

Circumvention by Delegation? An Analysis of North Carolina's Open Meetings Law and the *Byrd* Loophole

INTRODUCTION

On February 27, 1976, six elected Student Bar Association representatives at the University of North Carolina at Chapel Hill School of Law requested permission to attend an official meeting of the law school faculty.¹ Dean Robert Byrd summarily denied the students' petition, declaring the meeting to be a closed "private faculty session."² Not to be deterred by an uncooperative administration, and apparently eager to test their budding legal acumen, the students cited what they claimed to be their statutorily protected right to attend any meeting of a "public body" of a state institution pursuant to the North Carolina Open Meetings Law and promptly filed suit against their own law school.³

One and a half years of litigation later, the students, who had thus far successfully petitioned for a permanent injunction to be entered against Dean Byrd and the law school and defended a challenge at the North Carolina Court of Appeals, saw their case holding reversed without remand by the North Carolina Supreme Court.⁴ The law school's surprise victory is especially notable due to the supreme court's narrow interpretation of North Carolina's seemingly broad Open Meetings Law and the court's requirement that a subsidiary of a public body need only constitute a "governing and governmental"⁵ entity in order to fall within the law's purview. The fact that the law school ultimately prevailed at the supreme court in *Student Bar Ass'n v. Byrd*, even though it had failed to file any sort of an answer or other responsive pleading in the matter prior to the court's review, is also highly intriguing.⁶

1. Parks H. Wilson, Jr., Recent Decisions, *Sunshine Statute Requires that Law School Faculty Meetings of a State University Be Open to Members of the General Public*, 8 CUMB. L. REV. 539, 539 n.1 (1977).

2. *Id.*

3. N.C. GEN. STAT. §§ 143-318.1 to .7 (1978) (repealed 1979). See N.C. GEN. STAT. §§ 143-318.9 to .18 (2007).

4. *Student Bar Ass'n v. Byrd (Byrd I)*, 232 S.E.2d 855 (N.C. Ct. App. 1977); *Student Bar Ass'n v. Byrd (Byrd II)*, 239 S.E.2d 415 (N.C. 1977).

5. *Byrd II*, 239 S.E.2d at 418.

6. *Id.* at 427.

Justice Exum's dissent in *Byrd* argued that the majority's failure to hold the faculty of a state-funded academic institution within the ambit of the North Carolina Open Meetings Law created a legal "backdoor," whereby any state-sponsored agency or other governing body could potentially circumvent the clear intent of the law.⁷ Although a public body would normally be required to comport with the Open Meetings statutes and allow the public to attend its meetings and observe its deliberations and voting record, the precedent set by *Byrd* allowed any delegated subsidiary parts of such bodies to operate as though exempt from the law. This potentially meant that any discussion, deliberations, or voting taking place at the subordinate level would be effectively cordoned off from public view and scrutiny, thus allowing public agencies to eviscerate the very purpose of the law.⁸

North Carolina's Open Meetings Law has been changed substantially since the supreme court's 1977 decision in *Byrd*,⁹ and yet *Byrd* still appears to remain good law in North Carolina.¹⁰ In light of the *Byrd* precedent and the various amendments to the law over the past thirty years, this comment will address two concerns: first, whether the North Carolina Supreme Court's logic in deciding *Byrd* was sound, especially in view of the seemingly clear intent of North Carolina's Open Meetings Law; and second, given the present-day version of North Carolina's Open Meetings Law, whether state agencies and other governmental bodies may still operate through the purported *Byrd* loophole. Considered within the context of the relevant statutory and case law of the time, the *Byrd* decision was tenuous at best—decided without full consideration of the effect the holding would have in creating a backdoor to the Open Meetings Law. This conclusion is reinforced by the fact that the modern version of the law has wisely abrogated the *Byrd* loophole, which will likely result in the overturning of the decision should a direct challenge ever come before a North Carolina court.

I. NORTH CAROLINA'S OPEN MEETINGS LAW (1977 AND 2007)

A. General Principles

In 1977, Article 33B of the North Carolina General Statutes concisely explained the public policy rationale for having an "open meet-

7. *Id.* at 428.

8. *Id.*

9. Compare N.C. GEN. STAT. §§ 143-318.1 to .7 (1978) (repealed 1979), with N.C. GEN. STAT. §§ 143-318.9 to .18 (2007).

10. See *infra* note 86.

ings” law: “Whereas . . . bodies which administer the legislative and executive functions of this State and its political subdivisions exist solely to conduct the peoples’ business, it is the public policy of this State that the hearings, deliberations and actions of said bodies be conducted openly.”¹¹ Recognizing a “deeply entrenched sense of entitlement on the part of the state’s citizens,” the North Carolina General Assembly adopted a series of statutes in 1971 that sought to ensure that all governmental organizations and their respective subdivisions were held publicly accountable at all times, with certain circumstances excepted.¹² No official legislative history exists.¹³ Nonetheless, five central themes of importance can be determined in analyzing Article 33B: (1) what is considered a “governing and governmental body of the State”; (2) enumerated, specific statutory exceptions to the openness requirements; (3) allowances for a body subject to the law to hold a “closed session”; (4) what (if any) public notice requirements existed; and (5) what remedies were available to the complaining citizenry that proved a governmental body was in violation of the law.¹⁴

A brief statutory analysis of the 2007 version of North Carolina’s Open Meetings Law, and particularly the amendments since *Byrd*, will prove an instructive precursor to an examination of the *Byrd* decision and its contemporary implications.

B. *Applicability of the Open Meetings Law*

North Carolina’s Open Meetings Law originally applied to all official meetings of “governing and governmental bodies of this State and its political subdivisions . . . which have or claim authority to conduct hearings, deliberate or act as bodies politic.”¹⁵ This definition, though deemed “very broad coverage” by legal scholars shortly after its inception,¹⁶ was construed so narrowly in practice that the legislature repealed the original law in 1979.¹⁷ The law was reconstituted with a more robust (and twice as long) scope, making it applicable to

11. N.C. GEN. STAT. § 143-318.1 (1978) (repealed 1979).

12. Reporters Comm. for Freedom of the Press, Open Government Guide NC, <http://www.rcfp.org/ogg/item.php?t=short&state=NC&level=F1> (last visited Feb. 25, 2009).

