

**SAMPLING
OF
PAST
CONTESTED
LEGISLATIVE
ELECTIONS**

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

2011

House: Windsor-Orange 1 District

Buxton/Ainsworth

General Election: Buxton 882; Ainsworth 881

Recount: Buxton 881; Ainsworth 880

Issues raised in petition: voter qualifications; use of provisional ballots;
security of ballots

Special Report of the Committee on Government Operations:

Buxton duly elected and qualified

House vote: Report agreed to

Journal of the House

Friday, January 14, 2011

Rep. Leriche of Hardwick presiding.

At nine o'clock and thirty minutes in the forenoon the Speaker called the House to order.

Devotional Exercises

Devotional exercises were conducted by Rev. David Newlun of Morningstar Worship, Barre, VT.

Communication from Secretary of State

"Date: January 13, 2011

To: Speaker of the House Shap Smith
Clerk of the House Donald Milne

Gentlemen:

Enclosed please find the Attorney General's finding on the question of the seating of the member from the Windsor-Orange 1 District, in accordance with the requirements of 17VSA 2605.

Yours truly,
James C. Condos"

Communication from Michael McShane Assistant Attorney General

"December 28, 2010

Deborah Markowitz
Secretary of State
26 Terrace Street
Montpelier, VT 05609-1101
Re: Windsor- Orange 1 Election

Dear Secretary Markowitz:

Pursuant to 17 VSA Section 2605(b) you have requested that this Office look into the recent election in General Assembly District Windsor-Orange 1. The result of the General Election showed that Ms. Buxton received 882 votes and Mr. Ainsworth 881. A recount was conducted and the recount showed 881 votes for Ms. Buxton and 880 for Mr. Ainsworth.

By letter dated December 2, 2010 Mr. Ainsworth requested an investigation. The request alleges three grounds:

1. Voters living outside the Representative District voted in the General Election.
2. Provisional Ballots were not used by the towns as required by 17 VSA § 2555 and § 2556.
3. Ballots were lost or misplaced in the town of Tunbridge between the election night count and the recount.

By letter dated December 6, 2010, this Office requested details from Mr. Ainsworth concerning his complaint. By letter dated December 15, 2010, he provided a list of five individuals who voted but were believed to reside outside of the representative district. The letter offered no explanation or basis for the belief that the five voters listed resided outside of the representative district. The letter also listed four voters, believed to have registered in the Town of Royalton after the deadline. (Three of the four voters who were identified as having registered late were among the five whose residence was also questioned.)

Under Section 2605(b) this Office is required to prepare for you an opinion on the law and the facts.

The first allegation is resolved by the statutory process for challenging the residence of voters.

In Vermont, eligible voters are identified by creation and maintenance of voter checklists; 17 VSA Chapter 43. There is a very specific statutory framework that is designed to regulate voter checklists. Included in that framework is a process for removal of voters from a checklist. A voter may be removed from a checklist if the voter is no longer a resident of the voting district. However, in all but the most obvious circumstances, removal may not occur without compliance with a number of provisions designed to prevent voters from being erroneously removed from checklists.'

Boards of civil authority are required to meet at regular intervals to review the most recent checklist and consider "for each person whose name appears on the checklist, whether that person is still qualified to vote"; 17 VSA Section 2150(c). If the board is unable to immediately

(Footnote 1. The town clerk may remove a voter from the checklist if that voter has been placed on the checklist in a different district or is deceased, as evidenced by a death certificate. 17 VSA Section 2150(a).)

determine that a person is still qualified to vote in the district, the board is directed to attempt to determine the voter's status; 17 VSA Section 2150(d) (1). In that effort, the statute suggests that the board consider official and unofficial public documents including "telephone directories, city directories, newspapers, death certificates, obituary (or other public notice of death), tax records, and any checklist or checklists showing persons who voted in any election within the last four years." if after making the inquiry described above, the board is unable to locate the voter or if the inquiry reveals facts indicating that the voter may no longer be eligible to vote in the district, the board shall then send written notice to the voter at the last known address, asking the voter to verify his or her current eligibility to vote in the district; 17 VSA Section 2150(d) (3). There are a number statutory of requirements concerning the written notice, including that the voter be informed that if the form is not returned, a written affirmation of the voter's address will be required before the voter is permitted to vote again.

If the voter responds to the notice by confirming that he or she no longer lives in the district, the board shall then remove the voter from the checklist; 17 VSA Section 2150(d) (4). If the voter fails to response to the notice, the board may remove the voter's name from the checklist. However, the board may not do so until the day after the second general election following the date the notice was sent.

The above described statutes provide an orderly process to assure that persons on the checklist are qualified to vote in a particular municipality or district. It is a process that is intended to occur before Election Day. Checklists are presumed to be conclusive, and only under limited circumstance may the eligibility of a person on a checklist be challenged on Election Day; 17 VSA Section 2149. Residence is not among the issues that may be used to challenge a voter on Election Day. That is further evidence that it is an issue that should be raised before the election.

The second allegation was expressed in Mr. Ainsworth's first letter as a failure to use provisional ballots. The second letter clarified that the concern is that four voters were added to the checklist after the deadline to register had passed.² The assumption apparently is that if a voter was not on the checklist by the registration deadline, the only means for that voter to participate in the election would be by provisional ballot. That assumption is not accurate.

In cases in which an applicant has failed to provide any of the information required by the application form, the town clerk shall notify

the applicant that the form was incomplete and the applicant may provide the information "on or before the date of the election"; 17 VSA § 2144b (a).

We have interviewed the Royalton Town Clerk concerning the four voters identified as having been added to the list after the registration deadline. We will refer to the voters by initials. The facts are as follows for each voter:

1) S.B. The voter filed an application dated October 20, 2010. The application was incomplete because it lacked a Social Security number and Vermont Driver's License number. Efforts to contact the voter by phone were unsuccessful. The voter did appear on Election Day; he filled out and signed a Voter Affirmation Form for Addition to the Voter Registration Checklist (Voter Affirmation Form). The completed form includes all of the required information, including a specific street address in Royalton. He was added to the checklist and allowed to vote.

2) J.J. The voter and his spouse had previously been on the Royalton checklist. They had left their former residence and been removed from the checklist. The spouse was added to the checklist again as a result of information provided by the Department of Motor Vehicles that showed she had again become a resident of Royalton. J.J. appeared with his spouse on Election Day and filled out a Voter Affirmation Form. He was added to the checklist and allowed to vote.

3) L.S. The voter claimed to have filled out and signed a voter registration form prior to the final registration date during a voter registration drive that was conducted at Vermont Law School. A number of registration forms which had been collected at the Vermont Law School drive were delivered to the Town Clerk's Office prior to the registration deadline. However, L.S.'s form could not be found. On November 1, 2010 L.S. appeared at the Clerk's Office, filled out another registration form as well as a Voter Affirmation Form, and voted early.

4) S.H. voted at the polls on Election Day. She stated that she had filed a voter registration form. Her voter registration form (application to be placed on check list) could not be found, She filled out a Voter Affirmation Form and was allowed to vote.

(Footnote 2. The deadline for acceptance of applications to add names to the checklist is 5:00 PM on the Wednesday preceding the day of the election. 17 VSA § 2144(a).)

None of the four voters mentioned above requested a provisional ballot. All filled out Voter Affirmation Forms. All took the voters oath. All listed a specific address within the Town of Royalton as their principal dwelling place and affirmed under penalty of perjury that the information provided was accurate. In each case the procedure outlined in 17 VSA §2144b was followed.

The Third allegation is that ballots were lost or misplaced in the Town of Tunbridge between election night and the recount. The basis of this allegation is the fact that on election night, a total of 651 votes were counted in Tunbridge in the Windsor/Orange District 1 race and the recount totaled 649.

We have interviewed the Tunbridge Town Clerk who presided at the vote count on election night. The ballots in Tunbridge are hand counted. On election night both the number of voters on the checklist checked as having voted and the tally showed 651. After the count was concluded the counted ballots were placed in the ballot bag and were sealed by the clerk. The clerk then transported the bag from the Town Hall at which the voting and count had taken place to the Town Office. At the Town Office the bag was placed in the vault. The following morning the ballot bag was tagged and the Official Return of Votes was sent to the Office of Secretary of State. The ballot bag was returned to the vault in the Town Office and remained there until it was transported to the Windsor County Building for the recount.

The ballot bag was transported from the Tunbridge Town office to the Windsor County building in Woodstock by two town officials, one a Democrat and one a Republican. When the ballot bag arrived to the Windsor County Building it was locked in the Probate Court vault. On the day of the recount the ballot bag was removed from the vault and was unsealed by the Deputy County Clerk in the presence of four observers. The bag and seals were intact. A hand count was done by twenty counters, in the presence of the Deputy Clerk and four observers. The total number of votes counted from Tunbridge in the Windsor/Orange District 1 race was 649. The break down was Buxton 345, Ainsworth 295, write-in candidate 1, and 8 spoiled ballots. When added to the recount total from the Town of Royalton, the complete recount total was Buxton 881 and Ainsworth 880. Consequently, the recount did not change the result of the general election.

17 VSA § 2605 and Vermont Constitution Ch. II § 14 provide little guidance concerning the criteria to be used by the House of

Representatives in judging the qualifications of its members. However, in this election the evidence shows that proper statutory procedure was followed.

Four persons were added to the checklist in Royalton on Election Day or in the week immediately preceding the election. As outlined above, proper statutory procedure was used in all four cases. The recount of the Tunbridge ballots totaled two less than the count in the General Election. There is no explanation for the difference. However, the ballots were properly sealed and stored after the count on Election Day. The ballots were stored in a secure place and were transported from the Town Office to the County Office by a Democratic municipal office holder and a Republican municipal officer holder. It has been verified that the seals and bags were intact when they were open for the recount. Although the totals differed by one vote per candidate, the recount and the general election produced the same result.

Very truly yours,

/s/Michael McShane
Assistant Attorney General"

Rules Suspended; House Bills Introduced

House bills of the following titles were severally introduced. Pending first reading of the bills, on motion of **Rep. Komline of Dorset**, the rules were suspended and the bills were read the first time by number and referred or placed on the Calendar as follows:

H. 39

By Reps. Grad of Moretown, Bouchard of Colchester, Fisher of Lincoln, French of Shrewsbury, Howrigan of Fairfield, Jerman of Essex, Koch of Barre Town, Moran of Wardsboro, Partridge of Windham, Pugh of South Burlington, Ram of Burlington, Savage of Swanton, Shand of Weathersfield, Stevens of Waterbury, Sweaney of Windsor and Wizowaty of Burlington,

House bill, entitled

An act relating to advance directives for service members;

To the committee on General, Housing and Military Affairs.

H. 40

By Rep. Shand of Weathersfield,

House bill, entitled

An act relating to executive branch fees

Was taken up and pending second reading of the bill, on motion of **Rep. Ancel of Calais**, action on the bill was postponed until Tuesday, February 8, 2011.

Action on Bill Postponed

H. 46

House bill, entitled

An act relating to youth athletes with concussions participating in athletic activities

Was taken up and pending the reading of the report of the committee on Education, on motion of **Rep. Gilbert of Fairfax**, action on the bill was postponed until Wednesday, February 9, 2011.

Special Report of the Committee on Government Operations Agreed To

Special Committee Report on the request of David Ainsworth
for the House to judge the election and qualifications
of its member in House District Windsor-Orange-1

Representative Sweaney of Windsor, for the Committee on Government Operations, to which has been referred the request of David Ainsworth for the House to judge the election and qualifications of its member in House District Windsor-Orange-1 submits the following report:

The Committee on Government Operations considered the request of David Ainsworth for the House to judge the election and qualifications of its member in House District Windsor-Orange-1 and finds that Representative Sarah E. Buxton was duly elected and is qualified to represent House District Windsor-Orange-1 as a member of the House of Representatives.

Thereupon, **Rep. Sweaney of Windsor** moved to accept the report, which was agreed to.

Remarks Journalized

On motion of **Rep. Turner of Milton**, the following remarks by **Rep. Sweaney of Windsor** were ordered printed in the Journal:

“Mr. Speaker,

Your HGO committee has reached the conclusion as stated in today's calendar that Ms. Sara Buxton from Windsor-Orange 1 was dully elected and is qualified to represent the Windsor-Orange-1 district.

The issue before us came about as a result of the election of the office for representative in the Windsor-Orange-1 district.

The process began with the election night vote count of a win by one vote for Sara Buxton, next to be followed by a recount in Windsor district court that confirmed the one vote win.

That result was then challenged as to the validity of one of the ballots. The concern came before a judge who confirmed the validity of the ballot and the election of Ms. Buxton.

The issue then went to the Attorney General for review.

The petition from Mr. David Ainsworth questioning the validity of the elections and the response of the assistant attorney general can be found in the House Journal of Friday, January 14, 2011. The assistant attorney general's report finds that the election process was valid and confirms the election of Ms. Buxton.

The process then came to the House of Representatives since the constitution states that this body has the duty to deliberate the qualifications of its members when the question of the election is challenged.

The deliberations of the HGO committee included testimony from the assistant attorney general, the state archivist, the Director of Elections, and legislative council for the committee, the town clerks for Tunbridge and Royalton as well as the Windsor County Deputy Clerk who conducted the recount.

The committee during our deliberations found that there is no stated clear process for the House to follow in determining the qualifications of a candidate to serve when the election has been contested. Our options appear to be limited to recommendations of agreement or disagreement regarding the elections. We have discussed possible recommendations to be made to the House to consider for future like matters.

The HGO also concluded that there are possible efficiency recommendations for voting and recounts such as a standardized paper weight for both machine and hand counts thus making possible that the first recount be conducted with machines since they have proven to be more accurate than hand counting. You will hear more about this in the near future since we will be working on legislation to bring forward to the body as a whole.

Our vote was 8-3 and we hope the body will concur with our findings that Sara Buxton is qualified to serve as Representative to the Windsor-Orange-1 district. I therefore make the motion to the House that we concur with the finding of the HGO."

1997

Senate: Rutland District

Maynard/Macaulay

General Election: Maynard 10,952; Macaulay 10,934

Recount: Maynard 10,978; Macaulay 10,976

Issues raised in petition: incorrectly counted or missing votes; recount
procedures

*Resolution adopted to create special investigative committee
with authority to subpoena*

Report of Special Select Committee on Elections: Maynard duly elected and
qualified

Senate: Report accepted and adopted

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State of Vermont

Senate Chamber



Montpelier, Vermont

Senate Resolution

By Senators Shumlin, Ide, and McCormack

S.R. 5. Senate resolution relating to an investigation of the contested senatorial election for Rutland District.

Whereas, pursuant to the provisions of 17 V.S.A. §2606, the Secretary of the Senate has received a petition for relief from Thomas G. Macaulay, a candidate for the Senate from the District of Rutland, through his attorneys, the law firm of Lorentz, Lorentz & Harnett of Rutland, challenging the election and seating of Hull Maynard, as one of the Senators from Rutland District, and

Whereas, the margin of victory for Maynard Hull in securing the third and final seat in Rutland District's senatorial delegation was by a mere two (2) votes, and

Whereas, it is the sole prerogative of the Senate under Chapter II, Sec. 20 of the Vermont Constitution to decide upon the election and qualifications of its members, and, accordingly, to resolve for once and for all this election dispute, now therefore be it

RESOLVED BY THE SENATE:

That the Committee on Committees of the Senate shall appoint a special select committee on elections consisting of six senators, three of whom shall be from the majority party and three of whom shall be from the minority party, and be it further

RESOLVED: That this committee shall immediately meet, elect a chair and vice-chair, and shall examine all of the facts concerning the challenged Rutland District senatorial election, including the method of counting and recounting the ballots, the number of votes received by each candidate, and the decision of the courts in the matter, and be it further

RESOLVED: That this committee shall recommend, as soon as may be practicable, appropriate action to be taken by the Senate in resolving this election matter, and be it further

RESOLVED: That in the conduct of its investigation this committee may compel, by subpoena, the attendance of witnesses, documents and papers, may administer oaths and may use the services of the Legislative Council.

adopted a Joint Resolution of
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Senate is requested.
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overty in Vermont.

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Incurrence

following title was read and
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ears of military duty, he rose
; a position that he held with
ars on the Bennington Board
ie governance of Bennington
udential committee and for a

to the improvement of the
; being named as an honorary
and

Whereas, wishing to encourage the development of constructive activities for Bennington's youngsters, he has volunteered for many years with the local youth sports program, and

Whereas, Frank W. Snow, Jr. has been an active member and local leader in several fraternal organizations including the American Legion, the Elks and the Moose, and

Whereas, after four and one-half decades at the Department of Fish and Wildlife, he retired in November, 1996, and

Whereas, Frank W. Snow, Jr. has led an exemplary life both in his professional career and as a citizen volunteer, now therefore be it

RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES:

That the General Assembly recognizes the many accomplishments of Frank W. Snow, Jr. as a dedicated public servant to the citizens of the State of Vermont and extends best wishes to him and his family for many happy retirement years, and be it further

RESOLVED: That the Secretary of State be directed to send a copy of this resolution to Frank W. Snow, Jr.

Members Appointed to Special Select Committee on Elections

Pursuant to the provisions of S.R. 5, the President, on behalf of the Committee on Committees, announced the appointment of the following Senators to serve on the Special Select Committee on Elections:

- Senator Bartlett
- Greenwood
- Spaulding
- Costes
- Cummings
- Brownell

Petition Submitted by Thomas G. Macaulay Challenging the Election and Seating of Hull Maynard as a Senator From Rutland District Referred

The petition submitted by Thomas G. Macaulay challenging the election and seating of Hull Maynard as a Senator from Rutland District, together with the Report and Opinion from the Attorney General, were then referred to the Special Select Committee on Elections, and are as follows:

**PETITION SUBMITTED BY THOMAS G. MACAULAY
CHALLENGING THE ELECTION AND SEATING OF HULL
MAYNARD AS A SENATOR FROM RUTLAND DISTRICT**

“STATE OF VERMONT

TO THE SECRETARY OF STATE

IN RE: RUTLAND DISTRICT STATE SENATOR ELECTION

NOW COMES TOM MACAULAY, candidate for the office of State Senator in the General Election, pursuant to 17 V.S.A. §2606, and hereby makes this challenge of the election held on November 5, 1996 for Rutland District State Senator to wit;

The election of the third seat from said district which is contested between Tom Macaulay and Hull Maynard

and requests the Senate to exercise its constitutional authority to judge of the elections and qualifications of its own members. As grounds therefore the Petitioner alleges as follows:

1. As of the recount, there are only two (2) votes separating Hull Maynard and Thomas Macaulay.

2. There were at least forty (40) votes cast that are incorrectly counted or missing, which would alter the result of the elections as between Hull Maynard and Thomas Macaulay and make it impossible for a proper determination of the winner as between the two candidates.

