Does the Doctrine of Separation of Powers in the Vermont Constitution Require Granting the Legislative Branches* a Blanket Exemption from Compliance with the Consultation Requirement in 3 V.S.A. §1223(c) as Proposed by H.1?

Testimony of Peter R. Teachout,
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before the Senate Government Affairs Committee
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> "It is a fundamental principle of the American constitutional system, clearly expressed in our own State Constitution, c. 2, § 5, that the legislative, executive and judicial departments of government are separate from each other, and therefore such functions of the Legislature as are purely and strictly legislative cannot be delegated but must be exercised by it alone. . . . But the doctrine of the separation of governmental departments does not mean an absolute and entire separation for 'the efficient exercise of the police power inherent in the people of this state 'is not to be frittered away by overnice speculations upon the distribution of the powers of government.'"
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> *State v. Auclair*, 110 Vt. 147 (1939)

[*Note: I focus in this memo on the exemption of the legislative branches from compliance with the consultation requirement since that is the issue I was asked to address when I was first asked to look into the question. I am aware that in the version of H.1 passed by the House[1], the judicial branch now has also been granted an exception. Some modifications might be required in the analysis below to take account of the special role and functions of the legal profession and the courts in our system, but the basic argument – at least with respect to the applicable standards applied to determine if there has been a separation of powers violation – applies equally in both contexts.]

I. Introduction

My name is Peter Teachout. I am a Professor of Law at Vermont Law School with an area of special interest in state and federal constitutional law. I have published articles on constitutional law issues, including issues of Vermont constitutional law, in law journals and as chapters in books. In my role as a constitutional law scholar, I am occasionally asked to testify before committees of the Vermont legislature regarding constitutional aspects of bills under consideration. I appreciate this opportunity to testify before the Senate Government and Military Affairs Committee on constitutional aspects of H.1.

Under current Vermont law, all agencies and departments of state government, whether in the legislative, executive, or judicial branch, are required to consult with the State Ethics

[1] For convenient reference, the pertinent provisions of the bill as passed by the House are set out in Appendix B below.

Commission in reviewing alleged ethics violations by employees or other personnel within their jurisdiction before making final decisions. The applicable provisions can be found in 3 V.S.A. 1223.[2] H.1 if approved would exempt the legislative branch[3] from compliance with this consultation requirement.[4] Proponents of the proposed amendment claim that exemption is required by the separation of powers clause in the state constitution[5] since if the legislative branches are required to comply, they argue, it would interfere with right of the legislative branches to make final decisions about the appropriate disposition of ethics complaints in the performance of "core legislative functions."[6] I understand the argument and the concern that underlies it, but for reasons set out below I don't think it has valid basis here.

Before proceeding to analysis, let me anticipate here my general conclusion:[7] Based on my review of applicable state law, it is my judgment that separation of powers doctrine does not require carving out an exception for the legislative branches from compliance with the otherwise generally-applicable consultation requirements in state ethics law as proposed by H.1. Not only is carving out an exemption for the legislative branches not required, doing so could have a far-reaching negative impact on the state's ability to develop and implement an effective comprehensive statewide approach to dealing with ethics violations in government.

II. Purposes Served by the Required Consultations

Before turning to a discussion of the legal issues involved, it is important to understand the crucial role played by consultations in the review process. I suspect that most members of the Committee are already familiar with the basic steps in the process, but I think it might be helpful to briefly review them here for those who are not. The description below tracks the process as set forth in 3 V.S.A. §1223 attached as Appendix A below.

After receiving an ethics complaint, the Director of the Ethics Commission is required to conduct a preliminary review to determine if the complaint has merit. If the Director determines that the complaint has merit, the Director is required to refer the complaint to the governmental body

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[2] Pertinent provisions in current 3 V.S.A. §1223 are reproduced below in Appendix A .

[3] And, as amended in the version of the bill passed by the House, now also the judicial branch.

