

# Separation of Powers under the Vermont Constitution

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In the Context of a Vermont State Ethics Commission

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# Separation of Powers

- “The Legislative, Executive, and Judiciary departments, shall be separate and distinct, so that neither exercise the powers belonging to the others.” Vt. Const. Ch. II, § 5.
- “The logic of [the SoP requirement in Vt. Const. Ch. II, § 5] is deceptively simple. To apply it, we must determine the powers of each of the branches and ensure no one exercises powers belonging to another.
  - “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 . . .
  - “The focus of a separation of powers inquiry is not whether one branch of government is exercising certain powers that 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* [emphasis added].” In re D.L., 164 Vt. 223, 228-229 (1995).



# LEGISLATIVE BRANCH



# Legislative Branch

## Supreme Legislative Power within Constitutional Limitations

- “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 this Constitution.”  
Vt. Const. Ch. II, § 6.
- 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.” Rufus v. Daley, 103 Vt. 426, 154 A. 695, 697 (1931).



# Courts Can Adjudicate Constitutional Claims Regarding Legislative Acts

“Especially it is competent and proper for this court to consider whether its (the legislature’s) proceedings are in conformity with the Constitution and laws, because, **living under a written constitution, no branch or department of government is supreme**; and it is the province and duty of the judicial department to determine in cases regularly brought before them, whether the powers of any branch of government, and even those of the legislature in the enactment of laws, have been exercised in conformity to the Constitution; and if they have not, to treat their acts as null and void.” Powell v. McCormack, 395 U.S. 486, 506 (1969) (citing Kilbourn v. Thompson 103 U.S. 168, 199 (1881)).



# Constitutional Restrictions

(in addition to the prohibition on branch-function usurpation)

## *Qualifications of, Terms of, and Removal from Office*

- **Qualifications.**

- Residence: Vt. Const. Ch. II, § 15 (legislators); Vt. Const. Ch. II, § 23 (Gov. and Lt. Gov.); and Vt. Const. Ch. II, § 66 (Treasurer).
- Incompatible offices: Gov., Lt. Gov., S. Ct. Justice, Treasurer, Senator, House member, Surveyor-General (abolished by 1838, Act No. 25), and Sheriff. Also Congressional offices of profit or trust. Vt. Const. Ch. II, § 54.

- **Terms.**

- “ . . . all voters, having a sufficient, evident, common interest with, and attachment to the community, have a right to elect officers and be elected into office, agreeably to the regulations made in this constitution.” Vt. Const. Ch. I, Art. 8.
- Former AAG Skoglund opined in an Attorney General Opinion this Article prohibited even municipal term limits. 1984 WL 63421 (1984).

- **Removal.** Caselaw from other states has indicated that where the Constitution provides the method of removing an officer from office, that is the only method available.

- “Where the Constitution provides a method of debarring or removing an officer from his office, such method is exclusive.” State v. Gravolet, 168 La. 648, 650 (1929) (S. Ct. of LA).
- “The constitutional method of removal must be resorted to, where applicable, for it is ‘exclusive and prohibitory of any other mode which the Legislature may deem better or more convenient.’” In re Georges Township School Directors, 286 Pa. 129, 133 (1926) (S. Ct. of PA) (other citations omitted).



# Legislative Branch

## Ethics Overview

Legislative ethics are largely – but not completely – immune from judicial review under the constitutional principle of separation of powers. This leaves the House and Senate *almost* exclusively responsible for ensuring their members' ethical conduct in order to uphold the integrity of the Legislative Branch.

For example, each of the chambers of the General Assembly has the exclusive constitutional authority to judge the qualifications of its members. The SCOV – like other states' supreme courts – has determined that judging “qualifications” includes judging whether a member should vote on a question. Therefore, the SCOV has held that a challenge to whether a Legislator should have voted on a matter presented a nonjusticiable political question.

However, while the Vt. Const. grants to the House and Senate “Supreme Legislative power,” the Judicial Branch – as the interpreter of constitutional provisions – can first review a matter to determine whether and to what extent an issue is committed to the Legislative Branch. Courts have adjudicated challenges to legislator conduct when they have found the conduct was not “legislative” in nature. For example, courts have adjudicated challenges to legislator conduct involving bribery and defamation.

