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January 10, 2017

James C. Condos
Secretary of State
Office of the Vermont Secretary of State
128 State Street
Montpelier, VT 05633

RE: Report and Opinion

Dear Secretary Condos:

In accordance with 17 V.S.A. § 2605(b), enclosed please find a report and opinion from the Office of the Attorney General regarding "In Re: Petition of Susan Hatch Davis - Petition for Recount, House of Representatives for District Orange – 1 General Election held November 8, 2016", which was filed with your office on December 22, 2016.

Sincerely,

Michael O. Duane
Senior Assistant Attorney General
Director, General Counsel and Administrative Law Division

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REPORT AND OPINION
TO
SECRETARY OF STATE JAMES C. CONDOS

A request under 17 V.S.A. § 2605 in the form of a "Petition" was filed with the Secretary of State on December 22, 2016 by Susan Hatch Davis seeking to invoke the constitutional authority granted to the Vermont House of Representatives, pursuant to Chapter II, Section 14 of the Vermont Constitution, to judge of the election and qualifications of their own members.

Ms. Hatch Davis was a candidate for the two seats established for the Orange-1 House District. Hatch Davis seeks as a remedy in her request that the House order a new recount and order that all ballots deemed spoiled or defective be examined to determine whether they should be counted.

The matter originated at the Vermont Superior Court, Civil Division, Orange Unit at Chelsea where Hatch Davis requested a recount following the November 8, 2016 election. In that election four candidates sought election for the two seats established for the Orange-1 District. The recount was held on November 28, 2016.

Proceedings regarding the recount were commenced as *In Re: Petition of Susan Hatch Davis*, Docket No. 151-11-16 Oecv. On December 19, 2016, a Judgment was entered in the recount action (Teachout, J.) in accordance with 17 V.S.A. § 2602j declaring Rodney Graham and Robert Frenier as the winners in the election.

Ms. Hatch Davis' request to the Secretary of State presents a question that involves threading a constitutional eye of a needle. Under the Vermont Constitution the voters have the right to elect officers [Chapter 1, Article 7] and, more specifically with respect to the Vermont House of Representatives, the voters of each representative

district shall elect the representatives from that district. [Chapter II § 13]. In conjunction therewith, however, Chapter II, § 14 provides that the House of Representatives shall have the power to judge of the elections and qualifications of their own members.

The General Assembly has enacted a series of laws governing the conduct of elections. *See* 17 V.S.A., Chapter 51. Within that framework of laws, the local boards of civil authority shall have charge of the conduct of elections, 17 V.S.A. § 2451, and along with a local presiding officer and other assistant election officers, shall be responsible for the counting of votes, certifying the result of the vote count and assuring that an election is conducted according to law. *See* 17 V.S.A. §§ 2452 – 2455.

In accordance with these governing statues, a losing candidate has the right to have the votes "recounted" if the result of the votes cast in the election is within a numerical margin,17 V.S.A. § 2601, and may do so by filing a petition for a recount with the civil division of the Vermont superior court. 17 V.S.A. § 2602(b). Vermont law also provides that the result of an election may be "contested" by any legal voter entitled to vote on the office by filing a complaint with a superior court. 17 V.S.A. § 2603. This provision allowing "any legal voter" to contest an election presumably would include the candidate themselves in an election for an office. However, in *Kennedy v. Chittenden*, 142 Vt. 397 (1983), the Vermont Supreme Court ruled that the then existing provisions of 17 V.S.A. § 2603 [and 17 V.S.A. § 2604] could not constitutionally apply to the contest of an election to the Vermont House of Representatives. The Court held that as Chapter II, § 14 of the Vermont Constitution, noted above, provides the House of Representatives shall have the power to judge of the elections of its members, a statute purporting to give the courts of the judicial branch such authority violated the separation of powers doctrine contained in Chapter II, § 5 of our Constitution. In 1986, following the Court's decision in *Kennedy*, the legislature amended 17 V.S.A. § 2603(a) to add a provision to exclude elections to offices the general assembly with respect to the right to contest the results of elections for offices generally. 1985 Acts & Resolves, No. 148 (Adj.Sess.).

