

MEMORANDUM

To: The Senate Committee on Government Operations
From: Tim Devlin, Legislative Counsel
Date: January 10, 2024
Subject: 1974 Amendments to the Vermont Constitution re the Office of High Bailiff

I. Overview

It may be inferred from evidence found in the historical record that amendments made to the Vermont Constitution in 1974 were intended to recast the Office of High Bailiff and remove its distinction as an enumerated constitutional officer.¹ While only three of the four references to the Office of High Bailiff in Vermont's Constitution were removed in 1974, both the reworking of the final amended language and contemporary descriptions of the amendments indicate that the Office was likely meant to be removed from the Constitution entirely.

II. Context for the Constitutional Amendments of 1974

Four out of five proposals to amend Vermont's Constitution brought before voters in 1974 were ratified²: 'Proposal I proposed four-year terms for constitutional officers (this failed); Proposal III reduced the "time-lock" on the Constitution from 10 years to every two biennia; Proposal V revised the judicial system; Proposal X updated the reapportionment process to reflect national requirements; and Proposal VII granted the privileges of Freemen to 18 year-olds.' [Reducing the Time-Lock in the Vermont Constitution: An Analysis of the 1974 Referendum](#) by Frank M. Bryan, The Proceedings of The Vermont Historical Society, Vol 44, No. 1, Winter 1976, pg. 41. Proposal V (the text of which may be found [here](#)) primarily aimed to reform the judicial system but also removed, but this proposal also included the amendment of two sections (Sections 25 and 45³) and the removal of another (Section 48) that all removed references to the Office of High Bailiff, and, *importantly, did not reintroduce those references elsewhere.*

¹ Although the term "constitutional officer" is not defined in the Constitution, nor has it been squarely examined by the Vermont Supreme Court, Black's Law Dictionary defines this term as a "government official whose office is created by a constitution, rather than by a statute; one whose term of office is fixed and defined by a constitution." OFFICER (11th ed. 2019).

² A list of all historical proposals of amendment to the Vermont Constitution, as well as the full text of each proposal, may be found on the Secretary of State's webpage [here](#). A more succinct list of amendments may be found [here](#).

³The amendments referred to throughout this memorandum were introduced in 1971 and were ratified in 1974, and various documents may refer to the same amendments by either date.

III. Contemporary Description of the 1974 Constitutional Amendments Regarding the Office of High Bailiff

A 'Summary of Proposed Constitutional Amendments' published by the Secretary of State, Richard C. Thomas, pursuant to 17 V.S.A. § 1840, stated that Proposal V "*eliminates the High Bailiff as a constitutional office.*" See p.1.

PUBLISHED PURSUANT TO 17 V.S.A. §1840
BY SECRETARY OF STATE, RICHARD C. THOMAS

SUMMARY OF PROPOSED CONSTITUTIONAL AMENDMENTS

PROPOSAL I

Makes the Attorney General a constitutional officer. Changes two-year terms for constitutional officers to four-year terms. Modernizes the canvassing of votes for constitutional officers, and provides for a run-off election in the event no candidate receives a majority of the votes. Authorizes the Supreme Court to incorporate, rearrange and renumber amended sections into the present constitution. Eliminates the office of Secretary of Civil and Military Affairs.

PROPOSAL III

Changes the time-lock for amending the constitution from ten years to four years.

PROPOSAL V

Removes specific reference to creation of courts of chancery; provides for a unified judicial system composed of a Supreme Court, a Superior Court, and such other subordinate courts as the Legislature may establish; removes requirement of maintaining courts in every county; provides that all courts except the Supreme Court may be divided into geographical and functional divisions as provided by law or by judicial rules adopted by the Supreme Court not inconsistent with law; grants to Supreme Court administrative control over all courts and disciplinary control over all judges and attorneys in the State; vests rule-making authority in the Supreme Court subject to revision by the Legislature; provides for six-year terms of office for Justices of the Supreme Court and Superior Judges; provides for a judicial nominating body for selection of nominees to fill judicial vacancies except for Assistant Judges and Probate Judges; empowers the Governor, with the advice and consent of the Senate, to fill judicial vacancies; provides for retention in office at end of their terms of Justices of the Supreme Court and Superior Judges by vote of the Legislature; requires mandatory retirement of Justices of the Supreme Court and Superior Judges at end of calendar year in which they attain 70 years of age or at the end of the term of election during which they attain 70 years of age; provides that the manner and certification of elections and filling of vacancies in the offices of the Assistant Judges, Sheriffs, State's Attorneys, Judges of Probate, and Justices of the Peace shall be as established by law; provides for four-year terms of office for Assistant Judges, Sheriffs, State's Attorneys and Probate Judges; prohibits the exercise of judicial powers by Justices of the Peace; eliminates the High Bailiff as a constitutional officer; does away with the prohibition against waiver of trials by jury by one accused of a felony.

