VERMONT HOUSE OF REPRESENTATIVES

CLERK OF THE HOUSE

Memorandum

To: Senate Committee on Government Operations

From: BetsyAnn Wrask, Clerk of the House, Co-Counsel to House Ethics Panel

Date: April 2, 2025

Re: H.1 As Passed by House conforms to Vermont's State constitutional governance structure

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I. Introduction

Your committee is considering 2025, H.1 As Passed by House (accepting and referring complaints by the State Ethics Commission). The purpose of this memorandum is to provide additional context regarding why the House Ethics Panel and its staff perceive H.1 to be necessary in order to correct an infringement on constitutional legislative authority and procedure created by the enactment of 2024, Act 171 (H.875 - State Ethics Commission and State Code of Ethics), Sec. 9.

That Sec. 9 amended 3 V.S.A. § 1223, which provides the procedure by which the Vermont State Ethics Commission (Commission) accepts and refers complaints regarding governmental ethics in any of the three branches of State government. Under that statutory law—which existed prior to 2024, Act 171—when the Commission receives a complaint, it refers the complaint to the applicable State regulatory entity that ordinarily handles such a complaint, based on the complaint context.

To confirm, in the Legislative Branch, the Commission refers complaints regarding Representatives to the House Ethics Panel; and it refers complaints regarding Senators to the Senate Ethics Panel. In the Judicial Branch, the Commission refers complaints regarding judicial officers to the Judicial Conduct Board; and it refers complaints regarding attorneys to the Professional Responsibility Board. These are the regulatory entities that are the arms/agents of the State constitutional entities that have authority over these individuals, in accordance with the exclusive authority of the House and Senate to "judge member qualifications" as set forth in Vt. Const. Ch. II, §§ 14 and 19, and of the Supreme Court of Vermont to have "disciplinary authority concerning all judicial officers and attorneys at law in the State as set forth in Vt. Const. Ch. II, § 30.[1]

[1] The full list of applicable regulatory entities is set forth in 3 V.S.A. § 1223(b).

2024, Act 171, Sec. 9 added a new subsection (c) to provide a consultation requirement when the Commission refers such a complaint to the applicable State regulatory entity. The new consultation requirement is not yet in effect; it is set to take effect on September 1, 2025.[2]

That new subsection (c) purports to require each regulatory entity to consult in writing with the Commission regarding the application of the State Code of Ethics on any complaint the Commission refers to the regulatory entity, before the entity can make a final determination on the complaint, "meaning either closing the complaint without further investigation or issuing findings following an investigation."[3,4]

2025, H.1 As Introduced was sponsored by the members of the 2023–24 House Ethics Panel who were returning to the House, in order to address the separation of powers concerns regarding this new consultation requirement. These concerns were only realized after adjournment of that biennium, because neither the Panel nor its staff were consulted on these new requirements prior to bill enactment, despite these provisions impacting Panel processes.

H.1 passed the House with amended language that also includes the applicable Judicial Branch regulatory entities, since the Legislative and Judicial Branches have similar constitutional regulatory authority. The bill is limited to ***the manner in which*** this consultation is required when the Commission refers a complaint to the applicable regulatory entity in the Legislative and Judicial Branches, due to the constitutional authority of those two separate branches.

Specifically, H.1 would require the Commission to provide in advance any application of the State Code of Ethics to the complaint when it refers the complaint, and a recommended action, in order to avoid the 2024 act's attempt to control by statute the constitutional authorities of the Legislative and Judicial Branches to regulate the individuals described in the Vermont Constitution, because statute cannot control the Constitution.

By H.1 requiring the Commission to provide its consultation up-front, when it refers any complaint to the relevant legislative panels and judicial boards—rather than requiring those entities to consult with the Commission before they can make a final determination, as currently required by Act 171—it will address the constitutional concern, explained in testimony by the legal counsel for these entities, that the upcoming law, if not amended, attempts to control those entities before they can act on a complaint that is within their constitutional purview.

Under H.1, with this information in advance, for the House, the House Ethics Panel can then consider any application of the State Code of Ethics and the Panel's need to further consult with the Commission.

This memorandum will describe the legislative powers impacted by 2024, Act 171, Sec. 9 and relatedly, the judicial powers impacted by that provision. It will also provide an overview of the State Ethics Commission and the current processes shared between the Commission and the House Ethics Panel.

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[2] 2024, Act 171, Sec. 24 (effective dates).

[3] 3 V.S.A. § 1223(c), as amended by 2024, Act 171, Sec. 9.

[4] Note also—in contravention to both legislative panels' confidentiality requirements, as well as the confidentiality requirements of the Judiciary's two boards—that the Commission would thereafter have the authority to make these entities' written consultations public if the Commission pursued its own investigation of the complaint and it resulted in Commission discipline. 3 V.S.A. § 1231(b)(6).

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

Under the U.S. Constitution, the Supremacy Clause set forth in Art. VI, cl. 2 provides that federal law "shall be the supreme Law of the Land[.]" However, our federal constitution provides Congress with enumerated powers, and the 10th Amendment provides that all powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states or to the people.

