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. 22, 2025

Re: References re: constitutional scope of House authority to judge member elections

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I. Introduction

As a follow-up to our previous discussion, this memorandum provides citations to caselaw regarding the constitutional authority of the House to judge member elections specifically and of legislative acts generally, and provides references regarding contested elections in other contexts.

II. Judging House Elections is Exclusively a House Authority in Accordance with the Political Question Doctrine

The Vermont Constitution in Chapter II, § 14 provides that the Representatives of the House "shall have power to . . . judge of the elections and qualifications of their own members . . ." We know from the 1983 Vermont Supreme Court case Kennedy v. Chittenden[1] 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."[2]

Again in 2001 in Brady v. Dean,[3] in interpreting the Vt. Const. Ch. II, § 14 authority of the House to judge its members' qualifications, the Court stated that "[t]his and numerous other state courts have held that where the state legislature is made the judge of the 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," calling it the chamber's

[1] Kennedy v. Chittenden, 142 Vt. 397 (1983),
[2] Id. At 399.
[3] Brady v. Dean, 173 Vt. 542 (2001).

"exclusive constitutional prerogative[.]"[4] "We further conclude that, as a policy matter, a proper regard for the independence of the Legislature requires that we respect its members' personal judgments concerning their participation in matters before them."[5]

As the Court stated—on both the federal and state level—this principle of judicial restraint when a separate branch exercises its exclusive constitutional authority is called the "Political Question Doctrine":

> "'Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or . . . the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.'"[6]

III. The Only Thing that Limits Legislative Authority is the Constitution, and Courts Presume Legislative Acts are Constitutional

The only thing that limits the legislative authority is the Constitution. "The Constitution is not a grant of power to the Legislature, but it is a limitation of its general powers. The Legislature's power is practically absolute, except for constitutional limitations."[7]

"The standards for interpreting constitutional language and meaning, though related, are not the same as for ordinary statutes. Canons of construction, if applied, must be used more cautiously and sometimes differently. This is so because a constitutional provision, unlike a statute, usually operates to limit or direct legislative action . . . *It is of great importance to remember that, since the purpose of any constitutional enactment is to delineate the framework of government, the working details are frequently left, as here, for legislative definition.* Interpretation must, therefore, not be so narrow as to present an obstacle to that function. More than one pattern of working details may well be possible and constitutional [emphasis added]."[8]

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[4] Brady at 544–545 (citing Kennedy v. Chittenden, 142 Vt. 397, 399–400 (1983) ("The Constitution 'places the final determination of the election and qualifications of its members exclusively in the House of Representatives,' rendering any attempted judicial intervention ineffective and violative of separation of powers.")).

[5] Id. at 545.

[6] Brady at 544 (citing SCOTUS' Baker v. Carr, 369 U.S. 186, 217 (1962)).

[7] Rufus v. Daley, 103 Vt. 426, 154 A. 695, 697 (1931). *See also* City of Burlington v. Central Vermont RY Co., 82 Vt. 5, 71 A. 826, 827 (1909) ("[F]or the law is, by all the cases, that, except where there are constitutional limits upon the Legislature, it is practically absolute.") and Dresden School District v. Norwich Town School District, 124 Vt. 227, 231 (1964) ("Our constitution is, in powers not surrendered to the Federal government, the single great restraint on the autonomy of the Legislature as the repository of the law-making power of the people.").

[8] Peck v. Douglas, 148 Vt. 128, 132 (1987).

"[I]t is not for this Court to pass upon the propriety of the legislative election to exercise [its regulatory] power, nor to question the wisdom of it. Our function is only to determine whether or not the manner or its exercise meets constitutional standards and violates any fundamental rights."[9]

When the Judicial Branch is analyzing the General Assembly's exercise of its legislative authority, it presumes the Legislative Branch acted constitutionally. "[T]here is a presumption of a constitutional purpose on the part of the Legislature, a presumption as strong, perhaps, as any that is not conclusive . . ."[10] This has been stated repeatedly.[11]

"Every presumption is to be made in favor of the constitutionality of an act of the Legislature, and it will not be declared unconstitutional without clear and irrefragable evidence that it infringes the paramount law."[12]

IV. Mason's Manual of Legislative Procedure

Mason's Manual of Legislative Procedure, adopted by the House to supplement its rules pursuant to House Rule 88, reiterates the principles of the Political Question Doctrine in regard to a chamber's exclusive authority to judge member elections in § 560 (each house of a legislature is the judge of the election and qualifications of its members).

