Testimony of Thomas Jones regarding H.1
House Committee on Government Operations and Military Affairs
February 21, 2025

Introduction

Thank you for allowing me to speak today regarding H.1. I'm Thomas Jones. I teach Government Accountability and Government Ethics at the University of Connecticut School of Public Policy. Previously, I was appointed and served on the CT state ethics board. In addition, I have served as the Executive Director of the California Fair Political Practices Commission – California's state ethics agency, and as the first Ethics Enforcement Officer for the Office of State Ethics in CT. Over the past several years, I have consulted with the State Ethics Commission here in Vermont in an attempt to assist Vermont in having a vibrant and cohesive Code of Ethics.

I met many of you last legislative session when discussing municipal ethics in Vermont, and I appreciate your seeming tolerance to have me visit again. I apologize that I was unable to offer these comments in written form prior to this hearing, but I promise to submit them in writing later today.

H.1 Will Damage the Ethical Growth of Government because It Will Lead to Multiple, and Inconsistent Interpretations of the Code of Ethics

H.1 – as currently drafted – threatens to defeat primary goals that the legislature set forth in crafting the legislation behind the Commission: consistency and predictability. In the long-term, it will defeat the ability of the State to have a uniform understanding of what the Code of Ethics means.

The primary function of the Commission is to create an ethical culture for the state of Vermont. The primary tools it has in that regard are education and advice. 99.9% of government employees come to work each day, and they want and intend to act ethically at all times. The Commission is set up to support this by offering education and confidential advice. People – including legislators – can confidentially call up the Commission at any point and use the Commission as a knowledgeable expert in trying to avoid inadvertently stumbling over an ethical trip-wire.

But the advice function can't work without a common and consistent understanding of the Code. If multiple parties are making interpretations of the Code, there cannot be consistency. Because H.1 would change current law to cut the Commission out of offering a consistent interpretation of the Code, there will be different understanding of the rules throughout Vermont.

H.1 Creates Rather than Solves a Problem

I was not here for the hearing of February 13, but I have had opportunity to review the materials and hearing video. It appeared to me that the impetus behind the bill is the idea that the current law – or at least the consultation requirement under § 1223 - is somehow unconstitutional with regard to the legislature.

Section § 1223 of the Ethics Code was passed during the last session. It provides that, when the Commission refers a complaint to another agency or governmental body, the recipient has to consult with the Commission about how the Code of Ethics might apply to the facts in the complaint. It also says that the consultation has to happen within 60 days (but there is nothing magic about this time period). Importantly, there is no obligation to follow the advice of the Commission. The only obligation is procedural – not substantive.

H.1 says that the legislature would not have to consult with the Commission at all on the Code of Ethics. This will inevitably lead to multiple interpretations.

There Is No Constitutional Issue – or any Issue – with the Statute as Drafted

In reviewing the testimony from February 13, I understand there to be three issues being offered for the need for H.1. The three stated issues appeared to be: (1) § 1223 is an unconstitutional "prior restraint" on the legislature; (2) the § 1223 would trigger the "political question" doctrine; and, (3) the § 1223 violates the constitutional separation of powers. None of these are actual issues. I will address them each.

1. "Prior Restraint"

First, with respect to "prior restraint" – I understand from listening to previous testimony that the current statute somehow "restrains" the legislature. If this is a concern, it is not a constitutional one. In fact, it seems to be a misapplication of that doctrine entirely.

The prior restraint doctrine says that it is unconstitutional for the government to restrain a private citizen's free speech rights in advance of that speech. The paradigmatic case is the federal Pentagon Papers case. In that, the NY Times was planning on publishing an article that would reveal the mistruths that the government was making with regard to the Vietnam War. The Nixon administration attempted to stop the NY Times from publishing. This was deemed to be an attempt at "prior restraint" of otherwise free speech. The Supreme Court held that government can't do that unless there is a "compelling" reason (which it said did not exist in the Pentagon Papers case). The doctrine applies when government tried to restrain private speech. I am unaware of any application by any court anywhere to government-to-government interactions.

