

Mandate of the Special Rapporteur on the independence of judges and lawyers

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(Please use this reference in your reply)

1 February 2024

Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the independence of judges and lawyers, pursuant to Human Rights Council resolution 53/12.

I would like to bring to the attention of your Excellency's Government information I have received concerning allegations that Justice Anita S. Earls, of the Supreme Court of North Carolina, was investigated by the North Carolina Judicial Standards Commission for engaging in free speech.

Justice Anita S. Earls is an Associate Justice of the North Carolina Supreme Court. She was elected in 2018, sworn in for her eight-year term in January 2019, and has indicated that she will seek re-election when her term is over. Justice Earls is currently the only African American woman on the North Carolina Supreme Court.

According to the information received:

The North Carolina Judicial Standards Commission (the Commission) is mandated to "consider complaints against judges ... and, where appropriate, to make recommendations for discipline". The Commission is made up of 14 members.¹

Anyone alleging a violation of the North Carolina Code of Judicial Conduct (the Code) may file a written complaint, which remains confidential, to the Commission. The Commission can also decide to conduct their own investigation *proprio motu*. After a complaint is filed and found, upon initial review, to "disclose[] facts that, if true, indicate that a judge has engaged in conduct in violation of the Code", an investigative panel of the Commission opens a formal investigation upon the affirmative vote of five members. The Commission then conveys a general description of the subject matter of the investigation and provides a reasonable opportunity to the judge to respond to such notice. The Commission has the power to compel testimony or documentary evidence. It is only after the completion of this formal investigation that disciplinary hearings and actions can commence. Formal

¹ The members of the Commission were previously appointed by a mix of the Chief Justice of the North Carolina Supreme Court (six judge members), the State Bar Council (four attorney members), the Governor (two members drawn from the public) and the legislature (two members drawn from the public). However, budget appropriations legislation passed in October 2023 made provision for the immediate replacement of the attorney members appointed by the State Bar with four judge members appointed by the legislature. See Mehr Sher, "Proposed changes to NC's Judicial Standards Commission raise concerns about judicial integrity and oversight, Part One", *Carolina Public Press*, 13 July 2023, available at <https://carolinapublicpress.org/60724/proposed-changes-to-ncs-judicial-standards-commission-raise-concerns-about-judicial-integrity-and-oversight/>; Shea Dunning, "2023 Appropriations Act Enacts Significant Court-Related Changes", *North Carolina Criminal Law Blog*, 27 September 2023, available at <https://nccriminallaw.sog.unc.edu/2023-appropriations-act-enacts-significant-court-related-changes/>; Colin Campbell, "NC legislators use new power to make key appointments as session wraps up", *WUNC*, 25 October 2023, available at <https://www.wunc.org/politics/2023-10-25/nc-legislators-use-new-power-to-make-key-appointments-as-session-wraps-up>. For the current composition of the Commission see "About the Judicial Standards Commission", available at <https://www.nccourts.gov/commissions/judicial-standards-commission/about-the-judicial-standards-commission> (last accessed 14 December 2023).

ethics investigations rarely take place. In 2022, the Commission received 470 new complaints but opened just 16 new formal investigations.

The Commission may impose a range of disciplinary measures, from a private “letter of caution”, which the commission is authorized to issue after a formal investigation but without a hearing, to a public reprimand, censure, suspension and even removal of a judge. Apart from the private letter of caution, all of these measures require a finding by the North Carolina Supreme Court. A private letter of caution may be used in future disciplinary proceedings against the same judge “as an aggravating factor, as evidence of a pattern or practice of misconduct, or as evidence that the judge acted willfully or knew or should have known that the alleged conduct” was contrary to the Code. If, after a hearing, a judge is removed, the judge is not only barred from their current role, they are also disqualified from holding further judicial office.

