Financial Disclosures and Fist-Fighting: Disorderly Behavior in the South Carolina General Assembly

Noah Glen Allen

Follow this and additional works at: https://scholarcommons.sc.edu/sclr

Recommended Citation
Available at: https://scholarcommons.sc.edu/sclr/vol65/iss4/7

This Article is brought to you by the Law Reviews and Journals at Scholar Commons. It has been accepted for inclusion in South Carolina Law Review by an authorized editor of Scholar Commons. For more information, please contact dillarda@mailbox.sc.edu.
FINANCIAL DISCLOSURES AND FIST-FIGHTING: “DISORDERLY BEHAVIOR” IN THE SOUTH CAROLINA GENERAL ASSEMBLY

I. INTRODUCTION ............................................................................................................................................. 769

II. BACKGROUND ON ETHICAL OVERSIGHT IN THE SOUTH CAROLINA GENERAL ASSEMBLY .................................................................................................................................................................................................... 771
   A. The Statutory Process for Handling an Ethics Complaint .................................................................................. 774

III. RAINEY v. HALEY AND THE SEPARATION OF POWERS ISSUE .................................................................. 776
   A. Facts Leading to the South Carolina Supreme Court Hearing
      Rainey v. Haley .................................................................................................................................................. 776
   B. The Real Issue(s) in Rainey v. Haley and the Court’s Decision ...................................................................... 778

IV. THE SOUTH CAROLINA COMMISSION ON ETHICS REFORM ....................................................................... 780

V. ANALYZING DISORDERLY BEHAVIOR AND THE BREADTH OF ITS MEANING ............................................. 783
   A. Guidance on Defining Disorderly Behavior ...................................................................................................... 786

VI. CONCLUSIONS IN LIGHT OF RAINEY V. HALEY .......................................................................................... 793

I. INTRODUCTION

In 2013, the South Carolina Supreme Court addressed the question of whether the judiciary can exercise jurisdiction over an ethics complaint against a member of the General Assembly. Although the court dismissed the case, holding that the General Assembly has exclusive jurisdiction over such complaints, the court also brought up the issue of separation of powers. The separation of powers discussion—which was arguably necessary to resolve the issues in the case—later sparked a controversy over the South Carolina State Ethics Commission (State Ethics Commission or Ethics Commission), an entity independent of the General Assembly that has jurisdiction over members of the General Assembly in the same types of ethics complaints. Currently, the State Ethics Commission has no jurisdiction over the General Assembly. As of 2012, more than twenty years had passed since the South

2. Id.
3. Id. at 327, 745 S.E.2d at 84.
6. South Carolina is one of only six states in which the state ethics commission has no jurisdiction over the state legislature. See S.C. CODE ANN. § 8-13-320 (Supp. 2013); IND. CODE
Carolina General Assembly addressed comprehensive ethics reform.\(^7\) In response to this inaction, Governor Nikki Haley issued Executive Order 2012-09, creating the South Carolina Commission on Ethics Reform (the Reform Commission) on October 18, 2012.\(^8\) The purpose of the Reform Commission was, and still is, to restore South Carolinians’ “confidence in, and respect for, their institutions, including [the] government at all levels.”\(^9\) To that end, one of the Reform Commission’s major recommendations focused on independent oversight of ethics law.\(^10\) An independent ethics commission that oversees the South Carolina General Assembly would be better equipped to prevent “self-policing” than ethics committees consisting entirely of legislator-members.\(^11\) Further, an independent oversight commission would bring South Carolina in line with thirty-three other states in the Union.\(^12\)

This Note examines the current ethical oversight procedures in South Carolina government and the constitutional implications arising from such procedures. Specifically, Part II examines South Carolina’s statutorily created State Ethics Commission and House and Senate Ethics Committees, as well as

---


8. Id. at 1.

9. See id. at 2.

10. See id. at 13.


12. See COMMISSION REPORT, supra note 7, at 13.
their respective statutory schemes for handling ethics complaints under state law. Next, Part III analyzes Rainey v. Haley in detail and discusses the implications of the South Carolina Supreme Court’s separation of powers discussion in the opinion. Part IV examines the South Carolina Commission on Ethics Reform and its recent report regarding ethics reform. Part V delves into the separation of powers issue raised by the court in Rainey, particularly with respect to the scope of “disorderly behavior”—the breadth of which ultimately may resolve the constitutional issue. Part V also looks to national case law for further guidance regarding how to define disorderly behavior. Part VI concludes by relating Rainey back to the current ethics reform debacle facing the General Assembly, particularly focusing on the goal of creating a more independent form of ethical oversight. Further, Part VI recommends a possible method of creating such independent ethics oversight without violating the constitutional limits outlined in Rainey.

II. BACKGROUND ON ETHICAL OVERSIGHT IN THE SOUTH CAROLINA GENERAL ASSEMBLY

It is important to distinguish between an ethics commission and an ethics committee. Simply put, an ethics commission is generally more independent of the legislature than an ethics committee. A commission’s members are typically citizens or public officials from the executive branch appointed by the governor or other leaders, whereas a committee is made up of state legislators. Thus, a commission offers relatively independent external oversight compared to a committee’s internal oversight—which entails members overseeing their peers and ensuring that they comply with ethics laws. An ethics commission is usually classified as part of the executive branch, while a committee is clearly part of the legislative branch. Further, while a committee only has jurisdiction over legislative bodies, a commission’s jurisdiction usually reaches other branches of the government—sometimes extending from the executive branch to the legislature. All fifty states have some form of an ethics committee, whereas only forty-one states have some form of an ethics commission.

14. Id. at 326–27, 745 S.E.2d at 84.
15. See COMMISSION REPORT, supra note 7, at 1.
18. See id.
19. See id.
20. See id.
21. Id.
22. Id.
When the State Ethics Commission was created in 1975, it was responsible for financial disclosure, campaign procedure, and ethical rules of conduct pertaining to public officials.\textsuperscript{25} At that time, the commission could publish advisory opinions, receive ethics complaints, and conduct investigations and hearings in response to those complaints.\textsuperscript{26} However, after years of little change, and in response to the indictment of seventeen lawmakers on charges of accepting bribes,\textsuperscript{27} the General Assembly enacted the Ethics, Government Accountability, and Campaign Reform Act of 1991 (the State Ethics Act)\textsuperscript{28} to restore public trust in governmental institutions and the political process.\textsuperscript{29} The State Ethics Act increased the statutory penalties and expanded the size and responsibilities of the Ethics Commission to include lobbyist registration and disclosure.\textsuperscript{30}

Currently, the State Ethics Commission exists in addition to separate House and Senate Ethics Committees that provide ethical oversight to their respective bodies of the General Assembly.\textsuperscript{31} As such, the Ethics Commission has no jurisdiction over the members or staff of the General Assembly; rather, it only has jurisdiction over public officials, public members, or public employees—primarily of the executive branch.\textsuperscript{32} The policy behind this separation appears to

\textsuperscript{23} Id. South Carolina has both a House Ethics Committee and a Senate Ethics Committee. S.C. CODE ANN. § 8-13-510 (Supp. 2013).  
\textsuperscript{24} Id.  
\textsuperscript{26} Id.  
\textsuperscript{27} See Beam, supra note 5.  
\textsuperscript{28} S.C. CODE ANN. §§ 8-13-100 to -1520 (Supp. 2013).  
\textsuperscript{32} The State Ethics Commission’s jurisdiction is as follows:  
[T]o initiate or receive complaints and make investigations . . . upon complaint by an individual, of an alleged violation of this chapter or Chapter 17 of Title 2 by a public official, public member, or public employee except members or staff, including staff elected to serve as officers of or candidates for the General Assembly unless otherwise provided for under House or Senate rules. S.C. CODE ANN. § 8-13-320(9) (Supp. 2013). A public employee is “a person employed by the State, a county, a municipality, or a political subdivision thereof.” Id. § 8-13-100(25). Public member describes “an individual appointed to a nonecompensated part-time position on a board, commission, or council.” Id. § 8-13-100(26). A public member does not lose this status by receiving reimbursement of expenses or a per diem payment for services.” Id. Public official is defined as follows:  
[A]n elected or appointed official of the State, a county, a municipality, or a political subdivision thereof, including candidates for the office. “Public official” does not mean a member of the judiciary except that for the purposes of campaign practices, campaign
stem from article III, section 12 of the South Carolina constitution, which states that “[e]ach house shall... punish its members for disorderly behavior...”\textsuperscript{33} This provision has bolstered the argument that the state constitution requires legislative self-policing and, to date, has provided a legal basis for the continued separation of the Ethics Commission and legislative committees.\textsuperscript{34} To that end, “Courts have upheld state legislatures’ right to set and impose their own ethical rules, usually based on a separation of powers ruling.”\textsuperscript{35}