And 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,[5] 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.[6]

III. The Vermont Constitution Controls our State Government[7]

The Vermont Constitution controls the operation of our State government. "The Vermont Constitution is the fundamental charter of our state and is preeminent in our governmental scheme . . . As such, the constitution stands above legislative and judge-made law, and the rights contained therein speak 'for the entire people as their supreme law.'"[8]

IV. The Vermont Constitution Requires Separation of 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."[9] Separating these three core powers is a "fundamental principle" that serves to create a governmental structure "resistant to the forces of tyranny."[10]

And to understand the requirements of our constitutional structure of State government, we turn to the caselaw of the Supreme Court of Vermont, because 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"[11]; "[i]t is the function of the

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[5] 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.").

[6] 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 anther department of government, is for the determination of the state.").

[7] *See also* Overview of Vermont State Governmental Structure.

[8] In re Town Highway No. 20, 191 Vt. 231, 248 (2012) (other citations omitted).

[9] In re D.L., 164 Vt. 223, 228 (1995).

[10] Id. (citing James Madison's statement in *Federalist Paper No. 47* that the accumulation of legislative, executive, and judicial power into one place is the "very definition of tyranny.").

[11] Brigham v. State, 179 Vt. 525, 528 (2005).

courts to maintain constitutional government"[12]; and the Supreme Court of Vermont is the "final interpreter of the Vermont Constitution."[13]

V. The Legislative and Judicial Powers Impacted by 2024, Act 171, Sec. 9

A. Each Legislative Chamber's Authority to Judge Member Qualifications

Vt. Const. Ch. II, § 14 provides: "The Representatives so chosen . . . shall have power to . . . judge of the elections and 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, § 19 provides the Senate with "the like powers to decide on the election and qualifications of, and to expel any of, its members . . . as are incident to, or are possessed by, the House of Representatives."

In the 2001 Supreme Court of Vermont (SCOV) case Brady v. Dean,[14] the SCOV acknowledged that "our constitution does not define, nor have we previously addressed, the precise scope of the legislative prerogative over members' 'qualifications'," but held that this "exclusive constitutional prerogative" "encompasses the authority to determine whether a member's personal or pecuniary interest requires *dis* qualification from voting on a question before it."[15]

"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 . . . A member's decision to vote on a matter before the House represents, in our view, a core legislative function that must remain inviolate to ensure the continued integrity and independence of that institution."[16]

In other words, the SCOV in Brady v. Dean confirmed that each chamber's constitutional authority to "judge its members' qualifications" *at a minimum* means that each chamber is exclusively responsible for determining whether one of its members has a conflict in voting—and by the Vermont Constitution, no other entity can make that determination. The 2001 Brady case is the last known time the SCOV adjudicated the meaning of Vt. Const. Ch. II, § 14.[17]

However, as set forth in *Mason's Manual of Legislative Procedure* and in federal caselaw and that of multiple other states, the breadth of each chamber's authority to regulate the conduct of its members—in the exercise of the chamber's power to judge member qualifications—is practically unlimited as an inherent power of self-protection, in order to uphold chamber

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[12] C.O. Granai v. Witters, Longmoore, Akley & Brown, 123 Vt. 468, 470 (1963).
[13] State v. Read, 165 Vt. 141, 153 (1996).
[14] Brady v. Dean, 173 Vt. 542 (2001).
[15] Id. at 544.
[16] Id. at 545.
[17] The other two known SCOV cases adjudicating Vt. Const. Ch. II, § 14 are Pearl v. Curran, 135 Vt. 171 (1977) (SCOV could not adjudicate voter's claim that winning Leg. candidate did not keep campaign promise to provide Leg. salary to district's fire departments or rescue squads) and Kennedy v. Chittenden, 142 Vt. 397 (1983) (contested House election is exclusively within the authority of the House to judge its members' elections and qualifications).

integrity. And it is not just limited to regulating core legislative functions. We know from caselaw that courts may review legislative discipline in the exercise of this constitutional authority if it violates a legislator's 1st Amendment speech rights or basic due process, and Vt. Const. Ch. II, §§ 14 and 19 prohibit each chamber from expelling a member "for causes known to their constituents antecedent to their election[.]" But otherwise, there is no known caselaw that places limits on the type of legislator conduct that may be disciplined.[18]

Accordingly, each chamber can regulate the core and noncore legislative conduct of its members, and that means that any State Code of Ethics violation allegedly committed by a legislator may subject that legislator to discipline by the legislator's chamber. However—as described in Brady v. Dean—the Commission is prohibited by the Vermont Constitution from attempting to regulate alleged conduct of a legislator that pertains to a conflict in voting, and as described in other caselaw, other "core legislative functions."[19]

"In contrast, the Legislature may delegate the power to discipline with respect to conduct related to noncore legislative functions," such as using governmental resources for nongovernmental purposes, bidding or entering into governmental contracts, and receiving honorariums."[20,21]

The issue, however, is that at this time, it is not clear where the Commission understands the line to be between core vs. noncore legislative duties. Therefore, if H.1 is enacted into law, it will be helpful to the House Ethics Panel for the Commission to specify the application of the State Code of Ethics to facts presented in a complaint it refers to the Panel, so that the Panel can better understand the Commission's interpretation of the Code of Ethics.