Note specifically *Mason's* § 560-14: "The authority of a house of a legislature to pass upon its membership is a continuing power, and the question of the election and qualifications of members is never finally decided, in the sense that a decision is conclusive upon the house, until final adjournment. A member at any time may be seated or unseated upon the same facts."

Note also the hierarchy of rules of legislative procedure as described in *Mason's* § 4-2:

(1) Constitutional provisions and judicial decisions thereon.
(2) Adopted rules.
(3) Custom, usage, and precedents.
(4) Statutory provisions.
(5) Adopted parliamentary authority.
(6) Parliamentary law.

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[9] State v. Giant of St. Albans, 128 Vt. 539, 544 (1970).
[10] Sabre v. Rutland R. Co., 86 Vt. 347, 85 A.693, 700 (1913).
[11] *See, e.g.*, Badgley v. Walton, 188 Vt. 367, 376–77 (2010) ("We start by emphasizing that statutes are presumed to be constitutional . . . and are presumed to be reasonable. We have often observed that the proponent of a constitutional challenge has a very weighty burden to overcome (other citations omitted).").
[12] Village of Waterbury v. Melendy, 109 Vt. 441, 447 (1938) (other citations omitted).

V. Examples in Other Contexts

In contested legislative elections, the legislative chamber's remedy is dependent upon the specific issues raised in the petition for the chamber to judge a member's election. For example, for issues regarding the counting of ballots, the remedy may be for the chamber to conduct its own recount.

Here, in the Bennington-1 contested election, the issue raised is in regard to checklist irregularities resulting in voters voting in the wrong district enacted by law.

What follows are examples of potential remedies in other contexts.

1. From the Sampling of Past Contested Legislative Elections:

a. 1973 Senate CHI (Smith, Fayette), pg. 11 (failure to secure ballots between general election and recount, resulting in judge overseeing recount to refuse to certify recount results): Suggested *referendum* (not adopted). *See* 1/12/73 Senate Journal, pg. 37 *et seq.*

b. 1983 House CHI-6-2 (Chittenden, Kennedy), pgs. 7–8 (voter qualifications—18 voters on checklist did not reside in legislative district; 10 of them voted, which was greater than the 5-vote margin of victory): Initial Superior Court order—later found to be an unconstitutional in SCOV's Kennedy v. Chittenden as a violation of separation of powers—vacated the general election results for the district and ordered a new election.

2. Supreme Court of Vermont (SCOV) in the context of alleged improper municipal legislative body influence on the vote.

In the 1997 SCOV case Putter v. Montpelier Public School System,[13] a taxpayer challenged the validity of a city election in which voters approved a school system's operating budget and bond proposal, alleging that the school board spent public funds to promote passage of the election proposals, and sought to have the election invalidated. The SCOV refused to do so, stating in part as follows:

> 'Voiding an election and ordering a new one represents one of the more extreme remedial measures available to a court sitting in equity . . . courts have frequently declined to order a new election where the governmental misconduct, considered in light of all the circumstances, did not warrant so extraordinary and destabilizing a remedy . . .'[14,15]

[13] Putter v. Montpelier Public School System, 166 Vt. 463 (1997).
[14] Id. at 467-468.
[15] The SCOV relied upon Putter to reach the same holding in the subsequent and similar Daims v. Town of Brattleboro, 148 A.3d 185 (2016).

3. **Federal Congressional authority to judge member elections.** The U.S. Constitution provides to each chamber of Congress the similar exclusive authority to judge member elections as the Vermont Constitution provides to the House.

   U.S. Const. Art. I, § 5, cl. 1 provides as follows: "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members[.]"

   Here are some examples of how each chamber has exercised that authority:

   a. *U.S. House of Representatives*: *See* "Procedures for Contested Election Cases in the House of Representatives," Congressional Research Service (Oct. 18, 2016). *See esp.* Remedies Available on pg. 16.

   b. *U.S. Senate*: *See* "Closest Election in Senate History," NH, Wyman, Durkin (1975). *See also* full senate.gov synopsis here.

VI. Conclusion

This memorandum is intended to assist the Committee in understanding the full scope of the House's authority judge the Bennington-1 election. As described in both Vermont Supreme Court caselaw interpreting the House's Vt. Const. Ch. II, § 14 authority to judge its members' elections and qualifications, as well as in Congress' administration of its similar U.S. Const. Art. I, § 5, cl. 1 authority for each of its chambers to judge its members' elections, the remedy options are broad and are only for the chamber to decide. Please let me know if there is any further information I can provide to assist you along the way. Thank you.