembly may only consider such bills as were returned by the Governor to that reconvened session for reconsideration."<sup>44</sup> Additionally, according to the complaint, only the Governor, not the legislature, has ability to call the General Assembly to a special session.<sup>45</sup> The legislature is also limited to acting only on the specific bill(s) for which the session was called, as the constitution holds that "[a]t such reconvened session, the General Assembly may only consider such bills as were returned by the Governor to that reconvened session for reconsideration."<sup>46</sup> However, the North Carolina Constitution also gives the General Assembly wide authority to set its own adjournment schedule, granting "the two houses" the power to "jointly adjourn to any future day or other place."<sup>47</sup> There are no temporal restrictions or descriptions as to when a "future day" might be, and no apparent caveats regarding the original purpose of the session from which the chambers "adjourn."<sup>48</sup> Once the body has gathered, it may pass resolutions to convene and adjourn as it wishes,<sup>49</sup> which is precisely what it did on January 4.

On December 20, 2011, Governor Perdue issued a "Proclamation of Reconvened Session," stating that the "General Assembly shall reconvene on Wednesday, January 4, 2012, at 2:00 p.m. to reconsider Senate Bill 9,

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42. See Frank, *supra* note 7 (reporting the protests of Governor Perdue and Rep. Beverly Earle).

43. See Verified Complaint, *supra* note 6, at 1.

44. *Id.* at 10 (quoting N.C. CONST. art. II, § 22(7)).

45. N.C. CONST. art. III, § 5(11) ("The Governor shall, when required by Section 22 of Article II of this Constitution, reconvene a session of the General Assembly."); see also Verified Complaint, *supra* note 6, at 10.

46. N.C. CONST. art. III, § 5(11); see also Verified Complaint, *supra* note 6, at 5.

47. N.C. CONST. art. II, § 20.

48. See *id.*

49. See *id.*

‘*An Act to Reform the Racial Justice Act of 2009...*’<sup>50</sup> The aforementioned relevant provision in article II, section 22(7)—limiting the General Assembly’s ability to act on matters outside of the specific purpose for the reconvened session—is straightforward and lacks interpretational controversy. A search fails to turn up a single appellate case in North Carolina that addresses this provision. It is safe to assume, then, that the General Assembly was barred from voting on any other bills during the special session on January 4, and it refrained from doing so.<sup>51</sup> What it *did* do, however, was to take the opportunity to pass a *resolution* adjourning the special session and scheduling a reconvention of the regular session for the next day.<sup>52</sup> This particular act allowed the House to employ the power clearly vested in it by the constitution to reconvene “at any future day,”<sup>53</sup> no longer restricted by the limitations on conduct and business imposed on special sessions.

The resolution also provided that upon the adjournment of the January 5 regular session, the body would not reconvene again until February 16, 2012—the previously scheduled reconvention date.<sup>54</sup> This allowed for the commencement of a one-day regular session, and it permitted the House to circumvent the procedural limitations of the constitution. It was “crafty” and “sneaky,” but it was constitutional.<sup>55</sup>

One might object that the “future day” language was placed in the text to ensure at least one day’s notice to the public that there would be a legislative session. Indeed, this was a principal complaint lodged by Democratic Representative Rick Glazier, who lamented that “there was no right to flip into a new session and take up a matter with no notice to the public.”<sup>56</sup> However, there is not a “public notice” requirement in the constitution; there is only the “future day” requirement,<sup>57</sup> which the House clearly abided by. The late-night timing of this maneuver might well violate the “spirit” of the law, but the “letter” of the law was complied with.

#### B. “*Proceed to Reconsider*”

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50. Proclamation, *supra* note 31.

51. As stated previously, the House only considered the RJA reform bill and ultimately assigned it to a committee. *See supra* note 32 and accompanying text.

52. *See* S.J. Res. 794, 2011–2012 Gen. Assemb., Spec. Sess. (N.C. 2012).

53. N.C. CONST. art. II, § 20.

54. *See* N.C. S.J. Res. 794.

