

Separation of Powers under the Vermont Constitution

In the Context of a Vermont State Ethics Commission

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Separation of Powers

- “The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers belonging to the others.”
Vt. Const. Ch. II, § 5.
- “The logic of [the SoP requirement in Vt. Const. Ch. II, § 5] is deceptively simple. To apply it, we must determine the powers of each of the branches and ensure no one exercises powers belonging to another.
 - “Briefly stated, the legislative power is the power that formulates and enacts the laws; the executive power enforces them; and the judicial power interprets and applies them . . .
 - “The focus of a separation of powers inquiry is not whether one branch of government is exercising certain powers that in some way pertain to another branch, *but whether the power exercised so encroaches upon another branch’s power as to usurp from that branch its constitutionally defined function* [emphasis added].” In re D.L., 164 Vt. 223, 228-229 (1995).

LEGISLATIVE BRANCH

Legislative Branch

Supreme Legislative Power within Constitutional Limitations

- “The Supreme Legislative power shall be exercised by a Senate and House of Representatives . . .”
Vt. Const. Ch. II, § 2.
- “. . . but they shall have no power to add to, alter, abolish, or infringe any part of this Constitution.”
Vt. Const. Ch. II, § 6.
- The “Constitution is not a grant of power to the Legislature, but it is a limitation of its general powers. The Legislature’s power is practically absolute, except for constitutional limitations.” Rufus v. Daley, 103 Vt. 426, 154 A. 695, 697 (1931).

Courts Can Adjudicate Constitutional Claims Regarding Legislative Acts

“Especially it is competent and proper for this court to consider whether its (the legislature’s) proceedings are in conformity with the Constitution and laws, because, **living under a written constitution, no branch or department of government is supreme**; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void.” Powell v. McCormack, 395 U.S. 486, 506 (1969) (citing Kilbourn v. Thompson 103 U.S. 168, 199 (1881)).

Constitutional Restrictions on Legislative Authority

Qualifications of, Terms of, and Removal from Office

- **Qualifications.**

- **Residence:** Vt. Const. Ch. II, § 15 (legislators); Vt. Const. Ch. II, § 23 (Gov. and Lt. Gov.); and Vt. Const. Ch. II, § 66 (Treasurer).
- **Incompatible offices:** Gov., Lt. Gov., S. Ct. Justice, Treasurer, Senator, House member, Surveyor-General (abolished by 1838, Act No. 25), and Sheriff. Also Congressional offices of profit or trust. Vt. Const. Ch. II, § 54.

- **Terms.**

- “. . . all voters, having a sufficient, evident, common interest with, and attachment to the community, have a right to elect officers and be elected into office, agreeably to the regulations made in this constitution.” Vt. Const. Ch. I, Art. 8.
- Former AAG Skoglund opined in an Attorney General Opinion this Article prohibited even municipal term limits. 1984 WL 63421 (1984).

- **Removal.** Caselaw from other states has indicated that where the Constitution provides the method of removing an officer from office, that is the only method available.

- “Where the Constitution provides a method of debarring or removing an officer from his office, such method is exclusive.” State v. Gravolet, 168 La. 648, 650 (1929) (S. Ct. of LA).
- “The constitutional method of removal must be resorted to, where applicable, for it is ‘exclusive and prohibitory of any other mode which the Legislature may deem better or more convenient.’” In re Georges Township School Directors, 286 Pa. 129, 133 (1926) (S. Ct. of PA) (other citations omitted).

Constitutional Provisions Relating to Legislative Ethics

Both Chambers

“No member of the General Assembly shall, directly or indirectly, receive any fee or reward, to bring forward or advocate any bill, petition, or other business to be transacted in the Legislature; or advocate any cause, as counsel in either House of legislation, except when employed in behalf of the State.” *Vt. Const. Ch. II, § 12.*

House

“The Representatives so chosen . . . shall be styled the House of Representatives: they shall have the power to . . . judge of the . . . qualifications of their own members; they may expel members, but not for causes known to their constituents antecedent to their election . . .” *Vt. Const. Ch. II, § 14.*