3. Specifically, the election of November 5, 1996 and the recount contain the following irregularities:

a. Said recount was not conducted in accordance with 17 V.S.A. §2202 in that the teams were not informed of the statutory procedure set forth in §2202f. In fact, some team members understood the recount instructions from the Clerk to mean that only the team could decide the fate of questionable ballots and there was no procedure for setting aside questionable ballots for review by the court, pursuant to §2202f(c) and §2202f(d);

b. The ballot recount for several towns revealed that the ballot bags contained fewer or more ballots than were counted on election night, to wit:

i. In Clarendon, 1,200 votes were cast for President, Governor, Lieutenant Governor, Congress and all other statewide races. 3,600 votes were cast in the State Senate race. However, when the Recount Committee counted the ballots in the bags containing ballots from Clarendon, there were only 1,198 ballots to be counted. Two ballots were lost between election

night and the time of the recount.

- ii. In Castleton, a machine counted town, 1,660 ballots were counted for all statewide elections and for the State Senate race but only 1,659 ballots were in the bags containing ballots counted by the Recount Committee.
 - iii. In Rutland City, a machine counted municipality, the number of ballots cast on November 5 were different than the recount, to wit:
 - a. Ward 1 was 1,921; in the bag containing ballots counted by the Recount Committee, there were 1,924 ballots.
 - b. Ward 3A, there were 1,269 ballots counted on November 5, but the bags containing ballots counted by the Recount Committee from that Ward contained only 1,266 ballots.
 - iv. In Mendon, 575 ballots were counted on November 5; yet there were 578 ballots counted by the Recount Committee from the bags containing ballots from the Town of Mendon.
 - v. In Pawlet, 609 ballots were counted on election night and 610 ballots were counted by the Recount Committee.
- c. The Clerk's Summary Sheet Rutland County Senate Recount indicates that several ballots were spoiled. If the ballot is spoiled, there must be three (3) votes for each ballot that has been determined to be spoiled, as each ballot has three potential votes to be cast in the state Senate race. A ballot cannot be partially spoiled. Therefore, in any town in which the Recount Committee reports the number of spoiled ballots as any total other than zero or a multiple of three, there is an error. The Clerk's Summary Sheets show spoiled ballots from four towns and one city ward that are not multiples of three: Pawlet, Pittsford, Wallingford, Wells and Rutland City Ward 3B. See attached Summary Sheets.
- d. On election night, in several towns there were more ballots counted than the number of voters checked off on the entrance checklist, to wit:
- i. In Fair Haven 1,131 voters were checked off; 1,132 ballots were counted on election night.
 - ii. In Ira, 189 voters were checked off; 190 ballots were counted.
 - iii. In Mount Holly, 601 voters were checked off; 602 ballots were counted.

- e. Among the many bags containing ballots from the municipalities around Rutland County, two bags were unsealed when delivered to the County Clerk, despite the clear requirements of state election law that all bags be adequately sealed immediately after the election. Neither of these bags, nor the information contained in them, were set aside during the recount, as required by 17 V.S.A. §2602c(d). Of the two bags in question, one came from the Town of Proctor and one from the Town of Wallingford.
- f. During the recount, one team reported to the County Clerk that seven (7) different ballots in one lot of fifty (50) had the same handwriting for write-in candidates. These ballots were not set aside, as they should have been pursuant to 17 V.S.A. §2602f(c).
- g. According to 17 V.S.A. §2062b, an observer team is to be designated and perform only those functions established under this section for that team and not the simultaneous function of counting. The County Clerk organized the teams so that one of the county teams was the observer team. She advised that this action was taken pursuant to a judge's ruling that the observer team did not have to be a separate team of four (4).

4. Pursuant to 17 V.S.A. §2602j(c), "Candidates and their attorneys shall be given the opportunity to present evidence to the Court relating to the conduct of the recount . . ." In this instance, the Clerk's Certificate was presented to the judge on December 12, 1996, the same day as the judge's order certifying the election results. Candidate Macaulay was, therefore, not given a reasonable opportunity to present evidence to the Court relating to the conduct of the recount prior to the issuance of the Court's Judgment Order.

5. For the above reasons, the irregularities and inconsistencies in the general election and the subsequent recount indicate that there is a forty (40) vote discrepancy and only a two (2) vote victory margin. Therefore, it is impossible for the voters' wishes regarding the election of the third State Senator for Rutland County to be known.

WHEREFORE, Petitioner requests of the Senate as follows:

1. That neither candidate Hull Maynard nor candidate Tom Macaulay be seated as Senator from Rutland District until the remaining senators elected in uncontested elections shall have exercised their authority to judge of said election pursuant to 17 V.S.A. §2606 and Chapter II, §19 of the Vermont Constitution.
2. That the Senate declare it impossible for the voters' wishes regarding the election of the third State Senator for Rutland County to be known.
3. That the Senate order a recessed election for the third State Senator from the Rutland District to determine whether Tom Macaulay or Hull Maynard shall be seated.

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DATED at Rutland, Vermont this 27th day of December, 1996.

/s/Thomas Macaulay

Thomas Macaulay"

REPORT AND OPINION OF ATTORNEY GENERAL

Pursuant to the provisions of 17 V.S.A. §2606, the Office of the Attorney General filed a report and opinion in response to the Macaulay petition with the Secretary of the Senate, as follows:

"January 7, 1997

Honorable Robert H. Gibson
Secretary of the Senate
115 State St.
Drawer 33
Montpelier, VT 05633-5501

Re: Petition of Thomas G. Macaulay

Dear Mr. Gibson:

On December 30, 1996, the Secretary of State provided this Office with notice of a Petition filed by Thomas G. Macaulay (Petitioner) seeking to invoke the constitutional authority of the Senate to judge the elections and qualifications of its own members. Vt. Const. ch. II, §19. Pursuant to 17 V.S.A. §2606(b), it is the responsibility of the Attorney General to investigate the petition and deliver a report to the Senate at least 10 days before the General Assembly convenes.¹

Under the Vermont Constitution, the Senate is the final arbiter of the election and qualifications of its members. Vt. Const. ch. II, §19. In that role, the Senate may wish to consider whether the Petition was timely filed. Should the Senate decide to review the underlying factual allegations it will see that the Petition asserts that there were a variety of problems with the election and the recount. Many of the alleged discrepancies have reasonable explanations, while a few do not. From our review of the available facts, we do not believe that there is any pattern of election misconduct.

RECOUNT PROCEDURE

A recount is commenced by filing a petition with the Superior Court pursuant to 17 V.S.A. §2602. The Court then obtains the ballots from the town and city clerks and secures them.

¹ Unfortunately, we were not able to respond within the statutory period because we did not receive the Petition until December 30, 1996. We have made every effort to expedite the review.

Pursuant to 17 V.S.A. §2602a, the Superior Court clerk contacts the chairs of the relevant county political committees and asks for a list of nominees to serve on the recount committee. The candidates are also contacted and asked for a list. The Court then sets a date for the recount and names the committee.

At the outset, the clerk explains the responsibilities of the committee and assigns each member of the committee to a team. 17 V.S.A. §2602b and §2602c. Ballots are counted according to the procedures spelled out by the statutes. 17 V.S.A. §2602c - §2602h. During the course of a recount any member of the committee may object to a questionable ballot and that ballot is brought before the Superior Court Judge for final determination. 17 V.S.A. §2602f. A candidate may file an objection to the conduct of the recount during the course of the recount, or at any time prior to certification of the recount results by the Superior Court. 17 V.S.A. §2602j.

When the recount is completed, the clerk certifies the outcome to the Judge who then issues a final judgment certifying the results. 17 V.S.A. §2602h and §2606. Once the court order has been issued, a candidate for the Legislature may file a petition with the appropriate body of the General Assembly if he, or she, wishes to contest the results of the election or recount. 17 V.S.A. §2605 and §2606; *Kennedy v. Chittenden*, 142 Vt. 397 (1983).

FACTUAL BACKGROUND

The general election was held on November 5, 1996. At that time there were six candidates for the three Rutland County Senate seats. On the night of the election, John H. Bloomer, Jr. and Cheryl M. Hooker received the first and second highest vote totals. Hull Maynard received the third highest total with 10,952 votes and Thomas Macaulay received the fourth highest total with 10,934 votes. The canvass meeting was held on November 12, 1996, and Mr. Macaulay filed a petition for a recount on November 14, 1996.

After receiving the petition, County Clerk Gay R. Johnson, obtained the ballots from the various Town Clerks with the assistance of the State Police and secured them in the County vault. She then arranged for the appointment of the necessary recount committee and arranged for a place to conduct the recount.

The recount itself commenced on December 2, 1996, and ran until December 11, 1996, a period of eight working days. No challenge to the recount procedure was made by either of the candidates during the course of the recount and the Rutland Superior Court certified the recount results in a Judgment Order dated December 12, 1996.² In that Order, Judge Alden Bryan determined that John H. Bloomer, Jr., Cheryl M. Hooker and Hull Maynard were elected as the State

² A question has been raised about the form of the Court's certification. It is the view of this Office that the Court correctly issued the certification in the form of a judgment as specified in 17 V.S.A. §2606.

Senators from Rutland County in the November 5, 1996, general election. The Court further determined that Hull Maynard had received 10,978 votes in the recount and that Thomas Macaulay had received 10,976 votes.

On December 20, 1996, Thomas Macaulay filed a petition with the Rutland Superior Court to vacate or amend the December 12, 1996, Judgment Order. The matter was heard on December 26, 1996, and the petition was denied by Judge Bryan that same day.

On December 27, 1996, the Petition in question was transmitted to the Secretary of State by facsimile machine. A second Petition containing additional allegations was received by the Secretary of State on the following Monday, the 30th.

Since receiving the Petition, this Office has interviewed all of the Town Clerks from the Towns mentioned in the Petition and also the County Clerk. We have also reviewed the applicable law and discussed the matter at length with the Secretary of State's Office.

TIMELINESS OF FILING

At the outset, the Senate may wish to consider whether the Petition was filed in a timely manner. Under 17 V.S.A. §2606(a):

(a) A candidate for the office of state senator in the general election, or any 100 voters in the senatorial district may request the senate to exercise its constitutional authority to judge of the elections and qualifications of its own members by filing a written request with the secretary of state specifying the candidate or candidates whose election is being challenged. The request must be filed no later than the latest of the following:

- (1) 20 days after the date of the election;
- (2) 10 days after a final court judgment, if there is a recount under section 2602 of this title;
or
- (3) 10 days after a final court judgment, if there is a contest under section 2603 of this title.

The term "filed", as used in §2606, is defined to mean:

deposited in the regularly maintained office of the official with whom the filing is to be made. A document is not "filed" until received at the official's office. If the last day for filing petitions, consent forms, or other documents or reports

falls on a Saturday, Sunday or legal holiday, then the deadline shall be extended to 5:00 p.m. on the next day which is not a Saturday, Sunday or legal holiday. 17 V.S.A. §2103(13).

In this case, there was a recount and the judgment was signed on December 12, 1996. Thus, under §2606(a)(2) the deadline for filing a petition was on December 22, 1996. Since December 22nd was a Sunday, the rule established by §2103(13) would extend the filing deadline to Monday, December 23, 1996. The first Petition was filed on December 27, 1996, which was 15 days after the Judgment Order. Thus, unless the filing deadline is tolled, the Legislature could conclude that the filing was out-of-time under the statutes.

In the alternative, the Legislature might determine that the filing was timely, if it applies the Vermont Rules of Civil Procedure. Under V.R.C.P. 6, "[w]hen the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and State or federal legal holidays shall be excluded in the computation." If the Senate were to conclude that Rule 6 is applicable, weekends and the Christmas holiday would be excluded from the 10 day period. Thus, the first Petition which was received by the Secretary of State on the 27th of December would be timely. The second Petition filed on the following Monday might be considered as an amendment to the first Petition.

In considering whether to apply the Civil Rules to this Petition, the Legislature should be aware that the Rules, by their terms, apply to actions in Superior Court. V.R.C.P. 1. The Rules of Civil Procedure are sometimes made expressly applicable to specific proceedings, such as the contest of nonlegislative elections statute. 17 V.S.A. §2603. The Civil Rules have not been incorporated into the procedure for petitioning the Senate, however. 17 V.S.A. §2606.

Accordingly, the Senate may wish to consider this question of law prior to reviewing the claims contained in the Petition.

DECEMBER 27, 1996, PETITION

In the Petition faxed to the Secretary of State's Office on December 27, 1996, Mr. Macaulay raises a number of issues for the Senate's consideration, which include:

**"1. As of the recount, there are only two
(2) votes separating Hull Maynard and
Thomas Macaulay."** Petition at page 1.

This appears to be an accurate statement. Judge Bryan's December 12, 1996, Judgment Order sets the vote total for Maynard at 10,978 and vote total for Macaulay at 10,976.

"2. There were at least forty (40) votes cast that are incorrectly counted or missing, which would alter the result of the elections between Hull Maynard and Thomas Macaulay and make it impossible for a proper determination of the winner as between the two candidates." Petition at page 1.

This Office has not been able to identify all forty votes being questioned by the Petitioner. Whether Mr. Macaulay's assertion that it is impossible to make a proper determination of the winner as between the two candidates is a question of fact for the Senate.

"3. Specifically, the election of November 5, 1996 and the recount contain the following irregularities:

- a. **Said recount was not conducted in accordance with 17 V.S.A. §2202 [§2602] in that the teams were not informed of the statutory procedure set forth in §2202f [§2602f]. In fact, some team members understood the recount instructions from the clerk to mean that only the team could decide the fate of questionable ballots and there was no procedure for setting aside questionable ballots for review by the Court, pursuant to §2202f(c) [§2602f(c)] and §2202f(d) [§2602f(d)];" Petition at page 2.**

17 V.S.A. §2602c does require that the county clerk explain the recount procedures which are to be followed and answer the committee's questions. §2602f(c) provides that if one person on the team does not agree, the ballot shall be set aside as a questioned ballot and returned to the Clerk for a final decision. Under §2602f(d) the judge makes the final determination of the questioned ballot.

Rutland Superior Court Clerk Gay Johnson says that she reviewed the procedures with the Recount Committee at the beginning of the recount and that she very specifically told the members of the Committee that questionable ballots should be taken to the Judge for review.³ Ms. Johnson does state that she urged

³ The Senate should be aware that an affidavit was prepared in connection with the court proceeding by Beverly Mayo. In that document Ms. Mayo states under oath that she was a member of the Recount Committee and that the Committee was never given any instructions concerning the fate of questionable ballots. She states that she was not told that questionable ballots had to be unanimously agreed upon by the team, or set aside for review by the Court and that in more than two

the teams to make every effort to determine the intent of the voters and says that ultimately all questions were resolved by the Recount Committee and that it was not necessary for any questionable ballots to be brought to the Judge for consideration. Again, the candidates did not challenge the instructions or procedures during the recount.

"b. The ballot recount for several towns revealed that the ballot bags contained fewer or more ballots than were counted on election night, to wit:

i. In Clarendon, 1,200 votes were cast for President, Governor, Lieutenant Governor, Congress and all other statewide races. 3,600 votes were cast in the State Senate race. However, when the Recount Committee counted the ballots in the bags containing ballots from Clarendon, there were only 1,198 ballots to be counted. Two ballots were lost between election night and the time of the recount."

Petition at page 2.

According to Clarendon Town Clerk, Joyce A. Pedone, two "federal" ballots were received in the mail from individuals in the military. The ballots were small slips of paper about the size of an index card and contained only votes for the Presidential election. They were treated as blank votes by the Town counters for all other elections. Ms. Pedone says that the ballots were included in the ballot bag for the recount, but might not have been seen by the Recount Committee since they were so much smaller than the Vermont ballots. Ms. Johnson does not remember seeing them.

Mr. Macaulay gained three votes in the recount of Clarendon votes, while Mr. Maynard lost six.

"ii. In Castleton, a machine counted town, 1,660 ballots were counted for all statewide elections and for the State Senate race but only 1,659 ballots were in the bags containing ballots counted by the Recount Committee." Petition at page 2.

instances she disagreed with the other team members concerning questionable ballots and that the questionable ballots were counted notwithstanding her disagreement with the majority. Ms. Mayo apparently did not make her concerns known to the Judge at the time of the recount.

Neither Castleton Town Clerk Sara Grey, nor Gay Johnson have an explanation for the one vote discrepancy. Ellen Tofferi, at the Secretary of State's Office, notes that the original election returns from the Town of Castleton counted 1,659 voters checked off which was amended to 1,660.

Mr. Macaulay gained eight votes during the recount of Castleton votes, while Mr. Maynard gained seven votes.

"iii. In Rutland City, a machine counted municipality, the number of ballots cast on November 5 were different than the recount, to wit:

a) Ward 1 was 1,921; in the bag containing ballots counted by the Recount Committee, there were 1,924 ballots.

b) Ward 3A, there were 1,269 ballots counted on November 5, but the bags containing ballots counted by the Recount Committee from that Ward contained only 1,266 ballots." Petition at pages 2 - 3.

City Clerk Rosemary Finley says that there were an unusual number of hand counted ballots in the City of Rutland during this election.

In reviewing the numbers from the two Wards, it is obvious that while Ward 3A lost three ballots between the time of the election and the recount, Ward 1 gained three ballots. Therefore, one possible explanation for the discrepancy is that the ballots were somehow shifted from one Ward's bag to the other, perhaps on election night. Ms. Finley confirms that absentee ballots were counted at a central location during this election and that it is possible that the three ballots were placed in the wrong bag, although she considers this to be a remote possibility. Apparently no ballots were gained or lost in the process.

Mr. Macaulay gained two votes during the recount of these two wards and Mr. Maynard gained four votes.

"iv. In Mendon, 575 ballots were counted on November 5; yet there were 578 ballots counted by the Recount Committee from the bags containing ballots from the Town of Mendon." Petition at page 3.

Town Clerk Terry Curns does not have an explanation for the shift in total votes. Gay Johnson noted that there was no change in total votes shared between the candidates. The additional three ballots were evidently added to the blank vote count at the time of the recount. Accordingly, it does not appear that the additional ballots had any effect on the outcome.

Mr. Macaulay lost one vote in the recount of Mendon votes and Mr. Maynard gained one vote.

"v. In Pawlet, 609 ballots were counted on election night and 610 ballots were counted by the Recount Committee." Petition at page 3.