55. Laura Leslie, *Late-Night Legislation: Crafty, Sneaky, Legal?*, WRAL.COM (Jan. 9, 2012), <http://www.wral.com/news/state/nccapitol/story/10579383/> (quoting North Carolina Institute for Constitutional Law Executive Director Jeannette Doran as calling the bill “probably a little crafty, a little sneaky, but . . . constitutional”).

56. Leslie, *supra* note 24.

57. *See* N.C. CONST. art. II, § 20.

The other procedural constitutional challenge to the tactics employed during the special session centers on the language found in article II, section 22(1) of the North Carolina Constitution.<sup>58</sup> The relevant provision states that when the Governor vetoes a law, it should be returned to the house in which the law originated, and that body shall “proceed to reconsider it.”<sup>59</sup> If three-fifths of the originating chamber chooses to override the veto, then the bill should “likewise be reconsidered” by the “other house.”<sup>60</sup> If three-fifths of the members of that house decide to override the veto, then the bill “shall become a law notwithstanding the objections of the Governor.”<sup>61</sup> The NCAE’s complaint notes that Governor Perdue vetoed the bill on June 18, 2011, and that the Senate (the originating body for SB 727) overrode the veto on July 12, 2011, but that the House did not vote on the measure then or at any other time before adjournment.<sup>62</sup> The complaint asserts that the “proceed to reconsider” language requires the “General Assembly” to take up the vetoed bill in either the next special session called by the Governor for the purpose of considering the veto or the next regular session after the veto is issued.<sup>63</sup> Since the House did not “reconsider” the veto until January 5,<sup>64</sup> the complaint concludes that the constitution was violated because the House failed to consider the bill in a timely fashion.<sup>65</sup>

This argument has two flaws. The first and most glaring is that a search of case law reveals absolutely no North Carolina decision interpreting the “proceed to reconsider” language as including a temporal limitation. Moreover, no time frame needs to be established for the “proceed to reconsider” requirement because all bills that are not enacted by the end of a formal legislative session die.<sup>66</sup> Since each legislative session only lasts two years, there is a limited window in which a bill can pass through the legislature.<sup>67</sup> If the legislature fails to gain the votes

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58. See Verified Complaint, *supra* note 6, at 14–15.

59. N.C. CONST. art. II, § 22(1).

60. *Id.*

61. *Id.*

62. See Verified Complaint, *supra* note 6, at 14–15.

63. *Id.* at 14.

64. See *id.* at 15 (“Having failed to ‘proceed to reconsider’ the vetoed NCAE Bill at its July 13, 2011 Session, the . . . House . . . purported to do so at the Midnight Session, after an intervening six months and multiple Sessions.”).

65. *Id.*

66. H.R. Res. 19 (Rule 42), 2011–2012 Gen. Assemb., Reg. Sess. (N.C. 2011), <http://www.ncleg.net/Sessions/2011/Bills/House/PDF/H19v3.pdf> (“[A]fter a bill has: (1) Been tabled, (2) Been postponed indefinitely, (3) Failed to pass on any of its readings, or (4) Been placed on the unfavorable calendar, the contents of that bill or the principal provisions of its subject matter shall not be considered in any other measure originating in the Senate or originating thereafter in the House.”).

67. See *id.*



needed to pass a bill or to overturn a veto, a new bill has to be recreated in the next legislative session, and the process starts over.<sup>68</sup> Overriding a veto is no different. A vetoed bill will die at the end of a legislative session—just like a bill that failed to pass through the legislature.<sup>69</sup> Thus, there is no reason to “read in” a temporal limitation to the “proceed to reconsider” language because there is already one in place: the general two-year term for which the legislature is elected. If the dynamics, opinions, and make-up of a legislative body change during that two year time frame, and a previously vetoed bill suddenly has the votes to be overturned via a three-fifths majority, there is no reason to believe this is incongruent with the language and concept of “proceeding to reconsider.” Moreover, the practical effect of this would be no different than if the legislature simply went to the effort of introducing a new piece of legislation on the same issue. If the votes are there, it is inconsequential whether the legislation is passed through a veto-override or through a new bill.