It thus appears that a candidate for a seat in the Vermont House of Representatives who seeks a "recount" following an election may do so by invoking the recount procedures set forth in 17 V.S.A. § 2601 through § 2602k, even though the superior court: presides over the recount petition process,17 V.S.A. § 2602(b) and (c); may take evidence relating to the recount, 17 V.S.A. § 2602j(c); and shall issue a

judgment regarding the election. *Id.* It would follow that any appeal from a recount judgment with respect to the specific recount procedures set forth in the statutory scheme would be to the Vermont Supreme Court, as authorized by 4 V.S.A. § 2 and the Vermont Rules of Appellate Procedure.

It should be noted that in *Kennedy v. Chittenden*, 142 Vt. 397, the Supreme Court stated the case "first started" as a recount matter in which the recount appeared to confirm the election victory of the defendant candidate Chittenden, "... whereupon a contest was initiated before the Chittenden Superior Court, on the basis of asserted checklist irregularities ...,". It was the "contest" to the checklist irregularities, and the superior court's order calling for a new election regarding those perceived irregularities, that seemingly violated the separation of powers doctrine.

It must be presumed that the statutory role of the judicial branch in "recount" proceedings in 17 V.S.A. § 2601 through § 2602k (as opposed to "contest" proceedings in 17 V.S.A. § 2605) is a proper constitutional delegation by the Legislature, as statutes are presumed to be constitutional until the Supreme Court rules otherwise. *Badgley v. Walton*, 2010 VT 68, ¶¶ 20, 38, 188 Vt. 367.[1]

In this matter, any claim by Ms. Hatch Davis regarding the presentation of evidence to the superior court in the recount proceeding under 17 V.S.A. § 2602j, the application of the Vermont Rules of Evidence regarding offers of proof under V.R.E. 103 with respect to such evidence, and the superior courts' interpretation of § 2602j concerning the standard of proof in a recount action may be matters for appellate review by the Vermont Supreme Court, but not by the Attorney General or the Secretary of State under 17 V.S.A. § 2605.

Here, Ms. Hatch Davis' specific request for relief in contesting the election is that all ballots deemed spoiled or defective should be examined to determine whether they should be counted. She claims that such ballots were treated inconsistently within the district during the election and recount process.

With respect to early or absentee ballots,17 V.S.A. § 2547 provides the instances in which early or absentee ballots shall be marked "defective", and that in those instances the defective ballots shall not be counted. The Secretary of State's "2016 Elections Procedures" (July 2016) guide for local officials at Appendices H and I also instructs that "defective" and "spoiled" ballots", respectively, should be placed into envelopes, and further instructs in case of a recount that these "ballots" should not be

counted. The Secretary of State is the chief election official of the State, and has been authorized to adopt rules for the counting of ballots. 17 V.S.A. § 2582. As such, the Secretary of State's published procedures regarding the treatment of defective and spoiled ballots under Vermont's election laws is entitled to great weight, and should not be disregarded or overturned, except for cogent reasons, and unless it is clear that his statutory construction is erroneous. *See Town of Lunenburg, et al. v. Unorganized Towns and Gores of Essex County*, 2006 VT 71 ¶ 11, 180 Vt. 578 (mem.).

In light of the constitutional separation of powers line laid down by the Vermont Supreme Court in *Kennedy v. Chittenden*, when a "recount" proceeding turns into a "contest" of the election regarding alleged irregularities in the treatment of defective and spoiled ballots, the jurisdiction of the judicial branch ends. Therefore, any claims by Ms. Hatch Davis here that all ballots deemed spoiled or defective should be examined to determine whether they should be counted, is a "contest" of the election. Thus, her claims for relief fall under 17 V.S.A. § 2605, and are within the exclusive power of the House of Representatives to judge in accordance Chapter II, § 14 of the Vermont Constitution.

Respectfully submitted and dated at Montpelier, Vermont this 10th day of January, 2017.

Michael O. Duane
Sr. Assistant Attorney General
Director, General Counsel and
Administrative Law Division

[1] 17 V.S.A. § 2605(a) allows for a candidate to file a request with the Secretary of State to have the House of Representatives exercise its constitutional authority to judge of the elections and qualifications of its own members. If there has been a final court judgment in a "contest" under § 2603, such a request must be filed no later than 10 days after a final court judgment. The statute also requires that a request must be filed 20 days after the date of the election generally, and 10 days after a final court judgment if there is a "recount" under § 2602. In light of *Kennedy v. Chittenden*, the provisions of the statute providing for the filing of requests after a final court judgment in a "contest" of an election may no longer be operative.