Pawlet Town Clerk Joanne G. Waite says that 610 voters checked in on election day, but that they only were able to find and count 609 ballots. The Town counters tried very hard to find the missing ballot on election night, but were unsuccessful. She believes that one ballot simply was not counted that night, but was picked up in the recount.

Mr. Macaulay gained eight votes in the recount of Pawlet voters and Mr. Maynard lost two.

"c. Among the many bags containing ballots from the municipalities around Rutland County, two bags were unsealed when delivered to the County Clerk, despite the clear requirements of state election law that all bags be adequately sealed immediately after the election. Neither of these bags, nor the information contained in them, were set aside during the recount, as required by 17 V.S.A. §2602c (d). Of the two bags in question, one came from the Town of Proctor and one from the Town of Wallingford."
Petition at page 3.

Obviously, unsealed bags are a concern in any election recount. 17 V.S.A. §2602c(d) requires that each seal be inspected to determine whether it is intact prior to opening, "and the clerk shall attach to any bag with a defective seal a tag stating that the seal was defective and containing the information which was contained on the defective seal." The statute does not require that the bags be set aside.

Neither Town Clerk has direct knowledge of why the seals were not intact at the recount. Both bags left their respective towns properly sealed and were transferred to the County Clerk for safe keeping by the State Police. They both agree that the seals are very fragile and easily broken. Significantly, neither Wallingford nor Proctor are Towns where the Petitioner is contesting the vote totals. Moreover, the total vote for the two Towns is consistent between the election count and the recount.

Mr. Macaulay gained one vote in the Proctor recount and four votes in the Wallingford recount. Mr. Maynard lost two votes in the Proctor recount and gained one vote in the Wallingford recount.

"d. During the recount, one team reported to the County Clerk that seven (7) different ballots in one lot of fifty (50)

had the same handwriting for write-in candidates. These ballots were not set aside, as they should have been pursuant to 17 V.S.A. §2602f(c)."
Petition at page 3.

As the Petitioner notes, questionable ballots are to be decided by the Judge pursuant to §2602f. In this instance, however, Ms. Johnson states that she did not see the ballots and that no Committee member ever asked that the Judge review them. In fact, she does not even know what town they might have come from. Evidently, if there were seven ballots with similar handwriting, they were not considered a serious enough problem by the recount team to bring them to the Clerk's attention during the recount. Ms. Johnson believes that suspicious ballots would normally be brought to her for review. No candidate filed a request for review of this question with the Superior Court Judge during the recount.

"e. According to 17 V.S.A. §2062b [§2602b], an observer team is to be designated and perform only those functions established under this section for that team. According to the County Clerk, a judge "has ruled that this 'team' will not be a separate team of four (4), rather that one of the counting teams will be the 'observer' team"." Petition at page 3.

Under 17 V.S.A. §2602b(b) the county clerk is responsible for establishing the teams and their respective responsibilities. Further, "[o]ne team shall be designated as the clerk observer team, which shall perform only the functions established under this section for that team."

Ms. Johnson confirms that she did not appoint any one team to act as the observer team over the eight days of the recount. She believes that having one team doing nothing but observe is an unnecessary expense. Instead, different teams took turns acting as the observer team. She believes that this keeps all the recounters interested and involved in the process. Neither candidate presented this issue to the Judge during the recount.

DECEMBER 30, 1996, PETITION

The second Petition (Petition II) filed with the Secretary of State's Office on December 30, 1996, raises several additional concerns of the Petitioner which were not contained in the December 27 Petition. If the first Petition is considered to be timely by the Senate, the second Petition might be viewed as an amendment to the first Petition. The additional allegations raised in the second Petition include:

"c. The Clerk's Summary Sheet Rutland County Senate Recount indicates that

several ballots were spoiled. If the ballot is spoiled, there must be three (3) votes for each ballot that has been determined to be spoiled, as each ballot has three potential votes to be cast in the State Senate race. A ballot cannot be partially spoiled. Therefore, in any town in which the Recount Committee reports the number of spoiled ballots as any total other than zero or a multiple of three, there is an error. The Clerk's Summary Sheets show spoiled ballots from four towns and one city ward that are not multiples of three: Pawlet, Pittsford, Wallingford, Wells and Rutland City Ward 3B. See attached Summary Sheets." Petition II at page 3.

The Petitioner believes that one spoiled vote in a multiple seat election spoils all other votes in that same race. Gay Johnson disagrees; she believes that the intent of the voter should control, if it can be ascertained.

The statute requires election officials to give effect to the intent of the voter whenever possible:

(a) In counting ballots, election officials shall attempt to ascertain the intent of the voter, as expressed by his markings on the ballot. If it is impossible to determine the intent of the voter for any office or public question, the ballot shall be counted as blank or spoiled, as the case may be, for that office or question; but that determination shall not control any other office or question on the ballot for which the voter's intent can be determined.

(b) If the voter marks more names than there are persons to be elected to an office, or marks contradictory sides on any public question, his ballot shall not be counted for that office or public question. (emphasis added) 17 V.S.A. §2587.

While subsection (b) clearly prohibits counting votes where it is impossible to determine the intent of the voter, subsection (a) would seem to encourage election officials to count the votes that can be ascertained and mark those that cannot as spoiled in a multiple seat race.

"d. On election night, in several towns there were more ballots counted than

the number of voters checked off on the entrance checklist, to wit:

- i. In Fair Haven 1,131 voters were checked off; 1,132 ballots were counted on election night.
- ii. In Ira, 189 voters were checked off; 190 ballots were counted.
- iii. In Mount Holly, 601 voters were checked off; 602 ballots were counted." Petition II at page 3.

The returns for both Fair Haven and Mt. Holly indicate that one more vote was counted than the number of voters checked in. The same cannot be said for the Ira return.

Fair Haven Town Clerk Suzanne Ruest was aware of the discrepancy on the night of the election and informed Gay Johnson by phone as well as by making a notation on the paperwork which was sent to the County Clerk's Office. There does not appear to be an explanation for the Fair Haven vote other than the possibility that one voter might not have been checked off when voting.

The official return from Ira indicates that 190 voters were checked in (if you add the absentee votes to the voters checked off on the entrance check list) and further shows that 190 ballots (570 votes) were cast in the Senate race.

Mt. Holly Town Clerk Susan Covalla explained that the Town vote counters found one completely blank ballot in the ballot box; she chose to count it as a blank ballot, which increased the vote total by one over the number of voters. She suspects that two ballots might have been stuck together and the blank ballot wound up on the box along with the voted ballot.

During the recount, the Petitioner gained a vote in Mt. Holly, retained the same total in Fair Haven and lost a vote in Ira. Mr. Maynard gained six votes in Fair Haven, three in Mt. Holly and one in Ira.

"4. Pursuant to 17 V.S.A. §2602j(c), "Candidates and their attorneys shall be given the opportunity to present evidence to the Court relating to the conduct of the recount. . ." In this instance, the Clerk's Certificate was presented to the judge on December 12, 1996, the same day as the judge's Order certifying the election results. Candidate Macaulay was, therefore, not given a reasonable opportunity to present evidence to the Court relating to the conduct of the recount prior to the issuance of the Court's Judgment Order." Petition II at page 4.

The Petitioner correctly states that §2602j(c) allows candidates and their attorneys to be given an opportunity to present evidence to the court concerning the conduct of the recount. It is the view of this Office, however, that a challenge to the conduct of the recount must be made during the course of the recount. Once the Court has issued a Judgment Order certifying the results of the recount it has fulfilled its ministerial duty to administer the recount. Any contest of those results must be brought before the Senate. Kennedy v. Chittenden, 142 Vt. 397 (1983).

No candidate filed any challenges with the Court during the course of the recount. Therefore, once the Court issued its Judgment Order the appropriate venue for any complaints about the election or recount became the Vermont Senate.

Sincerely yours,

/s/William H. Rice

William H. Rice
Assistant Attorney General

Approved: /s/Jeffrey L. Amestoy
Jeffrey L. Amestoy
Attorney General

cc: Thomas Macaulay
Hull Maynard
James Milne, Secretary of State"

Adjournment

On motion of Senator Shumlin, the Senate adjourned until eleven o'clock and thirty minutes in the morning.

THURSDAY, JANUARY 16, 1997

The Senate was called to order by the President.

Devotional Exercises

Devotional exercises were conducted by the Reverend Robert Finch of Montpelier.

Message from the House

A message was received from the House of Representatives by Mr. Heyman, its Second Assistant Clerk, as follows:

Mr. President:

I am directed to inform the Senate the House has adopted a Joint Resolution of the following title:

faith and credit recognition, unless vacated pursuant to subsection (e) of this section.

Sec. 6. 12 V.S.A. § 7155(g) is added to read:

(g) An order of emancipation shall conform to and comply with the provisions of the Parental Kidnaping and Protection Act (28 U.S.C. § 1738A), the Full Faith and Credit for Child Support Orders Act (28 U.S.C. § 1738B), and the Uniform Child Custody Jurisdiction Act (chapter 19 of Title 15).

Sec. 7. REPEAL

4 V.S.A. § 454(16) (family court jurisdiction over emancipation of minors) is repealed.

And that when so amended the bill ought to pass.

Thereupon, the bill was read the second time by title only pursuant to Rule 43, the recommendation of amendment was agreed to, and third reading of the bill was ordered.

**Report of Special Select Committee on Elections Accepted and Adopted;
Petition of Thomas G. Macaulay Denied; Election of Senator Hull P.
Maynard, Jr. Affirmed**

Senator Bartlett, as Chair of the Special Select Committee on Elections, established pursuant to the provisions of S.R. 5 to investigate the contested senatorial election for Rutland District, and with unanimous consent of this special select committee, submitted the following report:

**REPORT OF SPECIAL SELECT COMMITTEE ON ELECTIONS
TO THE HONORABLE SENATE:**

The Special Select Committee on Elections to which was referred the Petition submitted by Thomas G. Macaulay of Rutland challenging the election and seating of Hull Maynard as a Senator from Rutland District, has investigated this matter pursuant to the provisions of S.R. 5 and respectfully submits the following report:

The Special Select Committee on Elections recommends that the Senate find that Hull Maynard has been duly elected and is qualified to represent Rutland District as a member of the Senate and further, that the prayers for relief contained in the Petition submitted by Thomas G. Macaulay of Rutland as filed on December 27, 1996, and as amended on December 30, 1996, be denied.

Thereupon, the question, Shall the report of the Special Select Committee on Elections be accepted and adopted by the full Senate? was decided in the affirmative.

1985

House: Chittenden-Franklin-1 District

Woodward/Greene

General Election: Woodward 807; Greene 800

Recount: Woodward 803; Greene 801

Issues raised in petition: counting errors in election or recount, or both;
recount procedures; failure of Superior Court to issue judgment

*Resolution adopted to allow House Committee on Municipal Corporations
and Elections to subpoena and count ballots, be assisted by other members*

Committee conducted a complete recount:

Woodward 806; Greene 801

Special Committee Report: Woodward duly elected and qualified

House: Report adopted

Godt, Eugene

Member from Brookline (District Windham-3)

Committee

Health and Welfare

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Member from Burlington (District Chittenden-7-5)

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Gruner, George S.

Member from M
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 J.R.H.

Petition for New Election in District Chittenden-Franklin-1

The Speaker placed before the House a communication from William W. Pearson, Esq., containing a Petition for a new election in District Chittenden-Franklin-1. The Petition was referred to the Committee on Municipal Corporations and Elections. The communication and Petition are as follows:

“Law Office of
DOWNS RACHLIN & MARTIN
Professional Corporation
100 Dorset Street
Burlington, VT 05401-6293

December 28, 1984

Robert L. Picher
Clerk of the House of Representatives
State of Vermont
Montpelier, Vermont 05602

RE: Petition of Bennett Greene
concerning general election of 6 November 1984

Dear Mr. Picher:

Enclosed please find PETITIONER BENNETT GREENE’S REQUEST TO THE VERMONT HOUSE OF REPRESENTATIVES.

Thank you.

Sincerely yours,

/s/ William W. Pearson”

“STATE OF VERMONT
CHITTENDEN COUNTY

VERMONT HOUSE OF
REPRESENTATIVES

IN RE: PETITION OF BENNETT GREENE
concerning the general election
of November 6, 1984 and the
recount of November 26, 1984 for
State Representative from the
Chittenden-Franklin-DistrictI-I

Petitioner Bennett Greene’s Request to the Vermont House of Representatives

Pursuant to Chapter II, § 14 of the Vermont Constitution and 17 V.S.A. § 2605 of the Vermont Election Laws, Petitioner Bennett Greene requests the Vermont House of Representatives to exercise its constitutional authority to

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Clerk)

Franklin-1

from William W. Chittenden Municipal Corporation as follows:

judge of the elections and qualifications of its own members by undertaking a review of the general election held on 6 November 1984 and a subsequent recount held on 26 November 1984 concerning the office of State Representative from the Chittenden-Franklin District I-I.

The petitioner contends that counting errors were made in either the general election count or in the court ordered recount or in both. The petitioner further contends that no safeguards were built into the court ordered recount procedure to determine whether the recount was a more accurate count than the original count.

Also the petitioner contends that his rights under the Vermont Election Laws may be in jeopardy. As of this date the Chittenden County Superior Court has not issued a judgment order on petitioner's recount. The legislature convenes on 9 January 1985.

Under 17 V.S.A. § 2605 (b) when an election is reviewed by the legislature pursuant to petition the Vermont Secretary of State requests the Vermont Attorney General to prepare an investigation report on the election. This report must be submitted to the Vermont Secretary of State *at least ten (10)* days prior to the date the legislature convenes. Thus, the Attorney General must submit his report by 31 December 1984.

Under 17 V.S.A. § 2605 (a) (2) the petitioner has ten days *after* the recount Judgment Order to take his petition to the legislature. No judgment order has yet issued. December 31, 1984 is three days away from the date this petition is filed. Thus the court's delay may be prejudicing the petitioner's rights under the election laws. The petitioner requests the legislature to exercise its power so that a timely, orderly procedure of review will occur.

The petitioner submits the following in support of his request:

1. Petitioner is the Democratic candidate for the office of State Representative for Chittenden-Franklin District I-I in the General Election of 6 November 1984.
2. Mr. Almon Woodward is the Republican candidate for the office of State Representative for Chittenden-Franklin District I-I in the General Election of 6 November 1984.
3. The Chittenden-Franklin District I-I consists of the Town of Westford in Chittenden County and the Town of Fairfax in Franklin County.
4. In the General Election held on 6 November 1984 the following numbers of votes were reportedly cast for the respective candidates (these figures are based on figures released by the Chittenden-Franklin District I-I Clerk):

S REQUEST TO

NT HOUSE OF
REPRESENTATIVES

f Representatives

n and 17 V.S.A. §
ene requests the
onal authority to

	<u>Westford</u>	<u>Fairfax</u>	<u>Total</u>
Bennett Greene	481	319	800
Almon Woodward	203	604	<u>807</u>
	Total Votes Cast		1607

5. The difference between the number of votes cast for each of the two candidates is less than 5% of the total votes cast for all the candidates for the contested office divided by the number of persons to be elected:

$$\begin{aligned} \text{Number of Persons to be Elected} &= 1 \\ 1607 \text{ (total votes cast)} \times .05 &= 80.35 \text{ votes} \\ 807 \text{ (Woodward votes)} - 800 \text{ (Greene votes)} &= 7 \\ 7 \text{ is less than } 80.35 \end{aligned}$$

6. On 9 November 1984 petitioner asserted his right under 17 V.S.A. § 2601 to have the votes in his general election recounted and requested the Chittenden County Superior Court to order a recount under the procedure as set forth in 17 V.S.A. § 2602.

7. The Chittenden County Superior Court issued an Order for a Recount on 11 November 1984. As part of its Order, the Chittenden County Superior Court selected a six person committee to conduct the recount.

8. On 26 November 1984 a recount was conducted under the direction of the Chittenden County Superior Court Clerk. During the recount process, the petitioner questioned the accuracy of the recount procedure being conducted.

9. The recount resulted in the following votes counted:

Bennett Greene	801
Almon Woodward	803
Blank	38
Write-in	2

10. On 27 November 1984, the petitioner filed a Petition challenging the recount procedure and requesting a second recount.

11. The Chittenden County Superior Court scheduled a hearing for 6 December 1984 pursuant to its responsibility under 17 V.S.A. § 2603(e). This hearing was cancelled due to a large snow storm and was rescheduled for 11 December 1984.

12. On 11 December 1984 a hearing was held before the Chittenden County Superior Court concerning the recount. In that hearing, petitioner objected to the procedures used by the Chittenden County Superior Court in conducting the petitioner's recount. The petitioner contended that the Chit-

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Total

800

807

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tenden County Superior Court's recount procedure could guarantee no more accuracy in its result than that achieved by the original count following the general election. Petitioner also alleged several technical violations of the recount statute.

13. As of the date of this petition, 17 days have passed without the Chittenden County Superior Court issuing its findings of fact and judgment order as required by 17 V.S.A. § 1601 *et seq.*

14. The recount statute, 17 V.S.A. § 2601 *et seq.*, makes no specific remedy available to the petitioner when the Superior Court overseeing the recount fails to make a prompt decision concerning the recount.

15. Under 17 V.S.A. §2605(a)(2) the petitioner has ten (10) days after the judgment order to file a petition to the legislature. If the petitioner is to request the Vermont House of Representatives to exercise its constitutional authority, the petitioner must file his petition with the Vermont Secretary of State. The Secretary of State notifies the Vermont Attorney General who is responsible for investigating the facts, preparing an opinion on the law and facts and sending his report and opinion to the Vermont Secretary of State at least *ten days* before the general assembly convenes. 17 V.S.A. § 2605(b).

16. As of the date of this petition, the legislature will convene in twelve (12) days.

17. Given the Chittenden County Superior Court's delay in issuing its Order, the two ten-day periods mandated by the statute have been effectively frustrated.

THEREFORE, petitioner requests the Vermont House of Representatives to judge the election for State Representative from the Chittenden-Franklin District I-I due to the irregularities in the general election count and subsequent recount.

Burlington, Vermont

28 December 1984

BENNETT GREENE

By: /s/ William W. Pearson
Attorney for Bennett Greene"

Petition for New Election in District Chittenden-4

The Speaker placed before the House a communication from William W. Pearson, Esq., containing a Petition for a new election in District Chittenden-4. The Petition was referred to the Committee on Municipal Corporations and Elections. The communication and Petition are as follows:

each of the two candidates for the 1:

er 17 V.S.A. § requested the e procedure as

Order for a enden County recount.