The second flaw with the complaint’s allegation is that the “proceed to reconsider” language does not apply to the entire General Assembly. The complaint twice asserts that the “General Assembly was required to ‘proceed to reconsider’ ” the veto,<sup>70</sup> and also claims that the “[House of Representatives] failed to ‘proceed to reconsider’ ” the veto.<sup>71</sup> However, the specific constitutional language only requires that the “*house in which [the bill] . . . originated . . .* proceed to reconsider it.”<sup>72</sup> If the originating house successfully overrides the bill, the constitution states simply that the “other house . . . shall . . . reconsider[] [it].”<sup>73</sup> Consequently, the Senate, the originating body of SB 727, would be required to “proceed to reconsider” the bill. The House, the non-originating body, is only tasked with “reconsider[ing]” the bill.<sup>74</sup> Therefore, even if there were a timeliness requirement inherent in the word “proceed,” it would only apply to the Senate, not the House, and the complaint concedes that the Senate satisfied

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68. *See id.* For this reason, it is exceedingly common to see substantively similar bills introduced session after session. For example, there were at least four different lottery bills created over a twelve-year span between 1993 and 2005. *See* H.B. 59, 1993–1994 Gen. Assemb., Reg. Sess. (N.C. 1993); S.B. 21, 1999–2000 Gen. Assemb., Reg. Sess. (N.C. 1999); H.R.B. 1218, 2001–2002 Gen. Assemb., Reg. Sess. (N.C. 2001); S.B. 1095, 2005–2006 Gen. Assemb., Reg. Sess. (N.C. 2005).

69. *See* N.C. CONST. art. II, § 22(1). This section describes the veto process and makes clear that the only way to circumvent a veto is through a three-fifths majority. *Id.* While not expressly stated, the clear implication of such language is that the veto will stand, and the bill will be defeated, if the legislature does not have the votes to override it. *See id.*

70. Verified Complaint, *supra* note 6, at 14.

71. *Id.*

72. N.C. CONST. art. II, § 22(1) (emphasis added).

73. *Id.*

74. *Id.*

all of the procedural requirements.<sup>75</sup> The House, which was not compelled to “proceed to reconsider” the bill, clearly did “reconsider” the bill during the midnight session on January 5, in full compliance with any interpretation of the state constitution.

### III. WAS THE LEGISLATIVE ACTION UNPRECEDENTED?

Perhaps the most disreputable aspect of the Republican leadership’s tactic was that two Democratic Representatives went home before the NCAE vote was cast.<sup>76</sup> If the two Democrats had been present for the vote, the Republicans would only have had a fifty-nine percent majority,<sup>77</sup> not the sixty percent necessary for the NCAE override.<sup>78</sup> Thus, without the legislative trickery employed, which was assuredly unanticipated by the representatives who left early, Republicans would likely not have been able to override SB 727.<sup>79</sup> The media and critics have roundly denounced the action.<sup>80</sup> However, it must be asked: was this truly unprecedented? Was it “a disgrace to [the legislature] and to the nine and a half million people in [North Carolina]?”<sup>81</sup> Was the transparency of the North Carolina General Assembly in “a worse place than we’ve ever seen before?”<sup>82</sup> Were the actions “a new low” for the legislature?<sup>83</sup> The answer to each of these questions is no.

It should first be noted that legislators are frequently absent for votes,<sup>84</sup> so voting without the two Democrats was not a particularly

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75. See Verified Complaint, *supra* note 6, at 14 (“The Senate ‘proceeded to reconsider’ the vetoed NCAE bill at its July 13, 2011 Session, but the House did not.”).

76. See *supra* note 35 and accompanying text.

77. The final vote was sixty-nine to forty-five. Bonner & Morrill, *supra* note 16. This gave Republicans sixty-nine out of 114 total votes, which amounts to .605, or exactly three-fifths. If you increase the number of total votes by two, for the absent Democrats, Republicans would have had sixty-nine of 116 votes, which amounts to .595—less than the three-fifths majority needed.

78. See *supra* text accompanying notes 60–61.

79. This conclusion is based on two factors. First, the Republicans lacked the votes to override the veto during the summer regular session when the Senate overrode it. See *supra* note 28 and accompanying text. There would be no need for controversial, furtive action if they had the votes to do it at a normal time. Second, the Democrats had the numbers and manpower to prevent the vote in the summer, and they made sure they had the numbers needed to block the override of the RJA before the two representatives went home on January 4. See Leslie, *supra* note 1. Consequently, the Democrats were clearly trying their hardest to make sure that they always had the necessary numbers in session to prevent veto overrides.