[4] According to the statement of purpose in H.1 as introduced, the purpose of the bill is "to exempt the House and Senate Ethics Panels from the requirement to consult with the Executive Director of the State Ethics Commission on any complaint referred to the Panels by the Commission." Emphasis supplied. Exemption of the legislative and judicial branches from the consultation requirement is provided for by Section (c) (1)(B) in the amended version of H.1. as passed by the House. Appendix B below.

[5] The separation of powers clause provides : "The Legislative, Executive, and Judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other." Chapter II, Section 5, Vermont constitution.

[6] The right and responsibility of the legislative branches to perform "core legislative functions" without interference by other branches is protected by provisions in the Section 14, Chapter II, establishing the powers of the House of Representatives, and Section 19, Chapter II, establishing the powers of the Senate, granting each branch of the legislature exclusive prerogative to "judge the elections and qualifications of its own members."

[7] Section V below at p.

responsible for making final decisions. For example, if the complaint alleges an ethics violation by a member of one of the legislative branches, the Director is required to refer the complaint to the applicable legislative branch.

If the individual charged with an ethics violation contests the allegations, the Commission may conduct an investigation and hold hearings to determine whether in fact the complaint is supported by the evidence,[8] but it is not required to do so. The responsible government body is not prohibited by state ethics law from conducting its own inquiry into whether what is alleged in the complaint is borne out by the facts.

Before reaching final decision, current state ethics law requires that the Commission and the representative of the responsible government body participate in consultations.[9] This is the consultation requirement at issue here. The law does not specify exactly what form the required consultations should take except to provide that the consultations must be in writing. That does not prevent the Director of the Ethics Commission and the representative of the affected government body from agreeing to meet to exchange views if they think it might be helpful to do so.

The required consultations serve a number of important functions: they provide a check against hasty decision; they provide an opportunity to share information (for example, if the Commission conducted an investigation, did the investigation produce evidence supporting the claim of violation?); they provide the government body responsible for making final decisions with an opportunity to learn from the Commission's experience in dealing with similar complaints in other contexts in the past; they provide an opportunity to discuss alternative approaches to the alleged violations and alternative possible dispositions; the benefits go both ways, moreover, since the consultations provide the Commission with an opportunity to learn about, and come to appreciate, the unique factors and considerations that might bear on the proper disposition of an alleged ethics violation in light of the particular role and functions of the governmental body involved. In all these respects and others, as this makes clear, the consultations serve a variety of beneficial purposes.

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[8] The Commission has investigative powers and the powers to hold and conduct hearings. The powers of the commission are set forth in 3 V.S.A. §1221(a):

> "There is created within the Executive Branch an independent commission named the State Ethics Commission to accept, review, investigate; hold hearings; issue warnings and reprimands; and recommended actions, make referrals regarding, and track complaints of alleged violations of governmental conduct regulated by law, of the Department of Human Resources Personnel Policy and Procedure Manual, of the State Code of Ethics, and of the State's campaign finance law set forth in 17 V.S.A. chapter 61; to provide ethics training; and to issue guidance and advisory opinions regarding ethical conduct."

[9] . Under the revised version of H.1 passed by the House, this consultation requirement would be eliminated when the complaint is referred to the legislative or judicial branches . In the amended House version, that requirement is replaced with the requirement that, in making the referral, the Director "shall specify the application of the State Code of Ethics to facts presented in the complaint and include a recommended action."

Implicit in the argument that the legislative branches ought to be exempt from the consultations is the view that participation in the consultations would somehow impair the legislative branch's ability to make final decisions. But experience suggests just the opposite. At least in the normal case, the required consultations should help ensure that when final decisions are made they will be more thoughtful, more responsible, and more fully informed.

After consultations, the government body responsible for making decisions is free to decide what action to take. Although the Commission may make recommendations, its recommendations are not binding. The government body – in this case, the relevant branch of the legislature - is absolutely free to determine whether a violation has been committed and, if so, what, if any, sanctions are appropriate..