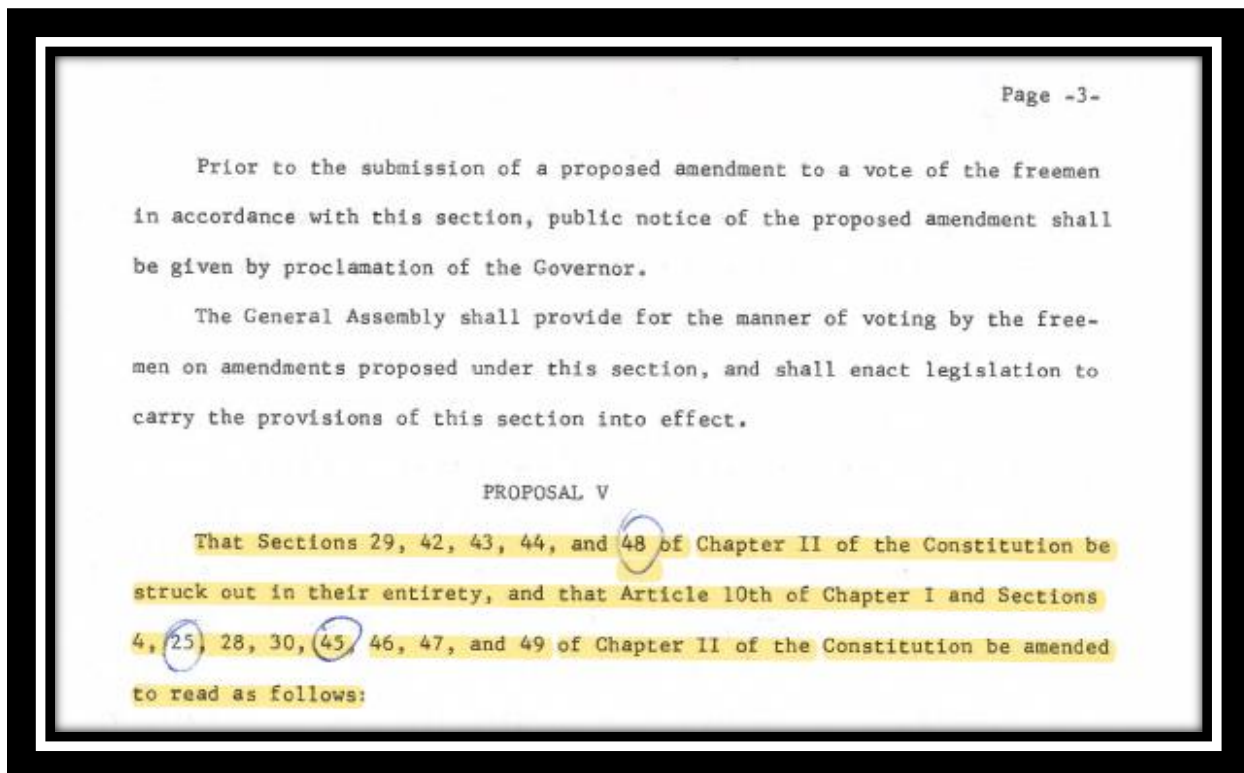
**IV. Constitutional Amendments of 1974 Office of High Bailiff in the Vermont
Constitution of 1973 and the current Vermont Constitution**