80. Leslie, *supra* note 1.

81. *Id.* (quoting Democratic Sen. Josh Stein).

82. Frank, *supra* note 7 (quoting Bob Phillips, executive director of Common Cause of North Carolina).

83. *Id.* (quoting Democratic Rep. Beverly Earle).

84. See *House Member Vote Statistics*, N.C. GEN. ASSEMBLY, <http://www.ncleg.net/gascripts/voteHistory/MemberVoteStatistics.pl?sSession=2011&sChamber=H> (last visited Sept. 26, 2012) (showing the voting breakdown for all House members in the 2011–2012 session). Even Representative Alma Adams, who recorded a vote ninety-nine percent

underhanded technique in and of itself. Indeed, the Democrats amounted to just two of six total legislators absent that evening.<sup>85</sup> Also, as noted previously, late-night votes are not altogether unprecedented.<sup>86</sup> However, aside from this, one need only look to two events that occurred in the past ten years to find similar examples of political maneuvering.

First, in 2005, the North Carolina Senate passed a very controversial bill establishing a state lottery.<sup>87</sup> The Democrat-controlled House passed the bill, but the Senate could not muster enough votes to pass it before the legislature adjourned in mid-August.<sup>88</sup> The Senate leadership told members of the body that the legislative session was over and no further matters would be addressed.<sup>89</sup> One member relied upon this information to go on his honeymoon,<sup>90</sup> and another was immobilized by a leg injury after the session let out.<sup>91</sup> Armed with this information, the Senate Democrats reconvened less than a week after they adjourned to vote on the lottery bill one more time.<sup>92</sup> The two absent Republicans shifted the majority, and the Democrats passed the bill by a single vote.<sup>93</sup>

The Republicans were “vocally livid” after the bill passed, calling for protest votes against the Senate’s leadership.<sup>94</sup> One senator called the lottery a “fleecing” of the people of North Carolina,<sup>95</sup> and a vocal religious leader called the passage an “unholy trinity of votes [that] . . . has deeply corrupted State government.”<sup>96</sup> There were even constitutional questions as to the procedures employed by the leadership to get the bill passed in only

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of the time she was eligible, did not vote in fifty-seven of the 1801 total votes. *Id.* On the other side of the spectrum, Representative Dale Folwell only voted eighty-one percent of the time, missing 369 votes. *Id.*

85. There are 120 members of the House. N.C. CONST. art. II, § 4. One hundred and fourteen of them voted on the RJA on January 4. *See supra* note 77 and accompanying text.

86. *See supra* note 14.

87. Eric Johnson, *North Carolina Passes Lottery*, DAILY TAR HEEL, Aug. 5, 2011, at 1, available at [http://www.dailytarheel.com/article/2005/08/north\\_carolina\\_passes\\_lottery](http://www.dailytarheel.com/article/2005/08/north_carolina_passes_lottery).

88. *See id.*

89. *Id.* (quoting Republican Sen. Fred Smith as complaining, “[w]e were told last week that we were going to adjourn and we were not coming back”).

90. *Id.*

91. *Id.*

92. *See id.*

93. *Id.* With the two aforementioned absences, the fifty-person body voted twenty-four to twenty-four on the measure, but (ironically) then-Lieutenant Governor Beverly Perdue cast the tiebreaking vote to pass the legislation. *Id.*

94. *Id.*

95. Mark H. Creech, *North Carolina Enacts a State Lottery*, RENEWAMERICA (Sept. 12, 2005), <http://www.renewamerica.com/columns/creech/050912> (quoting Sen. Jim Jacumin).

96. *Id.*

one day.<sup>97</sup> These tactics and the resulting public outcry perfectly mirror the circumstances surrounding the passage of SB 727.