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[18] *See* House Ethics Panel 2025 Training and its caselaw citations starting on slide 19. *See e.g.* SCOTUS' Powell v. McCormack, 395 U.S. 486, FN27 (1969) ("[W]e express no view on what limitations may exist on Congress' power to expel or otherwise punish a member once he has been seated.") and In re Chapman, 166 U.S. 661, 669 (1897) ("The right to expel extends to all cases where the offense is such as in the judgment of the senate is inconsistent with the trust and duty of the member.").

[19] *See* House Ethics Panel 2025 Training, slide 10. "[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 that 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 SCOV in Brady] 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 432-433; and citing in FN8 caselaw from multiple other state courts affirming that voting is a core legislative function).

[20] Commission on Ethics v. Hardy, 125 Nev. 285, FN9 (2009).

[21] *See also* Brady at 545 (Not all potential conflicts of interest of legislators are immune from Executive or Judicial oversight; legislators may be prosecuted for crimes such as bribery, or subject to civil suit for actions such as defamation committed outside the scope of legislative duties).

B. Each Legislative Chamber Controls its Own Procedure; Statute Does Not Control

In addition to H.1 addressing the constitutional authority of each chamber to judge its members' qualifications, H.1 also addresses the issue that statute cannot control legislative procedure, and statute enacted by one General Assembly cannot bind a future General Assembly. Put another way, H.1 will correct 2024, Act 171, Sec. 9's attempt to control by statute each chamber's constitutional legislative procedural authority.

The General Assembly's legislative power is only limited by the Vermont Constitution. "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" the Vermont Constitution, Vt. Const. Ch. II, § 6. As the Vermont Supreme Court stated, 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."[22]

Legislative rulemaking is considered a necessary legislative power. *Mason's Manual of Legislative Procedure* — adopted as supplemental parliamentary procedure by both the House and Senate[23] and based on caselaw nationwide— states that "[e]very governmental body has an inherent right to regulate its own procedure, subject to the provisions of the constitution or other controlling authority."[24]

While legislative procedure must comply with any constitutional requirements—such as quorum requirements, when a roll call is required, or the vote threshold to override a veto—legislative procedural authority is otherwise unlimited. While there is no known SCOV caselaw that has directly addressed the constitutional limits of Vermont legislative procedures, there seems to be robust caselaw on this issue in other states. For example, the Supreme Court of Iowa adjudicated many such cases, and its cited holdings have acknowledged broad legislative procedural authority. That court quoted at least two cases holding that authority:

> . . . does not restrict the power . . . to the mere formulation of standing rules, or the proceedings of the body in ordinary legislative matters; but in the absence of constitutional restraints . . . such authority extends to the determination of the propriety and effect of any action . . . taken by the body as it proceeds in the exercise of any power, in the transaction of any business, or in the performance of any duty conferred upon it by the Constitution.[25]

The General Assembly's chambers may follow legislative procedures set forth in statute. But statute exists only after concurrence with the other chamber and after a bill has been presented to the Governor in accordance with the Vermont Constitution. But neither the Governor nor the other chamber has the authority to control a chamber's procedure. Therefore, whenever possible, legislative procedure should not be set forth in statute.

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[22] Rafus v. Daley, 103 Vt. 426, 154 A. 695, 697 (1931) (citations omitted).
[23] House Rule 88 and Senate Rule 91, respectively.
[24] *Mason's* Sec. 2-1.
[25] Des Moines Register and Tribune Co, v. Dwyer, 542 N.W.2d 491, 498 (1996) (citations omitted). This quote is also used as the basis for *Mason's* Sec. 3-4.

Moreover, the principle that constitutionally permitted legislative rules and procedures supersede statute is proclaimed multiple times in *Mason's*.[26] While at this time there is no known SCOV caselaw that confirms this principle, that courts will not adjudicate challenges to constitutionally permitted legislative procedure — even if it conflicts with statute — is supported by caselaw in the U.S. Supreme Court and multiple other states' supreme courts.

First, courts will not adjudicate challenges to constitutionally permitted legislative rules, or the violation thereof. "It is a legislative prerogative to make, interpret[,] and enforce its own procedural rules and the judiciary cannot compel the legislature to exercise a purely legislative prerogative . . . Just as the legislature may not invade our province of procedural rulemaking for the court system, we may not invade the legislature's province of internal procedural rulemaking. A member of the legislature can raise a point of order regarding a violation of any of the rules of the house or senate. That is the proper forum for determining the propriety of the activities complained of . . ."[27]

Relatedly, the U.S. Supreme Court has stated that Congress' constitutional authority to determine its rules of proceedings is an ongoing power. "The constitution empowers each house to determine its rules of proceedings . . . The power to make rules is not one which once exercised is exhausted. It is a continuous power, always subject to be exercised by the house . . ."[28]

Moreover, multiple states' supreme courts appear consistent: statute does not control legislative procedure. For example, in an opinion by the Supreme Judicial Court of Maine, the court found that a person contesting a House member's election failed to comply with a statutory requirement to notify that legislator of the contest within a certain amount of time.[29] However, the Court stated that this should not prohibit the House's Committee on Elections from having jurisdiction to entertain the contestant's petition, since under a provision of the Maine Constitution, each chamber has the authority to judge the elections of its members.[30] "The Constitution thus clothes each house of the Legislature with exclusive and plenary jurisdiction. The Legislature may prescribe reasonable rules of conduct and procedure in resolving election contests involving its own membership, *but its jurisdiction continues to rest upon the authority*

