

March 22, 2022

## Testimony in Opposition to H 7593--An Act Relating to Food and Drugs--Rhode Island Cannabis Act

“In order to lay a due foundation for that separate and distinct exercise of the different powers of government, which to a certain extent is admitted on all hands to be essential to the preservation of liberty, it is evident that each department should have a will of its own; and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of members of the others.”

-James Madison, *Federalist 48*

Common Cause Rhode Island opposes H 7593--An Act Relating to Food and Drugs--Rhode Island Cannabis Act because the Cannabis Control Commission (CCC) it creates violates the Rhode Island Constitution's Separation of Powers, including the Appointments Clause in Article IX, Section 5.

The Separation of Powers are fairly new to Rhode Island. Prior to 2004 our state constitution allowed for state legislators to be appointed to executive boards and commissions such as the CCC, as well as make appointments to executive boards and commissions. That meant that legislators were not only enacting laws, but executing them as well, both directly or indirectly.

In 2004, 78% of Rhode Islanders voted to amend our state constitution, choosing to cast off the last remnants of the parliamentary system we inherited from the Royal Charter of 1663 and embark on a new era of Separation of Powers. They did so by passing four amendments:

Article III, Section 6 was amended to prohibit members of the General Assembly from serving on boards or commissions that are “exercising executive power.”

Article V was amended to create a system of three “separate and distinct” branches of government.

Article VI, Section 10 eliminating the “Residual Powers” Clause.

Article IX, Section 5, the “Appointments Clause,” was amended to give the governor the exclusive power to appoint members “of any board, commission or other state or quasi-public entity which exercises executive power under the laws of this state.”

In the period surrounding passage of the amendments the enabling statutes for numerous boards and commissions were reconstituted to remove the legislative appointments and appointees. In most instances the legislative language said that the governor should give “due consideration” to any substantive qualifications imposed by the legislature. Unfortunately over the last decade the General Assembly has largely abandoned that language and has been

putting binding substantive qualifications on appointees. Common Cause Rhode Island has consistently testified in opposition to restricting the governor's appointment authority in that way.

H 7593 goes beyond putting substantive qualifications on appointments to the Cannabis Control Commission (CCC). § 21-28.11-4(b) requires that two of the three members of the CCC come from lists of three people created by the Speaker of the House and Senate President. Common Cause Rhode Island opposes the use of lists. We believe that restricting the governor's appointment powers by requiring them to choose from lists is an unconstitutional violation of the Separation of Powers in Article V and the Appointments Clause in Article IX, Section 5, even if the due consideration language is included, as it is in H 7593. Substantive qualifications are about the importance of the nominees qualifications. Lists are about the importance of the nominees political loyalty.

We admit there is precedent for the use of lists. A decade ago when the General Assembly changed the enabling statute of the I-195 Redevelopment Commission it required the governor to appoint four members from lists submitted by the Speaker of the House and mayor of Providence. Common Cause Rhode Island has, since before 2004, testified repeatedly that we believe the use of lists violates the Separation of Powers generally, if not the Appointments Clause specifically. We were vocal in 2011 in our opposition to aspects of the legislation reconstituting the I-195 Commission.

We caution those who analogize with the model of the Judicial Nominating Commission (JNC), an institution that we are quite familiar with. Article X, Section 4 of our state constitution expressly grants authority to the JNC to produce a list from which the governor must choose. That is much different than a statute creating an executive commission.

In contrast with the JNC, the CCC will be a creation of the General Assembly, and in *In re: Request for an Advisory Opinion of the House of Representatives (Coastal Resources Management Council)* (2007) the Rhode Island Supreme Court made clear that executive boards and agencies, of which this would be one, are subject to the Separations of Powers generally, and the Appointments Clause, specifically.

Testimony by Claire Richards, Executive Counsel to Governor Daniel McKee points to the case of *State ex. rel. West Virginia Citizens Action Group v. West Virginia Economic Development Grant Committee*, 213 W. Va. 255 (2003) where a similar appointment scheme featuring lists was overturned for violating that state's Separation of Powers and similar Appointments Clause. A Florida statute that similarly required the governor to choose from lists created by third-parties was struck down in *Westlake v. Merritt*, 85 Fla. 28, 30 (2003).

Ms. Richards' testimony also points to the constitutional infirmities of the removal process for commissioners proposed in H 7593. Article XI of the Rhode Island Constitution vests the power of impeachment in the House and removal from office in the Senate. Article III, Section 8 grants the Rhode Island Ethics Commission the power to remove from office those officials who are not subject to impeachment (executive and judicial officers) or expulsion (legislators).



The General Assembly cannot through legislation create an additional process for the removal of executive officials by requiring the Senate's advice and consent. The U.S. Supreme Court spoke to this very questions in *Myers v. United States*, 272 U.S. 52 (1926).

At its most fundamental, the CCC violates the Separation of Powers because, in Madison's words, it gives "agency" in the appointment of two-thirds of an executive commission to a "separate and distinct" branch of government; the General Assembly. Given that the majority of the appointments fall under the control of the legislative branch, it is clear that this legislation is nothing less than an attempt by the General Assembly to claw back the power given by the people to the executive branch in 2004.

Common Cause Rhode Island urges you to amend H 7593 to comport with the Rhode Island Constitution.

