



Governor's lawsuit against Rules Review Commission could unleash executive power, experts say

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Gov. Roy Cooper is suing to dismantle a powerful legislative check on executive power. The N.C. Supreme Court will eventually decide the issue.

The legislature and the governor are fighting over control of the Rules Review Commission — a powerful board, chosen by lawmakers, that can prevent bureaucrats in the executive branch from wielding legislative power without the lawmakers' consent.

If the Democrat Cooper wins in court, his victory will weaken legislative authority and erode separation of powers in North Carolina, experts say. A ruling in Cooper's favor would cripple the legislature's control over how regulatory agencies interpret state laws.

Republicans lawmakers bashed Cooper's lawsuit as "another power grab, plain and simple." Cooper argues that lawmakers are interfering with the executive branch's authority to set policy in rulemaking.

The agency they're fighting over is a powerful watchdog. Its commissioners can veto rules on election laws, unemployment benefits, environmental conservation — even rules about hearing loss and heavy metals in fish. Its members have been said to "wield more power than most elected officials," argued former commissioner Harry Payne, who later joined N.C. Policy Watch, a left-leaning news organization.

Shifting control to the executive branch could disable the commission's oversight role. It also could help Cooper centralize power within the executive branch, says Andy Taylor, political science professor at N.C. State University.

Jon Sanders, John Locke Foundation director of regulatory studies, agrees.

"At that point, the fear would be that the governor would be able to rubber stamp anything that he wanted and remove any due diligence from the process," Sanders said.

The House and the Senate each appoint five of the board's 10 members, said Mitch Kokai, John Locke Foundation senior political analyst.

"Cooper wants a majority of appointments, which would kill the legislature's veto in the rulemaking process," Kokai says. "It serves as a safeguard against unelected bureaucrats making rules that have a drastic negative impact on North Carolinians."

“Not everything that affects people’s lives is the result of a law passed by lawmakers that you can hold accountable at the ballot box,” he says. “Much of what happens in government is the result of bureaucrats interpreting laws.”

Republican lawmakers accuse Cooper of dodging the legislature and pushing his policies through executive rulemaking and the courts.

So far during the COVID-19 pandemic, the commission has stymied two of Cooper’s policies. It blocked the State Board of Elections’ request for emergency powers and has complicated the Department of Employment Security’s plan for expanding unemployment benefits.

In May, the elections board asked for emergency powers — including the ability to change some election dates, as well as the deadlines for accepting by-mail ballots, reporting the sorting of ballots by precinct, hearings for candidate challenges, and election protest appeals.

Commissioners unanimously sank the request. Commissioner Tommy Tucker questioned whether it was “a devious stunt” and “an end run around the public, the General Assembly, and the courts.”

Weeks later, the commission became a potential roadblock for DES’s move to expand unemployment benefits.

Lawmakers expanded benefits to four narrow groups — residents infected or officially quarantined, and employees who lost hours or employers. But the department went further.

It expanded unemployment benefits to people who “reasonably believe there is a valid degree of risk” because of an employers’ failure to comply with state or federal guidelines. Benefits would also cover high-risk individuals and parents whose children can’t attend school.

The John Locke Foundation challenged the rule at the Office of Administrative Hearings. Republican legislative leaders questioned how the agency would determine employers’ failures. The agency failed to submit the necessary paperwork to go before the commissioners in August.

“The RRC will continue to stymie executive rulemaking pursuant to an unconstitutional statutory scheme that violates the Constitution’s separation of powers,” Cooper argued in his lawsuit.

Since the General Assembly created the RRC in 1986, the commission has been embroiled in the conflict between regulators and the regulated business community. Agencies complain the process slows regulations, while businesses praise its oversight. But the controversy never boiled over into major litigation — until now.

The lawsuit has the business community concerned. The Rules Review Commission has played a major role in the push for regulatory reform in North Carolina.

“We’re concerned about any sort of lawsuit that would diminish the protections that are afforded to citizens,” Michael Carpenter, N.C. Home Builders Association executive vice president. “Executive branch agencies have never liked this. They could basically do what they pleased, and this is clearly a restriction on their ability to do that.”

The legislature’s chances for keeping their appointments are slim. A 2016 state Supreme Court decision weakened legislative appointments within the executive branch, said Jon Guze, John Locke Foundation director of legal studies.

Only state Supreme Court Justice Paul Newby dissented with the 2016 ruling to defend legislative authority. Newby, a Republican, is running for chief justice in November, when two other seats on the state's highest court are up for election.

Cooper's lawsuit could cost the legislature its management role in overseeing governmental regulations, said William Yeatman, research fellow in Cato Institute's Robert A. Levy Center for Constitutional Studies.

"That would be a big, big deal," Yeatman said. "Given how much regulatory power has already been transferred to the executive, it would almost make it seem like a one-way ratchet. They can pass laws that would empower the executive, but not a law that allows them to compete with the executive."