13. *Id.*

14. N.C. GEN. STAT. §§ 143-318.1 to .7 (1978) (repealed 1979).

15. *Id.* § 143-318.1.

16. David M. Lawrence, *Interpreting North Carolina’s Open-Meetings Law*, 54 N.C. L. REV. 777, 781 (1975). An interpreting court could determine an agency to be subject to the law in three different ways: the conducting of hearings, deliberations, or any other action as a “body politic.”

17. See *Student Bar Ass’n v. Byrd (Byrd II)*, 239 S.E.2d 415 (N.C. 1977).

any elected or appointed authority, board, commission, committee, council, or other body of the State . . . [including specifically] constituent institutions of The University of North Carolina, or other political subdivisions . . . that (i) is composed of two or more members and (ii) exercises or is authorized to exercise a legislative, policy-making, quasi-judicial, administrative, or advisory function.¹⁸

The first piece of the new two-part definition is reflective of the federal version of the law, known as the Government in the Sunshine Act, which also uses the “two or more . . . members” language and is inclusive of agencies where a majority of the individual members are appointed by the President with senatorial advice and consent.¹⁹ It is apparent that the North Carolina General Assembly intended, pursuant to the amended version of the law, for a court or other interpreting body to err on the side of openness and inclusivity in determining which bodies are subject to the law’s reach. An analogous intent is reflected to some extent by the Supreme Court of New Mexico’s decision in *Raton Public Service Co. v. Hobbes*:

[W]hether governing bodies of local subdivisions are reasonably included within the term “all governing bodies of the state[]” . . . [poses] no difficulty in concluding that they may be, if we consider that “governing bodies of the state” means “governing bodies within the state,” rather than “state governing bodies.” Government bodies of local governmental subdivisions within the state are governing bodies of the state in the broadest sense.²⁰

This “within the state”-“state governing” dichotomy, interpreted by the North Carolina Supreme Court in the opposite direction, would prove pivotal in the *Byrd* decision.²¹

The meaning of “official meeting” has remained fundamentally unchanged since the North Carolina law’s 1971 inception, clearly pertaining to a “meeting, assembly, or gathering together . . . for the purpose of conducting hearings, participating in deliberations or voting upon or otherwise transacting the public business.”²² The only significant change in the 2007 version of the law was the inclusion of language pertaining to telephonic and electronic forms of “meetings.”²³

18. N.C. GEN. STAT. § 143-318.10 (2007).

19. 5 U.S.C. § 552b(a)(1) (2007).

20. *Raton Pub. Serv. Co. v. Hobbes*, 417 P.2d 32, 36 (N.M. 1966).

21. See *infra* notes 92-96 and accompanying text.

22. N.C. GEN. STAT. § 143-318.2 (1978) (repealed 1979); N.C. GEN. STAT. § 143-318.10(d) (2007).

23. The increased frequency of electronic meetings, and how to allow the public to attend and observe such occurrences, necessitated the passage of additional open-meetings statutes. See N.C. GEN. STAT. § 143-318.13 (2007).

On its face, the primary purpose of this statute appears to be the facilitation of public accountability for a body politic's voting record. It is important to recognize, however, that the legislature intends its inclusion of the word "deliberations" to ensure that the public is informed not only of how votes are cast, but also as to the rationale underlying such votes, and to "educate the public concerning the factual basis of and the issues involved in any public question."²⁴

C. Exceptions

Certain governmental bodies have been explicitly excluded from the purview of the Open Meetings Law. Some of these bodies were excepted under both the 1977 and modern-day versions of the law, including the General Court of Justice, grand and petit juries, and the Judicial Standards Commission.²⁵ Others have seen their exception status revoked by subsequent amendments. For example, the 1977 law excepted "all State agencies . . . exercising quasi-judicial functions during any meeting or session held solely for the purpose of making a decision in an adjudicatory action or proceeding."²⁶ As noted above, however, the current version of the law's definition of "public body" includes the "quasi-judicial" phrasing,²⁷ which denotes a narrowing in statutory thinking on this issue: the exception under 2007 law extends only to "quasi-judicial" activity by a "public body subject to the State Budget Act" when holding an adjudicatory meeting.²⁸ Agencies performing actions relating to the hiring, investigation, or firing of state employees are also exempted, presumably due to a combination of privacy concerns for the employee at issue and the necessity of secrecy for effective investigative proceedings to occur at the agency level.²⁹

One other substantial change between the 1977 and 2007 laws is the removal of language which provided that "[a]ny committee or subcommittee of the General Assembly has the inherent right to hold an executive [closed] session when it determines that it is *absolutely necessary* . . . to prevent personal embarrassment or when it is in the *best interest of the State*" to do so.³⁰ Generally, modern American courts have followed the lead of landmark federal cases, such as *Chevron*

24. Lawrence, *supra* note 16, at 784.

25. N.C. GEN. STAT. § 143-318.4 (1978) (repealed 1979); N.C. GEN. STAT. § 143-318.18 (2007).

26. N.C. GEN. STAT. § 143-318.4(8) (1978) (repealed 1979)

27. N.C. GEN. STAT. § 143-318.10(b) (2007).

28. *Id.* § 143-318.18(7).

29. *Id.* § 143-318.11(a)(6).

30. N.C. GEN. STAT. § 143-318.4(10) (1978) (repealed 1979) (emphasis added).

U.S.A., Inc. v. Natural Resources Defense Council, Inc.,³¹ with regard to the judicial presumption of substantial deference to agency determinations in their respective areas of expertise (but such deference is only appropriate where the authorizing statute is “specific” and “unambiguous” in its empowerment of the agency to make such judgment calls, the standard announced in *Chevron*).³² The expectation of the North Carolina legislature that any and all governmental bodies should retain the power to determine, of their own accord, what is in the “best interest of the State” and when they may choose to except themselves from the law to avoid their own potential embarrassment was both overly general and ostensibly unreasonable, and therefore patently in conflict with the *Chevron* precedent. The removal of this provision from the modern version of the law is thus unsurprising.