Investigation(s) against Justice Earls

On 20 March 2023, the Commission issued a Notice to Justice Earls indicating that a complaint had been filed against her and a formal investigation was being initiated. The complaint related to statements Justice Earls had made at two public events and to the media, regarding what it said were “matters being currently deliberated in conference by the Supreme Court.” The Notice did not accuse Justice Earls of discussing any specific cases, but rather mentioned three administrative matters, all of which had already been publicly discussed by other members of the Court.² In response to this Notice, Justice Earls retained a lawyer, attended a lengthy interview with the Commission, and spent a significant amount of time defending herself, which took time away from her role as Associate Justice.

On 16 May 2023, the Commission’s counsel notified Justice Earls that the Commission panel had met on 12 May and voted to dismiss the complaint against her without any further action. Despite the formal dismissal of the complaint, the Commission’s counsel reminded Justice Earls “of the language of Canon 2(A), that a Judge should respect and comply with the law and should conduct himself/herself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.”

Justice Earls has stated that she understood this communication to be a reminder that she must not publicly reveal any confidential matters. She did not understand this communication to be a warning that if she continued to speak on issues of public concern, she would be subjected to further investigation and discipline. A “warning” letter, sent without any finding of an explicit violation of the Code of Judicial Conduct, is not mentioned anywhere

² The Notice concerned her comments relating to (1) the court’s decision to rescind a 2019 rule adopting the universal citation format, (2) the court’s adoption of a rule permitting published court of appeals decisions to be deemed “unpublished” and (3) consideration of a possible legislative change to eliminate the right to appeal the North Carolina Supreme Court based on a dissent from the appeals court. The forums in which Justice Earls spoke on these issues were the North Carolina General Assembly Courts Commission and the North Carolina Bar Association Board of Governors.

in the Rules of the Commission.³ This “warning” letter was unprecedented and, according to a former Chair of the Commission, was contrary to the rules and practice of the Commission, particularly if the “warning” sought to circumscribe the Justice’s freedom of speech.⁴

In June 2023, Justice Earls participated in an interview with *Law 360*, which was published online. In the interview, Justice Earls—the only African American woman Justice on North Carolina’s Supreme Court—was asked why oral advocates who come before the North Carolina Supreme Court are “overwhelmingly male and white, despite the diverse state population and state bar membership.” Justice Earls referred to the lack of racial diversity among law clerks serving the North Carolina Supreme Court, as well as the role played by implicit bias, evidenced by justices unfairly interrupting female attorneys.⁵ She stated “...when the culture is that male advocates and advocates who reflect the majority of the court, white advocates, when they get more respect, when they are treated better — I think it filters into people's calculations about who should argue and who's likely to get the best reception and who can be the most persuasive.” Justice Earls went on to clarify, “I’m not suggesting that any of this is conscious, intentional, racial animus. But I do think that our court system, like any other court system, is made up of human beings and I believe the research that shows that we all have implicit biases.” When asked about obstacles she had faced that she attributed to her gender or race, Justice Earls described being interrupted and receiving different treatment from her colleagues on the bench during public oral argument, and gave her opinion that this might be on account of her race, her gender, or her political views.⁶

In response to a question about steps that could be taken to diversify the appellate bench in North Carolina, Justice Earls noted that an internal equity committee had been disbanded, and that the Chief Justice had refused to reappoint members of the Commission on Fairness and Equity in the North Carolina judicial system. This Commission on Fairness and Equity had previously been established by an order of the Supreme Court. Justice Earls observed that “[t]he new members of our court very much see themselves as a conservative bloc. They talk about themselves as ‘the conservatives.’ Their allegiance is to their ideology, not to the institution.”

When asked if implicit bias training was offered to North Carolina’s jurists, Justice Earls observed that a curriculum had been developed and provided to some trial judges, but the newly elected Chief Justice had ended the program. Justice Earls described this as “part of the general antipathy towards seeing that racial issues matter in our justice system.”⁷

³ Rule 11(a) explains that a “private letter of caution” can be issued, whereby the Commission “may advise the judge to engage in remedial action” only if the Commission finds that a judge violated a provision of the Code of Judicial Conduct but that a disciplinary hearing is unnecessary. However, this “warning letter” was not issued pursuant to Rule 11 because the Commission did not find that Justice Earls violated the Code upon conclusion of its first formal investigation against her in May.