The second scenario unfolded in 2006 and 2007, when Jim Black, the revered, multi-term Speaker of the House of Representatives, resigned from office and pled guilty to accepting illegal gratuities and obstruction of justice.<sup>98</sup> Black was charged with illegally accepting corporate contributions in exchange for pushing through certain pieces of legislation, for which he was ultimately sent to jail.<sup>99</sup> Black's other actions, though, are more relevant to this Comment. In 2003, the House had fifty-nine Democrats and sixty-one Republicans.<sup>100</sup> However, before the legislative session began, Republican Michael Decker switched his party affiliation.<sup>101</sup> This resulted in an even split between Republicans and Democrats and was directly responsible for keeping Black in power as the Speaker of the House.<sup>102</sup> It turns out that Decker and Black conspired to create this arrangement: Decker received \$50,000 of campaign contributions and personal cash from Black, as well as a full-time staffer, in exchange for his cooperation.<sup>103</sup> To further demonstrate how transparently corrupt this scheme was, Decker switched his party affiliation back to Republican after the 2003 legislative session.<sup>104</sup> The outcome of this scandal included jail sentences, plea bargains, fines, and personal embarrassment for all parties involved.<sup>105</sup>

The events surrounding SB 727 pale in comparison to this corruption. To claim that the legislature has "hit a new low," is a "disgrace," and is in as bad of a place as the people of North Carolina have ever witnessed is hyperbolic at best and dishonest at worst. Comparing the "bad actions" of the legislature on January 5 with the bad actions of the legislature from 2003 to 2005 is comparing apples and oranges. The past misdeeds of the legislature were far more destructive, damning and depressing. North Carolina has seen worse, and the legislature has done worse. The actions of

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97. *Id.* The North Carolina Constitution requires certain bills to be read not only three separate times, but on three different days. See N.C. CONST. art. II, § 23. However, the Senate suspended the rules to dismiss this requirement. See Creech, *supra* note 95.

98. David Crabtree, *Ex-Speaker Black Pays Half of Fine in Corruption Case*, WRAL.COM (June 26, 2008), <http://www.wral.com/news/local/politics/story/3112211/>.

99. *Id.* Black received a sixty-three-month federal prison sentence. *Black Surrenders to Marshals*, WRAL.COM (July 30, 2007), <http://www.wral.com/news/local/politics/story/1648174/>.

100. Cullen Browder, *Black Pleads Guilty to Corruption Charge*, WRAL.COM (Feb. 15, 2007), <http://www.wral.com/news/local/politics/story/1203494/>.

101. *Id.*

102. *Id.* He was actually elected co-speaker with Representative Richard Morgan. *Id.*

103. Cullen Browder, *Decker Guilty Plea Points to Black in Alleged Scheme*, WRAL.COM (Aug. 1, 2006), <http://www.wral.com/news/local/story/1091956/>.

104. Browder, *supra* note 100.

105. See sources cited *supra* notes 98–103.

the legislature on January 5 were cunning and sneaky, but completely legal and completely precedented, and to claim otherwise is erroneous.

#### CONCLUSION

In sum, the Republican leadership of the House of Representatives engaged in very tricky “letter of the law” tactics on January 4 and 5, 2012. Their actions were far from transparent government and forthrightness. These actions may not sit well with the members of the General Assembly who felt manipulated and betrayed; they also may not sit well with much of North Carolina’s general population who long for openness in government; they certainly do not sit well with the NCAE. Nonetheless, the legislative maneuvering of the midnight session was far from unconstitutional.

The Republican leadership appropriately called a new, general legislative session through a joint resolution and overrode Governor Perdue’s veto. They did not violate the constitutional mandate limiting the bills that may be considered in special sessions, and they did not exceed their power to adjourn and reconvene freely. Moreover, constitutional challenges regarding the “proceed to reconsider” language in article II are misplaced because no North Carolina court has ever ruled that this “key” language implicates a temporal requirement. The NCAE also incorrectly applied that language, and supposed requirement, to the House of Representatives, rather than only to the Senate, in which the bill originated. Finally, despite what critics have stated, the people of North Carolina are familiar with underhanded political maneuvering. In fact, the state has recently endured a scandal far more damning than a simple “midnight vote.” If the NCAE, the citizenry, and legislators do not like this variety of machination, then they can effect appropriate changes through the political and legislative processes. They will not, however, find respite and relief through the court system via a constitutional challenge. The actions taken on January 4 and 5 amounted to creative political scheming, nothing more and nothing less.

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