D. Closed Sessions

While the ideal of public accountability is a noble one, even the most publicly accountable governmental bodies need to call for non-public, closed—or, “executive”—sessions from time to time. Cognizant of these needs, the North Carolina legislature has maintained a series of scenario-specific exceptions to the Open Meetings Law that are fundamentally different from the blanket exemptions provided to particular agencies and bodies in the “Exceptions” provisions noted above. Included in this category of specific exceptions are matters dealing with any records that can be construed as privileged and confidential and matters that fall under any category of legally protected privilege (such as attorney-client or doctor-patient).³³

In many instances, a public body is required by statute to have an attorney present at its official meetings, while under other circumstances a body may choose when and if it will retain the services of an attorney. In such cases, the statute circumvents the otherwise appar-

31. 467 U.S. 837 (1984).

32. *Id.* at 842-43 (“When a court reviews an agency’s construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.”).

33. N.C. GEN. STAT. § 143-318.3 (1978) (repealed 1979); N.C. GEN. STAT. § 143-318.11 (2007).

ent ethical conflict an advising attorney would face between keeping his client's information confidential and maintaining openness on the public record so as to comply with the Open Meetings Law. In a similar vein, a body may go into a closed session while it considers the potential hiring, firing, or investigation of a state employee, as well as times during which a body needs to assume actions of negotiation and strategy with regard to public services, the alienation of publicly owned real property and other assets, and the like.³⁴ The only notable change from the 1977 law to the 2007 version is the altered language of the last section, which in the 1977 version allowed for closed sessions when necessary to deal with "riot[s] or [imminent] public disorders."³⁵ Presently, the statute creates specific exceptions for school board planning sessions relating to "incidents of school violence" and other government bodies' "plans to protect public safety as it relates to existing or potential terrorist activity."³⁶

Perhaps the most significant change to the closed-session allowances statute was procedural in nature. The 1977 law included no language stipulating how a government body needed to go about calling for a closed session; presumably, the decision to enter into a closed session was entirely at the discretion of the body's members. In outright contradiction to the Open Meetings Law's purposes of openness and accountability, the number of "secret" meetings that regularly occurred under the law's original version is unknown, since there was no requirement for keeping a formal record of "executive" proceedings.

This apparent omission was corrected over the next thirty years in a number of amendments. The 2007 version of the law mandates that a body politic "may hold a closed session only upon a motion duly made and adopted at an open meeting."³⁷ The body must cite, on the record, the "permissible purposes" for which the closed session is being called, and, where applicable, the particular law making the information to be discussed privileged and confidential.³⁸ In the event the public body is seeking legal advice on a lawsuit, it must first name the pertinent parties to the action at an open meeting.³⁹ Here again exists evidence of the North Carolina legislature amending its Open Meetings Law in favor of increased accountability with more rigid procedural requirements and mandatory public disclosure in situations

34. *See supra* note 33.

35. N.C. GEN. STAT. § 143-318.3(c) (1978) (repealed 1979).

36. N.C. GEN. STAT. § 143-318.11(a)(8)-(9) (2007).

37. *Id.* § 143-318.11(c).

38. *Id.*

39. *Id.*

where an agency seeks to temporarily exempt itself from otherwise requisite public openness.⁴⁰

E. Notice Requirements

Although requiring the provision of adequate notice to the public seems endemic to any open meetings statute—the physical presence of the public being an essential prerequisite to keeping the public informed—the original version of the North Carolina Open Meetings Law plainly failed to include any such stipulation.⁴¹ While the law explicitly prohibited “closed meetings,” its failure to include a notice requirement appeared to allow for “secret meetings” to occur; a meeting could be called at an irregular time or place, and while the public would not be formally excluded, such an act would essentially equate to an “executive session.”⁴² It was not until 1976 that the North Carolina Court of Appeals finally announced the implied existence of a notice requirement in its decision in *News & Observer Publishing Co. v. Interim Board of Education*.⁴³ Holding as insufficient the notice provided to a newspaper’s corporate office only one hour prior to the commencement of a special meeting of the Interim Board of Education regarding the selection of a new board member, the North Carolina Court of Appeals determined that the Open Meetings Law “would be meaningless unless the public had notice of meetings of the bodies covered by it.”⁴⁴ The court first enunciated a “reasonable notice” standard for governmental bodies subject to the law, and then proceeded to narrow its own definition, declaring that “one-hour notice given by telephone . . . [is] insufficient, [but] 48 hours’ notice for all meetings is unreasonably long.”⁴⁵

The North Carolina legislature eventually codified a notice requirement in 1979.⁴⁶ The statute expands upon the *News & Observer Publishing Co.* holding, requiring “at least 48 hours notice” by bulletin board posting at the meeting’s location, as well as by telephone or mail to any person who has filed to receive such notice for

40. For a further discussion of suggested legislative restraints upon an agency’s exemption procedures from open meetings laws, see Joseph W. Little & Thomas Tompkins, *Open Government Laws: An Insider’s View*, 53 N.C. L. REV. 452 (1974).

41. Lawrence, *supra* note 16, at 786.

42. *Id.*

43. 223 S.E.2d 580 (N.C. Ct. App. 1976).

44. *Id.* at 588.

45. *Id.* (referring to the forty-eight hour notice requirement established in Chapter 153A of the North Carolina General Statutes, which covers regular and special meetings of boards of county commissioners). See N.C. GEN. STAT. § 153A-40 (1976).

46. N.C. GEN. STAT. § 143-318.12 (2007).

any non-emergency meeting that is held at an irregular time or place.⁴⁷ Emergency meetings, which are only those “called because of generally unexpected circumstances that require immediate consideration,” require public notice to be “given immediately” after the notification of the board’s own members.⁴⁸ Where public meetings are held at regularly scheduled times and locations, it is compulsory for the public body to keep a copy of its meeting schedule with the Secretary of State (for state-level agencies) or an equivalent official at the county and local levels.⁴⁹

F. Remedies for Non-Compliance

The 1977 version of North Carolina’s Open Meetings Law included one brief section authorizing citizens to bring complaints against non-compliant government bodies, giving “[a]ny citizen denied access to a meeting” the “right to compel compliance . . . [through the seeking of a] restraining order, injunction[,] or other appropriate relief.”⁵⁰ Notably, the legislature did not provide for any judicial nullification of actions already taken by a board violating the law. Scholars at the time argued that the withholding of such a remedial tool from a reviewing court’s power would do little to curb the actual effects of an agency in breach of the law, even if an individual official could be severely fined or even temporarily incarcerated.⁵¹ It was not until 1985 that the remedial provisions of the law were more extensively fleshed out, thanks in part to lobbying efforts by the North Carolina Press Association to add a “voidability remedy” to the statutes.⁵²

The Open Meetings Law now contains three separate sections dealing with remedies: (1) injunctive relief (probably the most commonly issued corrective measure);⁵³ (2) declaratory judgments rendering particular decisions or actions null and void (and abrogating any need for a plaintiff to show special damages different from the public

47. *Id.* § 143-318.12(b).