The State Ethics Commission is composed of nine members appointed by the Governor, upon the advice and consent of the General Assembly, on which one member represents each of the seven congressional districts and two members are appointed from the state at large.\textsuperscript{36} Members serve five-year terms.\textsuperscript{37} The Ethics Commission is considered an administrative agency under the executive branch of government.\textsuperscript{38} Members of the General Assembly and other public officials are not eligible to serve on the commission.\textsuperscript{39} In comparison, the House and Senate Ethics Committees are each made up of six members who are elected by the House and Senate, respectively.\textsuperscript{40} The committees’ members serve terms that are coterminous with their terms in the House or Senate.\textsuperscript{41}

The current mission statement for the State Ethics Commission highlights its responsibility for enforcing the State Ethics Act and “restoring public trust in government.”\textsuperscript{42} The Ethics Commission carries out this policy by ensuring compliance with the requirements of the State Ethics Act.\textsuperscript{43} Nevertheless, the main distinction between the Ethics Commission and the House and Senate disclosure, and disclosure of economic interests, a probate judge is considered a public official and must meet the requirements of this chapter.

\textit{Id.} § 8-13-100(27).

\textsuperscript{33} S.C. CONST. art. III, § 12.

\textsuperscript{34} See Beam, supra note 5.

\textsuperscript{35} Ethic Committees & Commissions, Nat’l Conf. of St. Legislatures, http://www.ncsl.org/research/ethics/ethics-committees-commissions.aspx (last visited Mar. 5, 2014). This Note does not delve into the debate regarding whether courts have jurisdiction over legislative ethical violations; rather, this Note discusses the constitutionality of an independent ethics commission exercising jurisdiction over the General Assembly.

\textsuperscript{36} S.C. CODE ANN. § 8-13-310(B) (Supp. 2013).

\textsuperscript{37} Id. § 8-13-310(C).


\textsuperscript{39} S.C. CODE ANN. § 8-13-310(B) (Supp. 2013).

\textsuperscript{40} Id. § 8-13-510.

\textsuperscript{41} Id.


\textsuperscript{43} Id.
Ethics Committees concerns which public officials fall within their respective statutory jurisdictions.\textsuperscript{44}

\textit{A. The Statutory Process for Handling an Ethics Complaint}

Under the State Ethics Act, the process by which the State Ethics Commission conducts its investigations, inquiries, and hearings begins with the commission accepting a verified complaint, in writing, that states the name of the person alleged to have committed a violation and the particulars of that violation.\textsuperscript{45} Additionally, if the commission receives any information and finds probable cause to believe that a violation has otherwise occurred, the commission can file a verified complaint itself.\textsuperscript{46} Next, if the commission determines that a complaint fails to allege sufficient facts to constitute a violation, the commission will dismiss the complaint and strike it from public record.\textsuperscript{47} If the facts are sufficient, however, the commission will conduct an investigation.\textsuperscript{48} The commission must order testimony and subpoena any witnesses or materials evidencing proof of the alleged violation.\textsuperscript{49} Unless the respondent waives the right to confidentiality, all investigations, inquiries, hearings, and accompanying documents must remain confidential until a finding of probable cause or dismissal.\textsuperscript{50} Additionally, the Ethics Commission must afford the subject of a complaint the opportunity to be heard and all other due process rights.\textsuperscript{51} After the investigation, the commission must determine whether probable cause exists.\textsuperscript{52} If so, the commission may order a hearing before a “panel of three commissioners, selected at random, to determine whether a violation . . . has actually occurred”; if not, the commission will dismiss the complaint.\textsuperscript{53} Within sixty days of the conclusion of a hearing, the panel must issue its determination in a “written decision with findings of fact and conclusions of law.”\textsuperscript{54} The written decision may set forth an order requiring (1)

\textsuperscript{44} Compare S.C. CODE ANN. § 8-13-320(9) (listing public official, public member, or public employee except members or staff, including staff elected to serve as officers of or candidates for the General Assembly, unless otherwise provided for under House or Senate rules, as those subject to complaint investigation), with id. § 8-13-530 (listing members, staff, and candidates as subject to complaint investigation).

\textsuperscript{45} Id. § 8-13-320(10)(a).

\textsuperscript{46} Id. § 8-13-320(10)(d). This type of verified complaint is filed upon a motion and affirmative vote of the majority of the total membership of the commission. Id.

\textsuperscript{47} Id. § 8-13-320(10)(b). The executive director of the commission can also make this determination. Id.

\textsuperscript{48} Id. § 8-13-320(10)(c). The commission can request assistance from the appropriate agencies if needed. Id. § 8-13-320(10)(e).

\textsuperscript{49} Id. § 8-13-320(10)(f).

\textsuperscript{50} Id. § 8-13-320(10)(g).

\textsuperscript{51} Id. § 8-13-320(10)(h). This includes the right to counsel. Id.

\textsuperscript{52} Id. § 8-13-320(10)(i).

\textsuperscript{53} Id.

\textsuperscript{54} Id. § 8-13-320(10)(k).
the payment of a civil penalty; (2) the “forfeiture of gifts, receipts or profits, or the value thereof, obtained” in the violation; or (3) some combination of the two.\textsuperscript{55} Additionally, section 8-13-320(10)(k) outlines other actions the commission may take with respect to its decision:

The commission panel, where appropriate, shall recommend disciplinary or administrative action, or in the case of an alleged criminal violation, refer the matter to the Attorney General for appropriate action. The Attorney General may seek injunctive relief or may take other appropriate action as necessary. In the case of a public employee, the commission panel shall file a report to the administrative department executive responsible for the activities of the employee. If the complaint is filed against an administrative department executive, the commission panel shall refer the case to the Governor.\textsuperscript{56}

An appeal process, during which the full commission reviews the decision made by the panel, is also available so long as the respondent appeals within ten days after service of an order, report, or recommendation.\textsuperscript{57} Lastly, all actions taken by the commission after a decision is rendered are matters of public record.\textsuperscript{58}

The legislative committees follow a similar process, albeit more statutorily simplified. When a complaint is filed, the respective committee determines whether the facts are sufficient to constitute a violation.\textsuperscript{59} If so, the committee promptly conducts a confidential investigation of the alleged violation in which the committee may subpoena the attendance and testimony of witnesses, as well as the production of pertinent documents.\textsuperscript{60} If probable cause exists to support an alleged violation, the committee may “render an advisory opinion to the respondent” that requires compliance.\textsuperscript{61} Should the respondent fail to comply with the advisory opinion, the committee may convene a formal hearing on the matter within thirty days.\textsuperscript{62} After the hearing, the committee makes a finding of fact.\textsuperscript{63} If “competent and substantial evidence” warrants, the committee may

\textsuperscript{55} Id. § 8-13-320(10)(l).
\textsuperscript{56} Id. § 8-13-320(10)(k).
\textsuperscript{57} Id. § 8-13-320(10)(m).
\textsuperscript{58} Id. § 8-13-320(10)(o).
\textsuperscript{59} Id. § 8-13-540(1).
\textsuperscript{60} Id. These actions are very similar to those of the Ethics Commission. Compare id. § 8-13-540(1) (providing that a sufficiently pled violation mandates prompt investigation with possible subpoenas of witness and documents), with id. § 8-13-320(10)(c)-(h) (providing that a sufficiently pled violation permits an investigation with possible subpoenas of witnesses and documents).
\textsuperscript{61} Id. § 8-13-540(1)(a).
\textsuperscript{62} Id. § 8-13-540(1)(b). If a hearing is set, the respondent has access to all of the documents and matters procured by the committee and must be afforded all appropriate due process protections. Id. § 8-13-540(2).
\textsuperscript{63} Id. § 8-13-540(3).
take any combination of the following four actions: “administer a public or private reprimand,” determine that a “technical violation” has occurred, 
“recommend expulsion of the member,” or refer the matter to the state attorney general in the case of an alleged criminal violation. Following the committee’s order, the respondent has ten days to appeal the action to the full legislative body. If the respondent appeals, the committee may only recommend an action to the full legislative body. In these situations, the House or Senate has the power to sustain or overrule the ethics committee’s ruling or order other actions consistent with the State Ethics Act. Accordingly, the respective legislative body maintains final say over any ethical matter concerning its own members.