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challenging the

hearing for 6 2603(e). This eduled for 11

e Chittenden ng, petitioner rior Court in hat the Chit-

Howard Lunderville	1493
Thomas O'Neil	1822
Ruth Painter	1632
Ruth Stokes	1649
Write-ins	3
Spoiled	6
Blank	975
Total	<u>7580</u>

Thereupon, the Committee finds that Ruth Stokes was duly elected and is qualified to represent District Chittenden-4 as a member of the House of Representatives.

The report was taken up and, on motion of Mrs. Steele of Waterbury, was adopted.

Special Committee Report of Contested Election of Mr. Woodward of Fairfax

Mr. Westman of Cambridge, for the Committee on Municipal Corporations and Elections, to which had been referred the petition of Bennett Greene on the election for the office of State Representative from District Chittenden-Franklin-1, respectfully reports that it has considered the matter of the election contest between Almon Woodward and Bennett Greene in District Chittenden-Franklin-1, and on the 31st day of January 1985, did conduct a complete recount of all of the votes in that election on the 6th day of November, 1984.

As a result of the Committee's recount the Committee finds the votes cast as follows:

Total number of ballots	1646
Almon Woodward	806
Bennett Greene	801
Write-ins	1
Blank	38
Spoiled	0
Total	<u>1646</u>

Thereupon, the Committee finds that Almon Woodward was duly elected and is qualified to represent District Chittenden-Franklin-1 as a member of the House of Representatives.

The report was taken up and, on motion of Mr. Westman of Cambridge, was adopted.

Adjournment

At ten o'clock and forty minutes in the forenoon, on motion of Mr. Buraczynski of Brattleboro, the House adjourned.

1985

House: Chittenden-4 District

Stokes/Painter

General Election: *Painter 1,651; Stokes 1,632*

Recount: *Stokes 1,641; Painter 1,638*

Issues raised in petition: recount procedures

*Resolution adopted to allow House Committee on Municipal Corporations
and Elections to subpoena and count ballots, be assisted by other members*

Committee conducted a complete recount:

Stokes 1,649; Painter 1,632

Special Committee Report: Stokes duly elected and qualified

House: Report adopted

Constitution, United States
 Ratification of amendment re District of Columbia, *See table J.R.S. 10* 901

Constitution, Vermont
 Proposal of amendment 1. Equal rights, *See table Proposal 1* 906
 Proposal of amendment 7. Apportionment of General Assembly,
See table Proposal 7 906

Consumer Fraud
 Protection of farmers, *See table H. 302* 870

Contested Elections
 District Chittenden-Franklin-1, Bennett Greene/ Almon Woodward
 Petition for new election 42-45
 Report of Committee on Municipal Corporations and Elections 108
 District Chittenden-4, Ruth Painter/ Ruth S. Stokes
 Petition for new election 45-48
 Report of Committee on Municipal Corporations and Elections 107-108
 Recount committee; production of documents, *See table H.R. 5* 905-906

Corcoran, Timothy R.
 Member from Bennington (District Bennington-2-3)
 Committees
 Appropriations
 Conference on H. 414 693
 Conference on S. 26 201
 To wait upon Speaker-elect 5
 Motions
 H. 82. Introduced with Mr. Amadon 49
 H. 101. Introduced with others 57
 H. 153. Introduced with others 74
 H. 157. Introduced with others 75
 H. 178. Introduced 91
 H. 212. Introduced with others 103
 H. 345. Introduced with others 203
 H. 381. Introduced with others 209
 H. 390. Introduced with others 211
 H. 403. Reported for Committee 490
 S. 26. Moved to amend House proposal of amendment 190
 J.R.H. 8. Offered with others 94
 J.R.H. 25. Offered with Committee on Appropriations 448
 J.R.H. 32. Offered with others 521
 J.R.H. 43. Offered with others 718
 Moved remarks by Mrs. Batten printed in Journal 11

Corrections

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tenden County Superior Court's recount procedure could guarantee no more accuracy in its result than that achieved by the original count following the general election. Petitioner also alleged several technical violations of the recount statute.

13. As of the date of this petition, 17 days have passed without the Chittenden County Superior Court issuing its findings of fact and judgment order as required by 17 V.S.A. § 1601 *et seq.*

14. The recount statute, 17 V.S.A. § 2601 *et seq.*, makes no specific remedy available to the petitioner when the Superior Court overseeing the recount fails to make a prompt decision concerning the recount.

15. Under 17 V.S.A. §2605(a)(2) the petitioner has ten (10) days after the judgment order to file a petition to the legislature. If the petitioner is to request the Vermont House of Representatives to exercise its constitutional authority, the petitioner must file his petition with the Vermont Secretary of State. The Secretary of State notifies the Vermont Attorney General who is responsible for investigating the facts, preparing an opinion on the law and facts and sending his report and opinion to the Vermont Secretary of State at least *ten days* before the general assembly convenes. 17 V.S.A. § 2605(b).

16. As of the date of this petition, the legislature will convene in twelve (12) days.

17. Given the Chittenden County Superior Court's delay in issuing its Order, the two ten-day periods mandated by the statute have been effectively frustrated.

THEREFORE, petitioner requests the Vermont House of Representatives to judge the election for State Representative from the Chittenden-Franklin District I-I due to the irregularities in the general election count and subsequent recount.

Burlington, Vermont

28 December 1984

BENNETT GREENE

By: /s/ William W. Pearson

Attorney for Bennett Greene"

Petition for New Election in District Chittenden-4

The Speaker placed before the House a communication from William W. Pearson, Esq., containing a Petition for a new election in District Chittenden-4. The Petition was referred to the Committee on Municipal Corporations and Elections. The communication and Petition are as follows:

House Resolution Adopted

H.R. 5

Mrs. Edwards of Middlebury, for the Committee on Municipal Corporations and Elections, offered a House resolution, entitled

Resolution relating to the production of documents and the appointment of members to form a committee to conduct a recount;

Whereas, the Committee on Municipal Corporations and Elections has before it the petition of Ruth Painter of Williston contesting the election of Ruth Stokes of Williston to the General Assembly from the Chittenden-4 District, and

Whereas, the Committee on Municipal Corporations and Elections has before it the petition of Bennett Greene of Westford contesting the election of Almon Woodward of Fairfax to the General Assembly from the Chittenden-Franklin-1 District, and

Whereas, the Committee met with attorneys for the respective parties on January 23, 1985, and, after taking testimony from said attorneys and reviewing the issues, the Committee has concluded that a review of the ballots, tally sheets and papers for the election is essential in its deliberations concerning this contested election, and

Whereas, the ballots are presently in the custody of the Town Clerks of Williston, Richmond, Fairfax and Westford, and

Whereas, it is the conclusion of the Committee that appropriate procedure for directing the ballots from the offices of the Town Clerks to the House of Representatives is by way of a subpoena *duces tecum*, and

Whereas, it is also the conclusion of the Committee that appropriate procedures for the counting of ballots by the agents of this House require that the ballots be counted by a committee constituted of an equal number of representatives from each party, *now therefore be it*

Resolved by the House of Representatives:

That for the following purposes only the Committee on Municipal Corporations and Elections be authorized to issue a subpoena *duces tecum* to obtain the production of all the ballots, documents, papers and materials not otherwise privileged relative to the elections between Ruth Painter and Ruth Stokes and between Bennett Greene and Almon Woodward held on November 6, 1984, and subsequent recount and certification, *and be it further*

Resolved: That the Speaker of the House be directed to appoint four members of this House who are members of the Democratic Party to assist the members of the Municipal Corporations and Elections Committee so that the committee that counts ballots shall consist of an equal number of persons from each party.

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Committee on Municipal Corporations, entitled

Documents and the appointment of a recount;

Corporations and Elections has petitioned contesting the election of members from the Chittenden-4

Corporations and Elections has petitioned contesting the election of members from the Chittenden-4

proceedings for the respective parties on behalf of said attorneys and reviewed at a review of the ballots, tallying its deliberations concerning this

custody of the Town Clerks of and

Committee that appropriate proceedings of the Town Clerks to the House *ces tecum*, and

Committee that appropriate proceedings of this House require that instituted of an equal number of *be it*

Committee on Municipal Corporation a subpoena *duces tecum* to records, papers and materials not between Ruth Painter and Ruth Woodward held on November on, *and be it further*

be directed to appoint four Democratic Party to assist the Elections Committee so that the equal number of persons from

Which was read and adopted.

Joint Resolution Adopted

J.R.H. 6

Mr. Handy of St. Albans City offered a joint resolution, entitled

Joint resolution relating to the preservation of Vermont family farms;

Whereas, Vermont is a state built on a strong agricultural foundation, whose farms have traditionally been small family operations, and

Whereas, all Vermont farmers are expected to participate in the Federal Dairy Diversion Program, established to reduce the dairy surplus, whereby farmers must pay fifty cents per hundred-weight of milk produced to the federal government, and

Whereas, this is in spite of the fact that there is no dairy surplus in Vermont or in New England, and in fact New England's dairy farms fall short of meeting the region's needs and twenty-five percent of the milk consumed must be imported from other states, and

Whereas, all dairy farms are facing enormous financial strains today, a condition which is magnified in the case of the small family farm, and

Whereas, it is essential that these small farms be preserved and maintained until a workable agricultural policy is developed by the United States Agriculture Department, and

Whereas, a delay or a failure to act to preserve family farms will surely result in the tragic loss of significant numbers of small farms, and

Whereas, it is unconscionable to penalize Vermont dairy farmers for problems originating in other parts of the country, *now therefore be it*

Resolved by the Senate and House of Representatives:

That the Vermont Congressional Delegation should take immediate action and urge the United States Congress and the United States Secretary of Agriculture to exempt dairy farms of less than fifty cattle from the Federal Dairy Diversion Program or from any other federal assessment program, *and be it further*

Resolved: That the Secretary of State is directed to send a copy of this resolution to the Vermont Congressional Delegation and to the United States Secretary of Agriculture.

Which was read and adopted on the part of the House.

House Bills Introduced

House bills of the following titles were severally introduced, read the first time and referred or placed on Calendar as follows:

"Law Office of
DOWNS RACHLIN & MARTIN
 Professional Corporation
 100 Dorset Street
 Burlington, VT 05401-6293

31 December 1984

Robert L. Picher
 Clerk of the House of Representatives
 State of Vermont
 Montpelier, VT 05602

We enclose the following:

Petitioner Ruth Painter's Request to the Vermont House of Representatives.

Downs Rachlin & Martin
 By /s/ *William W. Pearson*"

"STATE OF VERMONT
 CHITTENDEN COUNTY, SS.

VERMONT HOUSE OF
 REPRESENTATIVES

IN RE: PETITION OF RUTH PAINTER
 concerning the general election
 of November 6, 1984 and the
 recount of November 26, 1984 for
 State Representative from the
 Chittenden District 4

Petitioner Ruth Painter's Request to the Vermont House of Representatives

Pursuant to Chapter II, §14 of the Vermont Constitution and 17 V.S.A. § 2605 of the Vermont Election Laws, Petitioner Ruth Painter requests the Vermont House of Representatives to exercise its constitutional authority to judge of the elections and qualifications of its own members by undertaking a review of the general election held on 6 November 1984 and a subsequent recount held on 26 November 1984 concerning the office of State Representative from the Chittenden District 4.

The petitioner contends the following: 1) counting errors were made in the general election count or in the court ordered recount or in both; 2) no safeguards were built into the court ordered recount procedure to determine whether the recount was a more accurate count than the original count; and 3) the recount committee did not examine the entire ballots to determine if any ballots were spoiled.

The petitions

1. Petitioner
 State Representative
 November 1984.

2. Mr. Hoy
 ican candidates for
 in the General Election

3. The Chittenden
 Town of Richmond

4. In the
 numbers of votes
 released by the Clerk

Howard Lun

Thomas O'Neil

Ruth Painter

Ruth Stokes

5. Thomas
 quently the candidate
 the District. The
 two candidates
 number of votes,
 for the contested

6. Pursuant
 recount, the Chittenden
 on 11 November
 Court selected a

7. On 26 November
 the Chittenden County
 petitioner questioned

8. The recount

Ruth Painter

Ruth Stokes

The petitioner submits the following in support of her request:

1. Petitioner was one of two Democratic candidates for the office of State Representative for Chittenden District 4 in the General Election of 6 November 1984. The other Democratic candidate was Thomas A. O'Neil.

2. Mr. Howard P. Lunderville and Ms. Ruth S. Stokes were the Republican candidates for the office of State Representative for Chittenden District 4 in the General Election of 6 November 1984.

3. The Chittenden District 4 consists of the Town of Williston and the Town of Richmond, Chittenden County.

4. In the General Election held on 6 November 1984 the following numbers of votes were reported as cast for the respective candidates (figures released by the Chittenden District 4 clerk):

	<u>Williston</u>	<u>Richmond</u>	<u>Total</u>
Howard Lunderville	1,033	460	1,493
Thomas O'Neil	602	1,219	1,821
Ruth Painter	1,069	582	1,651
Ruth Stokes	924	708	<u>1,632</u>
Total Votes Cast			6,597

5. Thomas O'Neil received the greatest number of votes and was consequently the candidate elected to one of the two State Representative offices for the District. The difference between the number of votes cast for each of the two candidates (Ruth Painter and Ruth Stokes) having the next greater number of votes, was less than 5% of the total votes cast for all the candidates for the contested office divided by the number of persons to be elected.

6. Pursuant to petitioner's opponent, Ruth Stokes, filing a petition for a recount, the Chittenden County Superior Court issued an Order for a Recount on 11 November 1984. As part of its Order, the Chittenden County Superior Court selected a six-person committee to conduct the recount.

7. On 26 November 1984 a recount was conducted under the direction of the Chittenden County Superior Court Clerk. During the recount process, the petitioner questioned the accuracy of the recount procedure being conducted.

8. The recount resulted in the following votes counted:

Ruth Painter	1,638
Ruth Stokes	1,641

Write-in	4
Blank	440
Spoiled	3

9. On 27 November 1984, the petitioner filed a Petition challenging the recount procedure and requesting a second recount. The Chittenden County Superior Court changed part of its procedure for two other recounts not yet started but refused to conduct a second recount for petitioner.

10. The Chittenden County Superior Court scheduled a hearing for 6 December 1984 pursuant to its responsibility under 17 V.S.A. § 2603(e). This hearing was cancelled due to a large snow storm and was rescheduled for 11 December 1984.

11. On 11 December 1984 a hearing was held before the Chittenden County Superior Court concerning the recount. In that hearing, petitioner objected to the procedures used by the Chittenden County Superior Court in conducting the petitioner's recount. The petitioner contended that the Chittenden County Superior Court's recount procedure could guarantee no more accuracy in its result than that achieved by the original count following the general election. Petitioner also alleged several technical violations of the recount statute.

12. On 28 December 1984, the Chittenden County Superior Court ordered the recount committee to return to the Court, to review their tally sheets and to submit a committee report to the Court which contained their vote totals for each recount.

13. On 29 December 1984, the Chittenden County Superior Court issued its Judgment Order in this matter certifying the report of the recount committee. The Court recognized in its Order the limited role of the Court in elections and the ultimate authority in the Legislature "to decide on the election and qualifications of its members."

14. The petitioner contends that given the limited and "circumspect" review of the election results by the Chittenden County Superior Court that significant questions remain about the accuracy of petitioner's election results.

THEREFORE, petitioner requests the Vermont House of Representatives to judge the election for State Representative from the Chittenden District 4 due to the irregularities in the general election count and subsequent recount.

Burlington, Vermont.

31 December 1984

RUTH PAINTER
 By: /s/ William W. Pearson
 Attorney for Ruth Painter"

House bills of
 time and referred

By Mr. Murphy

An act relating
 and contesting rul

To the Comm

By Mr. Murphy

An act relating

To the Comm

By Mr. Kaufman
 Burlington,

An act relating

To the Comm

By Mr. Carswell
 Northfield, Mrs. F
 New Haven,

An act relating
 Act 250;

To the Comm

By Mr. Faris

An act relating

To the Comm

By Mr. Corcoran

(2) "Electric energy generated" means *the greater of 10,000,000 kilowatt hours or the total number of kilowatt hours produced by the village of Swanton in the town of Highgate during the calendar year immediately preceding the taxable year, and*

The bill, having appeared on the Calendar one day for notice, was taken up, read the second time, recommendation of amendment agreed to and third reading of the bill ordered.

Favorable Reports; Third Reading Ordered

H. 4

Mr. DeBonis of Poultney, for the Committee on Transportation, to which had been referred House bill, entitled

An act relating to opening type II school bus windows before crossing railroad tracks;

Reported in favor of its passage. The bill, having appeared on the Calendar one day for notice, was taken up, read the second time and third reading of the bill ordered.

H. 111

Mr. Spater of Chester, for the Committee on Commerce, and Mr. Valsangiacomo of Barre City, for the Committee on Ways and Means, to which had been referred House bill, entitled

An act relating to registration fees for securities dealers and salesmen;

Reported in favor of its passage. The bill, having appeared on the Calendar one day for notice, was taken up, read the second time and third reading of the bill ordered.

Special Committee Report of Contested Election of Mrs. Stokes of Williston

Mrs. Steele of Waterbury, for the Committee on Municipal Corporations and Elections, to which had been referred the petition of Ruth Painter on the election for the office of State Representative from District Chittenden-4, respectfully reports that it has considered the matter of the election contest between Ruth Stokes and Ruth Painter in District Chittenden-4, and on the 31st day of January, 1985, did conduct a complete recount of all of the votes in that election on the 6th day of November, 1984.

As a result of the Committee's recount the Committee finds the votes cast as follows:

Total number of ballots	3790
-------------------------	------

Howard Lunderville	1493
Thomas O'Neil	1822
Ruth Painter	1632
Ruth Stokes	1649
Write-ins	3
Spoiled	6
Blank	975
Total	7580

Thereupon, the Committee finds that Ruth Stokes was duly elected and is qualified to represent District Chittenden-4 as a member of the House of Representatives.

The report was taken up and, on motion of Mrs. Steele of Waterbury, was adopted.

Special Committee Report of Contested Election of Mr. Woodward of Fairfax

Mr. Westman of Cambridge, for the Committee on Municipal Corporations and Elections, to which had been referred the petition of Bennett Greene on the election for the office of State Representative from District Chittenden-Franklin-1, respectfully reports that it has considered the matter of the election contest between Almon Woodward and Bennett Greene in District Chittenden-Franklin-1, and on the 31st day of January 1985, did conduct a complete recount of all of the votes in that election on the 6th day of November, 1984.

