



**VERMONT HOUSE OF REPRESENTATIVES**

CLERK OF THE HOUSE

**Memorandum**

To: House Committee on Government Operations and Military Affairs  
From: BetsyAnn Wrask, Clerk of the House  
Date: Wed., Jan. 15, 2025  
Re: Vt. Const. Ch. II, § 14 House authority to judge member elections

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***I. Introduction***

In accordance with statutory law,<sup>1</sup> your committee has been referred a petition for the House to judge the Bennington-1 House election and a corresponding [Attorney General report](#).

In the [Vermont Constitution](#), Ch. II, § 14 provides that the Representatives of the House “shall have power to . . . judge of the elections and qualifications of their own members . . .”<sup>2</sup>

We know from the 1983 Vermont Supreme Court case [Kennedy v. Chittenden](#)<sup>3</sup> that this constitutional provision “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.”<sup>4</sup>

And we turn to Vermont Supreme Court caselaw to understand the House’s constitutional authority because in the checks and balances built into the separation of powers among the three branches, “it is the province of the court to decide whether Vermont’s laws comply with the State Constitution”<sup>5</sup>; “[i]t is the function of the courts to

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<sup>1</sup> [17 V.S.A. § 2605](#) provides the process for a House candidate to petition the House to exercise its constitutional authority to judge a member’s election.

<sup>2</sup> The Vermont Senate is provided the similar authority to judge its members’ elections in Vt. Const. Ch. II, § 19.

<sup>3</sup> [Kennedy v. Chittenden](#), 142 Vt. 397 (1983).

<sup>4</sup> [Id.](#) at 399.

<sup>5</sup> [Brigham v. State](#), 179 Vt. 525, 528 (2005).

maintain constitutional government”<sup>6</sup>; and the Supreme Court of Vermont is the “final interpreter of the Vermont Constitution.”<sup>7</sup>

The Court’s holding in Kennedy v. Chittenden in interpreting the House’s constitutional authority to “judge member elections” is similar to the Court’s interpretation of the House’s authority in Vt. Const. Ch. II, 14 to “judge member qualifications”: In Brady v. Dean,<sup>8</sup> the Court similarly held that “where the state legislature is made the judge of qualifications of its members by a provision of the state constitution, the legislature has the sole authority to do so, and courts must refrain from interfering in that determination.”<sup>9</sup>

In other words, because Vt. Const. Ch. II, § 14 provides the House with the authority to judge its members’ elections and qualifications, that House authority is *exclusive*, meaning, no other entity controls it. This is a canon of constitutional construction is known as *expressio unius est exclusio alterius*—or, the expression of one thing is the exclusion of any alternative—which means that when the Constitution declares a thing to be done in a particular manner or way, it is necessarily implied that it shall not be done in any other way.<sup>10</sup> The House’s authority to judge this Bennington-1 House election is the House’s alone.

Note also that this Vermont legislative authority is similar to each U.S. congressional chamber’s authority to “be the Judge of the Elections, Returns and Qualifications of its own Members” as set forth in U.S. Const. Art. 1, § 5. And it’s a power that other state constitutions provide to their legislative chambers.

## ***II. Overview of Kennedy v. Chittenden***

In the 1982 general election for the House Chittenden-6-2 district, Candidate Chittenden received 788 votes to Candidate Kennedy’s 783. In Kennedy’s requested recount, the recount appeared to confirm Chittenden’s narrow victory, but Kennedy thereupon used prior statutory law to contest Chittenden’s election in Superior Court on the basis of asserted checklist irregularities, and after a hearing, the Superior Court issued a judgment order invalidating the general election results and ordered a new election.<sup>11</sup>

That Superior Court order resulted in no candidate receiving a certificate of election and therefore, no Representative being seated for the District on Day 1 of the 1983 Legislative Session (Jan. 5, 1983).

Later in the month on Jan. 21, 1983, on appeal in Kennedy v. Chittenden, the Vermont Supreme Court vacated the Superior Court order as an unconstitutional violation of both legislative and judicial power, holding that the Superior Court did not

<sup>6</sup> C.O. Granai v. Witters, Longmoore, Akley & Brown, 123 Vt. 468, 470 (1963).

<sup>7</sup> State v. Read, 165 Vt. 141, 153 (1996).

