



STATE OF VERMONT
OFFICE OF LEGISLATIVE COUNCIL

MEMORANDUM

To: House Committee on Government Operations
From: BetsyAnn Wrask, Legislative Counsel
CC: Luke Martland, Director and Chief Counsel; Michael O'Grady, Deputy Chief Counsel; Jennifer Carbee, Deputy Chief Counsel; Michele Childs, Legislative Counsel
Date: April 18, 2019
Subject: Analysis of S.54's compliance with Vt. Const. Ch. II, § 5 (separation of powers)

I. Introduction

[S.54 As Passed Senate](#) would create a Cannabis Control Board as an independent entity within the Executive Branch.¹ Under the bill, the three-member Board would consist of one Governor appointee, one Senate appointee, and one House appointee.² A Board member could be removed for cause by the remaining members in accordance with the Vermont Administrative Procedure Act.³

It is my understanding that the Administration's opinion is that a Board with two legislative appointees and one gubernatorial appointee "is a clear usurpation of executive power in violation of the Constitution."

The Office of Legislative Council does not agree. Our opinion is that this Board structure conforms to separation of powers requirements. Our opinion is based on applicable caselaw from the Supreme Court of Vermont (SCOV) regarding the Vermont Constitution's separation of powers requirement, as well as instructive caselaw from the Supreme Court of the United States and from other states.

This memorandum summarizes the basis for our Office's opinion, including these legal authorities. It provides an overview of Vermont's separation of powers requirement and of each branch's power, and with that information analyzes the constitutionality of S.54's Cannabis Control Board.

¹ Sec. 2, 7 V.S.A. § 841(a).

² Sec. 2, 7 V.S.A. § 841(c)(1).

³ Sec. 2, 7 V.S.A. § 841(c)(4).

II. Federal Law Does Not Control Separation of Powers in Vermont

The U.S. Supreme Court has held that the U.S. Constitution does not contain a requirement regarding how a state is to apportion power among its three branches,⁴ and that whether and to what extent a state should have a separation of powers among its branches is an issue within the state's control.⁵

III. Overview of Vermont's Separation of Powers Requirement

A. Requirement for Three Separate Core Powers

[Vt. Const. Ch. II, § 5](#) requires that there be a separation of powers among the three branches of State government: “The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others.”

“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.”⁶

B. Overlapping Powers Permitted

But, Vt. Const. Ch. II, § 5 “does not contemplate an absolute division of authority among the three branches such that each branch is hermetically sealed from the others.”⁷ The SCOV stated that due to the practical realities of government, and because there are many powers and functions that cannot be easily classified as belonging exclusively to one branch,⁸ it will “apply a relatively forgiving standard to separation-of-power claims” that is “tolerant” of overlapping institutional arrangements.⁹

“[W]e must construe the constitutional command consistent with efficient and effective government structures that are able to respond to the complex challenges and problems faced by today's state government.”¹⁰

⁴ Highland Farms Dairy v. Agnew, 300 U.S. 608, 612 (1937) (“The Constitution of the United States in the circumstances here exhibited has no voice upon the subject [of whether a state legislature unlawfully delegated its legislative power] . . . How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.”).

⁵ Dreyer v. People of State of Illinois, 187 U.S. 71, 84 (1902) (“Whether the legislative, executive, and judicial powers of a state shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the state.”).

⁶ In re D.L., 164 Vt. 223, 228 (1995).

⁷ Id. at 228.

⁸ Id. at 229.

⁹ State v. Nelson, 170 Vt. 125, 128 (1999).

¹⁰ Hunter v. State, 177 Vt. 339, 349–350 (2004).

C. Test of a Separation of Powers Violation

The SCOV has provided us with a test of a separation of powers requirement: First, the power exercised by a branch must be “incidental to the discharge of the functions of the [branch] exercising them[.]”¹¹ Thereafter, “[t]he focus of a separation of powers inquiry is not whether one branch of government is exercising certain powers that may 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.”¹²

IV. Vermont’s Judicial Branch

A. Vermont’s Constitutional Interpreter

In the checks and balances built into the separation of powers among the three branches, “it is the province of the court to decide whether Vermont’s laws comply with the State Constitution”¹³; “[i]t is the function of the courts to maintain constitutional government”¹⁴; and the Supreme Court of Vermont is the “final interpreter of the Vermont Constitution.”¹⁵

B. Does Not Question Constitutional Policy

The Judicial Branch will not strike down a law due to disagreeing with its policy. “[I]t is not for this Court to pass upon the propriety of the legislative election to exercise [its regulatory] power, nor to question the wisdom of it. Our function is only to determine whether or not the manner or its exercise meets constitutional standards and violates any fundamental rights.”¹⁶