The final step in the process is called the "report back" requirement. After making a final decision, the government body responsible for making that decision is required to report back to the Commission describing the decision that was made.

With that background, let us now turn to consider the legal arguments involved.

III. Does the Separation of Powers Doctrine in the Vermont Constitution Require That the Legislative Branches be Granted an Exemption from Compliance with the Consultation Requirements in State Ethics Law?

A. Why a Blanket Exemption?

As a preliminary matter, if the argument in support of granting the legislative branches exemption from compliance with the consultation requirement is based on concern about preserving the right of the legislative branches to perform core legislative functions, it is unclear why granting the legislative branches a blanket exemption from compliance is necessary. As proposed, it should be noted, H.1 would exempt the legislative branches from compliance even in contexts where the alleged ethics violation has nothing to do with performance of core legislative functions,[10] for example, if the complaint alleges that a member of one of the legislative bodies had used governmental time, property, equipment or other facilities for nongovernmental purposes, or had bid or entered into governmental contracts without disclosing the fact. There is a disconnect, in other words, between the rationale advanced for exempting the legislative branches from compliance and what the exemption would actually do.

Even if that problem were to be corrected so that the exemption only applied in contexts where the performance of core legislative functions is implicated, that still leaves the question – the central question here - of whether amendment is required to avoid separation of powers violation. To answer that question one needs to understand what the separation of powers doctrine in the Vermont constitution requires and what it does not require.

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B. What is the Basic Test that Vermont Courts Employ in Determining That a State Law Violates the Doctrine of Separation of Powers and How Does That Test Apply Here?

The test that Vermont courts employ for determining if a state law violates separation of powers, at least in classic expression, is whether the challenged law allows one branch of government to "exercise" powers assigned to another branch under the constitution. Occasionally the Vermont courts have applied slight variations of this test – whether the law allows one branch to "usurp" the functions assigned to another branch under the constitution or whether it allows one branch to so interfere with the constitutionally assigned responsibilities of another branch as to prevent that branch from being able to perform those responsibilities - but the core standard is the "exercise" standard.

Where does that standard come from? And what are examples of its application?

To understand why the actual "exercise" of powers by one branch of powers assigned to another is the core litmus test the courts apply in this area, the place to begin is with the language of the separation of powers clause itself.

> "The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others."[11]

Notice that this clause does not prohibit all laws calling for some form of interaction or collaboration among the branches, only laws that authorize one branch of government to "exercise" powers "properly belonging to the others.".

The explanation for why the clause makes the actual "exercise" of powers by one branch of powers assigned to another the applicable test for separation of powers violations can be found in in the political circumstances that led to the addition of the separation of powers clause to the Vermont constitution in the first place.

The original Vermont constitution, interestingly, did not contain a separation of powers clause. The clause was only added later, in 1786, in response to what during the previous period had been the blatant and unembarrassed exercise by the state legislature of judicial powers.. During the earlier period, the state legislature had passed laws removing whole areas of law from judicial consideration and had adopted the practice of passing individual bills "vacating and annulling" final court judgments. This is how it is described by Daniel Chipman in the preface to his memoir of Thomas Chittenden:[12]

> During the first Septenary, the Legislature frequently interfered with the Judiciary department. They passed an act prohibiting the prosecution of and real or possessory action, or any action on contract. They passed acts vacating and annulling judgments. They constituted themselves a Court of Chancery. They appointed a board of

[11] Chapter II, Section 5, Vermont constitution.

[12] Daniel Chipmen, A Memoir of Thomas Chittenden (Middlebury 1849), Preface at pp.21-23.

> Commissioners with full power to decide in a summary manner all disputes relative to the title of lands. They also frequently granted new trials in cases which had been finally decided by the Judiciary. The powers thus exercised by the Legislature . . . was unlimited and supreme.. . .