A. Affected Constitutional Language.

[Proposal 5](#) states, in part:

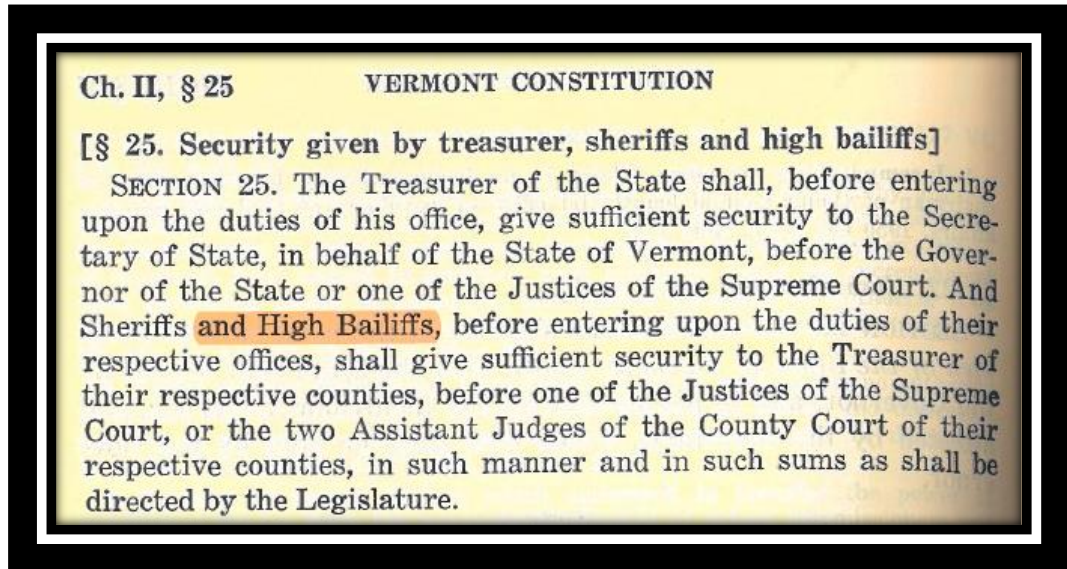
PROPOSAL V. That Sections 29, 42, 43, 44 and 48 of Chapter II of the Constitution be struck out in their entirety, and that Article 10th of Chapter I and Sections 4, 25, 28, 30, 45, 46, 47 and 49 of Chapter II of the Constitution be amended to read as follows.

The third page of the Summary reiterates this. Proposal V struck out or modifying constitutional sections pertaining to the Office of High Bailiff, specifically Chapter II, Sections 25, 45, and 48.



B. Chapter II, Section 25

- i. 1973 Text: Prior to the 1974 amendments, Chapter II, Section 25 of the Constitution read:



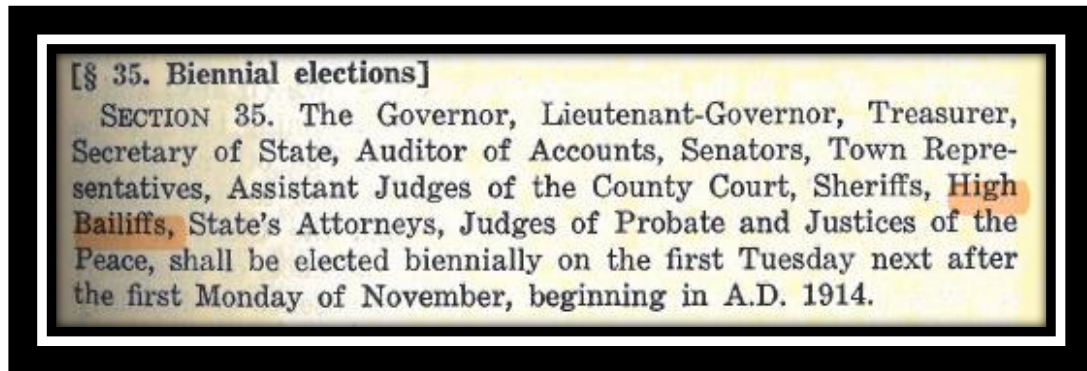
- ii. Current Text:

“§ 25. [Security given by Treasurer and Sheriffs] The Treasurer of the State shall, before entering upon the duties of office, give sufficient security to the Secretary of State, in behalf of the State of Vermont, before the Governor of the State or one of the Justices of the Supreme Court. **And Sheriffs, before entering upon the duties of their offices, shall give sufficient security in such manner and in such sums as shall be directed by the Legislature.**” (Emphasis added.)

