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S. 203, An act relating to the appointment of State Board of Education members

Thank you for inviting me to testify on S. 203, An act relating to the appointment of State Board of Education members. First, I would have to ask the Committee what problem it is we are trying to fix? The Board of Education is active and engaged and acting in accordance with its statutory mandates.

To the extent the Legislature seeks to govern the Board with this new structure, and assuming there is no change in Board function, on its face, my primary concern is this bill would violate the principle of separation of powers by encroaching on or usurping the Governor's Constitutional duty to faithfully execute the laws.[1]

That said, this bill provides an important opportunity for valuable discussions regarding the proper roles of the Board and the Agency of Education.

- Importantly, the Legislature can act in accordance with its own Constitutional powers to pass laws, redesign the scope of rulemaking, abolish the Board, redesign the purpose of the Board or the nominating process for the Secretary and conduct oversight and investigations.
- The Legislature can create an entity tasked with long term strategic vision, establish advisory commissions and do evaluations, investigations and reports.
- It can set up a legislative policy-making or oversight body which is supported by Legislative Counsel, the Joint Fiscal Office and other legislative support staff.
- The Legislature can create an advisory body and appoint members of its choice.
- Like all other Executive Branch agencies, the Legislature could assign substantive executive powers to the Agency of Education.

[1] One odd feature of this bill is that it does not address the Governor's removal and replacement power set forth in 16 V.S.A. § 162: "After notice and hearing, the Governor may remove a member of the State Board for incompetency, failure to discharge his or her duties, malfeasance, illegal acts, or other cause inimical to the welfare of the public schools; and in case of such removal, he or she shall appoint a person to fill the unexpired term."

This would create an unprecedented board governance structure with legislative appointment filling expiring and vacated terms and gubernatorial removal and replacement.

S. 203

This bill would restructure the State Board of Education. This restructuring would shift the primary appointment authority from the Governor to the Legislature. This structural change to the Board would give the legislative branch 6 voting members and the Governor 3 voting members on the 10-member board.

The Board's quorum requirements, not addressed in statute, rely on Robert's Rules of Order per Board Rule. According to Robert's Rules a quorum is the minimum number of voting members **who must be present** at a properly convened meeting in order to conduct business.

For this Board with 9 voting members, this would be 5 for a quorum and a majority vote could be as low as 3. **The Legislature would control 6 members and could thus act without, or regardless of, the participation of the Executive Branch. The Board would effectively become an agent of the Legislature.**

S. 203 provides the original appointing authority will fill a vacated or expired term, however, as noted above, this bill, read together with 16 V.S.A. § 162 creates an unprecedented governance structure whereby the Governor may remove a member for cause and fill the unexpired term.

Under 16 V.S.A. § 164, the State Board of Education is responsible for rulemaking, regulatory, programmatic and implementation functions, as well as enter into agreements with other states and the US. In this way, the Board, as an agent of the Legislature would be delegated a number of substantive executive functions by the Legislature including the authority to:

- Enter into agreements with school districts, municipalities, states, the United States, foundations, agencies, or individuals for service, educational programs, or research projects. (16 V.S.A. 164(2))
- Make regulations governing the attendance and records of attendance of all students and the deportment of students attending public schools. (16 V.S.A. 164(6))
- Adopt rules pursuant to 3 V.S.A. chapter 25 to carry out the powers and duties of the Board as directed by the General Assembly, within the limitations of legislative intent. (16 V.S.A. 164(7))
- Implement and continually update standards for student performance in appropriate content areas and at appropriate intervals in the continuum from

kindergarten to grade 12 and methods of assessment to determine attainment of the standards for student performance. ... (16 V.S.A. 164(9))