48. *Id.* § 143-318.12(b)(3).

49. *Id.* § 143-318.12(a).

50. N.C. GEN. STAT. § 143-318.6 (1978) (repealed 1979).

51. Little & Tompkins, *supra* note 40, at 479 (“But merely enjoining or even jailing public officials who violate the law does not correct the harm that may already be done by decisions taken in secret. Consequently, courts should be given authority to invalidate tainted actions upon petition of citizens. Invalidation should be discretionary, however, within the constraints of what is in the best interest of the public at the time the court makes its ruling.”).

52. Reporters Comm. for Freedom of the Press, *supra* note 12.

53. N.C. GEN. STAT. § 143-318.16 (2007); Lawrence, *supra* note 16, at 816-17.

at large, a deviation from the usual tort standard);⁵⁴ and (3) the assessment and award of attorneys' fees at a court's discretion (including the possible assessment of such fees against one or more of a board's individual members).⁵⁵ It has been argued, however, that the proclivity of reviewing courts to simply enjoin the public body from any further non-compliance with the requirements of the Open Meetings Law may have an ultimately detrimental effect on the statutory rights of an agency to hold a closed session when necessary and as allowed by the law's exceptions and exemptions:

A board under a flat injunction not to violate the statute is likely to be very careful in any gray area of the statute, preferring to meet in public rather than run the risk of being held in contempt. As a result, some of the policy considerations recognized by the inclusion of the exceptions in the statute might be vitiated. More appropriate injunctive relief would be to forbid the specific conduct that led to the lawsuit.⁵⁶

With the preceding framework established and the significant distinctions between the 1977 and 2007 versions of the North Carolina Open Meetings Law identified, an informed exploration of the *Student Bar Ass'n v. Byrd*⁵⁷ decision, rationale, and consequent ramifications can now be undertaken.

II. THE *BYRD* PRECEDENT AND ITS PRACTICAL EFFECT

A. *The North Carolina Court of Appeals Holding*

The North Carolina Court of Appeals opinion in *Byrd* is not a garrulous one. The court first commented that the defendants in the case had lost at the trial level on essentially procedural grounds—at no time prior to the court's ruling did counsel for the defendants file an answer to the initial complaint or assert any other exception to the trial court's preliminary findings of fact.⁵⁸ Citing Rule 8 of the North Carolina Rules of Civil Procedure, the court reminded the defendants that

54. N.C. GEN. STAT. § 143-318.16A (2007). It should be noted that lawsuits seeking such declaratory relief are required to be filed within forty-five days "following the initial disclosure of the action that the suit seeks to have declared null and void." *Id.* § 143-318.16A(b). The "initial disclosure" standard is potentially ambiguous; while the statute states that where the challenged action is contained in the board's formal minutes, the action is deemed disclosed on the "date the minutes are first available for public inspection," and the statute leaves it to a court's discretion to determine the date of "initial disclosure" for any challenged non-recorded action. *Id.*

55. *Id.* § 143-318.16B.

56. Lawrence, *supra* note 16, at 817 (footnote omitted).

57. *Student Bar Ass'n v. Byrd* (*Byrd I*), 232 S.E.2d 855 (N.C. Ct. App. 1977).

58. *Id.* at 856.

“[a]verments in a pleading to which a responsive pleading is required, other than those as to the amount of damages, are [deemed] admitted when not denied,” and as the defendants had not entered any such pleading, the facts as presented by the plaintiffs were deemed truthful as alleged.⁵⁹ With no factual issues in controversy, the court then proceeded to address the two basic legal issues presented: whether North Carolina’s Open Meetings Law as it existed in 1977 should be generally construed in a broad or narrow fashion; and consequently, whether the law school faculty at the University of North Carolina at Chapel Hill fell within the scope of the Open Meetings Law at that time.⁶⁰

The court began its concluding paragraphs by stating,

The act we consider is broad in its scope. . . . The General Assembly . . . attempted to draft . . . [section] 143-318.2 [of the North Carolina General Statutes] in such terms that it would cover (with a few specific exceptions) *every* meeting where *the business of the people* may be conducted. We note the broad language of that section and compare it with the narrow list of agencies exempted from the act by [section] 143-318.4.⁶¹

The court of appeals, like the trial court below it, understood that North Carolina’s Open Meetings Law was intended by the state legislature to be construed expansively, with an interpreting court expected to express a preference towards the application of the law to more, and not fewer, governmental agencies, state bodies politic, and their respective delegations and subcommittee counterparts.⁶²

The court then turned to the question of whether or not the law school faculty was subject to the law in the context of this broad interpretation.⁶³ To decide this issue, the court first addressed the organic statute establishing the University of North Carolina.⁶⁴ Pursuant to Article 1 of Chapter 116, the state legislature delegated “‘the general determination, control, supervision, management and governance’ of

59. *Id.*

60. *Id.* at 856-57.

61. *Id.* at 858.

62. *See id.*

63. *Id.* at 857.