As a result of the Committee's recount the Committee finds the votes cast as follows:

Total number of ballots	1646
Almon Woodward	806
Bennett Greene	801
Write-ins	1
Blank	38
Spoiled	0
Total	1646

Thereupon, the Committee finds that Almon Woodward was duly elected and is qualified to represent District Chittenden-Franklin-1 as a member of the House of Representatives.

The report was taken up and, on motion of Mr. Westman of Cambridge, was adopted.

Adjournment

At ten o'clock and forty minutes in the forenoon, on motion of Mr. Buraczynski of Brattleboro, the House adjourned.

At nine o'clock
House to order.

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Mr. Speaker:

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1983

House: Chittenden 6-2 District

Chittenden/Kennedy

General Election: Chittenden 788; Kennedy 783

Recount: Chittenden 788; Kennedy 783

Issues raised in petition: voter qualifications

Petitioner requested House declare the election void

and order a new election

Special Committee Report of Committee on Municipal Corporations

and Elections: Chittenden duly elected and qualified

House: Report adopted

Keefe, Alexander (Bud), continued

Motions, etc.

H. 112. Explained vote	143
H. 213. Introduced with others	75
H. 284. Introduced with others	123
H. 303. Introduced with others	140
H. 321. Introduced with others	152
S. 61. Demanded Yeas and Nays	411
J.R.H. 33. Offered with all members	561

Keefe, Webster W.

Member from Thetford (District Orange-4)

Committee

Fish and Game, Vice-Chairman

Motions, etc.

H. 146. Introduced with others	45
H. 158. Introduced with others	53
H. 179. Introduced with others	62
H. 233. Introduced with others	98
H. 246. Introduced with others	106
H. 268. Introduced with others	110
H. 287. Introduced with others	124
H. 318. Introduced	151
H. 448. Introduced with others	379
J.R.H. 33. Offered with all members	561

Kehaya, Barbara M.

Member from Winooski (District Chittenden-8)

Committees

Education

To wait upon Clerk-elect

8

Motions, etc.

H. 179. Introduced with others	62
H. 261. Introduced with Mr. Picher	109
H. 312. Introduced with others	150
H. 359. Introduced with others	191
H. 364. Introduced with others	196
J.R.H. 12. Offered with others	205
J.R.H. 23. Offered with others	402
J.R.H. 33. Offered with all members	561

Kennedy, Jeanne Bonneau

Petition for new election in District Chittenden-6-2

78-91

Report of Committee on Municipal Corporations and Elections

111-112

Kennison, Robert E.

Member from Essex (District Chittenden-2-1)

Committee

Members Appointed to Judicial Retention Committee

Pursuant to the provisions of 4 V.S.A. § 607, the Speaker appointed the following members to the Judicial Retention Committee to serve for the biennium:

Hise of Bristol
Brown of St. Albans City
Zuccaro of St. Johnsbury
Corcoran of Bennington

Members Appointed to Health Policy Corporation

Pursuant to the provisions of 18 V.S.A. § 2361, the Speaker appointed the following members to the Health Policy Corporation to serve from February 15, 1983, for a period of two years:

Young-Price of Westminster
Knapp of Bennington

Member Appointed to New England Board of Higher Education

Pursuant to the provisions of 16 V.S.A. §§ 2692, 2694 and 2731, the Speaker appointed Mrs. Condon of Bennington to the New England Board of Higher Education to fill a vacancy caused by the resignation of Mrs. Irene Durkee of Rutland City. Mrs. Condon will serve from February 1, 1983, until February 28, 1985.

Members Appointed to Legislative Council

Pursuant to the provisions of 2 V.S.A. § 402, the Speaker appointed the following members to the Legislative Council to serve for the biennium:

DeBonis of Poultney
DaPrato of Swanton
Morse of Charlotte

Judgment Order Received from Chittenden Superior Court

The Speaker placed before the House a certified copy of a Judgment Order from Chittenden Superior Court, as follows:

"STATE OF VERMONT

CHITTENDEN COUNTY, SS

In RE: : CHITTENDEN SUPERIOR COURT
PETITION OF :
JEANNE B. KENNEDY : DOCKET NUMBER S110-82 CnM

JUDGMENT ORDER

The report of the Recount Committee, conducting a recount of the votes cast for the Office of Representative to the General Assembly from Chittenden District 6-2, was filed with this Court on December 7, 1982.

The report of the recount discloses that the total votes cast for each of three candidates at the General Election on November 2, 1982, is as follows:

Robert Chittenden	788
Jeanne B. Kennedy	783
Charles Carpenter	73
Write Ins	3
Spoiled	4
Miscellaneous	58

The Court having approved the report of the Recount Committee it is hereby ORDERED and ADJUDGED:

1. That this Court certifies that Robert Chittenden received the greatest number of votes cast for the Office of Representative to the General Assembly from Chittenden District 6-2;

2. That this Judgment shall supersede any Certificate of Election previously issued;

3. That a certified copy of this Judgment shall be sent to the Secretary of State;

4. That a copy of this Judgment shall be furnished to the City Clerk of South Burlington;

5. That a copy of this judgment shall be furnished to each of the candidates for the Office of Representative to the General Assembly from Chittenden District 6-2.

6. The Court certifies that the Report of the Recount Committee, approved by the Court, is as follows:

Robert Chittenden	788
Jeanne B. Kennedy	783
Charles Carpenter	73
Write Ins	3
Spoiled	4
Miscellaneous	58

7. The final determination of the election and qualification of its members having been vested exclusively in the House of Representatives of the General Assembly, as a part of its legislative powers, a certified copy of this Judgment Order is to be sent to the Speaker of the House of Representatives of the Vermont General Assembly.

Dated this 24th day of January, 1983.

/s/ Thomas L. Hayes

Thomas L. Hayes
Presiding Judge

/s/ Jane L. Wheel

Jane L. Wheel
Assistant Judge"

"STATE OF VERMONT
CHITTENDEN COUNTY, SS

I, MARGARET H. MASKELL, Deputy Clerk of the Chittenden Superior Court, the same being a court of record having a seal as hereto affixed, DO CERTIFY that the within and foregoing is a true and complete copy of:

Judgment Order

as filed on January 24, 1983 in the within-entitled cause.

(SEAL)

IN WITNESS WHEREOF I HERETO set my hand and affix the seal of the Chittenden Superior Court at Burlington, in said county, this 24th day of January, A.D. 1983.

/s/ Margaret H. Maskell

Margaret H. Maskell
Chief Deputy Clerk"

Petition for New Election in Chittenden District 6-2

The Speaker placed before the House a communication from Bruce M. Lawlor, Esq., containing a Petition for a new election in Chittenden District 6-2. The Petition and attachments were referred to the Committee on Municipal Corporations and Elections. The communication, Petition and attachments are as follows:

"Bruce M. Lawlor, Esq.

Attorney at Law

P.O. Box 830

23 Pleasant Street

Springfield, Vermont 05156-0830

January 24, 1983

The Honorable Robert L. Picher
Clerk of the House of Representatives
State House
Montpelier, Vermont 05602

Re: Chittenden District 6-2

Dear Bob:

Enclosed please find a Petition for a new election in Chittenden District 6-2 for the Office of State Representative. This petition is directed to the Honorable House of Representatives under Chapter II, Section 14 of the Vermont Constitution.

The Petition is also simultaneously being filed with the Office of Secretary of State pursuant to the provisions of 17 V.S.A. 2605. However, as the recent Supreme Court decision in the matter of Kennedy vs. Chittenden et al., No. 83-016, appears to indicate the House may not delegate its authority with respect to elections to any other branch of government, 17 V.S.A. 2605 may well be constitutionally invalid.

Based on the foregoing, we would respectfully request that the House exercise its constitutional authority with respect to the election of its members in as expeditiously a manner as possible. Stated differently, based on the Supreme Court decision, we do not believe the House must wait upon the investigation called for under the statute but may, and probably is required to, conduct its own investigation of the election independent of the executive branch.

Thank you for your consideration.

Very truly yours,

/s/ Bruce M. Lawlor

Bruce M. Lawlor"

"STATE OF VERMONT

HOUSE OF REPRESENTATIVES

IN RE: ELECTION FOR THE *
OFFICE OF STATE *
REPRESENTATIVE * PETITION
FROM CHITTENDEN *
DISTRICT 6-2 *

Now comes your Petitioner, Jeanne B. Kennedy, and pursuant to Chapter II, Section 14 of the Vermont Constitution and the provisions of 17 V.S.A. 2605 respectfully petitions the House of Representatives of the State of Vermont to exercise its constitutional authority to judge elections and order that a new election be held for the Office of State Representative from Chittenden District 6-2. In support of this her petition for a new election, your Petitioner avers and says as follows:

1. Jeanne B. Kennedy, a resident of the City of South Burlington, was a candidate for the Office of State Representative to the Vermont General Assembly from Chittenden District 6-2 which said election was held in the

aforementioned district on 2 November 1982.

2. Robert Chittenden, also a resident of the City of South Burlington, was a candidate for the same office in the same district at the same time and place all as aforesaid.

3. Chittenden District 6-2, as established in 1982 by the Vermont Legislative Apportionment Board, is as follows:

Chittenden District 6-2 (one member): Beginning at the center line of the Williston Road at the boundary line of the City of South Burlington and the Town of Williston; thence westerly along the center line of Route 2 to the intersection of Route 89; thence along the center line of Route 89 southerly to a point 200 feet west of the westerly boundary of Dorset Street; thence southerly parallel to the westerly boundary of Dorset Street and 200 feet westerly therefrom to the Shelburne Town line and northerly along the Williston Town line to the point of beginning.

4. Pursuant to the provisions of 17 V.S.A. 2501(c), the Board of Civil Authority for the City of South Burlington is responsible for accurately determining the geographical location of the last known place of residence of each voter in Chittenden District 6-2 and for properly placing said voter on the appropriate checklist.

5. The Board of Civil Authority for the City of South Burlington failed to carry out its responsibilities under the provisions of the aforementioned 17 V.S.A. 2501(c) in that eighteen (18) persons residing outside the geographical boundaries of Chittenden District 6-2, as set forth hereinabove, were improperly included on the voter checklist for said district and were so present on said checklist at the time of the election for the Office of State Representative from said district held on 2 November 1982.

6. Of the aforementioned eighteen (18) persons improperly listed on the voter checklist for Chittenden District 6-2, ten (10) such persons actually voted in the election for the Office of State Representative from said district held on 2 November 1982.

7. A recount of the election held for State Representative from Chittenden District 6-2 was requested and the result of said recount, filed with the Superior Court, Chittenden County on 7 December 1982, disclosed that the total votes cast for each of the three candidates for the Office of State Representative were as follows:

Robert Chittenden	788
Jeanne B. Kennedy	783
Charles Carpenter	73
Write-ins	3
Spoiled	4
Miscellaneous	58

8. On 9 December 1982 and pursuant to the provisions of 17 V.S.A. 2603 and 17 V.S.A. 2617, your Petitioner initiated a contest in the Superior Court, Chittenden County alleging and asserting that the improper listing of the aforementioned eighteen (18) persons on the voter checklist for Chittenden District 6-2 and the actual voting of ten (10) such persons constituted an election irregularity sufficient to change the ultimate result of the election for the Office of State Representative from said district and that by virtue thereof said election should be set aside and a new election ordered.

9. On 4 January 1983, the Superior Court, Chittenden County, the Honorable Thomas L. Hayes, presiding, issued its Findings of Fact, Conclusions of Law and Order agreeing with the contentions of your Petitioner and ordering that a new election for the Office of State Representative from Chittenden District 6-2 be held on 25 January 1983. A copy of said Findings of Fact, Conclusions of Law and Order is attached herewith.

10. On 11 January 1983, Robert Chittenden filed a Petition for Extraordinary Relief and an Appeal with the Supreme Court of the State of Vermont requesting it to reverse the aforementioned decision of the Superior Court, Chittenden County and to vacate the election scheduled for 25 January 1983.

11. On 21 January 1983, the Supreme Court, State of Vermont issued its decision interpreting Chapter II, Section 14 of the Vermont Constitution and held Vermont courts to be without jurisdiction to decide election contests initiated under 17 V.S.A. 2603. Said Court went on to declare 17 V.S.A. 2603 and 2617 unconstitutional and to vacate the Superior Court's order of 4 January 1983 ordering a new election for the Office of State Representative from Chittenden District 6-2. A copy of said decision is attached herewith.

12. As a result of the aforementioned decision of the Supreme Court, your Petitioner's allegations of election irregularities sufficient to change the results of the election for State Representative from Chittenden District 6-2 have not been ruled upon by any tribunal of competent jurisdiction.

13. The inclusion of eighteen (18) persons on the voter checklist for Chittenden District 6-2, who reside beyond the geographical boundaries of said district, and the voting by ten (10) such persons in the election for State Representative from said district on 2 November 1982 constitute sufficient election irregularity and error to change the ultimate result of said election in that only five votes separate your Petitioner and Robert Chittenden.

14. By virtue of the aforementioned election irregularities and errors, the election for the Office of State Representative from Chittenden District 6-2 held on 2 November 1982 was not valid and a new election should be ordered.

Wherefore, your Petitioner respectfully prays as follows:

1. That the House of Representatives of the State of Vermont exercise its authority under Chapter II, Section 14 of the Vermont Constitution and the provisions of 17 V.S.A. 2605 to judge elections in the most expeditious manner

possible with respect to the election for the Office of State Representative from Chittenden District 6-2 held on 2 November 1982.

2. That the House of Representatives of the State of Vermont declare the election for the Office of State Representative from Chittenden District 6-2 held on 2 November 1982 is void and invalid.

3. That the House of Representatives of the State of Vermont order a new election for the Office of State Representative from Chittenden District 6-2 to be held no later than Town Meeting Day 1983.

Dated at Montpelier, County of Washington and State of Vermont, this 24th day of January 1983.

/s/ Jeanne B. Kennedy

Jeanne B. Kennedy”

“STATE OF VERMONT
CHITTENDEN COUNTY, SS.

CHITTENDEN SUPERIOR COURT
DOCKET NO. S115-82 CnM

JEANNE B. KENNEDY

*

-VS-

*

ROBERT CHITTENDEN, THE
CITY OF SOUTH BURLINGTON,
and THE BOARD OF
CIVIL AUTHORITY

*

*

*

*

The above-entitled cause came on for hearing on the merits before the Chittenden Superior Court December 17, 1982.

The Plaintiff, Jeanne B. Kennedy, was present at the hearing and represented by Rick Sharp, Esquire, and Bruce Lawlor, Esquire. The Defendant, Robert Chittenden, was also present and represented by Clarke B. Gravel, Esquire. The City of South Burlington, the City Clerk, and the Board of Civil Authority, were represented by Richard A. Spokes, Esquire.

This matter came before the Court on Plaintiff's request for a hearing pursuant to 17 V.S.A. Section 2602 and upon Plaintiff's complaint under 17 V.S.A. Section 2603.

After the review of the file and consideration of the evidence and the representations of counsel, the Court makes the following Findings of Fact, Conclusions of Law, and Order:

FINDINGS OF FACT

1. The Plaintiff, Jeanne B. Kennedy, resides in South Burlington, County of Chittenden, State of Vermont, and is a candidate for office of

Representative to the Vermont Legislature from Chittenden District 6-2.

2. Defendant Robert Chittenden resides in South Burlington, County of Chittenden, State of Vermont, and is a candidate for the office of Representative to the Vermont Legislature from Chittenden District 6-2.

3. Defendants City of South Burlington, City Clerk, and the Board of Civil Authority of South Burlington, were responsible for the conduct of the election for Representative to the Vermont Legislature, Chittenden District 6-2, held on November 2, 1982.

4. The above-mentioned District 6-2 was established by the South Burlington Board of Civil Authority and was approved with one minor change by the Legislative Apportionment Board. Said District is as follows:

Chittenden 6-2 (one member): Beginning at the center line of Williston Road at the boundary line of the City of South Burlington and the Town of Williston; thence westerly along the center line of Route 2 to the intersection of Route 89; thence along the center line of Route 89 southerly to a point 200 feet west of the westerly boundary of Dorset Street; thence southerly parallel to the westerly boundary of Dorset Street and 200 feet westerly therefrom to the Shelburne town line; thence southeasterly along the Shelburne town line and northerly along the Williston town line to the point of beginning.

5. Initially, one of the claims made by the Plaintiff was that the Recount Committee erroneously failed to count three absentee ballots. This claim was withdrawn by the Plaintiff at the hearing and is not now before this Court.

6. A second claim of the Plaintiff relates to the manner in which the recount was conducted under the supervision of Chittenden County Clerk Francis G. Fee. The Court finds this claim to be without merit. The facts indicate, and the Court finds, that at the recount, conducted under the supervision of Mr. Fee, the counters at one table used a system in which one person read the results of each ballot and the other two counters worked on tally sheets and, at the other table, two counters checked the ballots while one worked on the tally sheet. After objection was made to the procedure at the second table, the counters switched to a two-tally sheet method similar to that used by the other table.

7. Each system employed by the counters was proper and the Court finds no error with respect to the manner in which the recount was conducted.

8. The report of the Recount Committee conducting a recount of the votes cast for the office of Representative to the General Assembly from Chittenden District 6-2, was filed with this court on December 7, 1982.

9. The report of the recount discloses, and the Court finds, that the total votes cast for each of the three candidates at the general election on November 2, 1982 is as follows:

Robert Chittenden	788
Jeanne B. Kennedy	783
Charles Carpenter	73
Write-ins	3
Spoiled	4
Miscellaneous	58

10. Each ballot, about which there was any question, was counted only if a majority of the members of the Recount Committee was able to ascertain the intention of the voter.

11. The above-mentioned recount, conducted on November 22, 1982, demonstrates a difference of five votes between Jeanne B. Kennedy and Robert Chittenden, with Mr. Chittenden having the greater number.

12. The evidence indicates, and the Court finds, that eighteen persons were included on the checklist for Chittenden District 6-2 who did not reside within the aforementioned geographical boundaries of said district. Ten of these persons voted in the November 2, 1982 election for Representative from Chittenden District 6-2.

13. The ten people who voted in the election for Representative from Chittenden District 6-2 held on November 2, 1982, who did not reside in said district, are as follows:

Lloyd Roberts	1435 Dorset Street
Shelly Roberts	1435 Dorset Street
Jane Demers	1505 Dorset Street
Lucien Demers	1505 Dorset Street
William Lang	1675 Dorset Street
Gail Lang	1675 Dorset Street
Michael Beardseley	655 Spear Street
Gary Eley	300 Spear Street
Karen (Eley) Sanborn	300 Spear Street
Dawn Serridinger	1575 Dorset Street

14. The residential dwellings of each of the ten persons mentioned in the preceding paragraph are located more than 200 feet westerly from the western edge of Dorset Street and are therefore beyond the geographical boundary of Chittenden District 6-2.