Consequently, the Council of Censor, the body charged at that time with responsibility for reviewing the consistency of laws passed by the legislature with the state constitution, declared in its 1785 report to the people:

> "It is the opinion of this Council, that the General Assembly, in all the instances where they have vac[a]ted judgments, recovered in the due course of law [and exercised the other judicial powers described above] . . .have exercised a power not delegated or intended to be delegated by the Constitution."

To prevent that from happening in the future, the Council recommended that the state constitution be amended to add a separation of powers clause in exactly the same language in which we find that clause today::

> "The Legislative, Executive, and Judiciary departments shall be separate and distinct, so that neither exercise the powers properly belonging to the other."

That is the birth of what is now Section 5 of Chapter II of the state constitution. And that is why the actual "exercise" of powers by one branch of government of powers assigned to another forms the core litmus test for determining a separation of powers violation.

If you want to know what the framers of this amendment meant by an "exercise" of powers that constitutes a separation of powers violation, the historical experience described above provides a clear example. When the legislative branch blatantly "exercises" powers belonging to the judicial branch and does so, moreover, in a way that prevents the judicial branch from performing its core responsibilities, that is a violation of separation of powers.

Another example of application of this standard, this one from more recent experience, is the Vermont supreme court's decision in *Brady v. Dean*.[13] In that case, a group of legislators had entered a pool to bet on whether a particular measure would pass and then some members of the group commenced to vote on the measure ensuring the outcome, a clear conflict-of-interest ethics violation. Plaintiffs brought suit asking the Vermont supreme court to intervene. They wanted the court to rule that there had been an ethics violation and to disqualify the votes of those who had participated in the pool..

Under the Vermont constitution, however, decisions of this sort – decisions about who is and who is not qualified to vote on matters pending before a legislative branch – are clearly assigned to the legislative branch. Under the Vermont constitution the legislative branches have the

[13] 190 A.2d 428 (2001)

exclusive right to decide who is and who is not qualified to vote on pending legislation. They have exclusive power to "judge the qualifications and elections" of their members. In *Brady,* the court was essentially being asked to step in and substitute its own judgment for that of the legislature as whether there had been an ethics violation and, if so, whether disqualification was appropriate. The court – appropriately- declined the invitation since, had it agreed to decide whether the votes of those legislators participating in the pool should be disqualified, it would be tantamount to the "exercise" by the judicial branch of a quintessentially legislative function.

The key question here then is whether requiring the legislative branches to participate in the consultations called for by state ethics law would violate this standard.

No one questions the right of the legislative branches to make final decisions in the performance of core legislative functions, but does the requirement that the legislative branches participate in consultations before making final decisions in any way limit their ability to make those decisions in whatever way they deem appropriate? Does the consultation requirement allow the Ethics Commission to substitute its own judgment for that of the legislative branch as to the proper disposition of the ethics complaints? Does it allow the Ethics Commission to "exercise" the legislature's right to make final decisions in this context? These questions are critical because if participation in the required consultations has that consequence, what is involved is clearly a violation of separation of powers.

It should be clear, however, that compliance with the consultation requirement does not have the consequence – and, as it turns out, cannot have that consequence as a matter of state law. The reason is that, unlike in some other states, the State Ethics Commission in Vermont has no enforcement power.[14] It can make recommendations, but those recommendations are not binding. Under Vermont law, in other words, the responsible government body – in this case, the applicable branch of the legislature – is absolutely free to disregard the Commission's recommendation and to make any final decisions it deems to be appropriate under the circumstances. The state Ethics Commission has no authority to interfere with those decisions.

In summary, the consultation requirement in state ethics law does not allow the Ethics Commission to "exercise" the right to make final decisions about ethics violations. It does not allow the Ethics Commission to "usurp" the right of the applicable legislative branch to make whatever final decision it deems appropriate. It does not prevent the legislative branches from performing their assigned constitutional responsibilities. The legislative branches are absolutely free to make whatever final decisions they deem appropriate. There is consequently no separation of powers violation.