- If deemed advisable, determine educational standards for admission to and graduation from the public schools. (16 V.S.A. 164(11))
- Be the State Board for the program of adult education and literacy and perform all the duties and powers prescribed by law pertaining to adult education and literacy and to act as the State approval agency for educational institutions conducting programs of adult education and literacy. (16 V.S.A. 164(13))
- Adopt rules for approval of independent schools. (16 V.S.A. 164(14))
- Establish criteria governing the establishment of a system for the receipt, deposit, accounting, and disbursement of all funds by supervisory unions and school districts. (16 V.S.A. 164(15))
- Ensure that Vermont's students, including students enrolled in secondary career technical education, have access to a substantially equal educational opportunity by developing a system to evaluate the equalizing effects of Vermont's education finance system and education quality standards under section 165 of this title. (16 V.S.A. 164(18))
- With the approval of the Attorney General, enter into reciprocal agreements with the boards of education in other states to share in the expense of securing the services of specialists or persons skilled in the education of children with disabilities. (16 V.S.A. § 2949)
- Enter into interstate compacts with other states to regulate rates for tuition, room, and board for students receiving special education in independent schools. (16 V.S.A. § 2973)
- Define allowable special education expenditures that shall include any expenditures required under federal law in order to implement fully individual education programs under the Individuals with Disabilities Education Act, 20 U.S.C. chapter 33, and any costs of mediation conducted by a mediator who is approved by the Secretary. (16 V.S.A. § 2962)

In this bill, the Legislature restructures the State Board of Education with a supermajority of members appointed by and thereby accountable to the Legislature:

- The Board is effectively only accountable to the Legislature and of course to the special interests they represent.
- The Board can effectively act without the Executive Branch members to call a meeting, elect officers and adopt procedures and rules it deems necessary for the performance of its work.

I would argue this degree of legislative participation in executive functions, such as entering into agreements with foreign jurisdictions, controlling the administration of Vermont's schools and approving expenditures, usurps the powers of the executive and transfers all of the powers and functions of an executive board to an agency of the legislature. This structure is thus invalid.

Applicable Constitutional Provisions Regarding the Separation and Distribution of Power

The Supreme Legislative power shall be exercised by a Senate and a House of Representatives. Vt. Const. CH II, § 2

The Supreme Executive power shall be exercised by a Governor…. Vt. Const. CH II, § 3

The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others. Vt. Const. CH II, § 5

("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." See *State v. Washington,* 83 Wis.2d 808, 266 N.W.2d 597, 606 n. 13 (1978).In re D.L., 164 Vt. 223 (1995))[i]

The Senate and the House of Representatives shall be styled, *The General Assembly of the State of Vermont*. … They may prepare bills and enact them into laws, redress grievances, grant charters of incorporation, subject to the provisions of section 69, constitute towns, borroughs, cities and counties; 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***. Vt. Const. CH II, § 6

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. Vt. Const. CH II, § 20

The Governor is to correspond with other States, transact business with officers of government, civil and military… Vt. Const. CH II, § 20

The Governor is also to take care that the laws be faithfully executed. Vt. Const. CH II, § 20

The Legislature is well known for making appointments. Every year any number of boards, committees, councils and commissions are populated with several legislators, executive branch members and various experts and interests. The purposes vary, to include studies, nominating, policy development, legislative recommendations and reporting. Some are accountable to the Secretary of State and responsible for professional regulation; some are quasi-judicial; and some are required by federal law for the purpose of receiving federal grants. Over 150 boards and commissions (but only those with members appointed by the Governor) can be found here: Boards and Commissions | Office of Governor Phil Scott (vermont.gov). Many others are purely legislative and are presumably recorded in records of the Secretary of State and the Legislature.

However, the Legislature has no authority to unconstitutionally infringe on the Governor's Constitutional duty to faithfully execute the laws.