III. RAINey v. HALEY AND THE SEPARATION OF POWERS ISSUE

Lawmakers have cited Rainey v. Haley to support the proposition that the creation of a single ethics commission—indeed, of the General Assembly—to oversee all public officials would violate the separation of powers doctrine in the South Carolina constitution. This Part first covers the facts leading up to the South Carolina Supreme Court hearing the Rainey v. Haley case and then analyzes the court’s opinion in depth.

A. Facts Leading to the South Carolina Supreme Court Hearing Rainey v. Haley

The controversy involving John Rainey and Governor Nikki Haley began on November 17, 2011, when Rainey—acting simply as a private citizen—filed a complaint in the Richland County Court of Common Pleas seeking a declaratory judgment that Haley violated certain provisions of the State Ethics Act while serving in the South Carolina House of Representatives. Specifically, the complaint asked for a declaration regarding whether Haley violated the law by committing the following actions:

64. A technical violation is typically unintentional and not made in an effort to violate the Ethics Act. Id. § 8-13-1170. Technical violations must remain confidential unless the respondent requests otherwise; they are penalized by a fine not exceeding fifty dollars. Id.
65. Id. § 8-13-540(3).
66. Id. § 8-13-540(4).
67. See id. § 8-13-550(A).
68. Id.
69. See id.; see also Scoppe, supra note 4 (discussing “self-policing” policies in the General Assembly’s ethics oversight).
70. See Beam, supra note 5.
(1) lobbying a state agency in violation of S.C. Code Ann. § 2-17-15(A) (Supp. 2011); (2) failing to disclose that her reason for recusing herself from voting on legislation was because the legislation’s beneficiary was secretly paying her, in violation of S.C. Code Ann. § 8-13-700(B) (Supp. 2010); (3) failing to abstain from a vote authorizing payment of public money to a corporation paying her, in violation of S.C. Code Ann. § 8-13-700(A) (Supp. 2010); (4) soliciting money from registered lobbyists and lobbyists’ principals for the benefit of her employer, in violation of the same code section; and (5) concealing all of this activity by making false and incomplete public disclosures required by the Ethics Act, in violation of S.C. Code Ann. § 16-9-10(A)(2) (Supp. 2011).73

On March 21, 2012, the circuit court dismissed the action, finding that the court lacked subject matter jurisdiction and that Rainey lacked standing.74 Rainey, in line with the State Ethics Act, also filed the same complaint with the House Ethics Committee two days before the circuit court dismissed the case.75 In early May of 2012, several weeks after the circuit court’s dismissal, the House Ethics Committee—in line with the procedure outlined in section 8-13-540—found the allegations sufficient to warrant an investigation, but then voted along party lines to clear Haley of the charges.76 After House Democrats objected to the committee’s contradictory outcome, however, the committee reversed course and proceeded to hold a full hearing on the merits.77 Nevertheless, after the hearing, the House Ethics Committee held that “Governor Haley had not violated the law” and finalized the dismissal of Rainey’s claims.78 Subsequent to this jurisdictional ping-pong between the judiciary and General Assembly, Rainey appealed the circuit court’s decision and the South Carolina Supreme Court agreed to hear the appeal.79

73. Id. The complaint also noted that the 2011 amendment to South Carolina Code section 8-13-700(B) “does not apply to the allegations” in the case. Id. at 6 n.1.
74. See id. at 7.
76. See Rainey v. Haley, 404 S.C. 320, 322-23, 745 S.E.2d 81, 82 (2013). Thus, the case moved back to the judicial branch. Id.
B. The Real Issue(s) in Rainey v. Haley and the Court’s Decision

The two issues on appeal were clearly stated in both Rainey’s and Haley’s briefs to the supreme court: (1) whether courts in South Carolina have jurisdiction to render declaratory judgments regarding the regulated conduct of a member of the General Assembly who violates the law under the State Ethics Act; and (2) whether a private citizen has standing to seek declaratory relief in regard to the questionable ethical actions of the same member.80 Rainey also claimed that an answer to the second issue would “provide future guidance in a matter of great public importance.”81 The factual merits of the case were clearly not on appeal, however, because the circuit court never reached them.82 Additionally, the original briefs did not even mention the constitutional issue of whether the court was violating separation of powers principles by hearing the case.83

The supreme court began its opinion by addressing the first issue—whether the court had jurisdiction to hear Rainey’s case.84 Looking to the “plain and unambiguous”85 language of the State Ethics Act, the court held that “[t]he [General Assembly] has established a comprehensive statutory scheme for regulating the behavior of elected officials, public employees, lobbyists, and other individuals who present for public service.”86 To that end, the State Ethics Commission and the Senate and House Ethics Committees were statutorily created to enforce the Act.87 Additionally, the court looked to legislative intent to determine “whether the [General Assembly] has given another entity [besides the courts] exclusive jurisdiction . . . .”88 In that regard, “the relevant statute” determines where jurisdiction lies.89 The court concluded that, under the State Ethics Act, the General Assembly had conveyed exclusive jurisdiction upon the House and Senate Ethics Committees “for the handling of ethics complaints involving members of the General Assembly and their staff.”90 Furthermore, for the court to exercise jurisdiction otherwise would “contravene the clear language of the State Ethics Act.”91

80. Brief of Appellant, supra note 72, at 5; Return Brief of Respondent, supra note 75, at 1.
81. Brief of Appellant, supra note 72, at 5.
82. See Rainey, 404 S.C. at 322–23, 745 S.E.2d at 82.
83. See generally Brief of Appellant, supra note 72 (failing to mention separation of powers); Return Brief of Respondent, supra note 75 (failing to mention separation of powers).
84. Rainey, 404 S.C. at 323, 745 S.E.2d at 82.
85. Id. (quoting Hodges v. Rainey, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000)).
86. Id. at 323–24, 745 S.E.2d at 83.
87. Id. at 324, 745 S.E.2d at 83.
88. Id. at 323, 745 S.E.2d at 83 (quoting Dema v. Tenet Physician Servs.–Hilton Head, Inc., 383 S.C. 115, 121, 678 S.E.2d 430, 433 (2009)).
89. Id.
90. Id. at 324, 745 S.E.2d at 83. On the other hand, “[T]he State Ethics Commission is generally responsible for the handling of ethical violations by most public officials and employees . . . .” Id.
91. Id. at 327, 745 S.E.2d at 84.
The supreme court continued its discussion of legislative intent and fortified its position by citing the rule of construction “expressio unius est exclusio alterius,” or “to express or include one thing implies the exclusion of another, or of the alternative.”92 To that end, the court pointed to the single exception within the State Ethics Act under which the judiciary has jurisdiction and “the circuit court may receive and act on an ethics complaint, to the exclusion of the Ethics Committee.”93 Because this is the only exception under the Act, the court repeated its holding: “It is therefore clear the [General Assembly] intended the respective Ethics Committee to otherwise have exclusive authority to hear alleged ethics violations of its own members and staff.”94

