

2017 Contested Orange-1 House Election

BetsyAnn Wrask, Legislative Counsel, Office of Legislative Council
January 19, 2017

- Order of Events
- Constitutional Provisions
- Statutory Provisions and Election Guidance
- Potential Options

Overview of Issues to Discuss

Order of Events

General Timeline of Events

- Nov. 8, 2016: General Election
- Nov. 28, 2016: Recount
- Nov. 29, 2016: Davis request to Superior Court for hearing and second recount by hand
- Dec. 12, 2016: Davis supplemental request to Superior Court for hearing and second recount or new election
- Dec. 19, 2016: Superior Court certifies Nov. 28, 2016 recount results (including Court's final decision on three questionable ballots from that recount)
- Dec. 22, 2016: Davis petitions House to judge election
- Dec. 31, 2016: Frenier responds to Davis petition

1. General Election, Nov. 8, 2016

[Link here](#) for Secretary of State's Election Results webpage






Orange-1 Vote Totals

HOUSE TOTALS

VOTE FOR COUNT: TWO

STATE REPRESENTATIVE- ORANGE 1

TOWNS REPORTING: 6/6

Candidate	Party	Votes	Percent
 <u>RODNEY GRAHAM</u>	REPUBLICAN	2,018	22.90%
 <u>ROBERT FRENIER</u>	REPUBLICAN	1,853	21.03%
<u>SUSAN HATCH DAVIS</u>	PROG/DEM	1,845	20.94%
<u>ADAM DESLAURIERS</u>	PROG/DEM	1,014	11.51%
 Total Write-ins		4	0.05%
Spoiled Votes		4	0.05%
<u>Blank Votes</u>		2,074	23.54%
 Incumbent  Winner	Total votes cast	8,812	

1. General Election, Nov. 8, 2016 (cont.)

[Link here](#) for Secretary of State's Election Results webpage

Orange-1 Vote Totals by Town

ORANGE 1

Town	Rep Districts	RODNEY GRAHAM	ROBERT FRENIER	SUSAN HATCH DAVIS	Others	Total
CHELSEA	ORA-1	273	378	272	421	1,344
CORINTH	ORA-1	165	246	398	567	1,376
ORANGE	ORA-1	271	302	199	326	1,098
VERSHIRE	ORA-1	85	127	204	318	734
WASHINGTON	ORA-1	207	232	244	431	1,114
WILLIAMSTOWN	ORA-1	1,017	568	528	1,033	3,146
	Total:	2,018	1,853	1,845	3,096	8,812

2. Request for Recount

- [17 V.S.A. § 2601\(b\)](#) provides a losing House candidate with the right to have the votes recounted if the difference between the number of votes cast for the winning and losing candidate is less than 5% of the total votes cast for all the candidates for the office, divided by the number of persons to be elected.

Order of Events

3b. Recount Conducted on November 28, 2016; Questionable Ballots

- [17 V.S.A. § 2602f\(c\)](#) provides that if members of the recount team cannot agree on how to count a ballot, the ballot is set aside as a questioned ballot, and returned to the court for a final decision.
- [17 V.S.A. § 2602j\(c\)](#) provides that, after such hearings or arguments as may be indicated under the circumstances, the Superior Court shall issue a judgment, which shall supersede any certificate of election previously issued.

Order of Events

3c. Recount Results Certified by Court, December 19, 2016

STATE OF VERMONT
Orange Unit

CIVIL DIVISION
DOCKET No. 151-11-16 Oecv

IN RE: PETITION OF SUSAN HATCH DAVIS
Petition for Recount, House of Representatives for District Orange - 1
General Election held November 8, 2016

JUDGMENT

WHEREAS Susan Hatch Davis, a candidate for the office of State Representative for the House of Representatives for District Orange - 1, petitioned the Civil Division of the Orange Unit for a recount of all the votes cast for the office of State Representative for District Orange - 1 in the General Election of November 8, 2016;

WHEREAS Orders were issued directing the Orange County Clerk to conduct said recount according to law; and

WHEREAS a recount was conducted and the results certified on November 28, 2016; and

WHEREAS Petitioner requested a hearing to present evidence relating to the recount, and a hearing pursuant to 17 V.S.A. § 2602j(c) was held on December 19, 2016, and

WHEREAS based on the outcome of the recount and the hearing held, and for the reasons stated on the record, the number of votes is as follows:

<u>CANDIDATE'S NAME</u>	<u>VOTES</u>
Rodney Graham	2,015
Robert Frenier	1,852
Susan Hatch Davis	1,845
Adam DesLauriers	1,006

FILED
VERMONT SUPERIOR COURT
DEC 19 2016
ORANGE UNIT

NOW THEREFORE it is ORDERED that the following persons are declared the winners in the General Election for State Representative for District Orange - 1:

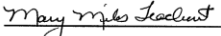
Rodney Graham

Robert Frenier

It is further ORDERED that this Judgment Order be filed in the office of the Orange County Clerk and that said Clerk shall issue certified copies of the same to all candidates and to the Secretary of State.