Senate

“The Senate shall have the like powers to decide on the . . . qualifications of, and to expel any of, its members . . . as are incident to, or are possessed by, the House of Representatives.” *Vt. Const. Ch. II, § 19.*

Vermont Caselaw Interpreting the General Assembly's Authority Over Legislative Ethics

- Generally; separation of powers.
 - Courts can interpret the Constitution in the first instance “to determine whether and to what extent an issue is committed to the legislative branch.” Brady v. Dean, 173 Vt. 542, 545 (2001).
 - Functions of the Legislature that are purely and strictly legislative cannot be delegated but must be exercised by it alone. Village of Waterbury v. Melendy, 109 Vt. 441, 448 (1938) (other citations omitted).
- “Qualifications” of legislators; Brady v. Dean, 173 Vt. 542 (2001); Political Question Doctrine.
 - Plaintiffs challenged the civil unions law based on Representatives’ participation in a betting pool re: a vote on the bill. The complaint alleged violations of House Rule 75; of misc. constitutional provisions, including Vt. Const. Ch. I, §§ 6 (officers servants of the people) and 7 (common benefits) and Ch. II, §§ 12 (fees for advocating bills) and 61 (public offices of profit); and of misc. provisions in T.13 re: lotteries, games of chance, and bookmaking. Id. at 543.
 - “[W]here the state legislature is made the judge of qualifications of its members by a provision of the state constitution, the legislature has the sole authority to do so, and courts must refrain from interfering in that determination.” Id. at 544.
 - “[T]he Vermont House of Representative’s exclusive constitutional prerogative to ‘judge of the qualifications of its members’ encompasses the authority to determine whether a member’s personal or pecuniary interest requires disqualification from voting on a question before it.” Id.
 - “We further conclude that, as a policy matter, a proper regard for the independence of the Legislature requires that we respect its members’ personal judgments concerning their participation in matters before them.” Id. at 545.

Brady and the Political Question Doctrine (cont.)

- The Court concluded that plaintiffs' challenge presented a nonjusticiable political question under the doctrine of separation of powers. *Id.* at 546.
- “The doctrine of standing . . . represents a core constitutional and prudential commitment to judicial restraint . . . ‘Standing and the separation of powers doctrine [are] wedded together.’”
 - Re: the U.S. Constitution’s Article III (jurisdiction of courts; case or controversies): “Article III embodies various doctrines, including standing, mootness, ripeness and political question, that help define and limit the role of courts in a democratic society . . . One of the ‘passive virtues’ of the standing doctrine is to promote judicial restraint by limiting the occasions for judicial intervention into the political process . . . Standing doctrine is fundamentally rooted in *respect for the separation of powers of the independent branches of government*.”
 - “Prominent on the surface of any case held to involve a political question is found a **textually demonstrable constitutional commitment of the issue** to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or . . . the impossibility of a court’s undertaking independent resolution **without expressing lack of the respect due coordinate branches of government**; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Id.* at 543-544 (other citations omitted).
- “Our conclusion that the issue before us represents a nonjusticiable political question bars the plaintiff taxpayers’ challenge to the vote on the civil union bill as effectively as it does the plaintiff legislators.” *Id.* at 546.

Legislator Conduct Not Considered Purely “Legislative” and Therefore Subject to Judicial Review

- “This is not, of course, to hold that all potential conflicts of interest of state legislators are immune from every form of executive or judicial oversight. **Senate and House members may be criminally prosecuted for certain actions, such as soliciting or accepting bribes . . . or even subject to civil suit for actions outside the scope of their legislative duties.**” Brady at 545, citing:
 - U.S. v. Brewster, 408 U.S. 501, 526 (1972) (“Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act.”).
 - Hutchinson v. Proxmire, 443 U.S. 111, 113 (1979) (allowing **defamation action** against legislator for acts outside the “legislative function or the deliberations that make up the legislative process”).
- In addition, legislative procedures cannot infringe upon individuals’ constitutionally-protected rights.
 - Vt. Const. Ch. II, §§ 14 and 19 provide the House and Senate with the power to expel members.
 - However, a court may vacate a legislative expulsion if a chamber did not afford due process protections.
 - See McCarley v. Sanders, 309 F.Supp. 8 (1970):
 - “Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law.” Id. at 11 (other citations omitted).
 - This Alabama District Court vacated an Alabama state senator’s expulsion in part because he did not receive adequate notice; there was not a formal charge made against him; and at the minimal hearing provided, he was not able to hear witnesses’ testimony or cross-examine them. Id. at 11-12.