- iii. Analysis: Proposal V amends the language of Section 25 in two ways: first by removing the Office of High Bailiff from the list of two offices (the other being sheriff) that shall provide sufficient security (bond), and second by removing the role of the Treasurer, the Supreme Court, and the Assistant Judges from this process. Of the modifications, the former, relating to the high bailiff, is more substantive, with the latter being more procedural.

C. Chapter II, Section 35 (now Section 43)

- i. 1973 Text: Prior to the 1974 amendments, Chapter II, Section 35 of the Constitution read:



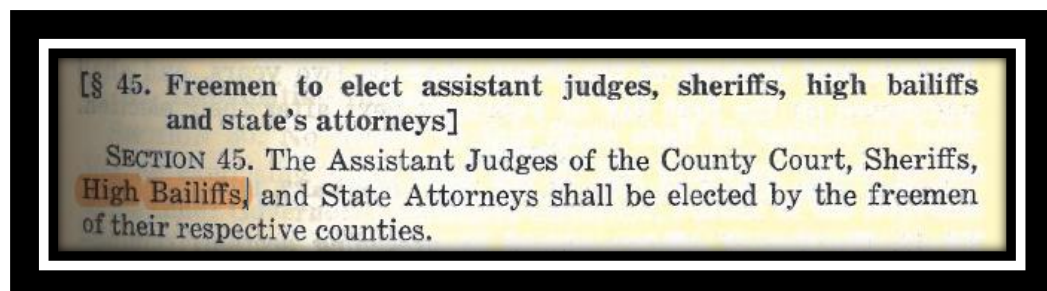
- ii. Current Text: (Note: Section 35 was later redesignated as Section 43.)

“§ 43. [Biennial elections] The Governor, Lieutenant-Governor, Treasurer, Secretary of State, Auditor of Accounts, Senators, Town Representatives, Assistant Judges of the County Court, Sheriffs, **High Bailiffs**, State's Attorneys, Judges of Probate and Justices of the Peace, shall be elected biennially on the first Tuesday next after the first Monday of November, beginning in A.D. 1914.” (Emphasis added.)

- iii. Analysis: **The 1973 text and the current text are the same.** The language of Section 35 (now Section 43) was not amended in 1974, nor has it been subsequently modified. Why this reference to the Office of High Bailiff was not removed is unknown and would require further delving into the historical record, that is, if a reason exists at all.

D. Chapter II, Section 45 (now Section 50)

- i. 1973 Text: Prior to the 1974 amendments, Chapter II, Section 45 of the Constitution read:



- ii. Current Text: (Note: Section 45 was later redesignated as Section 50.)

“§ 45. [Election of Assistant Judges, Sheriffs, and State’s Attorneys]

The **Assistant Judges** shall be elected by the voters of their respective districts as established by law. Their judicial functions shall be established by law. Their term of office shall be four years and shall commence on the first day of February next after their election.

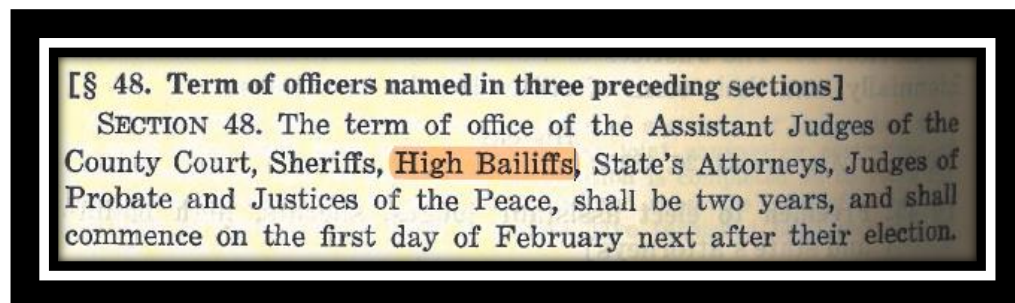
Sheriffs shall be elected by the voters of their respective districts as established by law. Their term of office shall be four years and shall commence on the first day of February next after their election.