15. There was no showing by credible evidence that the land portion of the real property of each of these ten individuals extends to Dorset Street.

16. If it was error to allow the aforementioned ten persons to vote in Chittenden District 6-2, the error was sufficient to change the ultimate result of the election for Representative because the recount indicates a difference of five votes between Jeanne B. Kennedy and Robert Chittenden, with Mr. Chittenden having the greater number.

17. There was no showing by credible evidence that any candidate for

Representative in District 6-2 or any voter in said District, prior to the election, requested the elimination of any names appearing on the pertinent checklist.

18. The Defendant Robert Chittenden contends, and the Court finds, that no request was made by the Plaintiff, the Democratic Party, or any other voter in the City of South Burlington to revise the posted checklist and eliminate the voters listed in Plaintiff's complaint as being physically resident outside the boundaries of District 6-2.

19. The Plaintiff, Mrs. Kennedy, prior to the election in question, had a telephone conversation with the South Burlington City Clerk regarding the residences of the ten voters whose eligibility is now being questioned. Mrs. Kennedy did not protest the inclusion of the names of said ten persons on the checklist but was interested in determining whether she should campaign at their residences and wanted to know whether said persons lived within District 6-2.

20. Mr. Carpenter, another candidate for Representative from District 6-2, made similar inquiries of the South Burlington City Clerk for like reasons.

CONCLUSIONS OF LAW

1. The result of an election for any office may be contested by any legal voter and contest may be initiated by filing a Complaint with a Superior Court alleging that errors were committed in the conduct of the election or in count or return of votes, sufficient to change the ultimate result. 17 V.S.A. § 2603. Such a Complaint was filed by Jeanne B. Kennedy in the case at bar and the Court concludes that it has jurisdiction in this matter.

2. Plaintiff contended, among other things, that three absentee ballots were not counted that should have been counted. However, at trial, this claim was withdrawn and requires no further consideration here.

3. A second contention of the Plaintiff related to the manner in which the recount was conducted under the supervision of the Chittenden County Clerk Francis G. Fee. There was no showing by credible evidence that there was any impropriety or illegality in the conduct of the recount. Each of the methods employed by the counters is deemed by the Court to be a proper method of conducting a recount.

4. The sole issue remaining for consideration is whether errors were committed in the conduct of the election sufficient to change the ultimate result. Plaintiff contends that the inclusion of eighteen persons on the checklist for Chittenden District 6-2 who resided beyond the boundaries of said District and the fact that ten of these persons voted in the election in dispute constitutes error sufficient to change the ultimate result of the election in that only five votes separate the Plaintiff, Jeanne B. Kennedy, and Defendant, Robert Chittenden, in the recount.

5. In this contention, the Court concurs.

6. The Vermont General Assembly placed upon the Board of Civil Authority the responsibility for accurately determining the geographical location of the last known place of residence of each voter in order to place the voter on the proper separate checklist. This responsibility is set forth in 17 V.S.A. § 2501(c) which states as follows:

'In preparing the separate checklists, the board of civil authority shall be responsible for accurately determining the geographical location of the last known place of residence of each voter in order to place the voter on the proper separate checklist. If at any time except on election day the board determines that a voter should be on a different checklist from the one on which his name appears, the board shall remove the voter's name from the wrong checklist and place it on the proper checklist in accordance with section 2147 of this title.'

7. It was the responsibility of the City Clerk of South Burlington to call such meetings of the Board of Civil Authority as were necessary before the election or at other times for revision of the checklist. 17 V.S.A. § 2142.

8. The Defendants have argued, in effect, that a post-election attack on the checklist is not allowed under § 2603 of Title 17. The Court disagrees. Such an argument amounts to an assertion that the checklist is conclusive proof which forecloses subsequent inquiry with respect to a voter's right to vote. This is apparently the law in some jurisdictions but it is not the law in Vermont. In this state the checklist is conclusive only on election day, and an aggrieved party may attack the list after election day. *State ex rel. Cawley v. O'Hearn*, 58 Vt. 718 (1886).

9. In the *Cawley* case, the Court allowed a post-election challenge even though there was a pre-election mechanism for challenge as here. The Court in *Cawley* discounted votes cast by voters improperly included on the checklist by the Board of Civil Authority. The results of the election were not changed, however, because the defendant in that case still came out with a majority of eight votes.

10. In contesting the election in District 6-2, the Plaintiff has the burden of showing that errors were committed in the conduct of the election that were sufficient to change the ultimate result. We conclude that the Plaintiff has met this burden.

11. The Defendant, Robert Chittenden, maintains that, in the absence of an allegation of fraud, the existence of alleged errors in the checklist does not provide a mechanism for this Court to order a new election. This assertion is in direct conflict with the language of 17 V.S.A. § 2603 which permits any legal voter entitled to vote on the office in question to contest an election if errors were committed in the conduct of the election or in count or return of votes, sufficient to change the ultimate result or if for any other reason the result of the election was not valid. The General Assembly intended to confer upon the

Court the power to grant appropriate relief for any of the reasons set forth in § 2603.

12. Ten persons voted in the election for Representative in Chittenden District 6-2 who do not reside in that District. Since only five votes separate the Plaintiff, Jeanne B. Kennedy, and Defendant, Robert Chittenden, in the recount, the error in the conduct of the election was such as to be sufficient to change the ultimate result.

13. The Court finds and concludes that there is just cause to order a new election in the case at bar.

ORDER

In view of the foregoing, it is hereby ordered, adjudged and decreed:

1. That a new election shall be held on January 25, 1983 for the office of State Representative from District 6-2. The date for this election has been set after consultation with the Secretary of State.

2. The Secretary of State and the election officials of the City of South Burlington, Vermont are to take such action as may be necessary to carry out paragraph 1 of this order.

3. All of those who qualified as candidates for State Representative from District 6-2, and whose names were on the official general election ballot for said election, shall appear on the ballots provided for the election to be conducted.

4. This Court shall issue such supplemental orders as may be necessary.

5. The Clerk of the Chittenden Superior Court is directed to send a certified copy of this decision to the Honorable James Douglas, Secretary of State of the State of Vermont.

6. All other claims of the parties are hereby dismissed with prejudice.

Dated this 4th day of January, 1983, at Burlington, County of Chittenden, State of Vermont.

/s/ Thomas L. Hayes

Thomas L. Hayes
Superior Judge"

"NO. 83-016

JEANNE B. KENNEDY

-VS-

ROBERT CHITTENDEN,
CITY OF SOUTH BURLINGTON,
and BOARD OF
CIVIL AUTHORITY

SUPREME COURT

APPEALED FROM
CHITTENDEN SUPERIOR COURT
NOVEMBER TERM, 1982

PRESENT: Billings, C.J., Hill, Underwood and Peck, J.J., and Barney, C.J. (Ret.), (Specially Assigned)

Per Curiam. This is an election contest first started as a recount under 17 V.S.A. Sections 2601 and 2602. That recount appeared to confirm the narrow victory of the defendant Chittenden, whereupon a contest was initiated before Chittenden Superior Court, on the basis of asserted checklist irregularities, under the authority of 17 V.S.A. Section 2603. The court below held a hearing, took evidence and made findings of fact and conclusions of law. The judgment order issued based on these findings called for a new election for the Chittenden District 6-2 seat.

The procedures outlined in 17 V.S.A. Section 2603 were followed and the new election scheduled as provided in Section 2603(e). 17 V.S.A. Section 2604 provides that nothing in these contested election statutes is to abridge the provisions of Chapter II, Article 14 of the Vermont Constitution which reads in part:

Section 14. The Representatives so chosen . . . shall have the power to . . . judge of the election and qualifications of their own members

This provision places the final determination of the election and qualifications of its members exclusively in the House of Representatives of the General Assembly as a part of its legislative powers.

The provisions of 17 V.S.A. Sections 2603 and 2617¹, insofar as they relate to elections to the House of Representatives are an improper delegation of legislative powers to a separate branch of government, to wit, the judicial branch, contrary to the Separation of Powers doctrine set forth in Chapter II, Article 5 of the Vermont Constitution. It provides:

Section 5. The Legislative, Executive, and Judicial departments, shall be separate and distinct, so that neither exercise the powers properly belonging to the others.

A further doctrinal difficulty arises from the lack of finality of the judicial adjudication contemplated under 17 V.S.A. Section 2503. Whatever result reached is subject to total revision or reversal by the exercise by the General Assembly of its acknowledged constitutional power over its own members as already noted under Chapter II, Section 14. Such power of revision, whether exercised or not, represents a further intrusion prohibited by the doctrine of separation of powers and also runs contrary to the precept that the exercise of judicial authority must lead to a final enforceable result and not be merely informative or advisory. *In re Constitutionality of House Bill 88*, 115 Vt. 524, 64 A.2d 169 (1949).

¹ 17 V.S.A. Section 2617 purports to confer general jurisdiction on the superior court "to hear and determine matters relating to elections and to fashion appropriate relief."

Moreover, '[c]ourts do not look with favor on the making of orders that are subject to be set at naught or avoided at the legitimate option of the party against whom the order is directed.' *State Highway Board v. Loomis*, 122 Vt. 125, 132, 165 A.2d 572 (1960).

Accordingly, we hold that the action below, instituted by plaintiff against defendants, has no support in law. The court was without jurisdiction to hear and determine the cause as stated in the complaint; accordingly, the order dated January 4, 1983, mandating a new election to be held on January 25, 1983, should be vacated and the complaint is to be dismissed.

The order in the above-captioned case dated January 4, 1983 ordering a new election on January 25, 1983 is vacated and the complaint and cause are dismissed as being without jurisdictional basis.

BY THE COURT

/s/ *Franklin S. Billings, Jr.*

Franklin S. Billings, Jr.
Chief Justice

/s/ *William C. Hill*

William C. Hill
Associate Justice

/s/ *Wynn Underwood*

Wynn Underwood
Associate Justice

/s/ *Louis P. Peck*

Louis P. Peck
Associate Justice

/s/ *Albert W. Barney*

Albert W. Barney
Chief Justice (Retired)
Specially Assigned"

Bill Amended, Read Third Time and Passed

H. 40

House bill, entitled

An act relating to construction aid to the Morristown school district;

Was taken up and pending third reading of the bill, **Mr. Hise of Bristol** moved to amend the bill in Sec. 1, by striking the following: "1984" and

Bill Amended; Third Reading Ordered**H. 92**

Mr. Candon of Proctor, for the Committee on Natural Resources, to which had been referred House bill, entitled

An act to amend 10 V.S.A. § 6090 relating to recording of land use permits;

Reported in favor of its passage when amended as follows:

First: On page 2, by striking lines 3 through 9 and inserting in lieu thereof the following:

(a) In order to afford adequate notice of the terms and conditions of land use permits, permit amendments, notices of violations and revocations of permits, they shall be recorded in local land records. Such recordings shall be in lieu of action required by 27 V.S.A. § 603. Recordings under this chapter shall be indexed as though the permittee were the grantor of a deed.

Second: In Sec. 1, page 2, by adding a new subsection to read:

(d) For recording permits, permit amendments, notices of violations and revocations of permits, under this section a fee equivalent to the fee authorized by 32 V.S.A. § 1671(1) for mortgages shall be paid to the town clerk upon submission for recording. The environmental board shall adjust fees authorized by 10 V.S.A. § 6083 to provide that applicants or permittees shall cover such recording costs.

The bill, having appeared on the Calendar one day for notice, was taken up, read the second time, recommendation of amendment agreed to and third reading of the bill ordered.

Favorable Report; Third Reading Ordered**H. 182**

Mr. DeBonis of Poultney, for the Committee on Transportation, and **Mr. Shaffe of Bennington**, for the Committee on Ways and Means, to which had been referred House bill, entitled

An act to amend 23 V.S.A. § 311(a) relating to obtaining a permit to operate a motorized wheelchair across a public highway;

Reported in favor of its passage. The bill, having appeared on the Calendar one day for notice, was taken up, read the second time and third reading of the bill ordered.

Special Committee Report on the Matter of the Contested Election of Mr. Chittenden of South Burlington

Mr. Powell of Essex, for the Committee on Municipal Corporations and Elections, to which had been referred the petition of Jeanne Kennedy on the

membership for

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election for the office of State Representative from Chittenden District 6-2, submitted the following report:

The Committee on Municipal Corporations and Elections considered the matter of the election and qualification of Representative Robert Chittenden and finds that Representative Robert Chittenden was duly elected and is qualified to represent District Chittenden 6-2 as a member of the House of Representatives.

The report was taken up and, on motion of **Mr. Powell of Essex**, was adopted.

**Member to Serve on Architectural Barrier Compliance Board
and State House Preservation Committee**

The Speaker announced that by virtue of being Chairman of the Committee on Institutions, **Mr. Allen of Panton** will serve *ex officio* on the Architectural Barrier Compliance Board, pursuant to the provisions of 18 V.S.A. § 1321, and the State House Preservation Committee, pursuant to the provisions of 29 V.S.A. § 155, to serve for the biennium.

Member to Serve on Meat Inspection Board of Appeals

The Speaker announced that pursuant to the provisions of 6 V.S.A. § 3211, **Mr. Booth of Barre Town**, by virtue of being Chairman of the Committee on Agriculture, will serve *ex officio* on the Meat Inspection Board of Appeals for the biennium.

Members to Serve on Emergency Board

The Speaker announced that pursuant to the provisions of 32 V.S.A. § 131, **Mr. Wright of Westminster**, by virtue of being Chairman of the Committee on Appropriations, and **Mr. Giuliani of Montpelier**, by virtue of being Chairman of the Committee on Ways and Means, will serve *ex officio* on the Emergency Board for the biennium.

Members Appointed to Joint Fiscal Committee

Pursuant to the provisions of 2 V.S.A. § 501, the Speaker appointed the following members to the Joint Fiscal Committee to serve for the biennium:

**Hise of Bristol
Candon of Rutland City
Graf of Rupert**

By virtue of their being Chairmen of the Committees on Appropriations and Ways and Means, the following are also members of the Joint Fiscal Committee for the current biennium:

**Wright of Westminster
Giuliani of Montpelier**

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Secretary, as fo
Mr. Speaker:

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Senate: Lamoille District

Manchester/Hastings

General Election: Manchester 5,671; Hastings 150

Issue raised in petition: failure to timely file consent form

Recommendation of Committee on Government Operations:

Reject challenge and allow Manchester to continue to serve as the duly
elected member

Senate: Report adopted

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Hastings, Henry C.

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Crowley, Vice-Chairman
Gannett
Gibson
Daniels

Challenge to Election Referred

The President laid before the Senate a communication from Henry C. Hastings, a candidate for Lamoille District Senator, through his attorney, Gabor Rona, Esq., under date of December 30, 1980, challenging the election and seating of R. Henry Manchester, as the Senator from the Lamoille District, which was read by the Secretary and is as follows:

“December 30, 1980

Honorable Robert Gibson
Secretary of Senate
State of Vermont
Montpelier, VT 05602

Dear Mr. Gibson:

Attached please find a copy of Mr. Henry C. Hastings' challenge to the candidacy of G. Henry Manchester as Senator from Lamoille County.

Pursuant to 17 VSA § 2606(b) this matter should have been brought to your attention by the Attorney General ten days prior to the convening of the General Assembly. Apparently this was not done and therefore we wish to bring this matter to your attention ourselves. We request that you advise us, at your earliest convenience, of what procedure the Senate will take in determining who shall be seated as Senator from Lamoille County.

Thank you.

Sincerely,
/s/ Gabor Rona
Gabor Rona

Enc.

GR: blb

cc: Henry Hastings”

Chairman, *ex officio*
Senate Chairman

"Nov. 12, 1980

Stowe, Vt.

James A. Guest
Sec. of State
State of Vermont

Dear Sir:

Please accept this as notice that Henry C. Hastings of Stowe, Vt., a legal voter and Candidate for State Senator from Lamoille District, hereby requests Hearing by the Vermont Senate upon its convening in January on the matter of — :

The ILLEGALITY of the candidacy of G. Henry Manchester, incumbent Senator from Lamoille, and recently there re-elected:

Manchester's candidacy was illegal from date July 21, Time 5:05 pm, in that he had not by that date and hour filed his consent form, required by Vermont Law to become a candidate on the primary ballot.

Secretary of State's office was apprised of this fact 10 minutes later. Superior Court was apprised of this fact on Aug. 12th; as was later Vermont Supreme Court and U.S. District Court in Burlington.

As final arbiters of 'Contested election matters', I ask the incoming Senate to address itself to this respectfully tendered grievance.

Respectfully,

/s/ Henry C. Hastings

Henry C. Hastings"

Thereupon, pursuant to the rules of the Senate, the Challenge was referred to the Committee on Government Operations.

Message from the House

A message was received from the House of Representatives by Mr. Seager their First Assistant Clerk, as follows:

Madam President:

I am directed to inform the Senate the House has considered a Joint Resolution originating in the Senate of the following title:

J.R.S. 4. Joint resolution relating to weekend adjournment.

And has adopted the same in concurrence.

Deferred

Communication from Henry C. Hastings, Senator, through his attorney, dated November 12, 1980, challenging the election of G. Henry Manchester, Senator from the Lamoille District, is as follows:

December 30, 1980

Henry C. Hastings' challenge to the election of G. Henry Manchester from Lamoille County.

The challenge should have been brought to the attention of the Senate prior to the convening of the Senate in January and therefore we wish to request that you advise us, at the earliest opportunity, what the Senate will take in determining the outcome of the challenge in Lamoille County.

Sincerely,

/s/ Gabor Rona

Gabor Rona

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/s:

A. Fraser.

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Consideration Postponed

Consideration was resumed on Senate bill entitled:

S. 48. An act to amend regulations under 8 V.S.A. §1218 relating to subdivisions.

Thereupon, pending the question, Shall the bill be amended as recommended by the Committee on Energy and Natural Resources? on motion of Senator Bloomer, action on the bill was postponed until Wednesday next.

Message from the House

A message was received from the House of Representatives by Mr. Seager, their First Assistant Clerk, as follows:

Madam President:

I am directed to inform the Senate the House has considered Joint Resolutions originating in the Senate of the following titles:

J.R.S. 8. Joint resolution honoring Senator Donald L. Smith.

J.R.S. 9. Joint resolution relating to weekend adjournment.