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[26] *See Mason's* Secs. 2-3 ("The constitutional right of a state legislature to control its own procedure cannot be withdrawn or restricted by statute, but statutes may control procedure insofar as they do not conflict with the rules of the houses or with the rules contained in the constitution."); 2-7 ("An act of the legislature is legal when the constitution contains no prohibitions against it."); 3-2 ("The house and senate each may pass an internal operating rule for its own procedure that is in conflict with a statute formerly adopted."); 4-1 and 13-5 ("Rules of procedure passed by one legislature or statutory provisions governing the legislative process are not binding on a subsequent legislature."); 4-2 ("Rules of legislative procedure are derived from several sources and take precedence in the order listed below . . . [with constitutional provisions; adopted rules; and custom, usage, and precedents taking precedence in that order over statutory provisions]"); 13-7 ("Rules of procedure are always within control of the majority of a deliberative body and may be changed at any time by a majority vote.").

[27] Des Moines Register and Tribune Co., 542 N.W.2d at 500-501 (1996) (citing Moffitt v. Willis, 459 So.2d 1018, 1021-1022 (Fla. 1984) (other citations omitted)).

[28] U.S. v. Ballin, 144 U.S. 1, 5 (1892).

[29] Opinion of the Justices, 157 Me. 98, 101 (1961). (The Maine House of Representatives requested this opinion pursuant to the Maine Constitution, which requires the Court to provide opinions to the Legislature under certain conditions.).

[30] Id.

vested in it by the Constitution and may not be made to depend upon any technical compliance or failure to comply with such procedural requirements [emphasis added]."[31]

In a case before the Wisconsin Supreme Court, respondents argued that an act was invalid in part because prior to passage, the bill was not referred to a specific committee, as required by statute.[32] Petitioners argued that the bill did not meet the description of the type of legislation that the statute required to be referred to that committee.[33] The court refused to decide the question, in light of the principle of separation of powers.[34] "To discuss or consider the petitioner's argument [regarding whether the statute applied to the bill] would imply that this court will review legislative conduct to ensure the legislature complied with its own procedural rules or statutes in enacting the legislation . . . we conclude we will not intermeddle in what we view, in the absence of constitutional directives to the contrary, to be purely legislative concerns; accordingly, we decline to resolve the question . . ."[35]

"Although since Marbury v. Madison[36]. . . courts have had the authority to review acts of the legislature for any conflict with the constitution, courts generally consider that the legislature's adherence to the rules or statutes prescribing procedure is a matter entirely within legislative control and discretion, not subject to judicial review unless the legislative procedure is mandated by the constitution."[37] The Wisconsin court then cited the principle in Sutherland that a legislature, by statute or joint resolution, cannot bind or restrict itself or its successors as to the procedure to be followed in the passage of legislation.[38] "[The statute] is simply a procedural rule, albeit in statute form and thereby imbued with all the dignity and importance of a legislative act passed by both houses of the legislature and signed by the governor. Nevertheless, the fact that [the statute] is something more than a mere internal procedural rule but less than a constitutional requirement, does not remove it from the application of the general rule as stated by Sutherland, *supra* . . . it has been held that the legislature's failure to follow a procedural rule — even if such rule is embodied in a statute — is not open to judicial scrutiny and cannot be a basis for judicial invalidation of a legislative enactment."[39]

The Supreme Court of New Hampshire more recently echoed the sentiment that constitutionally permitted legislative procedures may supersede statute, and that it is not within a court's authority to intervene if that happens. The court relied on multiple cases from other states, including one from Alaska, which held that "when a statute 'relates solely to the internal organization of the legislature, a subject which has been committed by our constitution to each house . . . proper recognition of the respective roles of the legislature and the judiciary requires that the latter not intervene.'"[40] While the court stated that claims regarding compliance with mandatory constitutional provisions are justiciable, the question of whether the New Hampshire

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[31] Id. at 102.
[32] State ex rel. La Follette v. Stitt, 114 Wis.2d 358, 363 (1983).
[33] Id. at 364.
[34] Id. at 364-365.
[35] Id. at 364.
[36] Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
[37] LaFollette at 365.
[38] Id. (citing 1 Sutherland, Statutory Construction (4th Ed.) sec. 7.04, p. 264).
[39] Id. at 367 (other citations omitted).
[40] Baines v. New Hampshire Senate President, 152 N.H. 124, 132 (2005) (citing Malone v. Meekins, 650 P.2d 351, 356 (Alaska 1982)).

legislature violated statutes codifying its own constitutionally permitted procedural rules is nonjusticiable.[41]

In a separate but similar case, the New Hampshire court — citing other states' caselaw — discussed that legislative rulemaking authority is a "'continuous power absolute,'" which means that a chamber is not bound by action taken by a previous legislature, and that a "legislature, alone, 'has complete control and discretion whether it shall observe, enforce, waive, suspend, or disregard its own rules of procedure.'"[42] "The same is true of statutes that codify legislative procedural rules. Statutes relating to the internal proceedings of the legislature 'are not binding upon the Houses . . . Either branch, under its exclusive rule-making constitutional prerogatives, is free to disregard or supersede such statutes by unicameral action.'"[43]

2024, Act 171, Sec. 9 purports to control by statute the legislative procedure of each chamber, by attempting to require the chambers' ethics panels to consult with the Commission on any complaint the Commission refers to them, before the panels can make a determination on the complaint. Statute cannot control constitutional legislative procedural authority. H.1 will resolve this issue by shifting the consultation requirement to the Commission, which is created by statute and may be controlled by statute.