64. *Id.* *See* N.C. GEN. STAT. §§ 116-1 to -44.9 (1975); *see also* Boney Publishers, Inc. v. Burlington City Council, 566 S.E.2d 701, 704 (N.C. Ct. App. 2002) (“[T]he courts must refer primarily to the language of the enactment itself. A statute that ‘is free from ambiguity, explicit in terms and plain of meaning’ must be enforced as written, without resort to judicial construction.” (quoting *Clark v. Sanger Clinic, P.A.*, 542 S.E.2d 668, 671-72 (N.C. Ct. App. 2001))).

all of the affairs . . . of the University” to a Board of Governors.⁶⁵ The Board of Governors, in turn, “is given the authority to delegate any part of its authority over the affairs of any institution to the Board of Trustees of a constituent institution or, through the President of the University, to the Chancellors of the institutions.”⁶⁶ A Chancellor functions as the “administrative head of the institution and exercises complete executive authority therein and is subject to the direction of the President . . . [and] is responsible for carrying out policies of the Board of Governors and Board of Trustees . . . [and keeping them] fully informed concerning the operation of the institution.”⁶⁷

In light of the statutory language, the North Carolina Court of Appeals determined that “[w]hether the Board [of Governors] has delegated any of its governing powers in a particular instance, is a question of fact. Defendants, by their failure to answer . . . the complaint appear [] to admit that the Law School Faculty does, in fact, govern the Law School.”⁶⁸ The court listed at length the various functions performed by the defendant-faculty that supported its conclusion, including the faculty’s retention of final decision-making control over the size of each enrolling class, changes to the curriculum, and rules relating to re-admissions, none of which were ever subject to review or ratification by any higher University of North Carolina authority (which might otherwise relegate the faculty to an advisory, as opposed to governing, body in the eyes of the court).⁶⁹ These facts, combined with the ascertained legislative intent of the Open Meetings Law, led the North Carolina Court of Appeals to conclude that the law school faculty was “delegated the authority not only to deliberate on but to conduct the ‘people’s business’ related to the operation of their tax supported Law School,” thus putting the defendants squarely within the ambit of the law and requiring them to admit any and all members of the public to any official meeting held by the faculty.⁷⁰ Further, the court stated,

The General Assembly has established the policy that the people’s business shall be conducted in public. That policy would be frustrated if the public is admitted only at the highest decision-making level and is excluded at the level where the real deliberation, debate and decision-making process takes place before a subordinate body.⁷¹

65. *Byrd I*, 232 S.E.2d at 857 (quoting N.C. GEN. STAT. § 116-11(2)).

66. *Id.* (citing N.C. GEN. STAT. § 116-11(13)).

67. *Id.* (citing N.C. GEN. STAT. § 116-34).

68. *Id.*

69. *Id.* at 857-58.

70. *Id.* at 858-59.

71. *Id.* at 859.

The North Carolina Court of Appeals' apparent concern was the creation of a legal "loophole" through which a public body might circumvent the Open Meetings Law by delegating its power to make sensitive decisions to its own subsidiary component.⁷² It was this particular portion of the appellate court's decision that would provoke the ire of the North Carolina Supreme Court nine months later, leading to the reversal of the lower courts and, it would seem, the judicial allowance of these loopholes.

B. The North Carolina Supreme Court's Reversal—a Loophole Created

The North Carolina Supreme Court reversed the opinion below, ostensibly basing its decision on the same legal issues considered by the court of appeals. The court first addressed the question of whether the Open Meetings Law was intended by the General Assembly to be interpreted as a broad or narrow set of statutes.⁷³ Then, in light of the decision rendered on the first question, the court addressed the fundamental dispute—whether the law school faculty fell within the purview of the law.⁷⁴

72. *Id.*

73. *Student Bar Ass'n. v. Byrd (Byrd II)*, 239 S.E.2d 415, 418 (N.C. 1977).

74. Any analysis of the North Carolina Supreme Court decision in *Byrd II* would be incomplete without some mention of two lesser issues referenced by the court in the majority holding: the question of notice, and the potential exempting issue raised by the Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g(b)(1) (2007).

Although the question of implied notice under the Open Meetings Law was seemingly settled in *News & Observer Publishing Co. v. Interim Board of Education*, 223 S.E.2d 580, 588-89 (N.C. Ct. App. 1976), where the court of appeals formulated a "reasonable notice" requirement more than a year before the supreme court decided *Byrd II*, see *supra* notes 43-45 and accompanying text, the North Carolina Supreme Court in *Byrd II* made no reference whatsoever to the *News & Observer* precedent. See *Byrd II*, 239 S.E.2d 415. The North Carolina Supreme Court asserted in *Byrd II* that the Open Meetings Law "contains no provision requiring any body to give to the public notice of any meeting," and the court presumed that the six-hour prior notice requirement applied under the trial court's injunction was "derive[d] from a similar requirement in an order entered by the Chancery Court of Tennessee on March 31, 1976 in" *Fain v. Faculty of the College of Law of the University of Tennessee*, 552 S.W.2d 752 (Tenn. Ct. App. 1977). *Byrd II*, 239 S.E.2d at 418. The North Carolina Supreme Court rejected the trial court's six-hour prior notice requirement, stating that "there is no comparable provision in the Open Meetings Law of this State." *Id.*

The Family Educational Rights and Privacy Act of 1974 (the FERPA) withheld federal funds from allocation to any "educational agency or institution which has a policy or practice of permitting the release of educational records . . . or personally identifiable information contained therein other than directory information." 20 U.S.C. § 1232g(b)(1). Because the University of North Carolina institutions, as state

The North Carolina Supreme Court's interpretation regarding which political bodies were subject to the 1977 Open Meetings Law represented a fundamental about-face from the manner in which the same statutory text was construed by the court of appeals below. In determining the meaning of the terms "governing and governmental" and "body politic," the majority purported to discern an entirely different legislative intent. The court gave great weight to the General Assembly's use of grammar, noting that "[t]he statute uses the term 'governing' and the term 'governmental' in the conjunctive, not the disjunctive relation,"⁷⁵ which was taken to mean that the terms were not synonymous, and that a governmental agency essentially had to meet two different definitions in order to be held subject to the law.⁷⁶ In a similarly narrow construction of the definition of "body politic," the court required that for an agency to be subject to the Open Meetings Law, it had to "exercis[e] powers which pertain exclusively to [a] government, as distinguished from those possessed also by a private individual or . . . association."⁷⁷ As the court summarized, the language of this statute "is designed to be restrictive, rather than broadening, and shows an intent of the legislature to limit the Open Meetings Law to meetings of 'governing and governmental bodies' strictly construed."⁷⁸ Thus, the supreme court forged a clear deviation from the court of appeals' notions of the law's "broad language,"⁷⁹ opting instead for a much narrower holding that "[t]he *only* meetings required by [section] 143-318.2 [of the North Carolina General Statutes] to be open to the public are [the] official meetings" of a restricted category of political bodies.⁸⁰

schools, were entitled to and did receive significant monies through various federal programs, the defendants in *Byrd II* argued that if law faculty meetings were required to be open to the public, the school would inherently violate the FERPA, resulting in a major financial crisis. *Byrd II*, 239 S.E.2d at 419. Although the court held that the issue was not "determinative of the present appeal," it did remark,

[T]he possibility that all further Federal financial aid to the entire University of North Carolina, including all its component institutions, may be jeopardized by an interpretation of the Open Meetings Law making it applicable to meetings of the faculty of the School of Law is an additional reason for care in so construing the Open Meetings Law.