C. Presumes that Statutes Are Constitutional

When the Judicial Branch is analyzing the General Assembly’s exercise of its legislative authority, it presumes the Legislative Branch acted constitutionally. “[T]here is a presumption of a constitutional purpose on the part of the Legislature, a presumption as strong, perhaps, as any that is not conclusive . . .”¹⁷ This has been stated repeatedly.¹⁸

Our courts will not hold a law unconstitutional unless it clearly conflicts with constitutional requirements. “The efficient exercise of police power inherent in the

¹¹ *In re Opinion of the Justices*, 115 Vt. 524, 529 (1949) (citing *Trybulski v. Bellows Falls Hydro-Electric Corp.*, 112 Vt. 1, 6–7 (1941)).

¹² *In re D.L.* at 229.

¹³ *Brigham v. State*, 179 Vt. 525, 528 (2005).

¹⁴ *C.O. Granai v. Witters, Longmoore, Akley & Brown*, 123 Vt. 468, 470 (1963).

¹⁵ *State v. Read*, 165 Vt. 141, 153 (1996).

¹⁶ *State v. Giant of St. Albans*, 128 Vt. 539, 544 (1970).

¹⁷ *Sabre v. Rutland R. Co.*, 86 Vt. 347, 85 A.693, 700 (1913).

¹⁸ *See, e.g., Badgley v. Walton*, 188 Vt. 367, 376–77 (2010) (“We start by emphasizing that statutes are presumed to be constitutional . . . and are presumed to be reasonable. We have often observed that the proponent of a constitutional challenge has a very weighty burden to overcome (other citations omitted).”).

people of this state is not to be frittered away by overnice speculations upon the distribution of powers of government.”¹⁹ “Every presumption is to be made in favor of the constitutionality of an act of the Legislature, and it will not be declared unconstitutional without clear and irrefragable evidence that it infringes the paramount law.”²⁰

V. Vermont’s Legislative Branch

A. Supreme Legislative Power, Restricted Only by the Constitution

As the General Assembly, the Senate and House hold the “Supreme Legislative power,”²¹ which includes the power to “prepare bills and enact them into laws.”²² The SCOV describes the General Assembly as “the lawmaking branch of government.”²³

However, the General Assembly “shall have no power to add to, alter, abolish, or infringe any part of [the Vermont] Constitution.”²⁴ In other words, the only thing that limits the General Assembly’s lawmaking authority is the Constitution. “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.”²⁵

B. Police Power

[Vt. Const. Ch. I, Art. 5](#) provides for police power: “That the people of this state by their legal representatives, have the sole, inherent, and exclusive right of governing and regulating the internal police of the same.”

“Subject to constitutional limitations, a state Legislature is authorized to pass measures for the general welfare of the people of the state in the exercise of the police power, and is itself the judge of the necessity or expediency of the means adopted.”²⁶ In regard to the police power, “the constitution clearly empowered the legislature to pass

¹⁹ Sabre at 700.

²⁰ Village of Waterbury v. Melendy, 109 Vt. 441, 447 (1938) (other citations omitted).

²¹ Vt. Const. Ch. II, § 2.

²² Vt. Const. Ch. II, § 6.

²³ Hartness v. Black, 95 Vt. 190, 114 A. 44, 47 (1921).

²⁴ Vt. Const. Ch. II, § 6.

²⁵ Rufus v. Daley, 103 Vt. 426, 154 A. 695, 697 (1931). See also City of Burlington v. Central Vermont RY Co., 82 Vt. 5, 71 A. 826, 827 (1909) (“[F]or the law is, by all the cases, that, except where there are constitutional limits upon the Legislature, it is practically absolute.”) and Dresden School District v. Norwich Town School District, 124 Vt. 227, 231 (1964) (“Our constitution is, in powers not surrendered to the Federal government, the single great restraint on the autonomy of the Legislature as the repository of the law-making power of the people.”).

²⁶ Sowma v. Parker, 112 Vt. 241, 22 A.2d 513, 517 (1941) (quoting In re Guerra, 94 Vt. 1, 110 A. 224, 227 (1920)).

such laws as, in its discretion, it might judge would be for the common benefit of the people of the state.”²⁷

VI. Vermont’s Executive Branch

A. Executive Power Means Carrying Out Laws

The conferred authority to execute a law is the Executive power.²⁸ Aside from any constitutional authority given to a specific Executive Branch entity, the General Assembly determines the Executive Branch entities to which it will confer authority; what laws those entities must execute; and how they must be executed.