C. How Do the Vermont Courts Deal with Separation of Powers Challenges Where No Violation is Found?

[14] See 3 V.S.A. §§1221(a) setting out the powers of the Commission. The powers are listed in fn. 9 *supra*.

> "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. . . . Moreover, there are many powers and functions of government that defy simple or obvious classification."
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> *In re D.L., 164 Vt. 223* (1995)

But that leaves the question of how the Vermont courts deal with challenges to state laws that call for an element of interbranch collaboration but fall short of violating the separation of powers standard described above. It is an important question because that fairly characterizes, I think, the consultation requirement involved here. The short answer is that, in that context, the Vermont courts not only have allowed great flexibility for interplay and interaction among the branches, but have gone out of their way to explain why, given the political realities, requiring interbranch collaboration is often essential to ensure the effective implementation of important state policy.

You can find that general approach by the courts reflected not only in Vermont court decisions but in decisions from other jurisdictions, but for present purposes let me illustrate by offering a one expression from the Vermont supreme court's decision in *In re D.L.* (1995). In that case, after considering and rejecting the view that simply because a state laws calls for some form of interbranch collaboration it necessarily violates the separation of powers clause, the court goes on to say:

> "Our decisions reflect . . . that more difficult issues and choices lie under the surface of separation of power 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,* (1995); see also *INS v. Chadha,* (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. 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)."[15]

[15] 164 Vt 223; 669 A.2d 1172 (1995

This passage is a classic expression of the general approach courts adopt in cases where the challenged law calls for an element of interbranch collaboration - even in contexts where the powers exercised by one branch "may in some way pertain to another branch" - but do not involve the actual exercise of powers by one branch of powers assigned under the constitution to another or otherwise violate the standard the courts have developed for finding a separation of powers violation.

D. Is the Ethics Commission as an Agent of the Executive Branch?

There is one final consideration deserving of attention in this respect although I am not sure it is necessary to address it to resolve the central constitutional question involved here since it should be clear from the discussion above that the consultation requirement in current state law does not violate separation of powers. The question however is nonetheless an important one: Since the Vermont Ethics Commission is an "independent commission," and intentionally designed that way, is it appropriate or at all helpful to treat it as an agent of the executive branch for separation of powers purposes..

The separation of powers clause in the Vermont constitution, as noted above, prohibits one "department" of government from exercising the powers assigned by the constitution to another "department." and the context makes clear that the term "department" is intended to refer to one of the three traditional branches of government. But how does that apply when the institution exercising powers is not a "department" or "branch" of government but "an independent commission," a unique type of governmental entity that doesn't fit neatly into any of the traditional governmental categories in part because it exercises powers belonging to all three branches?

It is true that in Vermont the state Ethics Commission is located in the executive branch as a matter of organizational convenience and solely for budgetary and record keeping purposes, adopting in this respect the prevailing national practice. But it is also the case that strict safeguards have been put in place to insure that the Commission's decisions are carefully insulated from any possible form of executive influence or control.[16] The Ethics Commission in Vermont could just as easily have been placed in the judicial branch.[17] Would that then justify treating the Commission as an agent of the judicial branch for separation of powers purposes?

Does it makes sense under these circumstances then to consider the Ethics Commission as an agent of the executive branch for purposes of separation of powers analysis? Is that an accurate

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[16] The members of the Ethics Commission in Vermont are selected, with one exception (one member is selected by the Chief Justice of the Vermont Supreme Court) by outside groups to ensure complete independence from government control, unlike the case in some other jurisdictions. https://ethicscommission.vermont.gov/about-us#:~:text=The%20State%20Ethics%20Commission%20was,a%20member%20of%20the%20Association

[17] I am led to believe that at least one other state has placed its ethics commission in the judicial branch.

reflection of the political realities? Of course it is possible to play "make believe" - to simply ignore or disregard the political realities involved or pretend they don't exist – and I know of at least one state court that seems to have bought into that approach, although without much critical thought or analysis.[18] But most observers I think would say that traditional separation of powers analysis does not apply in this context, or at the very least needs to be substantially modified to take account of the fact that ethics commissions are independent commissions and created as "independent" commissions by intentional design..