⁴ *Earls v. North Carolina Judicial Standards Commission, et al*, U.S. District Court for the Middle District of North Carolina, No. 23-cv-00734, filed 29 August 2023. Declaration of Wanda G. Bryant, sworn on 18 October 2023, Exhibit 1, ¶ 29.

⁵ Hannah Albarazi, “North Carolina Justice Earls Opens Up About Diversity”, *Law360*, 20 June, 2023, available at: <https://www.law360.com/articles/1687516/north-carolina-justice-anita-earls-opens-up-about-diversity>.

⁶ *Id.*

⁷ *Id.*

The information indicates that nothing in the interview related to decisions made in specific cases brought before the court.

On 15 August 2023, the Commission wrote to Justice Earls, indicating its intention to investigate her in relation to the June 2023 *Law 360* interview, wherein she appeared “to allege[] that [her] Supreme Court colleagues are acting out of racial, gender, and/or political bias in some of their decision making.”⁸ Although the Commission does not have any procedure for reopening a case that they have dismissed,⁹ the 15 August letter said that the Commission was “reopen[ing]” the earlier-dismissed investigation, using the same inquiry number.¹⁰

In its letter to Justice Earls informing her about the “re-opened” investigation, the Commission claimed that Justice Earls “publicly” alleged that “another judge makes decisions based on a motivation not allowed under the Canons”; that she made such statements “without some quantum of definitive proof”; and that this public speech “runs contrary to a judge’s duty to promote public confidence in the impartiality of the judiciary.”

In response to the “re-opened” investigation, Justice Earls attended a further interview with the Commission. Her attorneys also submitted a letter to the Commission, dated 6 December 2023. That letter stated (*inter alia*) that:

- a) 20 professors specializing in legal ethics – including professors from each of North Carolina’s six law schools – were of the opinion that the applicable ethical rules and principles not only allowed but encouraged Justice Earls’ statements and actions;
- b) The issue of interruptions is an endemic problem in appellate courts, and has been the subject of much scholarly study. The factual predicates for Justice Earls’ remarks on that issue were “unassailable”;
- c) Other justices on the North Carolina Supreme Court have publicly accused their colleagues of “asserting an ideological bent.” In particular, the letter quoted a dissenting judgment which stated that “the majority’s decision [including Earls’] today appears to reflect deeper partisan biases that have no place in a judiciary dedicated to the impartial administration of justice and the rule of law”¹¹; and
- d) By proceeding against Justice Earls, the Commission would be open to a claim that she was being “singled out”. This “could easily be construed as providing two different sets of rules applicable to judges depending on their ideology.”

⁸ Earls v. North Carolina Judicial Standards Commission, *supra*. Note 4. Declaration of Anita S. Earls, sworn on 29 August 2023, ¶ 5.

⁹ Earls v. North Carolina Judicial Standards Commission, *supra*. Note 4. Declaration of Wanda G. Bryant, sworn on 18 October 2023, Exhibit 1, ¶ 27 (“Any purported “reopening” of an investigation previously dismissed by an investigative panel would be highly irregular and contrary to both the Rules and practice of the Commission”).

¹⁰ Earls v. North Carolina Judicial Standards Commission, *supra*. Note 4. Declaration of Anita S. Earls, sworn on 29 August 2023, ¶ 5.

¹¹ Harper v. Hall, 874 S.E.2d 902, 904–05 (N.C. 2022) (Barringer, J., dissenting).

The Commission concluded that disciplinary proceedings were not warranted, and the complaint against Justice Earls should be dismissed.

Impact of the Investigation(s)

As a result of the investigation(s) by the Commission into her public comments, Justice Earls has experienced a “chilling effect” on her speech concerning matters of public interest. She has turned down an invitation to write an article for a national publication, and decided not to discuss the issue of the racial and gender composition of state courts in response to a request to contribute an essay to the *Yale Law Review* forum, because of concerns that this could lead to further investigation by the Commission. Justice Earls also refrained from speaking publicly at a meeting of the Equal Access to Justice Commission concerning a proposal to extend a court rule that broadens the pool of advocates available to indigent litigants, due to fear that she could not speak without running the risk of discipline from the Commission.