Vermonters should be concerned the Legislature increasingly seeks to shift power away from the Governor and toward "independent" commissions, boards and councils with little accountability other than to their own members. Some recent efforts include:

- the attempt to remove the Governor's removal power for the members of the Cannabis Control Board;
- the attempt to remove the Governor's removal power for the Executive Director of the Office of Racial Equity;
- the "independent" 5 member Community Broadband Board with 2 members appointed by the Governor, 2 appointed by the Legislature and one appointed by a unelected third party, located within, and with access to the resources of, the Department of Public Service, but removable only for cause and with no clear lines of accountability. After the first Executive Director, appointed by the Governor, successors will be appointed by the Board – an appointee accountable only to appointees and not to an elected official.
- the unconstitutionally constituted Global Warming Solutions Act Council, another legislative agency with over a quorum of legislative appointees, with access to the resources and support of Executive Branch agencies and authority to exercise the Executive functions of rulemaking, program development and implementation, yet accountable only to the Legislature.
- In 2023, development of the Clean Heat Standard was assigned to the "quasi-judicial" Public Utilities Commission with ultimate power for "approval" of rulemaking vested in the Legislature.

Separation of Powers Principles

The separation of powers doctrine does not contemplate an absolute division of authority among the three branches; practical realities dictate a certain overlap of the powers exercised by the branches. See In re D.L., 164 Vt. 223, 228–29 (1995):

"Our decisions reflect, however, that more difficult issues and choices lie under the surface of separation of powers questions. Thus, we have emphasized that separation of powers doctrine does not contemplate an absolute division of authority among the three branches such that each branch is hermetically sealed from the others. See *State v. Pierce,* 163 Vt. 192, ——, 657 A.2d 192, 194 (1995); see also *INS v. Chadha,* 462 U.S. 919, 951, 103 S.Ct. 2764, 2784, 77 L.Ed.2d 317 (1983) (federal branches not hermetically sealed from one another). Practical realities of daily government require that there must be a certain amount of overlapping or blending of the powers exercised by the different departments. *Trybulski,* 112 Vt. at 6, 20 A.2d at 120. Moreover, there are many powers and functions of government that defy simple or obvious classification. *Id.* at 7, 20 A.2d at 120.)

However, once the Legislature makes policy choices through the Constitutional process of bicameralism and presentment, and delegates rulemaking authority to the Executive Branch, its participation ends (other than through oversight, investigation and subsequent legislation). Intervention in Executive Branch decision-making necessary to execute the law is unconstitutional.

- As the Court said in In re D.L., 164 Vt. 223, 229 (1995):

  > The 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. See *Smith,* 686 F.Supp. at 854. As stated by James Madison, "where the *whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free Constitution are subverted." James Madison, The Federalist No. 47, at 303–04 (C. Rossiter ed. 1961) (emphasis in original).

See also Brady v. Dean, 173 Vt. 542 (2001):

> Although the separation of powers doctrine does not contemplate an absolute division of authority among the three branches, it does ensure, at a minimum, that no branch will usurp the core functions or impair the independent institutional integrity of another.

And see Hunter v. State, 177 Vt. 339 (2004):

> The 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.

State and Federal Precedent

Legislative Counsel and the Office of the AG have concluded that, as far as they are able to determine, there is no Vermont case law on legislative aggrandizement constituting encroachment on or usurpation of the powers of the executive in Vermont. This would be a matter of first impression in Vermont. However the Vermont Supreme Court has often opined on separation of powers matters relating to Judicial and Legislative branch powers and relied upon federal precedent to do so. As the Court explained in In re D.L., 164 Vt. 223, 228, (1995), fn. 3:

> ***We have often relied upon federal separation of powers jurisprudence in developing our own***. See *Trybulski v. Bellows Falls Hydro–Elec. Corp.,* 112 Vt. 1, 7, 20 A.2d 117, 120 (1941); see also *In re Constitutionality of House Bill 88,* 115 Vt. 524, 529, 64 A.2d 169, 171–72 (1949) (noting that judicial power of both Vermont and Federal Supreme Courts is same). ***Thus, this opinion will draw on federal case law for analysis and support.***

Various United States Supreme Court decisions are instructive on the issue of legislative encroachment and aggrandizement. They articulate two basic constitutional restraints on the Legislature: it may not by law invest itself or its agents with executive or judicial power; and the Legislature may only engage in lawmaking through the constitutional mechanisms of bicameral decision-making and presentment.