Each Chamber is Responsible for Regulating Core Legislative Functions

- “[T]o the extent that a legislator’s conduct, resulting in a disciplinary proceeding, **involves a core legislative function** such as voting and, by extension, disclosure of potential conflicts of interest prior to voting, any discipline of a legislator is a function constitutionally committed to each house of the Legislature . . . [and] this power cannot be delegated to another branch of government.” Commission on Ethics v. Hardy, 125 Nev. 285, 287 (2009).
- “[The Brady] court concluded that, when the conduct at issue constitutes a core legislative function, constitutional and prudential concerns protect members of the house from having that conduct scrutinized by another branch of state government.” Id. at 295 (citing Brady at 423-33).
- “[B]ecause the Commission is an executive branch agency, any delegation to the Commission by the Legislature of the power to discipline its members with respect to core legislative functions is an unconstitutional delegation of power in violation of [separation of powers].” Id. at 298.
- “By contrast, the Legislature may delegate the power to discipline with respect to conduct related to noncore legislative functions. Using the ethics as an example, such proceedings could include discipline for legislators who use governmental time, property, equipment, or other facilities for nongovernmental purposes, bid or enter into governmental contracts, or accept or receive an honorarium.” Id. at FN9.

JUDICIAL BRANCH

An Ethics Commission Likely Does Not have Constitutional Authority to Regulate the Judicial Branch

- “The Supreme Court shall have administrative control of all the courts of the state, and disciplinary authority concerning all judicial officers” in the State.
Vt. Const. Ch. II, § 30.
- “The Supreme Court in the exercise of its disciplinary power over the Judiciary of the state may suspend justices of the Supreme Court and judges of all subordinate courts from the judicial function for such cause and in such manner as may be provided by law.”
Vt. Const. Ch. II, § 36.
- Disciplinary Control of Judges Rule 4 establishes the Judicial Conduct Board (JCB), appointed by the SCOV. The JCB is made up of three judges, three attorneys, and three lay persons. It is advisory only; the SCOV has final disciplinary authority.
 - “[I]n judicial conduct proceedings[,] the SCOV makes the only final and ultimate decision. The findings and recommendations of the [JCB] carry great weight, but are advisory, not binding.” In re Bryan, 164 Vt. 589, 593 (1996) (other citations omitted).
 - “[The JCB] is an arm of this Court . . .” In re Hill, 152 Vt. 548, 555 (1989).

Legislative Regulation of the Judicial Branch

- Judicial Retention. Vt. Const. Ch. II, § 34.
- Impeachment of every Judicial officer of State. Vt. Const. Ch. II, §§ 57 and 58.

EXECUTIVE BRANCH

Constitutional Provisions Relating to the Executive Branch

- Terms of office.
 - Gov., Lt. Gov., and Treasurer specifically enjoy a two-year “term of office[.]” Vt. Const. Ch. II, section 49.
 - Secretary of State and Auditor of Accounts don’t have specific term language, but are elected every two years “upon the same ticket” with the Gov., Lt. Gov., and Treasurer. Vt. Const. Ch. II, section 48.
- Executive function.
 - “[T]he Governor . . . shall have power to commission all officers, and also to appoint officers, except where provision is, or shall be, otherwise made by law or this Frame of Government; and . . . is also to take care that the laws be faithfully executed.” Vt. Const. Ch. II, § 20.

Legislative Regulation of the Executive Branch

- Impeachment of every Executive officer of State.
Vt. Const. Ch. II, §§ 57 and 58.
- General legislative authority.

SUMMARY

- Under the Vermont Constitution, an Ethics Commission likely:
 - Cannot regulate whether legislators should vote on a question, but can regulate non-core legislative duties;
 - Cannot regulate the Judicial Branch; and
 - Can regulate certain aspects of Executive Branch conduct, but is limited in its discipline authority.