IV. Recommendation for Amendment

Although I do not support the amendment proposed by H.1, that does not mean I am opposed to amendment where amendment is called for to make the system work. The only context I can think of in this respect where the compliance with the consultation requirement in §1223 might interfere with the ability of the legislature to make final decisions is a situation where, because of the need to act quickly, the relevant legislative branch has to make the decision before there is time to arrange for consultations. In that situation, I think it can be fairly argued that the branch's ability to make final decisions would be impaired.

However that does not require granting the legislative branches a blanket exemption from compliance with the consultation requirement as proposed by H.1. It can be dealt with by adding a simple amendment to the existing law along the following lines:

> "If the Rules Panel of legislative body charged with responsibility for making ethics decisions determines that a final decision must be made before consultations can be arranged with the Ethics Commission, it shall so notify the Commission, and in that event post-decision consultations may serve as a substitute."

As you will note, the suggested amendment does not eliminate the need for consultation entirely. It still calls for post-decision consultations. Post-decision consultations obviously are a poor substitute for pre-decision consultations because it means the decisions will have been made without the benefit of consultation. But even in the context, it seems to me post-decision consultations might serve some important beneficial ends. Among other things, they would contribute to the larger effort to develop a coordinated approach to ethics violations in government.

V. Conclusion

My conclusion can be simply stated: Contrary to the arguments made to support the amendment proposed by H.1, the separation of powers doctrine in the Vermont constitution does not require granting the legislative branches an exemption from compliance with the otherwise generally-

[18] *Commission on Ethics v. Hardy,* 125 Nev. Adv. Op. No. 27, 53064 (2009)

applicable consultation requirements in the state ethics law. Consequently, I do not support the proposal in H.1.

Quite apart from the constitutional issues involved, I do not see how elimination of the consultation requirement would serve to improve the quality of ethics decisions made by the various agencies of government. I think that, without the consultations with the Ethics Commiossion, those decisions are less likely to be thoughtful, responsible and fully informed .

Finally, it is crucial to keep in focus the larger long-term perspective. For the first time in the state's history, the state has an opportunity to develop and implement a comprehensive approach to dealing with ethics violations in government. If you exempt the legislative branch from compliance with a crucial requirement in the review process, and allow it to go off in its own way, and then exempt the judicial branch as I understand the version of H.1 passed by the House would do, and allow it to go off in its own way, then the ability of the state to develop and effective comprehensive statewide approach will be seriously compromised. I don't see what would be gained by that, but it is not difficult to understand what would be lost.

Thank you for your consideration.

Appendix A: Pertinent Provisions of §1223 in Current State Ethics Law

Title 3 : Executive

Chapter 031 : Governmental Ethics

Subchapter 003 : STATE ETHICS COMMISSION

(Cite as: 3 V.S.A. § 1223)

- **§ 1223. Procedure for accepting and referring complaints**

(a) Accepting complaints.

(1) On behalf of the Commission, the Executive Director shall accept complaints from any source regarding governmental ethics in any of the three branches of State government or of the State's campaign finance law set forth in 17 V.S.A. chapter 61.

(2) Complaints shall be in writing and shall include the identity of the complainant.

* * *

(b) Preliminary review by Executive Director. The Executive Director shall conduct a preliminary review of complaints made to the Commission in order to take action as set forth in this subsection, which shall include referring complaints to all relevant entities.

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(4) Legislative and Judicial Branches; attorneys.

(A) If the complaint is in regard to conduct committed by a State Senator, the Executive Director shall refer the complaint to the Senate Ethics Panel and shall request a report back from the Panel regarding the final disposition of the complaint.