C. The Supreme Court of Vermont's Exclusive Disciplinary Authority

Pursuant to Vt. Const. Ch. II, § 30, the Vermont Supreme Court has "disciplinary authority concerning all judicial officers and attorneys at law in the State." While the Court has the assistance of the Judicial Conduct Board for judicial officers, "in judicial conduct proceedings, this Court makes the only final and ultimate decision. The findings and recommendations of the Board carry great weight, but are advisory, not binding."[44] Regarding attorneys, the Professional Conduct Board "acts on behalf of this Court" pursuant to the Court's "exclusive responsibility" over attorney discipline, with the Court making "its own ultimate decisions on discipline."[45]

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[41] Id. at 132.
[42] Hughes v. Speaker of the New Hampshire House of Representatives, 152 N.H. 276, 284 (2005) (other citations omitted).
[43] Id. (other citations omitted).
[44] In re Bryan, 164 Vt. 589, 593 (1996) (other citations omitted).
[45] In re Berk, 157 Vt. 524, 527 (1991) (quoting Vt. Const. Ch. II, § 30 and the Court's administrative rules).

VI. Overview of the Vermont State Ethics Commission

A. The Commission is an Independent Executive Branch Entity

The Commission comprises seven members appointed by seven different entities and elects its own chair.[46] The Commission is in the Executive Branch. This is stated in the Commission's enabling law ("There is created within the Executive Branch an independent commission named the State Ethics Commission . . ."),[47] but that statement exists only as clarifying language. The Commission would be in the Executive Branch regardless of whether that provision of its enabling law were repealed or if it were never enacted to begin with. Nor would the Commission's suggestion[48] to amend the law to provide that the Commission is not "of the" Executive Branch be of any effect.

The Vermont Constitution does not contemplate State entities that float free from one of the three branches. "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."[49,50]

The Ethics Commission is in the Executive Branch because it executes the law enacted by the General Assembly. The conferred authority to execute law is the Executive power.[51] Executive Branch entities have the power to "apply the general provisions of law to particular circumstances and situations[.]"[52] This is true not only on our State level, but also on the federal level.[53]

And the Ethics Commission is "independent" in the Executive Branch because it answers to no entity other than itself: Via 3 V.S.A. § 1221(b)(4), Commission members can only be removed for cause by the remaining members of the Commission. As the U.S. Supreme Court

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[46] 3 V.S.A. § 1221(b). The appointors are the SCOV Chief Justice, the League of Women Voters of Vermont, the Board of Directors of the Vermont Society of Certified Public Accountants, the Board of Managers of the Vermont Bar Association, the Board of Directors of the SHRM Vermont State Council, the Speaker, and the Committee on Committees. The Speaker and Committee on Committees are each to appoint a former municipal officer.

[47] 3 V.S.A. § 1221(a).

[48] Commission comments on H.1 submitted to HGOMA on Feb. 27, 2025: https://legislature.vermont.gov/Documents/2026/Workgroups/House%20Government%20Operations/Bills/H.1/Witness%20Documents/H.1~Christina%20Sivret~Ethics%20Commission%20Testimony~2-27-2025.pdf

[49] In re D.L., 164 Vt. 223, 228 (1995).

[50] *See also* SCOV caselaw discussing the difference between Executive and Judicial Branch functions, such as Trybulski v. Bellows Falls Hydro-Electric Corp., 112 Vt. 1, 8-9 (1941) ("[W]here the duty is primarily to decide a question of a private right, based on a claim for reparation for injuries suffered in the past, involving a determination of the facts or the construction and application of existing laws, the function is judicial, and constitutionally is to be performed by the Courts.").

[51] *See* Waterbury v. Melendy, 109 Vt. 441, 448 (1938) (There is a distinction "between a delegation of the power to make the law[,] which necessarily includes a discretion as to what it shall be[,] and the conferring of authority or discretion as to its execution[,]" which is exercised under and in pursuance of the law.).

[52] Sabre v. Rutland R. Co., 85 A. 693, 701 (1913).