But so long as an issue is constitutionally-committed to the Legislative Branch and a chamber's handling of that issue does not otherwise conflict with a constitutional requirement, the chamber has the final authority over that matter.



# Constitutional Provisions Relating to Legislative Ethics

## Both Chambers

“No member of the General Assembly shall, directly or indirectly, receive any fee or reward, to bring forward or advocate any bill, petition, or other business to be transacted in the Legislature; or advocate any cause, as counsel in either House of legislation, except when employed in behalf of the State.”  
Vt. Const. Ch. II, § 12.

## House

“The Representatives so chosen . . . shall be styled the House of Representatives: they shall have the power to . . . judge of the . . . 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, § 14.

## Senate

“The Senate shall have the like powers to decide on the . . . qualifications of, and to expel any of, its members . . . as are incident to, or are possessed by, the House of Representatives.” Vt. Const. Ch. II, § 19.



# Vermont Caselaw Interpreting the General Assembly's Authority Over Legislative Ethics

- Generally; separation of powers.
  - Courts can interpret the Constitution in the first instance “to determine whether and to what extent an issue is committed to the legislative branch.” Brady v. Dean, 173 Vt. 542, 545 (2001).
  - Functions of the Legislature that are purely and strictly legislative cannot be delegated but must be exercised by it alone. Village of Waterbury v. Melendy, 109 Vt. 441, 448 (1938) (other citations omitted).
- “Qualifications” of legislators; Brady v. Dean, 173 Vt. 542 (2001); Political Question Doctrine.
  - Plaintiffs challenged the civil unions law based on Representatives’ participation in a betting pool re: a vote on the bill. The complaint alleged **violations of House Rule 75**; of misc. constitutional provisions, including Vt. Const. Ch. I, §§ 6 (officers servants of the people) and 7 (common benefits) and **Ch. II, §§ 12 (fees for advocating bills)** and 61 (public offices of profit); and of misc. provisions in T.13 re: lotteries, games of chance, and bookmaking. Id. at 543.
  - “[W]here the state legislature is made the judge of qualifications of its members by a provision of the state constitution, **the legislature has the sole authority to do so**, and courts must refrain from interfering in that determination.” Id. at 544.
  - “[T]he Vermont House of Representative’s exclusive constitutional prerogative to ‘judge of the qualifications of its members’ encompasses the authority to determine whether a member’s personal or pecuniary interest requires **dis qualification from voting on a question before it.**” Id.
  - “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.” Id. at 545.



## Brady and the Political Question Doctrine (cont.)

- The Court concluded that plaintiffs' challenge presented a nonjusticiable political question under the doctrine of separation of powers. *Id.* at 546.
- “The doctrine of standing . . . represents a core constitutional and prudential commitment to judicial restraint . . . ‘Standing and the separation of powers doctrine [are] wedded together.’”
  - Re: the U.S. Constitution’s Article III (jurisdiction of courts; case or controversies): “Article III embodies various doctrines, including standing, mootness, ripeness and political question, that help define and limit the role of courts in a democratic society . . . One of the ‘passive virtues’ of the standing doctrine is to promote judicial restraint by limiting the occasions for judicial intervention into the political process . . . Standing doctrine is fundamentally rooted in *respect for the separation of powers of the independent branches of government*.”
  - “Prominent on the surface of any case held to involve a political question is found a **textually demonstrable constitutional commitment of the issue** to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or . . . the impossibility of a court’s undertaking independent resolution **without expressing lack of the respect due coordinate branches of government**; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Id.* at 543-544 (other citations omitted).
- “Our conclusion that the issue before us represents a nonjusticiable political question bars the plaintiff taxpayers’ challenge to the vote on the civil union bill as effectively as it does the plaintiff legislators.” *Id.* at 546.