Id.

75. *Byrd II*, 239 S.E.2d at 420-21.

76. See *infra* note 85 and accompanying text.

77. *Byrd II*, 239 S.E.2d at 420-21.

78. *Id.*

79. Student Bar Ass'n v. Byrd (*Byrd I*), 232 S.E.2d 855 (N.C. Ct. App. 1977).

80. *Byrd II*, 239 S.E.2d at 419 (emphasis added). The dissent in *Byrd II* echoed the North Carolina Court of Appeals' broad interpretation of the Open Meetings Law as

The majority was argumentative in justifying its asserted position on the second question—whether a law school faculty of a state university was indeed subject to the Open Meetings Law—from the outset of its analysis. Before ever reaching the merits of either party’s argument, the court proclaimed that “the statute affords no basis for distinction between the faculty of the School of Law, the faculty of the English Department, the Athletic Department or the football coaching staff,” and went on to suggest that it would “create substantial consternation . . . if a rival school’s coach appeared and demanded admission to a conference of the University’s football coaching staff called to consider strategy.”⁸¹ How could the appellate judiciary possibly hold that the state law school’s faculty meeting constituted “the people’s business” if it meant opening up the university football team’s playbooks to any politically savvy rival institution?⁸² The court apparently took such concerns very seriously, noting in its concluding sentence its “fail[ure] to find” any exempting language in the exceptions section of the law that would provide “any ground for the denial of such a demand.”⁸³

well. *Id.* at 424 (Exum, J., dissenting) (“The spirit of this law is that a democracy works best when the electorate knows how it is working. This kind of law should be liberally, not stingingly, construed. . . . Exceptions to this law, on the other hand, should be narrowly construed.”).

81. *Id.* at 418 (majority opinion).

82. N.C. GEN. STAT. § 143-318.1 (1978) (repealed 1979). In responding to these seeming public policy assertions, the dissent cited at length from a speech delivered by the Chairman of the Board of Trustees of the University of North Carolina at Chapel Hill on campus during University Day Exercises only two months prior to the *Byrd II* decision:

The University belongs . . . to all of the people of North Carolina . . .

. . . .

. . . [W]e owe it to that public not only to acknowledge their ownership but to include them in our governance, to inform them, to genuinely seek their support, to be respectful of their views, to explain our own and to be as solicitous of their understanding as we are of their tax dollars.

Byrd II, 239 S.E.2d at 424-25 (Exum, J., dissenting) (quoting Tom Lambeth, Speech at University Day Exercises, University of North Carolina at Chapel Hill (Oct. 12, 1977)).

83. *Byrd II*, 239 S.E.2d at 419 (majority opinion). Apparently seeking further validation for its football-minded concerns, the court reminded the parties, with no supporting precedent cited, that “a court may legitimately consider consequences to be anticipated from the respective possible constructions of a statute in determining which of these the Legislature most probably had in mind when it enacted the statute.” *Id.* at 418.

The dissent, however, argued that it had managed to find the exempting language overlooked by the majority in section 143-318.3(b) of the North Carolina General Statutes:

[Section] 143-318.3(b) provides: “Nor shall this Article be construed to prevent any board of education or governing body of any public educational

Notwithstanding its athletic apprehensions, the majority did reach the legal issue in controversy, and pursuant to its statutory analysis of the Open Meetings Law, announced a two-part test, both prongs of which had to be met for a “component part” of a state body to fall within the jurisdiction of the Open Meetings Law.⁸⁴ The court held that the body must “(1) be a component part of a ‘governing *and* governmental’ body of the State . . . and (2) the [component part in question] must ‘have or claim authority to conduct hearings, deliberate or act’ as a ‘body politic.’”⁸⁵ As the entire text of the test was taken directly from the relevant statute of the Open Meetings Law of the time,⁸⁶ it appeared that the only analytic aspect of the test left to the courts would be the particular definitions of the terms used in the test and how they were applied to the facts at bar.⁸⁷

institution, or any committee or officer thereof, from hearing, considering and deciding disciplinary cases involving students in closed session.” Why insert this limitation unless such bodies were otherwise covered by the Law’s general operative provisions?

Byrd II, 239 S.E.2d at 426 (Exum, J., dissenting) (quoting N.C. GEN. STAT. § 143-318.3(b) (1978) (repealed 1979)).

84. *Byrd II*, 239 S.E.2d at 419 (majority opinion).

85. *Id.*

86. N.C. GEN. STAT. § 143-318.1 (1978) (repealed 1979). One of the substantial changes to the Open Meetings Law between 1977 and 2007 is that the present-day statute now specifically defines terms like “public body,” and does so both at greater length and in far broader terms than did its 1977 predecessor. N.C. GEN. STAT. § 143-318.10 (2007) (“As used in this Article, ‘public body’ means any elected or appointed authority, board, commission, committee, council, or other body of the State, or of one or more counties, cities, school administrative units, constituent institutions of The University of North Carolina, or other political subdivisions or public corporations in the State that (i) is composed of two or more members and (ii) exercises or is authorized to exercise a legislative, policy-making, quasi-judicial, administrative, or advisory function. In addition, ‘public body’ means the governing board of a ‘public hospital’ as defined in [section] 159-39 and the governing board of any nonprofit corporation to which a hospital facility has been sold or conveyed pursuant to [section] 131E-8, any subsidiary of such nonprofit corporation, and any nonprofit corporation owning the corporation to which the hospital facility has been sold or conveyed.”).