Justice Earls filed a federal lawsuit in the U.S District Court for the Middle District of North Carolina to defend her right to speak publicly, including on important issues relating to diversity and presumed bias on North Carolina’s Supreme Court.¹² She sought a preliminary injunction halting the Commission’s investigation, but this was denied. The Commission subsequently notified Justice Earls that they were dismissing the complaint against her without recommending to the Supreme Court any disciplinary action. On 17 January 2024, Justice Earls filed a notice of voluntary dismissal of her federal lawsuit, stating “I continue to believe that the First Amendment protects my ability to speak about matters of racial equity in the legal system. However, I see no need to continue the litigation since the Commission has dismissed the complaint against me and at this time I no longer face being disciplined by the Court.”¹³

Without wishing to prejudge the accuracy of these allegations, I express my serious concern about the North Carolina Judicial Standards Commission’s investigation(s) against Justice Anita S. Earls. If confirmed, the events described above may amount to a breach of several international standards binding on the United States.

Specifically, article 14 of the International Covenant on Civil and Political Rights (ICCPR), which the United States has ratified, guarantees a fair trial to all before a “competent, independent and impartial tribunal established by law”. The guarantee that courts be “competent, independent, and impartial” has been further clarified through the adoption of international principles and guidelines, including the Basic Principles on the Independence of the Judiciary.

The investigation(s) against Justice Earls for her free expression about issues of great importance to the administration of justice, including the representativeness and potential implicit bias in North Carolina’s judiciary raise important concerns about the independence of judges in North Carolina. Principle 8 of the Basic Principles on the Independence of the Judiciary states that “members of the judiciary

¹² U.S. District Court for the Middle District of North Carolina, No. 23-cv-00734, filed 29 August 2023.

¹³ Hayley Fowler, “NC Justice Drops Suit Over Diversity Comments Probe”, *Law 360*, 17 January 2024, available at: <https://www.law360.com/articles/1786745>

are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.”

In addition to potentially infringing her right to freedom of expression, the investigations opened against Justice Earls, on the basis that her comments about bias and lack of diversity on the bench, diminish “public confidence” in the integrity of North Carolina’s judiciary, may constitute reprisal for her efforts to call attention to pressing issues of racial and gender discrimination.

As this mandate has explained, “to effectively play its role in defending equality for all under the rule of law, the composition of the judiciary should be diverse and representative.”¹⁴ Public statements by judges that raise concerns about representation and bias in judicial systems can help translate principles of equality before the law into reality, and should be protected.

By singling out the speech of the only African American woman on North Carolina’s Supreme Court, the Commission’s actions also raise questions of discrimination on the basis of race and gender. Such discrimination is proscribed by core provisions in the ICCPR, especially articles 2(1), and 26, which prohibit discrimination and guarantee equal protection before the law, as well as the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which the United States has also ratified.

In connection with the above alleged facts and concerns, please refer to the **Annex on Reference to international human rights law** attached to this letter which cites international human rights instruments and standards relevant to these allegations. I wish to request that your Excellency’s Government brings our concerns to the relevant executive, legislative and judicial authorities of the State of North Carolina.

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned allegations.
2. Please explain how the actions taken in the case of Justice Anita S. Earls are compatible with international human rights standards safeguarding the independence of the judiciary, including article 14 of the ICCPR and the Basic Principles on the Independence of the Judiciary, in particular principles 1, 2, and 8.
3. Please explain how the actions taken against Justice Earls for her comments about racial and gender bias in the judiciary are compatible with international human rights obligations under the ICERD, especially articles 1, 2, and 5(a), and the non-discrimination provisions of the ICCPR, in particular articles 2(1) and 26, as well as the Basic

¹⁴ A/HRC/53/31, para. 34.

Principles on the Independence of the Judiciary.

4. Please describe what steps will be taken to ensure that judges' rights to freedom of expression will be protected, in particular their right to speak in relation to important issues regarding judicial independence.