[53] *See* Bowsher v. Synar, 478 U.S. 714, 733 (1986) ("Interpreting a law enacted by Congress to implement the legislative mandate is the very essence of the "execution" of the law.").

stated, "[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."[54]

The General Assembly has used this same structure to create the similar independent Executive Branch entities the Green Mountain Care Board[55] and the Cannabis Control Board.[56]

B. New Commission Investigative and Enforcement Authority

As it was originally created, the State Ethics Commission did not have investigative or enforcement authority. However, the 2024 Ethics Act—2024, Act 171 (H.875)—provided the Commission with authority to investigate, subpoena, hold hearings, issue warnings and reprimands, and recommend actions in regard to complaints, effective September 1, 2025.[57] On that date, the Commission may investigate after receiving a complaint or investigate on its own initiative.[58]

On the record in the House Committee on Government Operations and Military Affairs, the Commission testified "that is not enforcement authority." However, as the SCOV noted in a case involving a municipal body's censure of a member, "reprimand is one of several disciplinary actions an organization may undertake . . . [c]ensure is a form of reprimand, defined as "[t]he formal resolution of a legislative, administrative, or other body reprimanding a person, normally one of its own members, for specified conduct."[59] For reference, warnings or reprimands are also one of the disciplinary powers that other entities in the State use to discipline individuals within their regulatory control.[60]

ATTACHMENT A of this memo sets forth some of the statutory provisions that will provide this new Commission investigative and enforcement authority that is set to take effect on September 1st of this year pursuant to 2024, Act 171 (H.875). Note, however, that while 2024, H.875 As Introduced would have provided the Commission in Sec. 17 with the new position of full-time Legal Counsel to assist the Commission with these new powers—in addition to the municipal ethics duties that the bill provided—that position and its related appropriation were deleted from the final version of the bill passed by the General Assembly. Therefore, at this time, the Commission has no legal staff to assist the Commission to administer these new functions that involve the interpretation and application of the law.[61] The General Assembly would need to appropriate funds to the Commission to enable it to appoint outside legal counsel and investigators pursuant to 3 V.S.A. § 1227(d).

This new Commission enforcement authority will include the power to enforce the State Code of Ethics, which is set forth in 3 V.S.A. ch. 31, subch. 1. While 3 V.S.A. § 1202(c) of the

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[54] Id. at 726 (quoting Synar v. U.S., 626 F.Supp. 1374, 1401 (1986)).
[55] *See* 18 V.S.A. § 9374(b)(4).
[56] *See* 7 V.S.A. § 843(c)(4).
[57] 3 V.S.A. § 1221(a), as amended by 2024, Act 171, Sec. 7.
[58] 3 V.S.A. § 1227, as added by 2024, Act 171, Sec. 10.
[59] LaFlamme v. Essex Junction School District, 170 Vt. 475, 480 (2000) (citing *Black's Law Dictionary*).
[60] *See e.g.* House Ethics Panel's Procedure for Handling Ethics Complaints § 4(C)(ii); Judicial Conduct Board Rule 8(2); the Office of Professional Regulation's 3 V.S.A. § 129(a)(2); and the Vermont Criminal Justice Council's 20 V.S.A. § 2406(a)(1).
[61] The Commission's Executive Director administers the Commission's duties, but 3 V.S.A. § 1221(c) does not require that position to be an attorney licensed in this State.

Code of Ethics provides that the application of the Code "does not in any way abrogate or alter the sole authority of each house of the General Assembly to judge the elections and qualifications of its members" under the Vermont Constitution, it is to be determined how the Commission will view the scope of its investigative and enforcement authority in regard to legislator conduct.

Specifically, it is unknown at this time what the Commission will perceive to be core legislative functions constitutionally committed to each chamber (such as conflicts of interest in voting as described in Brady), versus noncore legislative functions that the Commission may permissibly regulate. For example, it is unknown at this time whether the Commission would attempt to prohibit legislators from holding certain outside employment under 3 V.S.A. § 1203i(a),[62,63] or to prohibit another branch of government from hiring a legislator.[64]

VII. Interaction Between Commission and House Ethics Panel

1. Once the Commission was created in law, in accordance with the Commission's original duty in 3 V.S.A. § 1223(b)(4)(B) to refer complaints about Reps. to the House Ethics Panel and "request" a report back from the Panel regarding the final disposition of the complaint, the Panel added to its Procedure for Handling Complaints § 7(C), which provides an exception to the Panel's confidentiality requirement to provide to the Commission notice of the final disposition of a complaint referred to the Panel by the Commission.

    - To do so, the Panel provides the Commission with a copy of the closure report provided to the Complainant and Respondent.

2. 3 V.S.A. § 1205 provides that the Panel is to submit its Code of Ethics training materials to the Commission in advance of the training. The Panel has submitted its training Power Points to the Commission for review. In 2023, the Commission participated in this House training by reviewing the new gift provisions of the Code. This biennium, the Panel invited the Commission again to participate in the Panel training, but the Commission was not able to do so due to a scheduling conflict. However, the Commission reviewed the Panel's training materials, provided feedback, and the Panel updated its Code of Ethics training materials based on that feedback.

3. The Panel or its staff will refer Reps. to the Commission on matters that pertain to the acceptance of gifts and other non-core legislative duties.

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[62] 3 V.S.A. § 1203i provides: "A public servant shall not seek or engage in outside employment or activities that are inconsistent, incompatible, or in conflict with the public servant's official duties."

[63] Under the Vt. Const., the qualifications to be elected to legislative office are: 1) the voter qualifications as set forth in Ch. I, Art. 8 and Ch. II, § 42; and 2) the residency requirement set forth in Ch. II, §§ 15 and 66. And once in office, legislators are prohibited from being paid to lobby as set forth in Ch. II, § 12.