While the supreme court could have concluded its opinion with this subpart, the court instead included a paragraph of dicta discussing separation of powers and a constitutional issue.95 Specifically, the court began by acknowledging South Carolina’s constitutional and judicial recognition and respect for the General Assembly’s authority over the conduct of its own members. The court supported this sentence by citing article III, sections 11 and 12 of the South Carolina constitution.97 Section 11 grants each legislative house the authority to judge the election returns and qualifications of its own members,98 while section 12 provides that “[e]ach house shall choose its own officers, determine its rules of procedure, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member, but not a second time for the same cause.”99 Further, the supreme court cited two cases in which it had interpreted only section 11 and held that that provision barred its jurisdiction.100 The court,

92. See id. at 325, 745 S.E.2d at 84 (quoting Hodges v. Rainey, 341 S.C. 79, 86, 533 S.E.2d 578, 582 (2000)) (internal quotation marks omitted).
93. Id. at 325, 745 S.E.2d at 83–84 (citing S.C. CODE ANN. § 8-13-530(4) (Supp. 2013)).
94. Rainey, 404 S.C. at 325–26, 745 S.E.2d at 84.
95. Id. at 326–27, 745 S.E.2d at 84–85. This paragraph sparked controversy in later legislative discussions regarding the creation of a single ethics commission. See Beam, supra note 5.
96. Rainey, 404 S.C. at 326, 745 S.E.2d at 84.
97. Id. (citing S.C. CONST. art. III, §§ 11, 12).
99. Id. § 12 (emphasis added).
however, did not provide a citation to a case in which it had interpreted section 12. The supreme court then concluded that “[c]onsequently, a court’s exercise of jurisdiction over [Rainey’s] ethical complaint against Governor Haley would not only contravene the clear language of the State Ethics Act, it would also violate separation of powers.” This sentence was at the heart of the controversy in later legislative discussions and is the focal point of this Note.

In Rainey, the supreme court seemed to divide the statutory scheme for handling ethics violations into three distinct steps: (1) receiving the complaint, (2) handling and investigating the complaint under the statutory process, and (3) resolving the complaint. While these three steps appear to delineate certain jurisdictional boundaries, the question becomes where to draw the line to avoid violating separation of powers. The court looked to article III, section 12 in an attempt to find constitutional guidance as to what powers are reserved for the General Assembly. The court appeared to interpret the language pertaining to the ability to “punish its members for disorderly behavior” to include ethical violations under the provisions of the State Ethics Act. The power to “punish” appears to be synonymous with the court’s third step of its delineation—the actual resolution of an ethics complaint. That being said, the court arguably drew a line between the second step of handling a complaint and the third step of resolving a complaint. Thus, under Rainey, to give any entity besides the House or Senate Ethics Committee the power to punish legislative members for ethics violations would violate the South Carolina constitution’s separation of powers doctrine by depriving the General Assembly of its right to “punish its members for disorderly behavior.”

IV. THE SOUTH CAROLINA COMMISSION ON ETHICS REFORM

Prior to the outcome of Rainey v. Haley, Governor Haley issued an Executive Order in October of 2012 creating the South Carolina Commission on Ethics Reform. The Reform Commission published a report that “identify[d] those areas [in South Carolina ethics laws] which need immediate attention as

101. See id. at 326–27, 745 S.E.2d at 84.
102. Id. The court also held that, because it lacked jurisdiction to hear the case, it did not need to address the remaining issue on appeal—Rainey’s standing as a private citizen. See id. at 327, 745 S.E.2d at 84 n.6.
103. See Beam, supra note 5.
104. See Rainey, 404 S.C. at 325, 745 S.E.2d at 83.
105. For example, it may be possible for an entity to receive and handle a complaint but not resolve the complaint. See infra Part V.
106. Rainey, 404 S.C. at 326, 745 S.E.2d at 84.
109. See infra Part V.
111. COMMISSION REPORT, supra note 7, at 1.
well as some which would stimulate the further examination [sic] of broad categories of needed change."\textsuperscript{112} Of particular relevance to this Note is appendix 2, which addressed separation of powers and the State Ethics Commission’s jurisdiction.\textsuperscript{113}

Appendix 2 began by walking through the statutory provisions pertaining to the State Ethics Commission and the House and Senate Ethics Committees.\textsuperscript{114} Particularly, it pointed out that the Ethics Commission is the “appropriate supervisory office” for all public officials, “except for those members of or candidates for the office of State Senator or State Representative.”\textsuperscript{115} The Reform Commission referred to this statutory cutout as the “legislative exception.”\textsuperscript{116} Later in appendix 2, the Reform Commission noted that “even the section of the code establishing the three ethics bodies indicates that waiver of the legislative exception may be accomplished by House or Senate rule . . . ”\textsuperscript{117} Thus, the Reform Commission appeared to take a less constrictive approach to the statutory scheme of the State Ethics Act than the court in Rainey v. Haley.\textsuperscript{118}

Also contrary to the court in Rainey, the Reform Commission opined that the South Carolina constitution is silent on the issue of ethics oversight.\textsuperscript{119} Accordingly, appendix 2 addressed “whether a constitutional change would be necessary to remove the legislative exception to the jurisdiction of the South Carolina Ethics Commission.”\textsuperscript{1120} The Reform Commission specifically noted the separation of powers doctrine in article I, section 8 of the South Carolina constitution and the legislative power vested in the Senate and House of Representatives by article III, section 1.\textsuperscript{1121} The Reform Commission then examined article III, section 12 in conjunction with section 13, while the court in

\begin{itemize}
\item \textsuperscript{112} \textit{Id.} at 2.
\item \textsuperscript{113} See \textit{id.} at app. 2, at 28.
\item \textsuperscript{114} \textit{Id.} at app. 2, at 28 (citing S.C. CODE ANN. §§ 8-13-100(2)(a), -310(A), -320(9), -510, -530(3)).
\item \textsuperscript{115} \textit{id.} (quoting S.C. CODE ANN. § 8-13-100(2)(a)).
\item \textsuperscript{116} See \textit{id.} (quoting S.C. CODE ANN. § 8-13-510).
\item \textsuperscript{117} \textit{Id.} at app. 2, at 29 (“[T]o initiate or receive complaints and make investigations . . . of an alleged violation . . . by a public official, public member, or public employee except members or staff, including staff elected to serve as officers of or candidates for the General Assembly unless otherwise provided for under House or Senate rules.” (citing S.C. CODE ANN. § 8-13-320(9) (emphasis added))).
\item \textsuperscript{118} Compare \textit{id.} (interpreting jurisdiction under the State Ethics Act), with Rainey v. Haley, 404 S.C. 320, 323–24, 745 S.E.2d 81, 83–84 (2013) (citations omitted) (interpreting jurisdiction under the State Ethics Act).
\item \textsuperscript{119} COMMISSION REPORT, supra note 7, at 28. On the other hand, the Rainey court claimed that disorderly behavior umbrellas ethical oversight. See \textit{Rainey}, 404 S.C. at 326–27, 745 S.E.2d at 84.
\item \textsuperscript{120} COMMISSION REPORT, supra note 7, at 28. The issue is not whether the current language in the South Carolina constitution obstructs jurisdiction, as discussed in \textit{Rainey}. See \textit{Rainey}, 404 S.C. at 326–27, 745 S.E.2d at 84.
\item \textsuperscript{121} COMMISSION REPORT, supra note 7, at 28–29 (quoting S.C. CONST. art. I, § 8; art. III, § 1).
\end{itemize}
Rainey v. Haley considered it with section 11.122 This reading of the state constitution accounts for the Reform Commission's view that disorderly behavior from section 12 relates to the legislative arrest provision in section 13.123 The Reform Commission stated that "[t]he purpose of legislative arrest appears to be to prevent disruption of legislative business."124 Thus, by "[r]ead[ing] the two sections together, the power to punish both members and non-members appears to be linked to the actual operation of the legislative branch."125 The Reform Commission adopted a narrow view of disorderly behavior coupled with "threats of assault or arrest," referring to them as two of the "only urgent impediments to the smooth functioning of legislative business."126 As such, "[n]either punitive section appears to contemplate a role for sanctioning conduct not immediately threatening to legislative proceedings."127