87. *Byrd II*, 239 S.E.2d at 426-27 (Exum, J., dissenting) (recalling the defendants’ utter failure to submit a responsive pleading or in any other way contest the facts as alleged by the plaintiffs and determined by the trial court, the *Byrd II* dissent believed that any such “analysis” was entirely misplaced: “Whether the law school faculty is a subsidiary or component part of the Board of Governors and whether it is ‘a body politic’ are essentially questions of fact. The majority mistakenly treats them as questions of law answered by reference only to its own notions of what the faculty is and its relationship to the Board of Governors.”).

The court seemed to have difficulty in arriving at a clear decision as to whether the law school faculty of the University of North Carolina could be considered a “component part” of a state body, pursuant to the first prong of the test.⁸⁸ In the sentence prior to announcing the test, the court stated, “Obviously, the faculty of the School of Law is a ‘component part’ of the University of North Carolina at Chapel Hill. This alone does not bring its meetings within the scope of the [law]”⁸⁹ The court initially discussed the delegated-power hierarchy of the University of North Carolina system, wherein the court found that the General Assembly had in fact vested the Board of Governors of the University of North Carolina with “the general determination, control, supervision, management and governance of all the affairs of all of the . . . constituent institutions of the University.”⁹⁰ Thereafter, the court decided that being a “component part” of a state institution was not analogous to being a “component part” of the governing body of a state institution, and thus the “faculty . . . is not a ‘subsidiary or component part’ of the Board of Governors, but is simply a group of employees of the Board.”⁹¹

The court’s analysis of the test’s second prong turned on the chosen definitions of the test’s key phrases. After several paragraphs’ consideration of various scholarly definitions, the court narrowly defined the term “body politic” as “a body acting as a government; i.e., exercising powers which pertain exclusively to a government.”⁹² The phrase “governmental body” was defined as having “at least some of the powers of government . . . [and] the attributes of sovereignty. They are not possessed by individuals and private associations, as a matter of natural right”⁹³ These were deemed to include “the power to tax, to appropriate public money, to adjudicate controversies, to maintain a police force,” and related matters.⁹⁴ The *Byrd* majority was thus able to exclude the law school faculty from the Open Meetings Law vis-à-vis the University’s supervising body:

88. *See id.* at 418-19 (majority opinion).

89. *Id.* at 419.

90. *Id.* at 421 (internal quotation marks omitted).

91. *Id.*

92. *Id.* at 419-20. The dissent disputed the majority’s finding that neither the law school faculty nor the Board of Governors fit the definition of “body politic,” pointing to section 116-3 of the North Carolina General Statutes, which “expressly designates the Board of Governors of the University of North Carolina to be and continue ‘as a body politic and corporate.’” *Id.* at 426 (Exum, J., dissenting) (quoting N.C. GEN. STAT. § 116-3 (1975)).

93. *Id.* at 421 (majority opinion).

94. *Id.*

The Board of Governors . . . operates the educational institutions comprising the University and has the power to do all acts incidental thereto, but so does the “governing body” of a privately endowed and operated university. The Board of Governors of the University of North Carolina has no governmental powers; i.e., no powers peculiar to the sovereign.⁹⁵

The court’s definition of the term “governing” was the most central to its ultimate determination that the plaintiff-law students had failed to sufficiently establish that the law school faculty satisfied the two-prong test, which would have subjected it to the Open Meetings Law. The court held the phrase to include only those political bodies that

ha[ve] the ultimate power to determine [their] policies and control [their] activities. Such body may delegate . . . authority to make, initially, such decisions, but such employee or group of employees is not the “governing body” so long as his or its determinations are *subject to review and reversal by the higher authority*, by whose permission such determination is made.⁹⁶

Thus the *Byrd* loophole was created. The court’s intention in so holding was understandable and rational. Executive power is accompanied by responsibility for the acts executed, and those who are vested with such power have the duty to review, parse, amend, and approve (and to be ultimately accountable for) any and all work product of their subordinate components. Thus, the law would not understand one of these subsidiary parts as fulfilling a standard description of a “governing” body. In so holding, however, the majority failed to heed its own authority, as stated earlier in its opinion—“a court may legitimately consider consequences to be anticipated from the respective possible constructions of a statute.”⁹⁷

The statute at issue in *Byrd* was the Open Meetings Law—a law with an explicit purpose of opening up to public accountability both the actions taken by a political body at its official meetings and also *why those actions were taken*. In essence, by excluding the official meetings of “components” of otherwise publicly accountable bodies through its two-prong test, the *Byrd* majority allowed bodies subject to the Open Meetings Law to delegate their more sensitive and questionable functions to subordinate bodies, thereby removing any discussion or deliberation of such actions from the public purview. So delegated, these subcommittees and component parts at worst could then handle

95. *Id.* at 422 (quoting N.C. GEN. STAT. § 116-11).

96. *Id.* at 421 (emphasis added).

97. *Id.* at 418.

any unpleasantries, potential embarrassments, or plain illegalities outside the boundaries of public scrutiny; determine a course of action most advantageous to the delegating body (which may or may not be in the best interests of the general public); and recommend the course of action up to the official “governing body,” which could then sign such proposals into acting policy without the burden of public commentary and potential discord.⁹⁸ As Justice Exum warned in his dissent to *Byrd*:

[O]ne purpose of the [Open Meetings Law] was to prevent at non-public meetings the crystallization of secret decisions to a point just short of ceremonial acceptance. Rarely could there be any purpose to a non-public pre-meeting conference except to conduct some part of the decisional process behind closed doors. The statute should be construed so as to frustrate all evasive devices.⁹⁹

The dissent’s concerns notwithstanding, the *Byrd* majority reversed the trial court and the court of appeals, applying its two-prong test and determining that the law school faculty at a state-sponsored university was not a “body politic,” not a “governmental” or “governing” body, and thus was not subject to the North Carolina Open Meetings Law.¹⁰⁰ In so doing, the *Byrd* loophole was created.

98. *Id.* at 428 (Exum, J., dissenting).