[64] Legislators are prohibited from simultaneously holding Congressional offices of profit or trust as described in Vt. Const. Ch. II, § 17 or an incompatible constitutional office as set forth in Ch. II, § 54. Otherwise, Ch. II, § 12 prohibits a legislator from being paid to lobby, "except when employed in behalf of the State."

4. Pursuant to 3 V.S.A. § 1226(a), as added by 2024, Act 171, Sec. 19, annually, by November 15, the Panel is to report to the Commission "aggregate data on ethics complaints not submitted to the Commission, with the complaints separated by topic, and the disposition of those complaints, including any prosecution, enforcement action, or dismissal." The Panel corresponded with the Commission about this requirement due to the Panel's confidentiality requirement and issued an initial report, received feedback from the Commission regarding this new report requirement, and thereafter the Panel submitted to the Commission a report addendum to conform to this reporting.

    - Panel members sponsored 2025, H.R.6 to propose amendments to the House ethics rule to address this and other matters relating to disclosure of complaint information.

VIII. Conclusion

In conclusion, H.1 addresses the constitutional concerns related to 2024, Act 171, Sec. 9's consultation requirement, while still allowing the Panel to consider and understand the Commission's perspective and expertise on any application of the State Code of Ethics. Please let me know if you have any questions or would like to further discuss. Thank you.

ATTACHMENT A: STATUTORY PROVISIONS RE: COMMISSION INVESTIGATIVE AND ENFORCEMENT AUTHORITY

Beginning Sept. 1, 2025

3 V.S.A. § 1227. INVESTIGATIONS [EFFECTIVE SEPTEMBER 1, 2025]

(a) Power to investigate. The Commission, through its Executive Director, may investigate public servants for alleged unethical conduct. The Commission may investigate alleged unethical conduct after receiving a complaint pursuant to section 1223 of this title. The Commission may also investigate suspected unethical conduct without receiving any complaint.

(b) Initiation of investigation by Commission vote. The Executive Director shall only initiate an investigation upon an affirmative vote to proceed with the investigation of unethical conduct by a majority of current members of the Commission who have not recused themselves.

(c) Statute of limitations. The Commission shall only initiate an investigation relating to unethical conduct that last occurred within the prior two years.

(d) Outside legal counsel and investigators. The Executive Director may appoint legal counsel, who shall be an attorney admitted to practice in this State, and investigators to assist with investigations, hearings, and issuance of warnings, reprimands, and recommended actions.

(e) Notice. The Executive Director shall notify the complainant and public servant, in writing, of any complaint being investigated.

(f) Complainant participation. A complainant shall have the right to be heard in an investigation resulting from the complaint.

(g) Timeline of investigation. An investigation shall conclude within six months after either the date of the complaint received or, in the event no complaint was received, the date of the investigation's initiation by the Executive Director.

(h) Burden of proof. For a hearing to be warranted subsequent to an investigation, the Executive Director shall find that there is a reasonable basis to believe that the public servant's conduct constitutes an unethical violation.

(i) Determination after investigation.

(1) Upon investigating the alleged unethical conduct, if the Executive Director determines that an evidentiary hearing is warranted, the Executive Director shall notify the Commission. If a majority of current members of the Commission who have not recused themselves vote in concurrence with the Executive Director's determination that an evidentiary hearing is warranted, the Executive Director shall prepare an investigation report specifying the public servant's alleged unethical conduct, a copy of which shall be served upon the public servant and any complainant, together with the notice of hearing set forth in section 1228 of this title.

(2) Upon investigating the alleged unethical conduct, if the Executive Director determines that an evidentiary hearing is not warranted, the Executive Director shall notify the Commission, the public servant, and any complainant, in writing, of the result of the investigation and the termination of proceedings.

3 V.S.A. § 1228. HEARINGS BEFORE THE COMMISSION [EFFECTIVE SEPTEMBER 1, 2025]

(a) Power to hold hearings. The Commission may meet and hold hearings for the purpose of gathering evidence and testimony if found warranted pursuant to section 1227 of this title and to make determinations.

(b) All Commission hearings shall be considered meetings of the Commission as described in subsection 1221(e) of this title, and shall be conducted in accordance with 1 V.S.A. § 310 et seq.

(c) Time of hearing. The Chair of the Commission shall set a time for the hearing as soon as convenient following the Director's determination that an evidentiary hearing is warranted, subject to the discovery needs of the public servant and any complainant as established in any prehearing or discovery conference or in any orders regulating discovery and depositions, or both, but not earlier than 30 days after service of the charge upon the public servant. The public servant or a complainant may file motions to extend the time of the hearing for good cause, which may be granted by the Chair.

(d) Notice of hearing. The Chair shall give the public servant and any complainant reasonable notice of a hearing, which shall include:

(1) A statement of the time, place, and nature of the hearing.

(2) A statement of the legal authority and jurisdiction under which the hearing is to be held.

(3) A reference to the particular sections of the statutes and rules involved.

(4) A short and plain statement of the matters at issue. If the Commission is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application by either the public servant or any complainant, a more definite and detailed statement shall be furnished.

(5) A reference and copy of any rules adopted by the Commission regarding the hearing's procedures, rules of evidence, and other aspects of the hearing.

(e) Rights of public servants and complainants. Opportunity shall be given to the public servant and any complainant to be heard at the hearing, present evidence, respond to evidence, and argue on all issues related to the alleged unethical misconduct.