It is further ORDERED that the three questionable ballots ruled upon by the court be returned to the Orange County Clerk and that the Orange County Clerk forthwith return all ballots to the respective town clerks of Chelsea, Corinth, Orange, Vershire, Washington and Williamstown, pursuant to Vermont Statutes.

Dated at Chelsea, Vermont this 19th of December, 2016.


Mary Miles Teachout
Superior Court Judge

Copies to: Vincent Illuzzi, Attorney for Petitioner/Candidate Susan Hatch Davis
Thomas F. Koch, Attorney for Candidate Robert Frenier
Rodney Graham, Candidate
Adam DesLauriers, Candidate
Christina Rainville, Attorney for County Clerk Lisa Eastman
Lisa Eastman, Orange County Clerk
James C. Condos, Secretary of State

FILED
VERMONT SUPERIOR COURT
DEC 19 2016
ORANGE UNIT

Comparison of Results from Election and Recount

<u>Town</u>	<u>Frenier</u>		<u>Davis</u>		<u>Notes</u>
	<i>Election</i>	<i>Recount</i>	<i>Election</i>	<i>Recount</i>	
<u>Chelsea</u>	378	375	272	271	<ul style="list-style-type: none"> Frenier lost 3 in recount Davis lost 1 in recount
<u>Corinth</u>	246	247	398	400	<ul style="list-style-type: none"> Frenier gained 1 in recount Davis gained 2 in recount
<u>Orange</u>	302	302	199	198	<ul style="list-style-type: none"> Frenier same results Davis lost 1 in recount
<u>Vershire</u>	127	127	204	204	Same results for both
<u>Washington</u>	232	232	244	244	Same results for both
<u>Williamstown</u>	568	567	528	527	<ul style="list-style-type: none"> Frenier lost 1 in recount Davis lost 1 in recount
TOTALS from election	1,853	n/a	1,845	n/a	FRENIER WINS ELECTION BY 8
TOTALS from recount (after the judge's final decision on the three questionable ballots)	n/a	(incl. 2 questionable ballots ruled on by judge) 1,852	n/a	(incl. 1 questionable ballot ruled on by judge) 1,845	<ul style="list-style-type: none"> Frenier lost 1 in recount Davis got same result FRENIER WINS RECOUNT BY 7

4. Request for House to judge the election and qualifications of challenged member

- [17 V.S.A. § 2605\(a\)](#) allows a House candidate to request that the House judge the elections and qualifications of its members by filing a written request with the Secretary of State, specifying the candidates whose election is being challenged.

Summary of Petitioner Davis' Factual Allegations

Two main issues:

1. Conduct of recount, including:
 - Court's application of recount statutes
 - Recount procedures
 - Vote tabulator issues
2. Counting of ballots, including the treatment among Orange-1 towns of early voter absentee ballots (EVABs) returned with inner certificate envelope unsealed

Attorney General Report and Opinion

- 17 V.S.A. § 2605(b) provides that when there is a contested legislative election, the Attorney General shall investigate the facts, take such depositions as may be necessary, and prepare an opinion on the law and facts.

Constitutional Provisions

Vt. Const. Ch. I, Art. 8:

“That all elections ought to be free and without corruption, and that 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. II, § 14:

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

judge of the elections and qualifications

of their own members . . .”

Kennedy v. Chittenden, 142 Vt. 397 (1983)

- Plaintiff - a House candidate whose election loss was certified in a recount - used a former version of 17 V.S.A. § 2603 (contest of elections) to contest the election in Superior Court. Id. at 398.
 - In contesting the election, the plaintiff alleged checklist irregularities. Id.
 - The lower Superior Court ordered a new election. Id.
- On appeal, the Vermont Supreme Court held that:
 - Vt. Const. Ch. II, § 14 “places the final determination of the election and qualifications of its members exclusively in the House of Representatives of the General Assembly as part of its legislative powers.” Id. at 399.
 - The statutes allowing the Judicial Branch to make a determination on a contested legislative election violates Vt. Const. Ch. II, § 5 (separation of powers) because:
 - It’s an improper delegation of legislative powers to a separate branch of government (the Judicial Branch); and
 - Judicial Branch’s decision lacks finality because the decision is subject to being reversed by the Legislative Branch. Id.
 - The lower Superior Court was without jurisdiction to hear the complaint, and its order of a new election is vacated. Id. at 400.