- *In Bowsher v. Synar,* 478 U.S. 714 (1986), the Supreme Court determined the Congressional delegation of authority to the Comptroller General to revise the federal budget be an unconstitutional intrusion into the authority of the Executive. In *Bowsher,* the Court concluded that Congress could not reserve for itself the power of removal of an officer charged with the execution of the laws except by impeachment. The Court stated, "To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws…The structure of the Constitution does not permit

Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess." Bowsher v. Synar, 478 U.S. 714, 726 (1986).

If Congress were free to delegate its policymaking authority to one of its components, or to one of its agents, it would be able to evade "the carefully crafted restraints spelled out in the Constitution." *[*citing to *Chadha, infra]* That danger — congressional action that evades constitutional restraints—is not present when Congress delegates lawmaking power to the executive or to an independent agency. Id., 755.

- In *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.,* 501 U.S. 252, 274 (1991) the Court held that the creation by Congress of a Board of Review composed of Congress members with veto power over decisions of a local airport authority's directors violated the constitutional separation of powers principle. In analyzing the separation of powers principle, the Court stated:

  "If the power is executive, the Constitution does not permit an agent of Congress to exercise it. If the power is legislative, Congress must exercise it in conformity with the bicameralism and presentment requirements of Art. I, § 7. In short, when Congress "[takes] action that ha[s] the purpose and effect of altering the legal rights, duties, and relations of persons ... outside the Legislative Branch," it must take that action by the procedures authorized in the Constitution. See *Chadha,* 462 U.S., at 952–955, 103 S.Ct., at 2784–2786. Metro. Washington Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc., 501 U.S. 252, 276 (1991)

  The Court explained: "One might argue that the provision for a Board of Review is the kind of practical accommodation between the Legislature and the Executive that should be permitted in a "workable government."… ***However, the statutory scheme challenged today provides a blueprint for extensive expansion of the legislative power beyond its constitutionally confined role.*** [emphasis added] … ***As James Madison presciently observed, the legislature "can with greater facility, mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments***." [emphasis added] The Federalist No. 48, at 334. Heeding his warning that legislative "power is of an encroaching nature," we conclude that the Board of Review is an impermissible encroachment." Id. 276–77.

- In *INS v. Chadha,* 462 U.S. 919 (1983), the Court struck down a statute that authorized a single House of Congress by resolution to invalidate a decision by the Attorney General to allow a deportable alien to remain in the United States. The

Court was clear Congress could have acted through legislation to accomplish the same goal, but the one house veto was invalid without following the bicameral and presentment procedures specified in the Constitution. As the Court explained:

> The bicameral requirement, the Presentment Clauses, the President's veto, and Congress' power to override a veto were intended to erect enduring checks on each Branch and to protect the people from the improvident exercise of power by mandating certain prescribed steps. ***To preserve those checks, and maintain the separation of powers, the carefully defined limits on the power of each Branch must not be eroded***. To accomplish what has been attempted by one House of Congress in this case requires action in conformity with the express procedures of the Constitution's prescription for legislative action: passage by a majority of both Houses and presentment to the President. I.N.S. v. Chadha, 462 U.S. 919, 957–58 (1983)

In closing, to the extent the Legislature disagrees with the executive actions of the Board of Education , the Legislature's appropriate remedy would be to modify the legislation that authorized the action or revoke the authority entirely. As discussed, simply delegating the Legislature's policy making authority to a legislative agent expands its power beyond its Constitutional role. I would urge the Committee to use this opportunity to assess the structures most appropriate for executing on the important work of educating Vermont's children.