For example, the Vermont Supreme Court stated that the Public Service Commission “has only such powers as are expressly conferred upon it by the Legislature, together with such incidental powers expressly granted or necessarily implied as are necessary to the full exercise of those granted, and it is merely an administrative board created by the State for carrying into effect the will of the State as expressed by its legislation . . . The Commission, therefore, is to be classed as an agency of the Legislature[.]”²⁹

B. The Governor’s Supreme Executive Power Is Not as Broad as the President’s Exclusive Executive Power

The Vermont Constitution names the Governor the “Supreme Executive power[.]”³⁰ However, it also created in the Executive Branch four other separately elected statewide officers—the Lieutenant Governor, Treasurer, Secretary of State, and Auditor of Accounts—as well as district-elected State’s Attorneys and sheriffs. Moreover, the General Assembly has created by statute the separately elected statewide office of Attorney General, as well other Executive Branch entities that are to be independent from any other entity, such as the Green Mountain Care Board³¹ and the State Ethics Commission.³² S.54 would likewise create a new independent Cannabis Control Board within the Executive Branch.

Because there are multiple, separate, independent Executive Branch officers and entities that are not under the Governor’s control, the Vermont Governor’s supreme executive power is distinguishable from the Executive power in our federal government,

²⁷ *State v. Theriault*, 70 Vt. 617, 41 A. 1030, 1034 (1898). See also *State v. Curley-Egan*, 180 Vt. 305, 309 (2006) (“The police power has long been understood to encompass ‘the general power of the legislative branch to enact laws for the common good of all the people.’”) (other citations omitted).

²⁸ See *Waterbury v. Melendy*, 109 Vt. 441, 451–453 (1938).

²⁹ *Trybulski v. Bellows Falls Hydro-Electric Corp.*, 112 Vt. 1, 7–8 (1941).

³⁰ Vt. Const. Ch. II, § 3.

³¹ “It is the intent of the General Assembly to create an independent board to promote the general good of the State . . .” [18 V.S.A. § 9372](#).

³² “There is created within the Executive Branch an independent commission named the State Ethics Commission . . .” [3 V.S.A. § 1221\(a\)](#).

which by U.S. Const. Art. II, § 1, cl. 1 vests *the* executive power in the President.³³

Similarly, unlike U.S. Const. Art. II, § 2, cl. 2, which provides the President with the power to appoint all major officers of the United States (with the advice and consent of the U.S. Senate), the Vermont Constitution provides the Governor with the limited authority to appoint officers, “except where provision is, or shall be, otherwise made by law or this Frame of Government[.]”³⁴ This means that the Governor has the power to appoint officers, except as otherwise provided by the laws enacted by the General Assembly or by the Vermont Constitution.

Therefore, U.S. Supreme Court caselaw regarding the scope of presidential power is not on-point to the scope of Vermont’s gubernatorial power. This point must be emphasized here because of prior separation of powers claims the Governor has made.

For example, in the Governor’s [veto message for 2018, S.281](#), the Governor advised that he was vetoing [S.281](#) (mitigation of systemic racism) because the bill would not permit the Governor to remove an official that the bill gave him the authority to appoint. The Governor stated, “The removal power, incidental to the appointment power, is essential for a Governor to take care that the laws be faithfully executed in accordance with the Constitution.” While there was no citation provided for the Governor’s assertion, it appears to be based on U.S. Supreme Court caselaw such as [Myers v. U.S.](#),³⁵ which held that the President’s power of removal was incidental to his power of appointment, and was necessary for the President to take care that the laws be faithfully executed.³⁶

But this cannot be true for the Governor of Vermont, who shares Executive Branch authority with separately elected officers and separate, statutorily created independent entities that are not under the Governor’s control. Moreover, the Vermont Constitution does not provide the Governor with specific removal authority.

Accordingly, the SCOV has recognized the General Assembly’s ability to control gubernatorial removal authority. In [McFeeters v. Parker](#),³⁷ the SCOV adjudicated a challenge to the Governor’s authority to remove the members of the Public Service Commission, who the Governor had appointed with the advice and consent of the Senate. The Court stated that “whether the Governor should have this power of removal . . . is for the Legislature to decide. We are not concerned with the expediency of the law.”³⁸

Statute is in line with this SCOV holding. It is statute that generally provides the

³³ “The executive Power shall be vested in a President of the United States of America.” U.S. Const. Art. II, § 1, cl. 1.

³⁴ Vt. Const. Ch. II, § 20.

³⁵ [Myers v. U.S.](#), 272 U.S. 52 (1926).

³⁶ [Id.](#) at 163-164 (U.S. Const. Art. II “grants to the President the executive power of government – ie., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers – a conclusion confirmed by his obligation to take care that the laws be faithfully executed[.]”).

³⁷ [McFeeters v. Parker](#), 113 Vt. 139 (1943).