Lastly, the Reform Commission cited a later section of the South Carolina constitution concerning the actual removal of legislative officers, which states "that legislators shall be removed for incapacity, misconduct or neglect of duty, in such manner as may be provided by law, when no mode of trial or removal is provided in this Constitution."128 The Reform Commission seemed to include this quotation, and the emphasis within, to show a distinction between conduct immediately threatening to legislative proceedings—as dealt with under sections 12 and 13—and the mode of removal under the State Ethics Act for ethical misconduct, which deals with conduct that is not immediately threatening.129

The Reform Commission began the conclusion of appendix 2 by pointing out that "[a]ll bodies charged with investigating and punishing unethical conduct by public officials in South Carolina are statutorily created."130 Therefore, "If each body in the General Assembly possessed inherent state constitutional authority to investigate and sanction unethical behavior among its members as a consequence of separation of powers and its ability to punish 'disorderly behavior,' [then] statutory provisions for legislative ethics committees would be

122. Compare id. at 29 (examining article III, section 12 of the state constitution in conjunction with section 13), with Rainey, 404 S.C. at 326, 745 S.E.2d at 84 (examining article III, section 12 of the state constitution in conjunction with section 11). Note that the Reform Commission's report came out prior to Rainey v. Haley. Compare COMMISSION REPORT, supra note 7, at 2 (noting that the report was released in January of 2013), with Rainey, 404 S.C. at 320, 745 S.E.2d at 81 (noting that the case was decided in June of 2013).
123. See COMMISSION REPORT, supra note 7, at 29.
124. Id.
125. Id. (emphasis added).
126. See id. (internal quotation marks omitted).
127. Id. (emphasis added).
128. Id. (quoting S.C. CONST. art. III, § 27) (internal quotation marks omitted).
129. Compare id. (discussing the mode of removal when the threat is not immediate), with S.C. CONST. art. III, §§ 12–13 (discussing removal when an immediate threat to legislative proceedings is present).
130. COMMISSION REPORT, supra note 7, at 29.
unnecessary.”131 Because the state’s ethics bodies were created by statute, the General Assembly retains the power to modify the operations of these bodies by amending the relevant sections of the South Carolina Code.132 The Reform Commission pointed out that thirty-three of the forty states that have state ethics commissions include their respective state legislatures within the jurisdiction of their respective committees.133 On the other hand, “South Carolina is one of six states that have [sic] not granted this expanded jurisdiction.”134 Thus, the Reform Commission concluded that a constitutional amendment would be unnecessary to allow the State Ethics Commission to “subsume the jurisdiction of the Senate and House Legislative Ethics Committees.”135 Simply changing the existing statute would be consistent with the legislative power that created the ethical oversight bodies in the first place.136 Further, it “would pose no threat to the separation of powers, as the punitive authority vested in the legislature appears to be solely in service of maintaining the core legislative function”—which the Reform Commission concluded does not include ethical misconduct.137

V. ANALYZING DISORDERLY BEHAVIOR AND THE BREADTH OF ITS MEANING

The discrepancy between the supreme court’s analysis in Rainey and the Reform Commission’s conclusion in its report appears to turn on the scope of disorderly behavior—whether state legislators’ ethical misconduct falls within the exclusivity of article III, section 12 of the South Carolina constitution. While not explicitly stated, both the Rainey court and the Reform Commission addressed this issue, but reached their respective conclusions in different manners.138 First, the supreme court decided whether the judiciary has jurisdiction to hear an ethics complaint under the State Ethics Act.139 In

131. Id. at 29–30 (quoting S.C. CONST. art III, § 12).
132. Id. at 30. The Reform Commission also noted that bills were introduced in both the House and Senate during the 2011–2012 legislative session to expand the jurisdiction of the State Ethics Commission to cover members of the General Assembly; however, neither bill made it out of the committee stage. Id. (citing H.B. 4421 (S.C. 2012) and S.B. 1373 (S.C. 2012)).
133. Id.
134. Id.; see also sources cited supra note 6 (depicting which states have ethics commissions and which states have ethics jurisdiction over their respective legislatures).
135. COMMISSION REPORT, supra note 7, at 30.
136. Id.
137. See id. at 29–30 (emphasis added). This conclusion obviously conflicts with the court’s ruling in Rainey in so much as it deprives the General Assembly of its power to punish its members—but otherwise, it may be possible to grant jurisdiction to another entity to receive and handle ethics complaints. See infra Part V.
138. Compare Rainey v. Haley, 404 S.C. 320, 325, 745 S.E.2d 81, 84 (2013) (discussing whether the court can hear a legislative member’s ethics violations), with COMMISSION REPORT, supra note 2, at 30 (discussing whether the State Ethics Commission has jurisdiction over a legislative member’s nonpunitive violations).
139. Rainey, 404 S.C. at 324–25, 745 S.E.2d at 83–84 (citations omitted).
comparison, the Reform Commission considered whether the State Ethics Commission may—indeed, independently from the General Assembly—constitutionally exercise jurisdiction over a legislative member’s ethics violations under the State Ethics Act.\textsuperscript{140} While these may appear to be relatively different analyses, both interpreted article III, section 12—particularly disorderly behavior—to determine proper jurisdiction.\textsuperscript{141} Thus, these different interpretations raise the obvious questions: What exactly does disorderly behavior mean, and does its scope reach legislators’ violations under the State Ethics Act?

One of the following three outcomes ultimately results, depending on the scope of disorderly behavior:

1. Maintaining the current statutory scheme in the State Ethics Act, under which the House and Senate Ethics Committees handle their respective ethics cases involving members of the General Assembly because such power falls exclusively within their jurisdiction under article III, section 12 of the South Carolina constitution.

2. Drawing a jurisdictional line within the statutory scheme for processing ethics violations between the second step—handling the complaint under the statutory process—and the third step of resolving the complaint and punishing the violator. This outcome preserves all of the current ethics oversight entities, but also allows for more independent ethics oversight. The State Ethics Commission would receive the complaint and handle the resulting investigation and factfinding, while either the House or Senate Ethics Committee would then resolve the complaint and punish its members under article III, section 12.

3. Amending the State Ethics Act to grant the State Ethics Commission full jurisdiction over all public officials, including legislators, because the scope of disorderly conduct does not reach ethics violations and only refers to disruption of legislative business.

Drudging through the following analysis is necessary to understand these possible outcomes. The first two outcomes assume that the scope of disorderly behavior includes ethical misconduct under the State Ethics Act. Under that assumption, the South Carolina constitution appears to grant exclusive jurisdiction to the respective legislative bodies and, in turn, their ethics

\textsuperscript{140} See COMMISSION REPORT, supra note 7, at 30.

\textsuperscript{141} Compare id. at 29 (examining article III, section 12 of the state constitution in conjunction with section 13), with Rainey, 404 S.C. at 326–27, 745 S.E.2d at 84 (examining article III, section 12 of the state constitution in conjunction with section 11).
committees.142 This train of thought, however, can reach either of the first two outcomes. Looking back to Rainey v. Haley, the court divided the statutory scheme of processing ethics violations under the State Ethics Act into three distinct steps: (1) receiving the complaint, (2) handling and investigating the complaint under the statutory process, and (3) resolving the complaint.143 Because the statutory scheme contemplates all three steps, the supreme court held that the General Assembly “intended the respective Ethics Committees to have exclusive authority to hear the alleged ethics violations of its own members and staff.”144 In an attempt to further support this holding, the court later brought up article III, section 12, in which the court implied that the General Assembly’s “punish[ing] [of] its own members for disorderly behavior” includes the statutorily granted power to punish under the State Ethics Act.145 The action of actually punishing members of the General Assembly appears to fall under the third step in the statutory scheme, concerning resolution of the complaint.146 Thus, the first two outcomes presented above arise out of the creation of a jurisdictional line between the second and third step in the statutory scheme of handling ethics complaints.147 Without the jurisdictional line, one of the legislative entities—the House or Senate Ethics Committee—must handle the entire process.148 Alternatively, if the line is drawn, a separate entity—the State Ethics Commission—could possibly handle receiving the complaint and conducting the investigation and hearing, but then pass along the complaint to the legislative committee to handle the punitive resolution step. The latter solution allows independent ethics oversight without depriving the General Assembly of its constitutional right to punish its members for disorderly behavior.149 This outcome also appears consistent with the court’s holding in Rainey because it maintains the General Assembly’s sole authority over the conduct of its own members and, thus, preserves the separation of powers.150