<sup>8</sup> Brady v. Dean, 173 Vt. 542 (2001).

<sup>9</sup> Id. at 544-545.

<sup>10</sup> See Opinion of the Judges of the Vermont Supreme Court on the Constitutionality of “An Act Providing for Soldiers Voting”, 37 Vt. 665, 672 (1865).

<sup>11</sup> Kennedy v. Chittenden at 398.

have jurisdiction to adjudicate a challenge to a legislative election, nor did the Legislative Branch have authority to delegate that exclusive legislative power to the Judicial Branch.

To summarize, the Supreme Court held that the prior statutory law purporting to confer to the Superior Court general jurisdiction to hear and determine matters relating to elections and fashion appropriate relief—and Superior Court’s application of it to this legislative election by vacating the general election results and ordering a new election—violated separation of powers because [Vt. Const. Ch. II, § 14](#) provides the House with the exclusive authority to judge its members’ elections and qualifications, and the applicable statutory law therefore was an improper delegation of legislative powers to the Judicial Branch; and also because the Vermont Constitution requires that judicial decisions lead to a final, enforceable result that is not merely informative or advisory as described in [In re Constitutionality of House Bill 88](#), 115 Vt. 524 (1949).

Accordingly, a subsequent Superior Court order dated Jan. 24, 1983 certified the Dec. 7, 1982 recount results (Chittenden 788; Kennedy 783); Rep. Chittenden was seated on Jan. 25, 1983; and the House proceeded with its exclusive constitutional authority to judge this member’s election upon Ms. Kennedy’s petition.

### *III. Subsequent Conforming Statutory Corrections*

In light of this Vermont Supreme Court holding, the General Assembly has amended statutory election law regarding contested elections to clarify the chambers’ exclusive authority to judge their member elections.

Now, in [17 V.S.A. § 2603](#) (contest of elections), the law allows individuals to contest an election in Superior Court, “other than for the General Assembly[.]”<sup>12</sup> Conversely, contested House elections are covered by [17 V.S.A. § 2605](#) (House of Representatives) and contested Senate elections are covered by [17 V.S.A. § 2606](#) (Senate). Each of those two statutes provide a process for a candidate or specified voters to submit a written request to the Secretary of State for the relevant chamber judge a legislative election, and require the Attorney General to prepare a report for the chamber’s consideration.

This was the statutory process used for the contested House Bennington-1 district that was referred to your Committee.

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<sup>12</sup> Note this statute’s authority provided to the Superior Court for [non-legislative elections](#). Subsection (e) provides as follows: “After hearing, the court shall issue findings of fact and a judgment, which shall supersede any certificate of election previously issued. If the court finds just cause, the court shall grant appropriate relief, which may include ordering a recount, or ordering a new election. If during the hearing the court receives credible evidence of criminal conduct, the court shall order a transcript of all or part of the testimony to be forwarded to the proper State’s Attorney. If a new election is ordered, the court shall set a date for it, after consulting with the Secretary of State; in ordering a new election, the court shall have authority to issue appropriate orders, either to provide for special cases not covered by law, or to supersede provisions of law that may conflict with the needs of the particular situation.”

#### ***IV. History of Vermont Contested Legislative Elections***

This [Sampling of Past Contested Legislative Elections](#) (Clerk; 8/29/23) provides summaries of some of the more recent contested legislative elections, and at the end provides a list of all of the currently-known contested legislative elections in Vermont history, based on a review of journals and other historical records.

Here are some notes on reviewing this Sampling doc:

1. It has been House custom to seat on Day 1 the member who is certified the winner of the general election in cases where there has been no recount, or to seat the recount winner, in cases of a recount (*except* in the case of 1982's Chittenden, Kennedy election, as described above).
2. The Sampling attempts to describe the basis for each contested legislative election petition. Issues include ballot security, checklist irregularities, and recount procedures.
3. In some cases, the chamber has conducted its own recount. Legislative recounts are **highlighted**.

#### ***V. Conclusion***

This memorandum is intended to provide some baseline information to assist your Committee in performing its role in recommending to the House how the House should exercise its exclusive constitutional authority to judge the Bennington-1 election. Please let me know if there is any further information I can provide to assist you along the way. Thank you.