99. *Id.* (quoting *Town of Palm Beach v. Gradison*, 296 So. 2d 473, 477 (Fla. 1974)).

100. The majority cited to little precedent from other state courts’ decisions, explaining that “[a]ll of the Open Meetings Laws of the several states . . . vary widely in their terms, and so decisions from the courts of those states establishing their scope are of meagre assistance in construing the North Carolina Act.” *Id.* at 422 (majority opinion). The court did find some support in *McLarty v. Board of Regents of the University of Georgia*, 200 S.E.2d 117 (1973), where the Georgia “Sunshine Law” was held inapplicable to the meetings of a teacher-student committee that formulated student-fund allocation recommendations at the behest of the Dean of Student Affairs of the University of Georgia, and “[did] not encompass the innumerable groups which are organized and meet for the purpose of collecting information, making recommendations, and rendering advice but which have no authority to make governmental decisions and act for the State,” *id.* at 119. See *Byrd II*, 239 S.E.2d at 422-23.

In seeking other states’ decisional support for its rebuttal, the *Byrd II* dissent looked primarily to *Cathcart v. Andersen*, 530 P.2d 313 (Wash. 1975) (en banc), which saw the Supreme Court of Washington hold its Open Public Meetings Act applicable to meetings of the law school faculty at the University of Washington, where the court determined that the “purpose of the Act is to allow the public to view the decision-making process at all stages,” *id.* at 316. See *Byrd II*, 239 S.E.2d at 429 (Exum, J., dissenting).

III. *BYRD* ABROGATED? PRESENT-DAY OPEN MEETINGS LAW

Could a North Carolina political body within the purview of the 2007 version of the Open Meetings Law successfully circumvent the law by delegating certain of its powers and responsibilities to a subdivision or component part? The state supreme court's opinion in *Byrd* remains an unchallenged precedent and has been cited by federal and state courts both in and outside of North Carolina.¹⁰¹ In terms of how North Carolina's Open Meetings Law is to be generally construed by in-state courts, the 2007 version of the "Public Policy" section of the law implies that the General Assembly has reasserted its intent that the statute be broadly, as opposed to narrowly, interpreted. The inclusion of all "public bodies that administer the legislative, policy-making, quasi-judicial, administrative, and advisory functions" is certainly more encompassing than the "governing and governmental" language that was so heavily stressed by the *Byrd* majority.¹⁰² However, the argument could be made (and indeed, it was—by both the trial court and the North Carolina Court of Appeals in *Byrd*) that the 1977 Open Meetings Law was similarly intended to be broadly construed; yet the *Byrd* loophole still resulted. Are there any measures incorporated into the present-day version of North Carolina law that function to close these *Byrd* loopholes? The answer is unambiguously in the affirmative.

By defining in the statutory text each of the key terms used in the 2007 Open Meetings Law, the legislature sought to preclude future courts from following *Byrd* and claiming any authority to construct their own definitional determinations in interpreting the Open Meetings Law. The broad definition of "public body" requires only that it be comprised of "two or more members" who are exercising (or are authorized to exercise) "legislative, policy-making, quasi-judicial, administrative, or advisory function[s]."¹⁰³ Such bodies are considered to comprise not only the obvious elected and appointed authorities, but all other "board[s], commission[s], committee[s], council[s], or other bod[ies] of the State."¹⁰⁴ "Official meeting" is inclusive of nearly any "meeting, assembly, or gathering together . . . for the purpose of conducting hearings, participating in deliberations, or voting

101. See, e.g., *Bd. of Governors of the Univ. of N.C. v. U.S. Dep't of Labor*, 917 F.2d 812, 817 (4th Cir. 1990); *Polk County Bd. of Supervisors v. Polk Commonwealth Charter Comm'n*, 522 N.W.2d 783, 796 (Iowa 1994).

102. N.C. GEN. STAT. § 143-318.9 (2007).

103. *Id.* § 143-318.10(b).

104. *Id.*

upon or otherwise transacting the public business,”¹⁰⁵ which presumably includes any of the “pre-meeting conferences” referred to by the *Byrd* dissent.¹⁰⁶

Further, even when closed sessions may be held by a public body via the enumerated exceptions under the law, a “general account” of the body’s goings-on in closed session must be recorded and maintained so that any future allegations of non-compliance may be subject to thorough investigation.¹⁰⁷ Thus, although it technically remains unchallenged judicial precedent in North Carolina, the loophole created by the majority decision in *Byrd* has been sufficiently closed by the last three decades of effort by the North Carolina General Assembly. Nonetheless, history dictates that there will always be those who seek to circumvent publicly beneficial laws that promote relatively unfettered accountability, and only a watchful public and a mindful judiciary can ensure that North Carolina’s Open Meetings Law will continue to serve its purposes in the foreseeable future.

CONCLUSION

It certainly appears that the University of North Carolina law students in *Student Bar Ass’n v. Byrd* would have a greatly improved chance at jurisprudential success under the modern version of North Carolina’s Open Meetings Law. Nonetheless, as the North Carolina Supreme Court’s opinion in *Byrd* awaits a facial challenge within the state, it would behoove the wary practitioner who files an Open Meetings Law-based complaint in the state to consider both the majority and dissenting opinions in *Byrd* to ensure the thoroughness of a legal argument. For complaints regarding public authorities that clearly fall within the “body politic” and “governing and governmental” definitions embraced by the supreme court in *Byrd*, such an exercise should be relatively straightforward, but for those public bodies that exist in the gray area between the narrow two-prong test asserted in *Byrd* and those broader definitions reiterated in the current statutes, a degree of caution is appropriate. The proper legal definition of an adversarial public body within one’s legal pleadings is inherent to a successful Open Meetings Law claim in North Carolina, and although the *Byrd* loophole has by all intents and purposes been occluded by statute, its

105. *Id.* § 143-318.10(d).

106. *Student Bar Ass’n v. Byrd (Byrd II)*, 239 S.E.2d 415, 428 (N.C. 1977) (Exum, J., dissenting).

107. N.C. GEN. STAT. §§ 143-318.10(e), -318.11 (2007).

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unchallenged existence may still bring some of its curious legal reasoning to bear in present-day challenges.

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