The third outcome assumes that the scope of disorderly behavior does not include ethical misconduct. Thus, an independent entity—such as the State

142. This line of reasoning stems from Rainey, although the court did not directly address the State Ethics Commission’s jurisdiction there. See Rainey, 404 S.C. at 326–27, 745 S.E.2d at 84.
143. See id. at 325, 745 S.E.2d at 83.
144. Id.
145. Id. at 326, 745 S.E.2d at 84.
146. See S.C. CODE ANN. § 8-13-540(3)(a)-(d) (codifying the alternative actions the ethics committee shall take after hearing an ethics complaint and determining its findings of fact). As these options appear to be the only solution after hearing a complaint, it seems logical that they constitute the act of punishing. See WEBSTER’S UNABRIDGED DICTIONARY 1567 (Random House, 2d ed. 2001) (defining punish as “inflict[ing] a penalty for (an offense, fault, etc.).”).
147. See discussion supra Part III.B (discussing the court’s division of the statutory scheme of handling ethics violations under the State Ethics Act).
148. See Rainey, 404 S.C. at 324, 745 S.E.2d at 83.
149. See generally S.C. CONST. art. III, § 12 (bestowing the constitutional power to punish members for disorderly behavior on each house of the South Carolina General Assembly); S.C. CONST. art. I, § 8 (creating South Carolina’s separation of powers doctrine).
150. See Rainey, 404 S.C. at 326, 745 S.E.2d at 84–85.
Ethics Commission—could arguably exercise jurisdiction over the entire process of handling ethics violations of any public official, including legislators. Under this outcome, and in line with the Reform Commission’s report, the General Assembly could simply amend the State Ethics Act to grant jurisdiction to the State Ethics Commission in an effort to provide “extra-legislative ethics oversight.”\(^{151}\) That being said, this third outcome may conflict with the Rainey opinion.\(^{152}\) As previously discussed in this Note, the court undoubtedly implied that the scope of disorderly behavior under article III, section 12—in some capacity not defined—reaches ethics violations under the State Ethics Act.\(^{153}\) Thus, under Rainey, the General Assembly likely cannot delegate the entire process of handling ethics violations because article III, section 12 apparently grants some rights exclusively to the General Assembly.\(^{154}\)

Nevertheless, because the court in Rainey did not explicitly define disorderly behavior, the following discussion looks to several cases from other jurisdictions to better understand this term of art.

A. Guidance on Defining Disorderly Behavior

Unlike the South Carolina Supreme Court in Rainey v. Haley, the Reform Commission attempted to find some guidance from other jurisdictions on the definition of disorderly behavior.\(^{155}\) In its report, the Reform Commission looked to State v. Gregorio,\(^{156}\) a New Jersey case that “addresse[d] issues raised by non-legislative prosecution of ethics violations [of a state senator] as possible violations of the separation of powers doctrine and legislative rule-making authority.”\(^{157}\) In that case, the defendant allegedly failed to report certain income

---

151. COMMISSION REPORT, supra note 7, at 30.
152. See Rainey, 404 S.C. at 326, 745 S.E.2d at 84–85.
153. See supra Part III.B. The concurrence in Rainey, however, did mention several bills that were introduced in the House and Senate last year to bring the General Assembly within the jurisdiction of the State Ethics Commission. See Rainey, 404 S.C. at 328 n.8, 745 S.E.2d at 85 n.8 (Hearn, J., concurring). Nevertheless, these bills did not make it out of the committee stages. See COMMISSION REPORT, supra note 7, at 30 (citing H.B. 4421 (S.C. 2012) and S.B. 1373 (S.C. 2012)).
154. See Rainey, 404 S.C. at 326, 745 S.E.2d at 84–85.
155. See COMMISSION REPORT, supra note 7, at 29.
157. COMMISSION REPORT, supra note 7, at 30 (citing Gregorio, 451 A.2d 980). In its report, the Reform Commission approached this case to better define disorderly behavior, but also in a broader context to suggest that the judiciary has jurisdiction over ethics violations—contrary to the holding in Rainey v. Haley; which came out after the Reform Commission’s report. Compare id. at 30–31 (citations omitted) (rejecting the argument that the executive branch has no power to enforce a rule requiring financial disclosure statements), with Rainey, 404 S.C. at 327, 745 S.E.2d at 84 (holding that “ethics investigations regarding legislative members and staff can only be performed by the [General Assembly]”). However, this Note is solely focused on defining disorderly behavior in regard to the constitutionality of an independent ethics commission—and examines Gregorio in that specific context.
in a filing required under New Jersey’s conflict of interest law, an ethics violation similar in nature to a violation under the South Carolina State Ethics Act. However, unlike South Carolina, New Jersey has a single independent ethics commission—the Joint Legislative Committee on Ethical Standards—which functions under the executive branch and has statutorily granted jurisdiction over the legislature. The defendant argued that this executive branch oversight and subsequent prosecution in state court violated the state’s separation of powers doctrine. New Jersey’s separation of powers doctrine is very similar to that found in the South Carolina constitution. New Jersey’s doctrine states that “[t]he powers of the government shall be divided among three distinct branches, the legislative, executive, and judicial. No person or persons belonging to or constituting one branch shall exercise any of the powers properly belonging to either of the others, except as expressly provided in this Constitution.” Likewise, according to South Carolina’s doctrine, “In the government of this State, the legislative, executive, and judicial powers of the government shall be forever separate and distinct from each other, and no person or persons exercising the functions of one of said departments shall assume or discharge the duties of any other.”

The New Jersey court dismissed the defendant’s argument, reasoning that the separation of powers doctrine is not “to be construed as creating three mutually exclusive watertight compartments.” To that end, “criminal prosecution in such a case plainly advances the legislative goal.” The court compared such “concurrent jurisdiction” to the executive prosecution of an errant attorney, even though the exclusive authority to supervise and discipline attorneys rests with the New Jersey Supreme Court. The court explained that “[t]o accept [the] defendant’s theory, one must subscribe to the view that the Legislature intended to make its members super-citizens shielded from criminal

158. Gregorio, 451 A.2d at 982.
166. Id. That goal is “to combat official corruption and advance public confidence in its governmental institutions.” Id. at 983.
167. Id. at 984 (citing N.J. Const. art. VI, § 2, para. 3 (1947)). This argument would be equally applicable in South Carolina because the situation is the same regarding attorney discipline. See S.C. App. Ct. R. 413.
prosecution by sheer virtue of their public office.” 168 The court finalized its
dismissal of the defendant’s arguments by holding that “[t]he power of
the Legislature to enforce its own code of ethics, to assess monetary penalties and to
pursue further action, including expulsion of a member, does not divest the
Executive Branch of the authority and obligation to prosecute criminal
conduct.” 169 Further, such power cannot “be construed to encroach upon that
sphere of responsibility constitutionally dedicated to the judiciary.” 170

Another possibly more important part of Gregorio addressed the New Jersey
state legislature’s amicus curiae argument that “the requirement of financial
disclosure statements constitutes a legislative rule beyond the power of the
executive to enforce.” 171 This argument relies on the fact that New Jersey’s
ethics code was derived from constitutionally granted rulemaking authority; as
such, only the legislature can enforce it. 172 New Jersey’s constitutional provision
states that “[e]ach house shall choose its own officers, determine the rules of its
proceedings, and punish its members for disorderly behavior.” 173 The court
rejected the amicus argument and summarized its holding as follows:

The short answer to the argument advanced by amicus is that the code of
ethics and hence the requirement that financial disclosure statements be
filed with the joint committee were adopted pursuant to the Conflicts of
Interest Law, not by virtue of the constitutional authority of the
Legislature to make rules and punish members for disorderly behavior.
The constitutional rule-making power of the Legislature is generally
exercised in the context of establishing standards to provide for the
orderly and efficient conduct of legislative proceedings. The code of
ethics provision requiring the filing of financial statements stands upon
an entirely different footing . . . . [T]he Legislature made a clear
procedural election when it adopted a code of ethics and characterized it
as an agency rule. It cannot be said that the code was adopted pursuant
to a power demonstrably committed to the Legislative Branch of
government by the text of the Constitution. Simply stated, it was
adopted pursuant to the Conflicts of Interest Law, not by virtue of a rule

168. Gregorio, 451 A.2d at 985 (stating further that “[i]n such a case, his activities would
constitute a violation of the legislative code of ethics and, hence, criminal penalties would be
barred”).
169. Id.
170. Id. (citing N.J. CONST. art. V, § 1, para. 1 (1947)).
171. Id. at 988.
172. See id. (citing N.J. CONST. art. IV, § 4, para. 3 (1947)).
173. N.J. CONST. art. IV, § 4, para. 3 (emphasis added). This provision is almost identical to
South Carolina’s article III, section 12, which states that “[e]ach house shall choose its own officers,
determine its rules of procedure, punish its members for disorderly behavior, and, with the
concurrency of two-thirds, expel a member, but not a second time for the same cause.” S.C. CONST.
art. III, § 12.
promulgated pursuant to the constitutional responsibility of the Legislature to establish its own procedures.\footnote{174}

The court’s holding explicitly clarified that the purpose of the constitutional rulemaking provision is for the orderly and efficient conduct of legislative proceedings, and that it does not relate to enforcement of the state ethics code.\footnote{175} The South Carolina Reform Commission agreed with this contention by citing the New Jersey court’s holding in its report.\footnote{176}

United States v. Rose\footnote{177} provides further guidance in defining \textit{disorderly behavior}.\footnote{178} In that case, a congressman was found to have violated the Ethics Act in Government Act of 1978\footnote{179} (the Federal Ethics Act) after being investigated by the U.S. House of Representatives Committee on Standards of Official Conduct.\footnote{180} The same Committee concluded the matter by issuing a public rebuke for the violations.\footnote{181} Despite the Committee’s conclusion, the Department of Justice (DOJ) opened an investigation to determine whether the congressman had “knowingly and willfully” violated the ethics law.\footnote{182} Subsequent to the DOJ’s action, the House Committee informed the DOJ that it had already concluded that the congressman did \textit{not} knowingly and willfully violate the Federal Ethics Act.\footnote{183} The DOJ, however, proceeded with its action and this lawsuit ensued.\footnote{184} The portion of the opinion relevant to this Note discussed whether “the constitutional provision granting each House the power to regulate the conduct of its Members . . . bars the DOJ [under the separation of powers doctrine] from bringing an action charging ‘knowing and willful violations’ of the [Federal] Ethics Act after the Committee has determined that the violations were inadvertent.”\footnote{185} Interestingly—and in contrast to South Carolina law—the U.S. House of Representatives took its ethics law further by adopting the full text of the Federal Ethics Act into the House Rules.\footnote{186} The D.C. Circuit held that this action allowed the House to enforce the Federal Ethics Act “pursuant to its

\footnotesize

\textit{174} Gregorio, 451 A.2d at 988–89 (emphasis added) (citations omitted).
\textit{175} See id.
\textit{176} See COMMISSION REPORT, supra note 7, at 32.
\textit{177} 28 F.3d 181 (D.C. Cir. 1994).
\textit{181} Id. (citing H.R. Rep. No. 100-526, at 26).
\textit{182} Id.
\textit{183} See id.
\textit{184} Id. at 185.
\textit{185} Id. at 189–90 (citing U.S. CONST. art. I, § 5, cl. 2) (“Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behavior, and, with the Concurrence of two thirds, expel a Member.”).
\textit{186} Id. at 190 (citing House Rule XLIV, H.R. Res. 1099, 90th Cong., 2d Sess., 114 CONG. REC. 8777 (1968)).
constitutional power to discipline its Members.”187 Despite this further action by
the House, however, the court still held that “by codifying these requirements in
a statute, Congress has empowered the executive and judicial branches to
enforce them; in bringing this action, then, the DOJ was fulfilling its
constitutional responsibilities, not encroaching on Congress’s.”188 Thus, the
court stated that it “[did] not think the DOJ’s action against Congressman Rose
offend[ed] the separation of powers doctrine.”189

This holding is very pertinent to defining disorderly behavior because it
seems to imply that, by incorporating the Federal Ethics Act into the House
Rules, enforcement of that Act came within the scope of the House’s power to
“punish its Members for disorderly Behavior” under Article I, Section 5, Clause
2 of the U.S. Constitution.190 More importantly, however, the inclusion of the
Federal Ethics Act into the House Rules did not bar concurrent executive
enforcement of the Act because the Act was already codified prior to its
incorporation into the House Rules.191

Lastly, the most important aspect of the D.C. Circuit’s holding in Rose is its
implication that Article I, Section 5, Clause 2 of the U.S. Constitution—
particularly disorderly behavior—refers only to the actual operation of the
legislative proceedings.192 This proposition would support the South Carolina
Reform Commission’s conclusion that the almost identical provision in the state
constitution does not “contemplate a role for sanctioning conduct not
immediately threatening to legislative proceedings.”193 Only by incorporating
the Federal Ethics Act into the House Rules did the U.S. House of
Representatives bring ethics violations within its scope of power under the U.S.
Constitution’s rulemaking provision.194 Prior to such incorporation, ethics
violations under the Federal Ethics Act were likely outside the scope of
disorderly behavior.

Lastly, the Commission on Ethics v. Hardy195 case presents yet another twist
in the task of defining disorderly behavior. In Hardy, the Supreme Court of
Nevada addressed an appeal for a permanent injunction after the Nevada
Commission on Ethics instituted administrative proceedings against a state
senator.196 The proceedings followed a complaint of ethics violations that
involved the senator’s failure to adequately disclose an alleged conflict of

187. Id. (referring to the “punish its Members for disorderly Behavior” provision in U.S.
CONST. art. I, § 5, cl. 2).
188. Id.
189. Id.
190. See id.; see also U.S. CONST. art. I, § 5, cl. 2 (creating the constitutional power for each
House of Congress to determine the “Rules of its Proceedings”).
192. See id.
193. COMMISSION REPORT, supra note 7, at 29 (emphasis added).
194. See Rose, 28 F.3d at 190; U.S. CONST. art. I, § 5, cl. 2.
195. 212 P.3d 1098 (Nev. 2009).
196. Id. at 1102.
interest regarding a senate bill, as well as his failure to abstain from the voting on that bill. Particularly, the court considered whether such a proceeding violated the Nevada separation of powers doctrine by delegating a constitutionally committed function of the legislature to another branch of government. The court began its discussion by reviewing Nevada’s separation of powers doctrine, which prohibits one branch of government from impinging on the powers of another. Next, the court considered article 4, section 6 of the Nevada constitution:

Each House shall judge of the qualifications, elections and returns of its own members, choose its own officers (except the President of the Senate), determine the rules of its proceedings and may punish its members for disorderly conduct, and with the concurrence of two thirds of all the members elected, expel a member.

The court stated that “[t]his provision expressly grants the authority to discipline legislators for disorderly conduct to the individual houses of the Legislature, thus the power to discipline legislators for disorderly conduct is a function constitutionally committed to each house of the Legislature.” Further, “the Legislature may not delegate th[is] constitutionally committed authority.” This conclusion left the court to decide “[w]hat legislative actions are subject to discipline for disorderly conduct under this constitutional provision,” and particularly, whether the power to discipline for disorderly conduct applied to the senator’s ethics violations. Addressing these issues, the court reached the following conclusion:

[To the extent that a legislator’s actions are undertaken in the course of the legislator’s participation in, or conduct of, a core legislative function, any discipline for purported disorderly conduct in the course of engaging in these core function activities is a function constitutionally

197. Id.
198. Id. at 1100. In particular, the court determined that the Nevada Commission on Ethics is an executive branch agency and, thus, part of another branch of government that is separate from the legislature. Id. at 1108.
199. Id. at 1103–04 (citing Heller v. Legislature, 93 P.3d 746, 753 (Nev. 2004)). Specifically, article 3, section 1(1) of the Nevada constitution states the following:

The powers of the Government of the State of Nevada shall be divided into three separate departments, . . . the Legislative, . . . the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution.