I would appreciate receiving a response within 60 days. Past this delay, this communication and any response received from your Excellency's Government will be made public via the communications reporting [website](#). They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

I may publicly express my concerns in the near future as, in my view, the information upon which the press release will be based is sufficiently reliable to indicate a matter warranting immediate attention. I also believe that the wider public should be alerted to the potential implications of the above-mentioned allegations. The press release will indicate that I have been in contact with your Excellency's Government's to clarify the issue/s in question.

Please accept, Excellency, the assurances of my highest consideration.

Margaret Satterthwaite
Special Rapporteur on the independence of judges and lawyers

Annex

Reference to international human rights law

In connection with above alleged facts and concerns, I would like to draw the attention of your Excellency's Government to the international norms and standards applicable to the present case.

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), which the United States signed in 1966 and ratified on 21 October 1992, defines racial discrimination as "any distinction, exclusion, restriction, or preference based on race...which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural, or any other field of public life" (article 1). ICERD provides that: "[e]ach State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists" (article 2(1)(c)). Further, ICERD requires State parties to "not permit public authorities or public institutions, national or local, to incite racial discrimination" (article 4(a)), and provides for the right to "equal treatment before tribunals and all other organs administering justice" (article 5(a)). The ICCPR also has important non-discrimination provisions, requiring the equal protections of the rights enshrined in the Convention "without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status" (article 2(1)). Further, the ICCPR requires the law to provide "all persons equal and effective protection against discrimination on any ground" (article 26).

In addition, I would like to refer you to articles 14 and 19 of the International Covenant on Civil and Political Rights (ICCPR), ratified by the United States on 8 June 1992. Paragraph 1 of article 14 enshrines the requirements of independence and impartiality of the judiciary. As the Human Rights Committee has stated, these provisions are absolute and do not allow for limitations.¹⁵ Article 14 guarantees the right to a public hearing by a competent, independent, and impartial tribunal established by law. Paragraph 2 of article 19 protects the right to freedom of expression, explaining that "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

I would like to refer you to the Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, establish that all governmental and other institutions must respect and conform to the independence of the judiciary (principle 1) and that judges will decide cases impartially, on the basis of the facts and in accordance with the law, "without any restriction and without undue influence, incitement, pressure, threat or interference, direct or indirect, from any sector or for any reason"

¹⁵ See general comment no. 32, paragraph 19.

(principle 2).

These Basic Principles on the Independence of the Judiciary also provide that, in accordance with the Universal Declaration of Human Rights, “members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary” (principle 8). As the preamble of the Basic Principles states, the principle of equality before the law is of utmost importance, but “frequently there still exists a gap between the vision underlying those principles and the actual situation” and “efforts should be undertaken to translate them fully into reality” (preamble).

The Bangalore Principles of Judicial Conduct, which the United Nations Economic and Social Council (ECOSOC) adopted in 2006, as complementary to the 1985 United Nations Basic Principles on the Independence of the Judiciary, require that a judge “be aware of, and understand, diversity in society and differences arising from various sources” including, but not limited to, issues of race and sex (principle 5.1). Further the principles provide that, “subject to the proper performance of judicial duties, a judge may...[w]rite, lecture, teach and participate in activities concerning the law, the legal system, the administration of justice or related matters” or “[e]ngage in other activities if such activities do not detract from the dignity of the judicial office or otherwise interfere with the performance of judicial duties.” (principle 4.11).

In 2015, the United States signed the 2030 Agenda for Sustainable Development which includes a target to “[e]nsure responsive, inclusive, and representative decision-making at all levels” including an indicator that seeks to monitor the “proportions of positions in national and local institutions, including...(c) the judiciary, compared to national distributions by sex, age, persons with disabilities and population groups” (16.7.1).

In a 2023 report to the United Nations Human Rights Council, the mandate on Independence of Judges and Lawyers recalled that judicial systems around the world must address systemic inequalities and discrimination that threaten both independence and decision-making, “to effectively play its role in defending equality for all under the rule of law, the composition of the judiciary should be diverse and representative” (A/HRC/53/31, para. 34).