# Legislator Conduct Not Considered Purely “Legislative” and Therefore Subject to Judicial Review

- “This is not, of course, to hold that all potential conflicts of interest of state legislators are immune from every form of executive or judicial oversight. **Senate and House members may be criminally prosecuted for certain actions, such as soliciting or accepting bribes . . . or even subject to civil suit for actions outside the scope of their legislative duties.**” Brady at 545, citing:
  - U.S. v. Brewster, 408 U.S. 501, 526 (1972) (“Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act.”).
  - Hutchinson v. Proxmire, 443 U.S. 111, 113 (1979) (allowing **defamation action** against legislator for acts outside the “legislative function or the deliberations that make up the legislative process”).
- In addition, legislative procedures cannot infringe upon individuals’ constitutionally-protected rights.
  - Vt. Const. Ch. II, §§ 14 and 19 provide the House and Senate with the power to expel members.
  - However, a court may vacate a legislative expulsion if a chamber did not afford due process protections.
  - See McCarley v. Sanders, 309 F.Supp. 8 (1970):
    - “Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law.” Id. at 11 (other citations omitted).
    - This Alabama District Court vacated an Alabama state senator’s expulsion in part because he did not receive adequate notice; there was not a formal charge made against him; and at the minimal hearing provided, he was not able to hear witnesses’ testimony or cross-examine them. Id. at 11-12.



# General Rule to Chamber Rule

- **General Rule.** So long as an issue is constitutionally-committed to the Legislative Branch and a chamber's handling of that issue does not otherwise conflict with a constitutional requirement, the chamber's actions are immune from judicial review.
- **Chamber Rules.** The chambers generally regulate their internal operating procedures – including chamber ethics – via chamber rule.



# Chamber Rules re: Legislative Voting

## HOUSE

- House Rule 75: Members shall not be permitted to vote upon any question in which they are **immediately or directly interested**.
- House Rule 88: A question of parliamentary procedure **not covered** by these House Rules **shall be decided according to Mason's Manual of Legislative Procedure**.

## SENATE

- Senate Rule 71: No senator shall be permitted to vote upon any question in which he or she is **directly or immediately interested**.
- Senate Rule 91: Where a question of parliamentary procedure arises **not covered** by these Senate Rules, **Mason's Manual of Legislative Procedure shall prevail**, except Mason's Rule No. 780, as that rule is contrary to Senate procedures and customs.



# *Mason's Manual of Legislative Procedure*

- Mason's Sec. 241-6: The proper time to raise a point of order questioning the right of a member to vote because of a direct personal or pecuniary interest is **after the vote has been recorded and before the result is announced**.
- Mason's Sec. 522-1: It is the general rule that no members can vote on a question in which they have a direct personal or pecuniary interest. The right of members to represent their constituencies is of such major importance that **members should be barred from voting on matters of direct personal interest only in clear cases and when the matter is particularly personal**. This rule is obviously not self-enforcing and, unless the vote is challenged, members may vote as they choose. A member may vote regarding a matter when other members are included with that member in the motion, even though that person has a personal or pecuniary interest in the result, or the member may vote to increase salaries of all of the members.
- Mason's Sec. 561-1: A legislative body has the right to regulate the conduct of its members and may discipline a member as it deems appropriate, including **reprimand, censure, or expulsion**.
- Mason's Sec. 562-4: Adequate notice, formal charges, and a public hearing with the right to cross-examine witnesses have been held to be necessary components of **procedural due process** that must be afforded to a member prior to expulsion.



# Additional House Rules Relating to Ethics

14a. On or before the 10th day of the beginning of the biennium, each member shall submit to the Clerk a **disclosure form** prepared by the Clerk. The form shall be signed by the member, be **publicly available**, and may be updated. The form shall set forth, to the best of the member's ability, the following information applicable as of the date of submission:

- (a) any **boards, commissions, or other entities on which the member serves**; a **description of that position**; and, except in the case of legislative appointments, whether the member receives any form of **remuneration** for that position; and
- (b) **the member's employer**.

\* \* \*

90a. (a) The House Rules Committee shall, at the beginning of the biennium or as soon as possible thereafter, establish an **Ethics Panel** with the following powers and duties:

- (1) to **advise individual members and provide training to all members on ethical conduct, including compliance with House Rule 75**; and
  - (2) to **receive and investigate complaints of alleged ethical violations made against members of the House, except for those complaints covered under House Rule 90**, and to **recommend to the House any disciplinary action** against a member for an ethical violation, if the Panel deems it necessary.
- (b) The Panel shall comprise **five members** of the House who shall serve until successors are appointed. **The members shall elect a chair and adopt policies and procedures to conduct their business.**
- (c) **Annually**, on or before December 31, the Ethics Panel shall **report to the House** the number of complaints filed, the disposition of those complaints, and the number of member requests for ethical advice.