And has adopted the same in concurrence.

Appointment of Senate Members to Joint Rules Committee

The President *pro tempore*, on behalf of the Committee on Committees, announced the appointment of the following Senators to serve on the Joint Rules Committee for terms of two (2) years pursuant to the provisions of Joint Rule No. 5:

Senator Bloomer, *ex officio*

Gannett

Crowley

Gibson

Challenge to Election Rejected

Senator Doyle, on behalf of the Committee on Government Operations, submitted a report relating to the challenge of the election and seating of R. Henry Manchester, as the Senator from Lamoille District, by Henry C. Hastings, a candidate for Lamoille District Senator, as follows:

"INTRODUCTION

"The Committee on Government Operations was charged by the Senate with investigating the challenge by a Mr. Henry Hastings of Stowe to the seating of the member from Lamoille County, R. Henry Manchester. The Committee met in open session on January 20. Mr. Hastings and his counsel, Gabor Rona, attended and testified. Senator Manchester also testified.

Neither the challenger, Mr. Hastings, nor Senator Manchester presented any other evidence. In addition to the testimony the Committee considered written submissions offered by Mr. Rona and the Attorney General's Office.

"Mr. Hastings challenged the seating of the member from Lamoille County on the grounds that Mr. Manchester did not make a timely filling of the form indicating his consent to the printing of his name on the ballot in the primary election pursuant to 17 V.S.A. § 2361.

"For relief Mr. Hastings requested that the Committee take the following actions:

1. Unseat Mr. Manchester and remove him from the Senate; and
2. Declare Henry Hastings the winner of the election and seat him as the new member from Lamoille County.

"BACKGROUND

"The facts were not disputed by the parties. Three candidates circulated petitions for the Republican nomination for the Senate seat from the Lamoille District - R. Henry Manchester, Kenneth W. Libby and Henry Hastings. Mr. Manchester personally circulated his petition and personally obtained many of the signatures. In the middle of July and before the 21st, the date for filing petitions, Mr. Manchester hand-carried his petitions to the County Clerk's office. The County Clerk was not there. Mr. Manchester requested a consent form from the assistant clerk but she did not know what or where they were. The assistant clerk told Mr. Manchester that he should leave the petitions and that she would have the clerk take care of the consent form when she returned. Mr. Manchester left his petitions and then left for Detroit where he attended the Republican National Convention.

"The Testimony established that Kenneth W. Libby had the identical problem. Like Mr. Manchester, he filed his nominating petitions by July 21st but the assistant clerk couldn't help him with the consent form. Mr. Libby filed his consent form after 5:00 p.m. on July 21st and his name was placed on the primary ballot with Mr. Hastings and Mr. Manchester.

"When Mr. Manchester returned from Detroit, he received a call from the County Clerk advising him she had the consent form for his signature. Mr. Manchester went to the clerk's office and signed the consent form on July 25th, the day he received the call from the clerk.

"Mr. Hastings filed his nominating petitions and consent form by July 21st. However, several signatures on Mr. Hastings' petitions were invalid and he lacked the required 100 names to have his name placed in nomination. The clerk returned Mr. Hastings' petitions to him and he solicited additional names which he filed after Mr. Manchester's consent form had been signed and recorded with the clerk.

"Three men had their names printed on the ballot as Republican candidates for the Senate nomination. The Primary results were:

Manchester	1,287
Libby	1,010
Hastings	186

"In the Genral Election Mr. Manchester ran as the Republican nominee. Mr. Hastings ran as an independent write-in candidate of the Supreme Justice Party. The results were:

Manchester	5,671
Hastings	150

"In considering the Hastings' challenge, the Senate's jurisdiction is based upon constitutional authority vested in it pursuant to Chapter II, Section 19, of the Vermont Constitution. The Senate has the ultimate authority and constitutional duty to decide on the election and qualifications of its members. The Senate may also be guided by the Vermont Election Law and, in particular, Title 17 § 2361 regarding the 'consent of candidate'.

"The stated proposed of the Vermont Election Law is to guarantee free, open and honest elections. That Mr. Manchester's consent form wasn't filed until shortly after July 21st did not, all parties acknowledged, in any way affect the fairness of the election campaign. The Hastings' challenge asserts, however, that failure to file the consent form by 5:00 p.m. on July 21st should have prohibited the Secretary of State from printing Mr. Manchester's name on the ballot.

"The clear purpose of 17 V.S.A. § 2361, which requires filing by a candidate of a consent form, is to establish the willingness of the candidate to run for office and if elected to serve. It also allows the candidate to set forth exactly how she or he wishes his name to appear, his town of residence and mailing address. All parties agreed that Mr. Manchester's actions evidenced a clear intent to run for office and to serve if elected. Mr. Manchester circulated his petitions and personally delivered them to the clerk's office. He also personally requested a consent form but the assistant clerk did not know what or where they were. Immediately upon returning from Detroit and before Mr. Hastings had filed his completed nominating petition, Mr. Manchester executed and filed his consent form.

"In both the Primary and General Elections the voters of Lamoille County made a clear choice, selecting R. Henry Manchester as their chosen representative in this body.

"In exercising its constitutional authority to decide this challenge, the Committee believes that the Senate should be ever mindful that its constitutional power is derived directly from the people of Vermont. It is their will which must be respected. No where is more deference owed than to honoring the vote our citizens cast in a free and open election. The Committee believes

that the vote of the freemen and freewomen of Lamoille County must be respected. The Committee also notes that not a single voter of Lamoille County (other than the challenger) has raised an objection to the seating of Mr. Manchester.

“COMMITTEE RECOMMENDATION

“For the foregoing reasons the Committee on Government Operations unanimously recommends that the challenge of Henry Hastings be rejected and that R. Henry Manchester continue to serve as the duly elected member from Lamoille County.

Respectfully submitted,
Committee on Government
Operations
/s/ William Doyle
William, Doyle, Chairman”

Thereupon, Senator Doyle moved that the Senate adopt the report of the Committee on Government Operations and thereby reject the unseating challenge of contender Henry C. Hastings and affirm the seating and election of R. Henry Manchester as the Senator from Lamoille District for the 1981 biennial session of the General Assembly,

Which was agreed to on a roll call, Yeas 27, Nays 0.

*Pending the calling of the roll by the Secretary, Senator Manchester requested and was granted leave to be excused from voting on this motion and any other matters relating to the report of the Committee on Government Operations pursuant to Senate Rules 69 and 71.

Senator Crowley, having demanded the yeas, and nays, they were taken and are as follows:

Roll Call

Those Senators who voted in the affirmative were: Bloomer, Crowley, Daniels, Doyle, Gannett, Gibb, Gibson, Godnick, Haley, Harwood, Howland, Howrigan, Illuzzi, McGregor, McSweeney, Morse, Parker, Reynolds, Scott, Skinner, K. Smith, P. Smith, S. Smith, Sorrell, R. Soule, S. Soule, Welch.

Those Senators who voted in the negative were: None.

Those Senators absent or not voting were: Avery, Kaplan, *Manchester (excused).

Adjournment

On motion of Senator Bloomer, the Senate adjourned, to reconvene again

1977

House: Windham-4 District

Nixon/Emond

General Election: Emond by one vote

Recount: Nixon by one vote

House Committee: *conducted its own recount and recommended Emond
won by one vote*

Nixon resigns from House

Niquette, J. Randall

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“State of Vermont
Secretary of State
Montpelier

January 3, 1977

The Honorable Robert L. Picher
Clerk of the House of Representatives
Statehouse
Montpelier, Vermont 05602

RE: *Windham 4-2 District*

Dear Mr. Picher:

Enclosed pursuant to 17 V.S.A. Section 1361, is a copy of the petition of ROBERT R. J. EMOND, relating to his disputed election for the above Representative seat, contesting the election of SYDNEY T. NIXON to that seat as certified by the Windham Superior Court.

Also enclosed is a copy of the opinion of the Attorney General relating to this disputed election, dated January 3, 1977, and signed by Louis P. Peck as Chief Assistant Attorney General, with the approval of the Honorable M. Jerome Diamond, Attorney General. This opinion is also forwarded to you pursuant to the provisions of 17 V.S.A. Section 1361.

Yours sincerely,
/s/ Richard C. Thomas
Secretary of State

RCT:jlc

Enclosures

“State of Vermont
Secretary of State
Montpelier

January 5, 1977

The Honorable Robert L. Picher
Clerk
House of Representatives
Statehouse
Montpelier, Vermont 05602

Dear Bob,

I am herewith transmitting my file on the *John Curran* case for your disposition. Since you are well aware of the circumstances of this case, which we discussed at lunch on Tuesday, I feel that the material will speak for itself.

You should also be receiving from the Washington Superior Court, Edward Amidon presiding as Superior Judge, the ruling on a hearing on this

Rec. fr. Sen., 677; rd., prop. of amend. agreed to, adptd. in con. w. prop. of amend., text, 688-9.

By Senators Boylan and Mandigo,

J. R. S. 37. (R-59) Joint resolution paying tribute to Fred P. Davis.

Rec. fr. Sen., 748; rd. & adptd. in con., text, 748-9; Sen. mess., Gov. app., 768.

HOUSE RESOLUTIONS

Offered by Mr. Candon of Rutland City and Mr. Douglas of Middlebury,

H. R. 1. Resolution relating to temporary House rules.

Rd. & adptd., text, 8.

Offered by Mr. Candon of Rutland City and Mr. Douglas of Middlebury,

H. R. 2. Resolution relating to organization of the House and informing the Senate thereof.

Rd. & adptd., text, 8.

Offered by Mr. Candon of Rutland City and Mr. Douglas of Middlebury,

H. R. 3. Resolution relating to the organization of the House and informing the Governor thereof.

Rd. & adptd., text, 8; C. apptd. pursuant to, 9-10.

Offered by the Committee on Municipal Corporations and Elections,

H. R. 4. Resolution authorizing the Committee on Municipal Corporations and Elections to issue subpoenas to obtain the production of ballots and other documents.

Rd. & pl. on Cal., text, 64-5; ord. to lie, 75; lv. req. to wdr., 101-2; wdrn., 114.

Offered by Mr. Moffett of Brandon,

H. R. 5. Resolution welcoming the Atlantic Islands of Nantucket and Martha's Vineyard.

Rd., mo. made to amend, mo. to subst. amend. for pndg. amend. disagreed to, amend. disagreed to, adptd., text, 364-5.

Offered by the Committee on Commerce,

H. R. 6. Resolution relating to a study of unemployment compensation provisions.

Rd., mo. made to commit to C. on Appr., lv. req. to wdr. mo., act. postp. on div., text, 381-2; mo. wdrn., act. postp., 458; lv. req. to wdr., 640-1; wdrn., 645.

Offered by Mr. Smith of Woodstock and Mr. Stone of East Montpelier,

Resolved by the Senate and House of Representatives:

That it is the sense of the Senate and House of Representatives that a significant contribution should be made toward alleviating medical malpractice problems by improving upon Hospital Risk Management Programs, *and be it further*

Resolved: That it is recommended that all Vermont hospitals vigorously pursue Hospital Risk Management Programs adapted to the characteristics of each institution, *and be it further*

Resolved: That Risk Management Programs include the following functions:

(1) The investigation and analysis of the frequency and causes of general categories and specific types of adverse incidents causing injury to patients; and

(2) The development of appropriate measures to minimize the risk of injuries and adverse incidents to patients through the cooperative efforts of all personnel; and

(3) The analysis of patients' grievances which relate to patient care and the quality of medical services; *and be it further*

Resolved: That the risk management program shall be carried out either through a person on the administrative staff of a hospital, as part of his administrative duties; or by a committee of the hospital board of trustees or directors; or by the medical staff in a manner deemed appropriate; *and be it further*

Resolved: That reports of the nature and operation of all Hospital Risk Management Programs be provided to the Commissioner of Banking and Insurance and the Commissioner of Health.

Which was read and, under Rule 52, in the discretion of the Speaker, ordered placed on the Calendar for action tomorrow.

HOUSE RESOLUTION PLACED ON CALENDAR

H. R. 4

The Committee on Municipal Corporations and Elections offered a resolution, entitled

Resolution authorizing the Committee on Municipal Corporations and Elections to issue subpoenas to obtain the production of ballots and other documents;

Whereas, the Committee on Municipal Corporations and Elections has before it the petition of Robert R. J. Emond of Brattleboro contesting the legality of the election of Sydney T. Nixon of Brattleboro to the General Assembly from Windham District 4-2, and

Whereas, the Committee met with attorneys for the respective parties on January 13, 1977 and, after taking testimony from said attorneys and review-

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ing the issues, the Committee has concluded that a review of the ballots, tally sheets and papers for the election is essential in its deliberations concerning this contested election, and

Whereas, the ballots are presently in the custody of Norman C. Robinson, Windham County Clerk per order of Judge Ernest W. Gibson III, dated November 14, 1976, and

Whereas, it is the conclusion of the Committee that appropriate procedure for directing the ballots from the office of the County Clerk to the House of Representatives is by way of a subpoena duces tecum, *now therefore be it*

Resolved by the House of Representatives:

That for the following purposes only that the Committee on Municipal Corporations and Elections be authorized to issue a subpoena duces tecum to obtain the production of all the ballots, documents, papers and materials not otherwise privileged relative to the election between Sydney T. Nixon and Robert R. J. Emond in District 4-2 held on November 2, 1976, and subsequent recount and certification.

Which was read and, in the discretion of the Speaker, placed on the Calendar for action tomorrow.

FAVORABLE WITH AMENDMENT

H. 4

Mr. Keve of Montpelier, for the Committee on Judiciary, to which had been referred House bill, entitled

An act to amend 14 V.S.A. § 2656 relating to guardians appointed by Will;

Reported in favor of its passage when amended

On page 1, line 23, by inserting before the word "determined" the word *judicially*

The bill, having appeared on the Calendar one day for notice, was taken up, read the second time, recommendation of amendment agreed to and third reading ordered.

FAVORABLE REPORTS

H. 114

Mrs. Babcock of Burlington, for the Committee on General and Military Affairs, to which had been referred House bill, entitled

An act to amend 18 V.S.A. § 1324 relating to parking for the handicapped;

RESOLUTION ORDERED TO LIE

H. R. 4

House resolution, entitled

Resolution authorizing the Committee on Municipal Corporations and Elections to issue subpoenas to obtain the production of ballots and other documents;

Was taken up and pending the question, Shall the resolution be adopted? Mr. Allard of St. Albans Town moved that the resolution be ordered to lie, which was agreed to.

MEMBERS EXCUSED TO ATTEND INAUGURATION OF PRESIDENT

Mr. Niquette of Winooski, Mr. Chaloux of St. Johnsbury and Mr. Mahoney of Burlington were excused from attendance upon the session Wednesday, Thursday and Friday of this week to attend the inauguration of President Carter.

ADJOURNMENT

At ten o'clock and thirty-five minutes in the forenoon, on motion of Mr. Candon of Rutland City, the House adjourned.

WEDNESDAY, JANUARY 19, 1977

At nine o'clock and thirty minutes in the forenoon the Speaker called the House to order.

Devotional exercises were conducted by Reverend Mark A. Follansbee of Bethany Congregational Church in Montpelier.

HOUSE BILLS INTRODUCED

House bills of the following titles were severally introduced, read the first time and referred as follows:

H. 176

By Mr. Allard of St. Albans Town, Mr. Moffett of Brandon and Mr. Morse of Newfane,

An act to amend 24 V.S.A. §§ 73, 133, 291, 299, 308 and 311; 32 V.S.A. § 1182 and to add 24 V.S.A. §§ 291a and 291b and to repeal 24 V.S.A. § 307 and Sec. 4 of Public Act No. 302 of the 1969 Adjourned Session relating to municipal and county government;

To the Committee on Government Operations.

the following re-

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By Mr. Kinsey of Craftsbury:

"Mr. Speaker:

When I first came here, the former member from Newport, Mr. Mooney, took me under his wing and introduced me to his friends here. On one instance he said, I want to introduce you to one of the real gentlemen of this House. That introduction was most appropriate because the member from Brattleboro, even in this controversy, has conducted himself as one of our finest gentlemen and certainly commands my greatest respect."

RECESS

At nine o'clock and fifty minutes in the forenoon the Speaker declared a recess until ten o'clock.

At ten o'clock in the forenoon the Speaker called the House to order.

MEMBERS EXCUSED

Mrs. Swainbank of St. Johnsbury and Mr. Austin of Newport City asked and were granted leave to be absent from attendance upon the session Friday of this week.

BILL RECOMMENDED

H. 156

On motion of Mr. Ketcham of Middlebury, the rules were suspended and House bill, entitled

An act to add 12 V.S.A. § 520 relating to judicial procedure;

Appearing on the Calendar for notice, was taken up for immediate consideration. Pending the reading of the report of the Committee on Judiciary, Mr. Ketcham of Middlebury moved that the bill be recommitted to the Committee on Judiciary, which was agreed to.

OATH ADMINISTERED

The Speaker directed the doorkeeper to conduct Mr. L. Philip Bouchard, the member-elect from the Town of Franklin, to the bar of the House where he took and subscribed the oath, administered by the Clerk, and required by the Constitution and laws of the State.

LEAVE REQUESTED TO WITHDRAW RESOLUTION

H. R. 4

Mr. Allard of St. Albans Town asked leave to withdraw House resolution, entitled

Resolution authorizing the Committee on Municipal Corporations and Elections to issue subpoenas to obtain the production of ballots and other documents;

Thereupon, the resolution, under the rule, was ordered placed on the Calendar for action tomorrow.

**COMMITTEE RELIEVED OF CONSIDERATION OF BILL
AND BILL COMMITTED TO OTHER COMMITTEE**

H. 96

Mr. Rouse of Hartford moved that the Committee on Institutions be relieved of House bill, entitled

An act to amend 28 V.S.A. § 853 (a) relating to corrections;

And that the bill be committed to the Committee on Judiciary, which was agreed to.

JOINT RESOLUTION REFERRED

J. R. H. 10

Mr. Obuchowski of Rockingham offered a joint resolution, entitled

Joint resolution relating to convention of proposed human life constitution amendment;

Whereas, millions of abortions have been performed in the United States since the abortion decision of the Supreme Court on January 22, 1973, and

Whereas, the Congress of the United States has not, to date, proposed, subject to ratification, a human life amendment to the Constitution of the United States, *now therefore be it*

Resolved by the Senate and House of Representatives:

That the Legislature of the State of Vermont hereby makes application to the Congress of the United States to call a Convention for the purpose of proposing an amendment to the Constitution of the United States that would protect the life of all human beings, including unborn children at every stage of their biological development, *and be it further*

Resolved: That this shall constitute a continuing application for such convention pursuant to Article V of the Constitution of the United States until such convention shall have been called by the Congress of the United States, *and be it further*

Resolved: That the Secretary of State is directed to send copies of this resolution to the President of the United States, the President of the United States Senate, the Speaker of the United States House of Representatives and to the members of Vermont's Congressional Delegation.

