



MONTPELIER, VT 05633-5301

PHONE: (802) 828-2231

FAX: (802) 828-2424

STATE OF VERMONT

OFFICE OF LEGISLATIVE COUNCIL

MEMORANDUM

To: Senator Tim Ashe
From: Michael O'Grady, BetsyAnn Wrask, and Brynn Hare
Date: May 31, 2018
Subject: S.281--Separation of Powers

A. General Response

You asked for an analysis by the Office of Legislative Council of the separation of powers argument offered by Governor Scott in his veto message to S.281, an Act relating to the mitigation of systemic racism. Per your request, BetsyAnn Wrask, Brynn Hare, and I conducted a preliminary analysis of the question. Review of the Vermont Constitution, Vermont Supreme Court precedent, persuasive authority from other states and secondary sources, and the text of S.281 indicates to our office that S.281 does not violate the separation of powers requirement and that the Vermont General Assembly may dictate the terms of removal of an Executive Branch officer. Please let us know if you would like a more detailed memorandum.

B. Constitution.

I. Legislative Authority

The Vermont Constitution provides that the "Supreme Legislative power shall be exercised by a Senate and a House of Representatives."¹ The Senate and the House of Representatives "may prepare bills and enact them into laws . . . and shall have all other powers necessary for the Legislature of a free and sovereign State . . ."²

The Vermont Supreme Court has stated that the General Assembly's supreme legislative power is practically absolute but for constitutional limitations. The "Constitution is not a grant of power to the Legislature, but it is a limitation of its general

¹Vt. Const. Ch. II, § 2.

²*Id.*, § 6.

powers.”³ These general powers include the authority to statutorily establish, condition, and empower the offices of the Executive Branch not otherwise authorized by the Constitution, such as the Executive Director of Racial Equity established in S.281.

³*Rufus v. Daley*, 103 Vt. 426, 432-33 (1931).

II. Appointment and Removal Authority

Unlike other states, the Vermont Constitution does not grant the Governor specific authority to remove Executive Branch officers. The veto message for S.281, however, states that the removal authority is incidental to the appointment power of the Governor. The Vermont Constitution does include specific authority for the Governor to appoint Executive Branch officers, but the Constitution conditions that authority. Specifically, the Constitution provides that:

The Governor . . . shall have power to commission all officers, and also to appoint officers, except where provision is, or shall be, otherwise made by law or this Frame of Government . . .⁴

As the General Assembly is the lawmaking body of State government, the General Assembly may specify the process or criteria for appointment of an Executive Branch officer. Thus, if the removal authority is incidental to—i.e. accompanying or dependent upon—the appointment power, then the Governor has authority to remove executive branch officers except where provision is made by law or the frame of government.

Vermont Supreme Court authority supports this conclusion. In the case of *McFeeters v. Parker*⁵, the Vermont Supreme Court stated that “whether the Governor should have power of removal of the members of [an executive branch agency] is for the Legislature to decide.”⁶ Moreover, the *McFeeters* court noted that the challenger in that case was unable to refer the court to any authority that would conflict with the Legislature’s authority to control the power of removal.⁷ This conclusion is also supported by precedent in multiple other states.⁸

In addition, the American Law Review secondary source, which provides general legal principles based on state case law nationwide affirms that unless restricted by a state

⁴ Vt. Const. Ch. II, § 20.

⁵ 113 Vt. 139 (1943).

⁶ *Id.* at 144.

⁷ *Id.*

⁸ See *McCarthy v. Sheriff of Suffolk Cty.*, 366 Mass. 779, 782, 322 N.E.2d 758, 761 (1975). It is well settled that, where an office is created by the Legislature and not by the Constitution, ‘(I)t may be regulated, limited, enlarged or terminated by law, as public exigency or policy may require.’ *Taft v. Adams*, 3 Gray 126, 130 (1855). *Accord*, *Butler v. Pennsylvania*, 51 U.S. 402, 10 How. 402, 416, 13 L.Ed. 472 (1850); *Barnes v. Mayor of Chicopee*, 213 Mass. 1, 4, 99 N.E. 464 (1912); *Attorney Gen. v. Tufts*, 239 Mass. 458, 480, 131 N.E. 573 (1921); *Williams v. New Bedford*, 303 Mass. 213, 214—215, 21 N.E.2d 265 (1939). See *Nichols v. Commissioner of Pub. Welfare*, 311 Mass. 125, 130, 40 N.E.2d 275 (1942); *Commissioner of Admn. v. Kelley*, 351 Mass. 686, 691, 223 N.E.2d 670 (1967). Cf. *McNeil v. Mayor & City Council of Peabody*, 297 Mass. 499, 9 N.E.2d 566 (1937). See also *Kingston v. McLaughlin*, 359 F.Supp. 25 (D.Mass.1972), *affd.* 411 U.S. 923, 92 S.Ct. 1900, 36 L.Ed.2d 388 (1973). The Legislature is free to alter the methods for appointment and removal of State officers, as well as to change their duties or tenure. *Collins v. Selectmen of Brookline*, 325 Mass. 562, 565, 91 N.E.2d 747 (1950).

constitution, a legislature has the authority to provide how an executive branch officer may be removed.⁹

⁹ 99 A.L.R. 336, 119 ALR 1437.

C. Statutory Removal Authority

The Governor may argue that statute grants his office with the exclusive authority to remove executive branch officers. Specifically 3 V.S.A. § 2004 and 3 V.S.A. § 258 do provide that the Governor may remove an officer of the executive branch. However, this statutory authority is granted by the General Assembly, and is not a constitutional authority that would implicate the separation of powers. Moreover, S.281, is a more recent legislative, specific enactment that would control the removal of the Executive director of the Racial Equity Advisory Panel.¹⁰

D. Inter-branch Authority over the Governor

The veto message for S.281 provides that the exercise of executive authority by an inter-branch entity over a Governor violates the separation of powers dictated by the Constitution. However, the power to remove the Executive Director of Racial Equity is granted to the Racial Equity Advisory Panel itself. By the terms of S.281, the panel is an Executive Branch entity, and the panel is authorized to remove the Director. Neither the General Assembly nor the Judiciary have a role in the removal of the Executive Director. Thus, the exercise of removal authority is an intra-branch authority wholly vested with the Executive Branch.

¹⁰ See *State v. Lynch* 137 Vt. 607 (1979).