(f) Executive session. In addition to the provisions of 1 V.S.A. § 313(a), the Commission may enter executive session if the Commission deems it appropriate in order to protect the confidentiality of an individual or any other protected information pertaining to any identifiable person that is otherwise confidential under State or federal law.

3 V.S.A. § 1229. WARNINGS; REPRIMANDS; RECOMMENDED ACTIONS; AGREEMENTS [EFFECTIVE SEPTEMBER 1, 2025]

(a) Power to issue warnings, reprimands, and recommended actions. The Commission may issue warnings, reprimands, and recommended actions, not inconsistent with the Vermont Constitution and laws of the State, including facilitated mediation, additional training and education, referrals to counseling and wellness support, or other remedial actions.

(b) Factors in determination.

(1) Circumstances of unethical conduct. In this determining, the Commission shall consider the degree of unethical conduct, the timeline over which the unethical conduct occurred and whether the conduct was repeated, and the privacy, rights, and responsibilities of the parties.

(2) Determination based on evidence. The Commission shall render its determination on the allegation on the basis of the evidence in the record before it, regardless of whether the Commission makes its determination on the investigation report of the Executive Director pursuant to section 1227 of this title alone, on evidence and testimony presented in the hearing pursuant to section 1228 of this title, or on its own findings.

(3) Burden of proof. The Commission shall only issue a warning, reprimand, or recommended action if it finds that, by a preponderance of the evidence, the public servant committed unethical conduct.

(c) Determination after hearing.

(1) If a majority of current members of the Commission who have not recused themselves find that the public servant committed unethical conduct as specified in the investigation report the Executive Director pursuant to section 1227 of this title alone, the Commission shall then, in writing or stated in the record, issue a warning, reprimand, or recommended action.

(2) If the Commission does not find that the public servant committed unethical conduct, the Commission shall issue a statement that the allegations were not proved.

(3) When a determination or order is approved for issue by the Commission, the decision or order may be signed by the Chair on behalf of the Commission.

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3 V.S.A. § 1230. PROCEDURE; RULEMAKING [EFFECTIVE JULY 1, 2025]

(a) Procedure. Unless otherwise controlled by statute or rules adopted by the Commission, the Vermont Rules of Civil Procedure and the Vermont Rules of Evidence shall apply in the Commission's investigations and hearings.

(b) Rulemaking. The Commission shall adopt rules pursuant to 3 V.S.A. chapter 25 regarding procedural and evidentiary aspects of the Commission's investigations and hearings.

(c) Waiver of rules. To prevent unnecessary hardship, delay, or injustice, or for other good cause, a vote of two-thirds of the Commission's members present and voting may waive the application of a rule upon such conditions as the Chair may require, unless precluded by rule or by statute.

(d) Subpoenas and oaths. The Commission, the Executive Director, and the Commission's legal counsel and investigators shall have the power to issue subpoenas and administer oaths in

connection with any investigation or hearing, including compelling the provision of materials or the attendance of witnesses at any investigation or hearing. The Commission, the Executive Director, and the Commissioner's legal counsel shall seek voluntary compliance prior to issuing a subpoena, except in cases where there is reasonable suspicion that materials will not be produced in a timely manner. The Commission, the Executive Director, and the Commission's legal counsel and investigators may take or cause depositions to be taken as needed in any investigation or hearing.

3 V.S.A. § 1231. RECORDS; CONFIDENTIALITY [EFFECTIVE SEPTEMBER 1, 2025]

(a) Intent. It is the intent of this section both to protect the reputation of public servants from public disclosure of frivolous complaints against them and to fulfill the public's right to know any unethical conduct committed by a public servant that results in issued warnings, reprimands, or recommended actions.

(b) Public records. Except as where otherwise provided in this chapter, public records relating to the Commission's handling of complaints, alleged unethical conduct, investigations, proceedings, and executed resolution agreements are exempt from public inspection and copying under the Public Records Act and shall be kept confidential, except those public records required or permitted to be released under this chapter. Records subject to public inspection and copying under the Public Records Act shall include:

(1) investigation reports relating to alleged unethical conduct determined to warrant a hearing pursuant to section 1227 of this title, but not any undisclosed records gathered or created in the course of an investigation;

(2) at the request of the public servant or the public servant's designated representative, investigation reports relating to alleged unethical conduct determined to not warrant a hearing pursuant to section 1227 of this title, but not any undisclosed records gathered or created in the course of an investigation;

(3) evidence produced in the open and public portions of Commission hearings;

(4) any warnings, reprimands, and recommendations issued by the Commission;

(5) any summaries of executed resolution agreements; and

(6) any records, as determined by the Commission, that support a warning, reprimand, recommendation, or summary of an executed resolution agreement, including consultations created pursuant to subsection 1223(c) of this title and investigation reports in accordance with subdivisions (1) and (2) of this subsection.

(c) Court orders. Nothing in this section shall prohibit the disclosure of any information regarding alleged unethical conduct pursuant to an order from a court of competent jurisdiction, or to a State or federal law enforcement agency in the course of its investigation, provided the agency agrees to maintain the confidentiality of the information as provided in subsection (b) of this section.