\* \* \*

*[At the end of the 2015 legislative session, the Senate Committee on Government Operations proposed similar rule provisions to the Senate Committee on Rules.]*



## The Regulation of Purely Legislative Procedure Should be by Chamber Rule

*Under separation of powers, the ability of a chamber to regulate its procedure  
– within constitutional limitations – belongs only to it*

- *Mason's* provides in multiple instances that purely legislative procedures trump statute. See:
  - § 2-3 (Leg. right to control procedure cannot be restricted by statute);
  - § 2-7 (a Leg. act is legal when the constitution doesn't prohibit it);
  - § 3-2 (chambers may pass internal procedural rules in conflict with a statute);
  - §§ 4-1 & 13-5 (rules or statutes governing Leg. procedure are not binding on the next Leg.);
  - § 4-2 (adopted rules take precedence over statutory provisions); and
  - § 13-7 (procedural rules are always within control of a majority of a deliberative body and may be changed at any time by the majority).
- “Although since Marbury v. Madison [5 U.S. (1 Cranch) 137 (1803)] . . . 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.” State ex. rel La Follette v. Stitt, 114 Wis.2d 358, 365 (1983).
- “Statutes relating to the internal proceedings of the legislature ‘are not binding upon the Houses . . . Either branch, under its exclusive rule-making constitution prerogatives, is free to disregard or supersede such statutes by unicameral action.’” Hughes v. Speaker of the New Hampshire House of Representatives, 152 N.H. 276, 284 (2005) (other citations omitted).



# Each Chamber is Responsible for Regulating Core Legislative Functions

- “[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 a 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 Brady] court 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 423-33).
- “[B]ecause the Commission is an executive branch agency, any delegation to the Commission by the Legislature of the power to discipline its members with respect to core legislative functions is an unconstitutional delegation of power in violation of [separation of powers].” Id. at 298.
- “By contrast, the Legislature may delegate the power to discipline with respect to conduct related to noncore legislative functions. Using the ethics as an example, such proceedings could include discipline for legislators who use governmental time, property, equipment, or other facilities for nongovernmental purposes, bid or enter into governmental contracts, or accept or receive an honorarium.” Id. at FN9.



# Investigations by and Advisory Opinions from an Ethics Commission to the General Assembly

- Arguments in favor:
  - **Investigations**
    - Ethics Commission is acting like an Executive Branch prosecutor, with each chamber being ultimate “judge.”
    - Likened to the AG investigating elections under 17 V.S.A. [2605](#) or [2606](#), which helps each chamber “judge the elections” of its members in accordance with Vt. Const. Ch. II, sections 14 and 19.
  - **Advisory opinions. Advisory only; Leg. makes final decision.**
- Arguments against:
  - **Investigations.**
    - Investigating member conduct is at least a part of judging qualifications, and therefore the General Assembly may be unconstitutionally delegating a part of its authority if it allowed an Ethics Commission to investigate and “scrutinize” member conduct.
    - If legislative rules and procedures trump statute when in regard to legislative procedure, arguably the already-established House Ethics Panel’s investigation procedure - and an investigation procedure established by the Senate Committee on Rules - would trump statute providing for an Ethics Commission’s investigation of legislative conduct involving core legislative functions.
    - As discussed in [Powell v. McCormack](#), there are finite constitutional qualifications for office, so investigating a member’s election is different from investigating a member’s conduct once in office.
      - Can penalties constitutionally be imposed for a member’s failure to comply with an Executive Branch investigation, if the investigation relates to a chamber’s core legislative function of judging member qualifications?
  - **Advisory opinions. Only a chamber has the authority to judge its members’ qualifications. Giving advice includes making judgments, and allowing an Ethics Commission to issue advisory opinions to the Legislative Branch may be unconstitutional delegation.**