State’s Attorneys shall be elected by the voters of their respective districts as established by law. Their term of office shall be four years and shall commence on the first day of February next after their election.” (Emphasis added.)

- iii. Analysis: Proposal V amends the language of Section 45 (now Section 50) in two ways: first by removing the Office of High Bailiff from the list of four offices that are to be elected by the voters of their respective counties, and second by adding terms for each office. The latter change regarding terms is seemingly imported from Section 48, which was struck out in its entirety by Proposal V (see below), while also expanding the two-year terms to four-year terms for those remaining offices.

E. Chapter II, Section 48

- i. 1973 Text: Prior to the 1974 amendments, Section of the Constitution read:



- ii. Analysis: Chapter II, Section 48 was ‘struck out in its entirety,’ although elements regarding terms were incorporated into Section 45 (now redesignated as Section 50), with the omission of the Office of High Bailiff.

The reworking of Sections 45 and 48 into an updated section that enumerates three offices to be elected by county for certain terms included two opportunities for the Legislature to carry over the Office of High Bailiff, neither of which were seized upon, likely indicating that it intended to eliminate high bailiff from the Vermont Constitution.

V. References to the Office of High Bailiff in Current Statutes

Regardless of whether the Legislature in 1971 had intended to eliminate the Office of High Bailiff as a constitutional officer or not, the Office persists today in each county with elected officials currently serving in this Office. The duties of the high bailiff, as a constitutional officer—or not if the Constitution were to be amended as such—are to be laid out in statute as there are no duties described in the Constitution.⁴ Vermont statutes currently include 15 references to the Office of High Bailiff (listed below); the duties of the high bailiffs largely overlap with those of sheriffs and law enforcement officers in the State. The Office of High Bailiff would survive its designation as a “constitutional officer” being repealed (much like how the Attorney General exists as a State officer despite not being a constitutional officer), so long as statute provides a means to select the official.

Title 12: Court Procedure

- [12 V.S.A. § 5246. Bond of sheriff and high bailiff-action by a creditor after execution returned unsatisfied](#)
- [12 V.S.A. § 5247. Judgment](#)

⁴ See *Office of State's Attorney Windsor County v. Office of Attorney General* (138 Vt. 10, 15 (1979)) wherein the Court discusses the Office of State's Attorney, which is also sparsely referenced in the Constitution:

The Powers of the State's Attorney are not set forth in the constitution but rather in 24 V.S.A. s 361. The constitution merely provides the date on which the State's Attorneys shall be elected and the terms for which they shall serve. Vt. Const. ch. II, ss 43, 50. Since the powers of the State's Attorney are those granted by statute, the legislature is not precluded from delegating to other offices equal authority

- [12 V.S.A. § 5248. Defense by defendant and sureties](#)
- [12 V.S.A. § 5249. When the principal has removed from the State](#)

Title 13: Crimes and Criminal Procedure

- [13 V.S.A. § 1812. Officers to make seizures](#)

Title 17: Elections

- [17 V.S.A. § 2103. Definitions](#)
- [17 V.S.A. § 2471. General election ballot](#)

Title 21: Labor

- [21 V.S.A. § 601. Definitions](#)

Title 24: Municipal and County Government; Chapter 005: County Officers; Powers and Duties

- [24 V.S.A. § 294. Sheriff imprisoned](#)
- [24 V.S.A. § 331. Oath; bond](#)
- [24 V.S.A. § 332. Powers and duties](#)
- [24 V.S.A. § 333. Confinement of sheriff; vacancy](#)

Title 32: Taxation and Finance

- [32 V.S.A. § 4697. Distrain by copy](#)
- [32 V.S.A. § 4737. Extent against sheriff](#)
- [32 V.S.A. § 4738. High bailiff's liability](#)