NEV. CONST. art. III, § 1.
200. NEV. CONST. art. IV, § 6.
201. Hardy, 212 P.3d at 1104.
202. Id. at 1105.
203. Id. (citing NEV. CONST. art. IV, § 6).
committed to each legislative house with regard to its members that cannot be delegated to another branch of government.204

The court was quick to note that the legislature can delegate the power to discipline conduct related to noncore legislative functions.205 In this case, however, the court held that voting on legislation is a core legislative function.206 As such, “the authority to discipline legislators for disorderly conduct allegedly committed in the course of voting on legislation . . . cannot be delegated to another branch of the government.”207 The rule from Hardy is relatively expansive in the sense that the punishment of any disorderly conduct related to the core function activities, such as the disclosure necessary to vote or abstain from voting on legislation, cannot be delegated to another branch of government.208

The decision in Hardy likely creates another step of analysis when considering what constitutes disorderly behavior: determining whether the misconduct was undertaken in the course of a “core legislative function.”209 If so, under Hardy, any punishment for that misconduct falls within the category of a “function constitutionally committed to each house of the Legislature [that] cannot be delegated to another branch of government.”210 This rule would disrupt the South Carolina Reform Commission’s conclusion that article III, section 12 of the South Carolina constitution only deals with conduct linked to the actual operation of legislative proceedings.211 Instead, in determining whether conduct falls under the protection of article III, section 12, one would have to first determine whether such conduct relates to a “core legislative function.”212 If so, only the South Carolina General Assembly would have the constitutional power to punish its members for such conduct.213

204. Id. at 1106 (emphasis added) (citing Brady v. Dean, 790 A.2d 428, 431–33 (Vt. 2001)).
205. See id. at 1106 n.9 (emphasis added). The court expanded on this by stating, “Using the ethics laws as an example, such proceedings could include discipline for legislators who use governmental time, property, equipment, or other facilities for nongovernmental purposes (NRS 281A.400(8)), bid or enter into governmental contracts (NRS 281A.430), or accept or receive an honorarium (NRS 281A.510).” Id.
206. Id. at 1106.
207. Id.
208. See id. at 1107 (citing Heller v. Legislature, 93 P.3d 746, 753 (Nev. 2004); Brady v. Dean, 790 A.2d 428, 431–33 (Vt. 2001)).
209. See id. at 1106 (citing Brady, 790 A.2d at 431–33 (Vt. 2001)).
210. Id. (citing Brady, 790 A.2d at 432 (Vt. 2001)). This, of course, assumes that the state in which such analysis is taking place has a similar constitutional provision to those in Nevada and South Carolina dealing with the “punishment of disorderly behavior.” See Nev. Const. art. IV, § 6; S.C. Const. art. III, § 12.
211. COMMISSION REPORT, supra note 7, at 29.
212. See Hardy, 212 P.3d at 1106.
VI. CONCLUSIONS IN LIGHT OF RAINEY V. HALEY

South Carolina is bound by the court’s ruling in Rainey. Thus, the resolution—or punishment—of ethics violations under the State Ethics Act appears to currently fall within the General Assembly’s exclusive jurisdiction. The Rainey court, however, did not explicitly define disorderly behavior and only implied that punishing members of the General Assembly for disorderly behavior includes the resolution of ethics violations. Accordingly, the conclusions reached by the South Carolina Ethics Reform Commission are not entirely invalid. The Reform Commission made a useful observation: the South Carolina Code clearly states that jurisdiction can be granted to the State Ethics Commission if the House or Senate rules are amended. Also, and perhaps more importantly, the notion that disorderly behavior only refers to conduct affecting legislative proceedings may be found in case law outside of appendix 2 in the Reform Commission’s report. The Gregorio and Rose cases support the idea that conduct not immediately threatening to a legislative function—such as ethics violations under the State Ethics Act—does not fall within the scope of disorderly behavior. The Hardy case also provides support for the distinction between conduct that is immediately threatening and conduct that is not—but analyzes the issue from the perspective of whether the conduct affects a core legislative function.

Going forward, the South Carolina Supreme Court may need to reconsider its ruling in Rainey and more clearly explain its interpretation of disorderly behavior. The cases discussed above, however, provide keen insight into how other courts have dealt with the issue of whether disorderly behavior includes ethics violations. If the South Carolina General Assembly adopts the State

214. See Rainey v. Haley, 404 S.C. 320, 326–27 745 S.E.2d 81, 84 (2013) (holding that to give any entity besides the House and Senate Ethics Committees the power to punish legislative members for ethics violations would violate the separation of powers by depriving the General Assembly of its right to “punish its members for disorderly behavior”).
215. Id. at 326, 745 S.E.2d at 84–85 (citations omitted).
216. Id. at 326, 745 S.E.2d at 84.
217. See COMMISSION REPORT, supra note 7, at 29 (“[T]o initiate or receive complaints and make investigations . . . of an alleged violation . . . by a public official, public member, or public employee except members or staff, including staff elected to serve as officers of or candidates for the General Assembly unless otherwise provided for under House or Senate rules.”) (emphasis added) (quoting S.C. CODE ANN. § 8-13-320(9) (Supp. 2013))).
218. See, e.g., United States v. Rose, 28 F.3d 181, 183 (D.C. Cir. 1994) (discussing the notion that disorderly behavior only refers to conduct affecting legislative proceedings); Comm’n on Ethics v. Hardy, 212 P.3d 1098, 1106 ( Nev. 2009) (citing Brady v. Dean, 790 A.2d 428, 432 (Vt. 2001)) (discussing the notion that disorderly behavior only refers to conduct affecting legislative proceedings); State v. Gregorio, 451 A.2d 980, 989 (N.J. Super. Ct. Law Div. 1982) (discussing the notion that disorderly behavior only refers to conduct affecting legislative proceedings).
219. See Gregorio, 451 A.2d at 989; Rose, 28 F.3d at 190.
220. See Hardy, 212 P.3d at 1106 (citing Brady, 790 A.2d at 432–33 (Vt. 2001)).
222. See supra Part V.A.
Ethics Act into its rules of proceedings, then *disorderly behavior* would include any violations under the Act.223 Alternatively, perhaps only punishment for violations involving core legislative functions—such as voting on bills—will come under the exclusive jurisdiction of the General Assembly granted by article III, section 12.224

If the goal is truly to restore trust in government, then South Carolina must find a solution to provide more independent oversight of the ethics laws enforced against state legislators. The most viable option would likely involve a situation in which an independent entity—the State Ethics Commission—can receive ethics complaints and handle investigations and factfinding, while either the House or Senate Ethics Committee would then resolve the complaints and punish the respondents accordingly.225 This solution draws a jurisdictional line that preserves the constitutional right of the General Assembly to punish its own members for ethics violations, but also creates a system of independent oversight that instills more trust in the state’s public officials.226 Regardless, after the Rainey decision, the implementation of this solution will require further clarification from the South Carolina Supreme Court on the concept of disorderly behavior. Only then can South Carolina move forward and restore trust in its government.

Noah Glen Allen

223. See, e.g., Rose, 28 F.3d at 183 (holding that adopting the Federal Ethics Act into the U.S. House Rules allowed the House to enforce the Federal Ethics Act “pursuant to its constitutional power to discipline its Members”).

224. See, e.g., Hardy, 212 P.3d at 1106 (citing Brady, 790 A.2d at 432–33) (holding that punishment of any disorderly conduct related to the core function activities of the legislature cannot be delegated to another branch of the government).

225. See supra Part V.

226. See supra Part V.