# JUDICIAL BRANCH



# An Ethics Commission Likely Does Not have Constitutional Authority to Regulate the Judicial Branch

- “The Supreme Court shall have administrative control of all the courts of the state, and disciplinary authority concerning all judicial officers” in the State.  
Vt. Const. Ch. II, § 30.
- “The Supreme Court in the exercise of its disciplinary power over the Judiciary of the state may suspend justices of the Supreme Court and judges of all subordinate courts from the judicial function for such cause and in such manner as may be provided by law.”  
Vt. Const. Ch. II, § 36.
- Disciplinary Control of Judges Rule 4 establishes the Judicial Conduct Board (JCB), appointed by the SCOV. The JCB is made up of three judges, three attorneys, and three lay persons. It is advisory only; the SCOV has final disciplinary authority.
  - “[I]n judicial conduct proceedings[,] the SCOV makes the only final and ultimate decision. The findings and recommendations of the [JCB] carry great weight, but are advisory, not binding.” In re Bryan, 164 Vt. 589, 593 (1996) (other citations omitted).
  - “[The JCB] is an arm of this Court . . .” In re Hill, 152 Vt. 548, 555 (1989).



## Legislative Regulation of the Judicial Branch

- Judicial Retention. Vt. Const. Ch. II, § 34.
- Impeachment of every Judicial officer of State. Vt. Const. Ch. II, §§ 57 and 58.



# EXECUTIVE BRANCH



## Constitutional Provisions Relating to the Executive Branch

- Terms of office.
  - Gov., Lt. Gov., and Treasurer specifically enjoy a two-year “term of office[.]” Vt. Const. Ch. II, section 49.
  - Secretary of State and Auditor of Accounts don’t have specific term language, but are elected every two years “upon the same ticket” with the Gov., Lt. Gov., and Treasurer. Vt. Const. Ch. II, section 48.
- Executive function.
  - “[T]he Governor . . . shall have power to commission all officers, and also to appoint officers, except where provision is, or shall be, otherwise made by law or this Frame of Government; and . . . is also to take care that the laws be faithfully executed.” Vt. Const. Ch. II, § 20.



# Legislative Regulation of the Executive Branch

- Impeachment of every Executive officer of State. Vt. Const. Ch. II, §§ 57 and 58.
- Who are State Executive officers?
  - In regard to who, under former Vt. Const. Ch. II, § 29 (now Ch. II, § 56) is a “judicial, executive, or military” officer “in authority under this State” and therefore required to take that section’s **oath of office** (**not who is subject to impeachment**), the SCOV held it did not apply to officers who hold their authority from towns, but “applies only to such officers, judicial, executive, and military as are *strictly* state officers . . . to-wit:
    - “*First*, such as derive their authority to act from the votes of the freemen of the state at large;
    - “*second*, such as are either elected, or declared to be elected, by the legislature of the state, or appointed by the governor of the state, and hold and discharge the duties of their respective offices under the authority of a commission duly executed and issued to them by the governor.” Rowell v. Horton, 58 Vt. 1, 3 A. 906, 906-907 (1886).



# OVERVIEW OF THE BILLS' PROVISIONS



# General Provisions Regarding the Proposed Ethics Commission

- Findings.
- Definitions, including:
  - “Conflict of interest”; and
  - the Executive officers subject to Commission regulation.
- Disclosures.



# Prohibited Conduct

- Executive officers: \$ interest in government decision
- Executive officers: Ownership or \$ interest in regulated business
- Executive officers: Gifts and contributions from certain persons
- Legislators and Executive officers: Use or disclosure of confidential information
- Legislators and Executive officers: Bribery



# Revolving Door Prohibitions

## for limited periods of time

- Executive officers:
  - Certain paid lobbying; and
  - Employment by certain private entities regulated by the Executive officer's office.
- Legislators:
  - Paid lobbying; and
  - Certain positions created by acts of legislation.



# Potential Discipline

- Reprimand
- Cease and desist
- Require disclosure
- Monetary administrative penalties
- Recommend disciplinary action, as applicable:
  - To supervisor;
  - Impeachment; or
  - To legislative chamber.



# Miscellaneous Provisions in Both Bills

- Commission training for public officials
- Commission staff of three from existing positions in the position pool
- Commission procedure for receiving, investigating, and adjudicating complaints
- Creation of a State Ethics Fund
- Recommendation that municipalities use existing statutory authority to address municipal issues relating to ethics and conflicts of interest



# Main Differences Between the Bills

- Legislative disclosures
- Legislative advisory opinions
- Membership of the Commission
- Regulation of campaign finance law