

Cannabis Control Board - Separation of Powers Analysis

First let me say I agree with Leg Council's view that this is a Vermont separation of powers issue under the Vermont Constitution and not the US Constitution. Further, I agree that the limits on legislative authority are found in the Vermont Constitution.

I believe the current governance structure of the Cannabis Control Board violates the doctrine of separation of powers by effectively ensuring the Governor can no longer effectively perform his constitutional duty to faith

- I. I start with the authority granted in the Vermont Constitution in the Frame of Government articulated in Section II:
 - **§ 2. [SUPREME LEGISLATIVE POWER]**
The Supreme Legislative power shall be exercised by a Senate and a House of Representatives.
 - **§ 3. [SUPREME EXECUTIVE POWER]**
The Supreme Executive power shall be exercised by a Governor...
 - **§ 5. [DEPARTMENTS TO BE DISTINCT]**
The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others.
 - **§ 6. [LEGISLATIVE POWERS]**
 - i. The House and the Senate shall have and exercise the like powers in all acts of legislation; ...
 - ii. They may prepare bills and enact them into laws, redress grievances, grant charters of incorporation, ... constitute towns, boroughs, cities and counties;
 - iii. and they shall have all other powers necessary for the Legislature of a free and sovereign State; but they shall have no power to add to, alter, abolish, or infringe any part of this Constitution.
 - The VT Supreme Court has recognized the lack of specificity in the latter provision in Hunter v. State, 2004 VT 108 (2004) which considered whether the Legislature had unconstitutionally delegated its spending power. "Chapter II gives the Legislature "powers necessary for

the Legislature of a free and sovereign State,” but provides little specificity on the nature of the powers.”

- **§27 [Power of the Purse]**

Only the legislature has the power to appropriate funds for the support of governmental programs.

- **§ 20. [GOVERNOR; EXECUTIVE POWER]**

The 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 shall supply every vacancy in any office, occasioned by death or otherwise, until the office can be filled in the manner directed by law or this Constitution.

...The Governor is also to take care that the laws be faithfully executed. ...And the Governor may draw upon the Treasury for such sums as may be appropriated by the General Assembly.

- The General Assembly has some degree of control over administrative agencies through the exercise of legislative power. Assuming a bill is enacted into law through bicameralism and presentment in accordance with the Constitution, the legislature’s tools may include structural design, delegation of authority, procedural controls on agency decision-making and agency funding - however reliance on this authority must be informed by separation of powers principles.
- The structure envisioned for the Cannabis Control Board appears to be unprecedented for an Executive Branch regulatory body:
 - i. 3 member Board
 - 1 Governor’s appointee who serves as chair
 - 1 Committee on Committees appointment;
 - 1 Speaker appointment.
 - ii. Alternatively, 5 member Board
 - 1 Governor’s appointee

- 1 Committee on Committees appointment;
- 1 Speaker appointment
- 1 AG appointment
- 1 Treasurer's appointment
- iii. In either case, an executive director appointed by and accountable solely to the Board.

I believe this governance structure violates the doctrine of separation of powers by effectively ensuring the Governor can no longer effectively take care that the laws be faithfully executed.

II. So then I look at the case law

- In re D. L. 164 Vt.223 (1995) – in this case the VT Supreme Court held the judiciary's participation in an inquest did not violate separation of powers. The Court essentially analyzed whether the judiciary's participation in an executive branch function was incidental to the discharge of the judicial function and found that it was.
- There is very helpful analysis generally in order for the court to determine the powers of each branch and ensure no one exercises power belonging to the other.
- The court articulates the basic roles of each branch: “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 fundamental principle of our governmental structure is to divide power to create a structure resistant to the forces of tyranny. The court cites James Madison in the Federalist Papers who states that the accumulation of legislative, executive and judicial power into one place is the very definition of tyranny.
- However, our Supreme Court also recognizes the separation of powers doctrine does not require the absolute division of authority among the three branches – no one branch is hermetically sealed from the other.
- **THE FOCUS IS NOT WHETHER ONE BRANCH IS EXERCISING CERTAIN POWERS THAT MAY 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.