2. "Political Question"

Second, the "political question" doctrine is inapplicable as well. The core of this doctrine is the idea that, when the legislature and the executive branch are arguing over something

that relates to an interpretation of constitutional functions, the judicial branch (i.e., the Supreme Court) will typically not intervene. Here, no one is seeking intervention by the judicial branch to make any interpretation of constitutional functions. The doctrine is simply not relevant to the current situation.

3. Separation of Powers

Finally, the requirement to consult on matters of ethics – with no obligation to do anything else – does not implicate the separation of powers doctrine.

You may recall that this discussion was had last session in this Committee with respect to this provision. The language that is in the current bill was drafted with knowledge of, and discussion of, the separation of powers doctrine. But, even if the Committee now wants to re-open this provision for further separation of powers discussion, the constitutional answer stays the same: this provision does not implicate the separation of powers doctrine.

By way of background, Vermont is similar to most states in that your Constitution delineates and distinguishes the functions of the three branches of government. And, it also says that the constitutional functions are exclusive – no branch can take over another branch's functions. The key thing that your Supreme Court looks for in these types of cases is whether one branch of government is trying to "usurp" – or take away – the constitutional function of another branch. None of that is happening here.

Three main points I'd like to make to show how the separation of powers doctrine is not implicated here: (a) any separation of powers issue is fully mooted by the plain language of § 1223; (b) the consultation requirement does not "usurp" any legislative function; and, (c) the Commission does not wield any executive power that needs to be "separated".

a. The Plain Language Prohibits the Commission from Opining on Core Legislative Functions

The plain language of § 1223 requires only that the recipient of the complaint consult on only those issues "regarding the application of the Code of Ethics." This limitation was deliberate. The Code of Ethics explicitly states that it does not apply to any core legislative function. Core legislative functions cannot be touched by the Commission. The language of § 1223 incorporates this. By limiting the consultation to the "Code of Ethics," § 1223 already honors the separation of powers doctrine.

b. Consultation between the Branches Does Not "Usurp" any Core Constitutional Function

The consultation requirement does not usurp a core legislative function. This is because the "consulting" is not related to any core legislative function, but also because § 1223

doesn't ask for any substantive action. § 1223 does not tell the legislature that it has to do anything. The requirement is purely procedural.

c. The Ethics Commission Does Not Wield "Executive Power"

The VT legislature placed the Commission in the Executive Branch for administrative purposes only. But, the Commission is not an Executive Branch agency. It exercises no Executive authority. The authority of the Executive Branch rests with the Governor. At present, the Governor has no authority – including appointment authority – with regard to the Commission. Rather, the Commission is helmed by appointees from several sources, including from the legislative and judicial branches – but NOT from the Governor.

This structure – where the ethics agency is housed in the Executive Branch for "administrative purposes only" but otherwise has no substantive executive authority – is the standard model for independent ethics commissions across the United States. The majority of state ethics commissions follow this same general pattern. Many of the states put those exact words – "for administrative purposes only" – into the governing statute. In establishing their commission several years ago, the New Mexico government phrased the structure of its ethics commission as "in the executive branch, but not of it."

This is important in analyzing any constitutional separation of powers issues with respect to the Vermont Ethics Commission. In order to violate the separation of powers doctrine, one branch of government has to use its power to "usurp" the constitutional power of another branch. However, because the Ethics Commission does not, and cannot, exercise any executive power, there cannot be any usurpation by the Governor over the legislature.

This issue of separation of powers has come up every time the legislature has discussed the Commission's powers and authority. Each time, everyone agreed – the Commission, the legislature, the judiciary: everyone – that the Commission cannot interfere with core legislative functions. Even though the Constitution already makes that clear, the Commission supported language that further clarified this in the statute. The Commission also did not object to a provision that clarified that the Commission has no jurisdiction over core judicial functions. 3 VSA § 1223 does not change this.

Conclusion

In summary, H.1 appears to be looking for a solution to a problem that does not exist. The language of H.1 would thwart the ability of the State to have a consistent and predictable application of the Code of Ethics. This Committee should reject H.1.