(B) If the complaint is in regard to conduct committed by a State Representative, the Executive Director shall refer the complaint to the House Ethics Panel and shall request a report back from the Panel regarding the final disposition of the complaint.

(C) If the complaint is in regard to conduct committed by a judicial officer, the Executive Director shall refer the complaint to the Judicial Conduct Board and shall request a report back from the Board regarding the final disposition of the complaint.

(D) If the complaint is in regard to an attorney employed by the State, the Executive Director shall refer the complaint to the Professional Responsibility Board and shall request a report back from the Board regarding the final disposition of the complaint.

* * *

(c) Consultation on unethical conduct. If the Executive Director refers a complaint under subsection (b) of this section, the Executive Director shall signify any likely unethical conduct described in the complaint. **Any entity receiving a referred complaint**, except those in subdivision (b)(5) of this section [not applicable here], **shall consult with the Commission regarding the application of the State Code of Ethics to facts presented in the complaint**. The consultation shall be in writing and occur within 60 days after an entity receives a referred complaint and prior to the entity making a determination on the complaint, meaning either closing a complaint without further investigation or issuing findings following an investigation. [emphasis supplied].

(d) Confidentiality. Complaints and related documents in the custody of the Commission shall be exempt from public inspection and copying under the Public Records Act and kept confidential . . .

Appendix B: H.1 as Passed by the House

Sec. 1. 3 V.S.A. § 1223 is amended to read:

§ 1223. PROCEDURE FOR ACCEPTING AND REFERRING COMPLAINTS

(a) Accepting complaints.

(1) On behalf of the Commission, the Executive Director shall accept complaints from any source regarding governmental ethics in any of the three branches of State government or of the State's campaign finance law set forth in 17 V.S.A. chapter 61

(2) Complaints shall be in writing and shall include the identity of the complainant.

(b) Preliminary review by Executive Director. The Executive Director shall conduct a preliminary review of complaints made to the Commission in order to take action as set forth in this subsection and section 1223a of this title which shall include referring complaints to all relevant entities, including the Commission itself.

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(4) Legislative and Judicial Branches; attorneys.

(A) If the complaint is in regard to conduct committed by a State Senator, the Executive Director shall refer the complaint to the Senate Ethics Panel and shall request a report back from the Panel regarding the final disposition of the complaint.

(B) If the complaint is in regard to conduct committed by a State Representative, the Executive Director shall refer the complaint to the House Ethics Panel and shall request a report back from the Panel regarding the final disposition of the complaint.

(C) If the complaint is in regard to conduct committed by a judicial officer, the Executive Director shall refer the complaint to the Judicial Conduct Board and shall request a report back from the Board regarding the final disposition of the complaint.

(D) If the complaint is in regard to an attorney employed by the State, the Executive Director shall refer the complaint to the Professional Responsibility Board and shall request a report back from the Board regarding the final disposition of the complaint.

. * * *

(c) Consultation on unethical conduct.

(1) If the Executive Director refers a complaint under subsection (b) of this section, the Executive Director shall signify any likely unethical conduct described in the complaint. Any entity receiving a referred complaint, except those in subdivision (b)(5) of this section, shall consult with the Commission regarding the application of the State Code of Ethics to facts presented in the complaint.

(A) For complaints referred under subdivision (b)(4) of this section, the Executive Director shall specify the application of the State Code of Ethics to facts presented in the complaint and include a recommended action.

(B) For all other complaints referred under subsection (b) of this section, **except those in subdivisions (b)(4) and (5) of this section**, an entity receiving a complaint shall consult with the Commission regarding application of the State Code of Ethics to facts presented in the complaint. The consultation shall be in writing and occur within 60 days after an the entity receives a the referred complaint and prior to the entity making a determination on the complaint, meaning either closing a complaint without further investigation or issuing findings following an investigation [emphasis supplied]

(2) Any advice the Commission provides during the consultation process shall be confidential and nonbinding on the entity.