- In In re DL, in order to determine whether the judiciary's role in an inquest proceeding constituted an unconstitutional usurpation of power the court applied a 4 part test:
 - i. Whether the actions at issue are judicial functions or are reasonably necessary or incidental to the discharge of the judicial function;
 - ii. Whether the court's role in another department's affairs is merely advisory;
 - iii. Whether the judiciary has any discretion in accepting or rejecting the delegated functions;
 - iv. Whether the actions impair the independent institutional integrity of the judiciary.
- This is my analysis when I apply the 4 part test in this case:
 - i. Whether the actions at issue are reasonably necessary or incidental to the discharge of the legislative function. The actions at issue relate to the charge of a new Cannabis Control Board. The Board, which exists within the Executive branch, is responsible for exercising clearly executive functions: to make rules, administer a regulatory program which includes the issuance of licenses and enforcement of the applicable law and rules, administer the Medical Cannabis Registry, administer a program for licensed medical cannabis dispensaries (formerly performed by the Department of Public Safety), and submit a budget to the Governor. None of these functions are incidental to the role of the Legislature and yet the Legislature seeks majority control of the Board through its appointments.
 - ii. Whether the legislature's role in Executive Branch affairs is merely advisory; Again, the Legislature seeks majority control of the Board through its appointments. There is nothing advisory about the role of the Legislature in this context. The

legislature's role in the normal course of its business may be to investigate and oversee the executive branch, in order to ensure the executive is faithfully executing the laws, but it has no authority to both enact and then execute the laws. The Legislature does not seek to advise the Executive (JNB, GMCB Nominating Committee, Racial Equity Advisory Panel) – it seeks to usurp executive authority through the appointment process. The General Assembly is seeking to vest executive authority in appointees of the legislative branch.

- iii. Whether the legislature has any discretion in accepting or rejecting the delegated functions. There is nothing discretionary about the constitution of this Board or the exercise of executive functions with which it is charged.
- iv. And 4th, whether the actions [and in this context I would interpret this to mean the participation by the Legislature in Executive agency governance], impair the independent institutional integrity of the legislative branch.

- I would argue that it does. For the Legislature to make appointments and then exercise its proper legislative role to oversee and investigate those appointees would seem to impair the independent institutional integrity of the branch. Furthermore, the Board is charged with delivering a budget to the Governor. First the Legislative appointees deliver a budget to the Governor and then the Legislature acts on those budget recommendations?

On balance, after applying this test, I conclude the Legislature proposes to unconstitutionally usurp the Governor's Executive Authority.

- III. Finally, I would like to more generally address the Limitations Imposed by Principles of Executive Authority

- By vesting the Governor with the Supreme Executive power and the personal responsibility to ensure faithful execution of the laws, the constitution gives the Governor the administrative control of the executive branch. Free Enterprise Fund v. Public Company Accounting Oversight Bd., 561 U.S. 477, 492–93 (2010) (“The landmark case of *Myers v. United States* reaffirmed the principle that Article II confers on the President “the general administrative control of those executing the laws.” *493 272 U.S., at 164, 47 S.Ct. 21. It is *his* responsibility to take care that the laws be faithfully executed.”)
- I believe there is a strong argument to be made that for the purpose of a separation of powers analysis, the appropriate focus is not just whether the Legislature has literally usurped the executive function by maintaining legislative control over an executive branch agency, although the current structure suggests that it has, but whether the structure of this Board and its appointed Executive Director are such that they impede the Governor's ability to perform his constitutional duty. By any measure, this unprecedented board structure insulates the agency from accountability to the Governor and so encroaches on the authority of the Governor to faithfully execute the laws so as to usurp the Governor's constitutionally defined function.
 - a. The Governor has minority representation on the Board and may not even remove his own appointee.
 - b. The Governor has neither appointment nor removal authority of the Executive Director.

I think this would be true as well if the Legislature were to structure the Board in such a way as to

diffuse power so that the Governor cannot be the judge of the Board's conduct.

- The Governor's ability to ensure accountability is an essential aspect to his constitutional duty to oversee the enforcement and execution of the laws. Free Enterprise Fund v. Public Company Accounting Oversight Bd., 561 U.S. 477 (2010) [related to vesting administrative authority in tenured officers who were not subject to the President's direct control. The Court found the arrangement unconstitutional.] (“This arrangement contradicts Article II's vesting of the executive power in the President. Without the ability to oversee the Board, or to attribute the Board's failings to those whom he *can* oversee, the President is no longer the judge of the Board's conduct. He can neither ensure that the laws are faithfully executed, nor be held responsible for a Board member's breach of faith. ...Such diffusion of power carries with it a diffusion of accountability; without a clear and effective chain of command, the public cannot determine where the blame for a pernicious measure should fall. The Act's restrictions are therefore incompatible with the Constitution's separation of powers. Pp. 3153 – 3155.”)
- The Legislature's authority to structure administrative agencies cannot be used to deprive the Governor of his executive power and his constitutional duty to “faithfully execute the laws.”