Statutory Provisions and Guidance

Statutes re: General Conduct of Elections

- [17 V.S.A. § 2451](#): BCA has the charge of the conduct of elections in its political subdivision. Before an election, BCA may issue guidance to assist elections officials in conducting the election; this guidance shall not conflict with federal or State election laws.
- [17 V.S.A. § 2452](#): Town clerk is presiding officer, unless otherwise provided. There must be a presiding officer at each polling place.
- [17 V.S.A. § 2453](#): Presiding officer is responsible for counting votes, certifying election results, and in all things assuring that the election is conducted according to law.
- [17 V.S.A. § 2587\(a\)](#): In counting ballots, election officials shall attempt to ascertain the intent of the voter, as expressed by markings on the ballot that is consistent with guidance adopted by the Secretary of State. The Secretary shall adopt, by rule, guidance on determining whether a ballot is spoiled.

Statutes re: Early Voter Absentee Ballots

See [17 V.S.A. ch. 51, subch. 6](#) (early or absentee voters):

- [17 V.S.A. § 2540\(a\)](#) instructs voters to seal the EVABs in the envelope
- [17 V.S.A. § 2541\(a\)](#) states that the early or absentee voter “shall mark the ballots in accordance with the instructions.”
- [17 V.S.A. § 2542\(b\)](#) states that the “early or absentee voter must sign the certificate on the outside of the envelope in order for the ballot to be valid.”
- [17 V.S.A. § 2543](#) provides:
 - After marking the ballots and signing the certificate, the early or absentee voter shall return the ballots in the manner prescribed.
 - Once an EVAB is “returned to the clerk in the sealed envelope with the signed certificate,” it shall be securely stored and not returned to the voter.
- [17 V.S.A. § 2546\(a\)](#) allows towns to open the outside envelope containing the EVAB before election day and directs election officials to place the sealed envelope in a secure container for transport to the polling place on election day.

Statutes re: Early Voter Absentee Ballots (cont.)

17 V.S.A. § 2547 (defective [early voter absentee] ballots):

“If upon examination by the election officials it shall appear that the early or absentee voter is not legally qualified to vote, or has voted in person, or that the affidavit on any envelope is insufficient, the certificate is not signed, or the voted ballot is not in the voted ballot envelope, or, in the case of a primary vote, the early or absentee voter has failed to return the unvoted primary ballots, such envelope shall be marked "defective," and the ballots inside shall not be counted and shall be returned in the unopened envelope to the town clerk in the manner prescribed by section 2590 of this title. The provisions of this section shall be indicated prominently in the early or absentee voter material prepared by the Secretary of State.”

Guidance re: Early Voter Absentee Ballots

See [the Secretary of State's 2016 Election Procedures](#):

Appendix H, "Defective Ballot Envelope" (pg. 40):

- During Election Day, place defective ballots in a defective ballot envelope with a note clipped to each ballot explaining why it is defective.
- "These ballots can be examined during a recount but should not be counted."
- Instructions to County Clerk in Recount: "DO NOT COUNT the votes on the ballots that are in this envelope—Vermont law provides that the votes on these defective ballots cannot be counted."

Guidance re: Early Voter Absentee Ballots (cont.)

Portion of Oct. 7, 2016 Elections Bulletin email
from Secretary of State's Office to Town Clerks:

2. **Return of Absentee ballots:** when the General Election ballots are returned, the law contains four instances when the ballots should be considered defective:

- a. The person is not qualified to vote or has already voted;
- b. The affidavit on the envelope is insufficient;
- c. The certificate is not signed; or
- d. "the voted ballot is not in the voted ballot envelope".

These are the only reasons why a ballot should be considered defective. If so, the ballot is marked defective and the votes are not counted. If the ballot is in the certificate envelope but the envelope is not sealed, it is our opinion that the ballot should be counted. The law does not require the envelope to be sealed, and moreover, we are aware that because some of the envelopes you have are getting rather old, they are often difficult or impossible for the voter to seal.

See 17 VSA 2547 (bold added for emphasis):

"§ 2547. Defective ballots

If upon examination by the election officials it shall appear that **the early or absentee voter is not legally qualified to vote, or has voted in person, or that the affidavit on any envelope is insufficient, the certificate is not signed, or the voted ballot is not in the voted ballot envelope, . . . such envelope shall be marked "defective,"** and the ballots inside shall not be counted and shall be returned in the unopened envelope to the town clerk in the manner prescribed by section 2590 of this title. The provisions of this section shall be indicated prominently in the early or absentee voter material prepared by the Secretary of State."

Potential Options

Potential Committee Options in Judging Orange-1 Election:

- Reach decision based on currently-scheduled witnesses
- Conduct a committee investigation, which may include more testimony
- Conduct your own recount
 - [17 V.S.A. § 2590\(c\)](#) – regarding security of election materials after an election – provides that ballot bags and containers shall not be removed or tampered with in any way, except under court order, “or by order of any authorized committee of the General Assembly.”