³⁸ [Id.](#) at 144.

Governor with discretionary removal authority,³⁹ but this authority is also limited by statute.⁴⁰

VII. Constitutionality of S.54’s Cannabis Control Board, Based on the Foregoing Analysis

A. Absence of Vt. Const. Provision or On-Point SCOV Caselaw

The Vermont Constitution does not state that an Executive Branch entity cannot be comprised of a majority of legislative appointees; this issue is not addressed in our Constitution. Moreover, there is no known SCOV caselaw that addresses whether such an Executive Branch entity violates separation of powers.

Therefore, because the only thing that limits Vermont General Assembly authority is a constitutional provision, because the SCOV will apply a relatively forgiving standard to separation of power claims that is tolerant of overlapping institutional arrangements, and because the SCOV has not indicated otherwise, we must presume that S.54’s Board structure is constitutionally permissible, since there is no clear and irrefragable evidence to the contrary.

B. Instructive U.S. Supreme Court Caselaw

While federal law does not control separation of powers in Vermont State government, the U.S. Supreme Court case Bowsher v. Synar⁴¹ is instructive. In that case, the Court quoted a lower district court, which held that “[o]nce an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey.”⁴²

S.54 adheres to this principle: In maintaining the Cannabis Control Board’s status as an independent entity within the Executive Branch, a Board member may be removed only for cause by the remaining members of the Board in accordance with the Vermont Administrative Procedure Act.⁴³ This same principle is applied to other independent Vermont Executive Branch entities.⁴⁴

³⁹ See 3 V.S.A. § 258 and § 2004.

⁴⁰ See 30 V.S.A. § 3(e), requiring Governor-appointed Public Utility Commissioners to be removed for cause, and 18 V.S.A. § 9374(b)(4) and [draft Board rules](#), providing that Governor-appointed Green Mountain Care Board members be removed for cause by remaining members.

⁴¹ Bowsher v. Synar, 478 U.S. 714 (1986).

⁴² Id. at 726 (quoting Synar v. U.S., 626 F.Supp. 1374, 1401 (1986)).

⁴³ Sec. 2, 7 V.S.A. § 841(c)(4).

⁴⁴ See e.g. the five-member Green Mountain Care Board, comprised of gubernatorial appointees, who may only be removed for cause by remaining Board members, [18 V.S.A. § 9374\(a\) and \(b\)](#) and [draft Board rules](#); and the five-member State Ethics Commission, comprised of one member appointed by the SCOV Chief Justice and the remaining four members appointed by private entities, who may only be removed for cause by remaining Commission members, [3 V.S.A. § 1221\(b\)](#).

C. Instructive Caselaw from Other States

Courts in other states have upheld Executive Branch entities with majority legislative appointees when adjudicating separation of powers challenges:

- In Parcell v. Governmental Ethics Commission, 639 F.2d 628 (1980), the Tenth Circuit Court of Appeals accepted the determination of the Kansas Supreme Court that an 11-member Governmental Ethics Commission with six legislative appointees and five gubernatorial appointees did not violate separation of powers.
- In State Board of Ethics for Elected Officials v. Green, 566 So.2d 623 (1990), the Supreme Court of Louisiana upheld a five-member Board of Ethics for Elected Officials within the Executive Branch, which contained four legislative appointees and one gubernatorial appointee.
- In Marine Forests Society v. California Coastal Commission, 36 Cal.4th 1 (2005), the Supreme Court of California upheld the California Coastal Commission within the Executive Branch, which contained two-thirds legislative appointees and one-third gubernatorial appointees.

D. Examples of Other Vermont Executive Branch Entities with Mixed Appointments

For reference, current Vermont Executive Branch entities contain members appointed by a mix of appointing authorities, including:

- The 16-member Commission on Women, which contains eight gubernatorial appointees and eight legislative appointees. [3 V.S.A. § 22\(b\)](#).
- The five-member State Ethics Commission, which contains one member appointed by the SCOV Chief Justice and four members appointed by private entities. [3 V.S.A. § 1221\(b\)](#).
- The five-member Racial Equity Advisory Panel, which contains no majority branch appointees. Two are legislative appointees; one is a SCOV Chief Justice appointee; one is a gubernatorial appointee; and one is a Human Rights Commission appointee. [3 V.S.A. § 5003\(b\)](#).
- The 17-member Vermont Working Lands Enterprise Board, which contains seven gubernatorial appointees and 10 legislative appointees. [6 V.S.A. § 4606\(b\)](#).
- The seven-member Clean Energy Development Board, which contains three members appointed by the Commissioner of Public Service and four legislative appointees. [30 V.S.A. § 8015\(e\)\(4\)](#).