Which was read the first time and, at the Speaker's discretion, treated as a bill and referred to the Committee on Judiciary.

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LEAVE GRANTED TO WITHDRAW RESOLUTION

H. R. 4

House resolution, entitled

Resolution authorizing the Committee on Municipal Corporations and Elections to issue subpoenas to obtain the production of ballots and other documents;

Appearing on the Calendar for action, was taken up and the question, Will the House grant Mr. Allard of St. Albans Town, for the Committee on Municipal Corporations and Elections, to withdraw the resolution? was decided in the affirmative.

ADJOURNMENT

At ten o'clock and seventeen minutes in the forenoon, on motion of Mr. Galli of Barre City, the House adjourned until Tuesday, February 1, 1977, at ten o'clock in the forenoon pursuant to the provisions of J.R.S. 15.

TUESDAY, FEBRUARY 1, 1977

At ten o'clock in the forenoon the Speaker called the House to order.

Devotional exercises were conducted by Reverend William A. Lasher of Trinity United Methodist Church in Montpelier.

MESSAGE FROM SENATE

A message was received from the Senate by Mr. Thomas, their Assistant Secretary, as follows:

Mr. Speaker:

I am directed to inform the House that the Senate has on its part passed Senate bill entitled:

S. 1. An act to amend 4 V.S.A. § 73 relating to rotation of Superior Judges;

In the passage of which the concurrence of the House is requested.

MESSAGE FROM GOVERNOR

A message was received from His Excellency, the Governor, by Mr. Charles Butler, Jr., Secretary of Civil and Military Affairs, as follows:

Mr. Speaker:

I am directed by the Governor to inform the House that on the 28th day of January he approved and signed joint resolutions and a bill originating in the House of the following titles:

COMMUNICATION FROM MR. NIXON OF BRATTLEBORO

The Speaker laid before the House the following communication from Mr. Nixon of Brattleboro:

"State of Vermont
House of Representatives
Montpelier
05602

January 27, 1977

Honorable Timothy J. O'Connor
Speaker of the House of Representatives

Mr. Speaker:

Last fall I campaigned for the privilege to serve the people of my district for a sixth term. On election night, my opponent was declared the winner by a margin of a single vote. Following the advice of loyal supporters, I petitioned for a recount in Windham Superior Court under the provisions of 17 V.S.A. § 1361. The recount committee in that court found me to be the winner by one vote and the court gave me a certificate of election. I sincerely believed that I was duly elected to again represent the interests of the people of my district.

However, a committee of this House, having received a petition to look into the matter of my election once again, chose to disregard the court order and my certificate of election, and duplicated the work of the recount committee, coming up with the opposite result, namely, that I had lost by one vote, and is urging this House that it should unseat me and seat my opponent instead.

Mr. Speaker, I thought I had won the election but this committee's report now seems to require that my fellow members, many of whom have served with me for nine years, be asked to disregard the court order and send me home. To ask this of you, my friends, seems to me to be both embarrassing and unfair to you.

And so, Mr. Speaker, after much soul-searching, I have concluded that I should spare you the difficult decision that you would otherwise have to face, and tender my resignation from the House and from further service to the State of Vermont which we all love so dearly.

I depart this hallowed Hall of Representatives with sadness in my heart but with bitterness toward none of you, my friends, who remain to face the many difficult problems yet to be resolved.

In my nine years of service here, I have always attempted to serve my constituents to the best of my ability. I have thoroughly enjoyed it. I thank you for your friendship. I have many fond memories which I shall cherish for the rest of my life. God bless you all. Goodbye.

Sincerely,
/s/ Sydney T. Nixon"

Which was disagreed to and the recurring question, Shall the bill be read the third time? was decided in the affirmative.

SPECIAL COMMITTEE REPORT

The following Special Committee Report, appearing on the Calendar for action, was taken up, considered and adopted:

The Committee on Municipal Corporations and Elections respectfully reports that it has considered the matter of the qualification and election of Representative John H. Curran, in District Grand Isle-Franklin 1 and finds that Representative John H. Curran was duly elected and is qualified to represent District Grand Isle-Franklin 1, as a member of the House of Representatives for District Grand Isle-Franklin 1.

LEAVE GRANTED TO WITHDRAW BILL

H. 101

House bill, entitled

An act to add 29 V.S.A. Chapter 17 relating to the Vermont State Job Retention Board;

Appearing on the Calendar for action, was taken up and the question, Will the House grant Mr. Caracciola of Bennington leave to withdraw the bill? was decided in the affirmative.

LEAVE GRANTED TO WITHDRAW SPECIAL COMMITTEE REPORT

The Special Committee Report of the Committee on Municipal Corporations and Elections, relating to the matter of the election contest between Sydney T. Nixon and Robert R. J. Emond, appearing on the Calendar for action, was taken up and the question, Will the House grant Mr. Allard of St. Albans Town leave to withdraw the report on behalf of the Committee on Municipal Corporations and Elections? was decided in the affirmative.

REMARKS BY MR. LLOYD OF WESTON

On motion of Mr. Babcock of South Burlington, the following remarks by Mr. Lloyd of Weston were ordered printed in the Journal:

"Mr. Speaker:

A week ago last Thursday evening I watched and listened to the historic passing of the leadership of our land from one pair of hands to another.

On these occasions every four years, it's easy enough to talk of policies and politics—what one man did or didn't do during his term—what the other man may or may not do during his.

But rather than policies and politics, I prefer for a moment to speak of institutions.

1973

Senate: Chittenden District

Smith/Fayette

General Election: Fayette wins

Recount: Smith 19,319; Fayette 18,957

Issues raised in petition: failure to secure ballots after election

Special Election Committee Chair recommended a new special election be held in Essex, and that the special election's votes be added to the recount totals of the other towns

Other members recommended that there be an advisory referendum in Essex

Senate: Affirmed election of Smith

Enosburg Falls Graded School District,

Appropriation to for capital construction projects, See table H. 191 833

Equal Rights,

Proposed amendment to U.S. Constitution re, See table J.R.S. 3 and J.R.H. 8 842; 846
Question of to be submitted to voters, See table S.R. 10 851

Essex, Town of

Advisory referendum in, See table S.R. 7 851

Executive Orders,

No. 2 - Referral of, text 73
Extension of time for filing of, See table S. 79 817
No. 3 - Referral of, text 73-75
Extension of time for filing of, See table S. 79 817
No. 4 - Referral of, text 75-77
Extension of time for filing of, See table S. 79 817

Executive Sessions,

Prohibition of by public boards and commissions, See table S. 15 809

F.

Farmer, Robert (Rev.)

Devotional exercises by 217; 227; 234

Farmers Home Administration,

Assistance from requested for farmers, See table J.R.S. 11 843

Farming,

Assistance for farmers requested (funds frozen by President), See table J.R.S. 11 843
Mortgage loans on farms eligible for purchase by Vermont Home Mortgage Credit Agency, See table S. 92 819
Property taxation, homestead exemptions, See table S. 29 811

Fayette, Frederick J.

Petition from (re election), text 4-6
Letter from re Special Election, text 38-39
Petition denied by Senate on roll call 42-43

Federal Water Pollution Control Act,

Federal assistance under increased, See table S. 94 820

Felonies,

Definition of amended, See table H. 118 829

Fetal Deaths,

Provision for reporting of, disposition of bodies, See table S. 70 816

Fiduciary Relations,

Institutional funds; uniform management of, See table S. 35 811

Field, Harold T. (Rev.)

Devotional exercises by 45; 47; 50

Finney, E. Dean

Appointed Member, Board of State Colleges 263
Appointment confirmed 339-340

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of East Montpelier, as Journal Clerk, and

CLARA B. THOMAS

of Montpelier, as Calendar Clerk, and

FAITH A. PERRY

of Barre, as a third Secretary.

The President announced the appointment of

JOAN THOMAS

of Barre, as Secretary to the President.

PETITION OF ELECTION JOURNALIZED

The President laid before the Senate a Petition from Frederick J. Fayette of South Burlington relating to the general election held on November 7, 1972, and its results (and recount thereof) pertaining to senatorial seats in Chittenden County, which Petition was read by the Secretary and is as follows:

"STATE OF VERMONT

CHITTENDEN COUNTY

PETITION TO THE VERMONT
SENATE UNDER CHAPTER 11,
SECTION 19 OF THE VERMONT
CONSTITUTION.

COMES Frederick J. Fayette of South Burlington, Vermont and respectfully represents:

1. That he was duly elected a member of the State Senate from Chittenden County at the General Election held on November 7, 1972.

2. That on November 17, 1972, Frederick P. Smith of Burlington, Vermont, a candidate for the office of Chittenden County Senate on the Republican ballot petitioned the Honorable Robert W. Larrow for a recount of all the votes cast for County Senators in Chittenden County, pursuant to V.S.A. 17, Section 1362, *alleging in said petition, among other things that he was informed and believed that a mistake or fraud had been committed in the counting or the return of the votes cast for the Chittenden County Senators.*

3. That on November 20, 1972, the Honorable Robert W. Larrow made and issued an order, based on the petition of Frederick P. Smith, directing a recount of the ballots cast for the office of County Senator within and for the County of Chittenden.

4. That a recount of said ballots, under the above order of November 20, 1972, began on November 27, 1972, and concluded on December 13, 1972. Said recount having been conducted by a committee appointed for that purpose.

5. That the recount as reported by said committee was as follows:

Frederick P. Smith	19,319
Russell F. Niquette	19,178
Frederick J. Fayette	18,957

6. That notwithstanding the result of said recount and the requirements of V.S.A. 17, Section 1362, Judge Larrow refused to certify the result of the recount indicating the election of Frederick P. Smith because of 'various irregularities' that were reported to him during the recount, and that had become apparent to him.

(See Larrow Order)

7. That none of the ballots cast for County Senator within and for the County of Chittenden at said General Election were 'securely sealed', as required by V.S.A. 17, Section 1223.

(See page 1 Larrow Order)

8. That the ballots delivered to the County Clerk by the respective Town Clerks within said County of Chittenden for the office of County Senator, were delivered in paper bags, cardboard boxes and other unsecured receptacles affording an opportunity to tamper with said boxes and the ballot contents of the same 'the possibilities of fraud are apparent'.

(See page 2 Judge Larrow Order)

9. The Deputy County Clerk certified that he did not receive a single ballot box from any town or city within the county that was in compliance with the law, i.e. V.S.A. 17, Section 1223.

(See Clerk's certificate—last page of Report of Recount Committee)

10. That the petitioner herein, Frederick J. Fayette, Esq., has reason to believe and does believe that the ballots cast for the candidates for County Senator, were not properly preserved by the town and city clerks between the dates of November 7, 1972, and November 24, 1972, when they were delivered to the County Clerk, so to reasonably preclude unauthorized persons from tampering with said ballots.

11. The petitioner herein Senator Fayette is informed and believes, and so states, that the ballots in question, those which Frederick P. Smith *claims* to have elected him as County Senator, were not carefully preserved by the various town clerks as required by law; they were exposed to tampering by persons who might have an interest in and to such action. Can it be said this gross irregularity should be disregarded? The integrity of an election, and the ballots cast thereof cannot be preserved by allowing the ballots to be placed within the reach of persons not authorized to have access to them.

12. That for the reasons set forth herein, and for those advanced by the Honorable Robert W. Larrow, in his refusal to certify a Senatorial candidate as a result of the recount, the petitioner requests the Honorable members of the Senate to:

from Frederick J. on held on November 7, 1972, to senatorial the Secretary and

1, Vermont and re- e Senate from Chit-ber 7, 1972.

Smith of Burlington, County Senator on the Larrow for a recount County, pursuant to other things that he been committed in Chittenden County Sena-

Robert W. Larrow Frederick P. Smith, County Senator within

order of November ed on December 13, mittee appointed for

A. By the adoption of appropriate resolution refuse to acknowledge Frederick P. Smith as a duly elected senator from Chittenden County and to deny him a senatorial seat therein.

B. By the adoption of an appropriate resolution affirm the original count of the ballots cast for senators in Chittenden County on November 7, 1972, and declare Frederick J. Fayette as duly elected Senator from Chittenden County.

C. By the adoption of an appropriate resolution declare the election of November 7, 1972, to the extent it pertains to the petitioner herein Frederick J. Fayette and Frederick P. Smith a nullity and direct that a 'run off' election be held between them in Chittenden County. This is the preferred resolution.

A statement of facts and a memorandum of law are attached hereto and made a part hereof. They are important and integral parts of the formal petition.

Respectfully submitted this 3rd day of January, 1973.

FREDERICK J. FAYETTE

By: /s/ Harold C. Sylvester
Harold C. Sylvester
His Attorney"

SENATE RESOLUTIONS ADOPTED

Senate resolutions of the following titles were severally offered, read and adopted, and are as follows:

By Senator Janeway,

S. R. 1. Senate resolution relating to the rules of the Senate.

Resolved by the Senate:

That the Senate be governed by the Rules of the Senate of 1972 as far as applicable until others are adopted.

By Senator O'Brien,

S. R. 2. Senate resolution relating to appointment of a committee to inform the Governor of the organization of the Senate.

Resolved by the Senate:

That a committee of two Senators be appointed by the President to wait upon His Excellency, the Governor, and inform him that the Senate has organized and is ready on its part to proceed with the business of the session.

By Senator Buckley,

S. R. 3. Senate resolution relating to informing the House of the organization of the Senate.

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Whereas, the future of our country is dependent on the development of our youth for the ultimate accomplishment of worthy goals, and

Whereas, motivation for such achievement can arise from the free exchange of ideas at a gathering of our young citizenry, *now therefore be it*

Resolved by the Senate and House of Representatives:

That the Youth Citizenship Conference may use the Hall of Representatives as a meeting place on Saturday, February 17, 1973, beginning at ten o'clock in the morning.

BILL REFERRED

House bill of the following title was read the first time and referred:

H. 162. An act relating to the Hartford High School Band.

To the Committee on Appropriations.

MESSAGE FROM THE HOUSE

A message was received from the House of Representatives by Mr. Graham their First Assistant Clerk, as follows:

Mr. President:

I am directed to inform the Senate the House has on its part adopted a Joint Resolution entitled:

J. R. H. 10. Joint resolution relating to weekend adjournment.

In the adoption of which the concurrence of the Senate is requested.

I am directed to inform the Senate the House has considered a Joint Resolution originating in the Senate of the following title:

J. R. S. 4. Joint resolution to provide for a Joint Assembly to hear the budget message of the Governor.

And has adopted the same in concurrence.

SPECIAL ORDER: REPORTS OF SPECIAL ELECTION COMMITTEE RECEIVED; SENATOR EXCUSED FROM VOTING; SENATE RESOLUTION REJECTED; PETITION DENIED; ELECTION AFFIRMED

The Report of the special committee established pursuant to S. R. 6 to investigate the senatorial election for Chittenden County,

Was taken up as a Special Order.

Senator Soule, on behalf of himself and Senator Branon, submitted a report as members of this special committee, as follows:

"PROPOSAL FOR 'APPROPRIATE ACTION' OF THE SENATE AS TO SENATE RESOLUTION #6 RELATING TO THE CHITTENDEN COUNTY SENATORIAL ELECTION.

The committee agreed that any of its four members could make a report to the Senate of his recommendations for 'Appropriate Action' in this situation or join in the report of another member of the committee.

Therefore, as chairman of the Committee I make the following report initially.

In view of the conflicting testimony heard by the committee from persons involved in the election and the recount, it is my opinion there can be no proof of fraud but only gross error, particularly in the town of Essex, in the counting and tallying of ballots. For the committee to follow up all avenues of conflict within the time allotted by the Senate resolution is an impossible task and one which only leads to further antagonisms and possible smearing of innocent persons. Furthermore, the Senate is being delayed and hampered in carrying out the duties for which we were elected.

Therefore, I recommend as follows:

1. On the first Saturday in February 1973, an election be held in the town of Essex between the two principal adversaries in the election, namely Senator Smith and Mr. Fayette.
2. That the election be conducted by the Essex Board of Civil Authority supervised by representatives from the Secretary of State's Office.
3. That the four Senate members of the Investigating Committee be in attendance at the election, one of each political party at each polling place in the town of Essex.
4. That following this special election the total votes cast for each individual be added to the recount totals for each of the other towns, in Chittenden County and the combined highest total be declared the individual winner.
5. That until at least the first Tuesday after the Saturday's election, Senator Smith will hold the Chittenden County Senate Seat in question.

To the end of accomplishing this election, I submit now to the Secretary a so-called resolution for a referendum as previously described to the committee by the Attorney General as one approach which he considers legally defensible. The hazards in this approach as described to the committee by the Attorney General, are that an appeal might be taken by either of the contestants or even a citizen voter. To lessen this hazard I also submit a letter from Mr. Fayette which I read as follows:

FREDERICK J. FAYETTE
South Burlington, Vermont

Wednesday, January 10, 1973

Hon. Richard Soule, Chairman
Special Senate Investigating Committee
Montpelier, Vermont

Honorable Sir:

Since my appearance before your honorable committee today, I have given further serious thought to the acceptability of a runoff election between Fred Smith and me in the Town of Essex only.

I am fully cognizant of the predominance of the Republican Party in Essex and the fact that my appeal to the Senate has focused an attention on this Town which may act to my detriment. However, it is the true vote in Essex which is in question. Therefore, I am willing to support fully a runoff election limited to Essex only. This will provide the people of Essex an opportunity to clearly express their position and I will accept their new expression as the people's choice. I will abide the decision reached in this new election and if the vote of the Town when added to the results of the recount in the other towns of Chittenden establish Fred Smith as the winner, I will wish him Godspeed and success and give him my support in his representation of the people of Chittenden County.

I will also commit myself to abide this decision without further appeal, either legislative or judicial.

Respectfully submitted,

/s/ Frederick J. Fayette
Frederick J. Fayette'

I also have verbal assurance from Senator Smith that he will abide by the vote in the same manner and not render an appeal either legal or judicial.

Speaking now for the Committee we have been impressed with particularly the manner in which the two principal contestants have conducted and represented themselves. We are grateful to the numerous people who have heeded our requests and questions in interviews without the necessity of using the subpoena power granted us in the resolution.

Personally I thank the Senate and particularly the Committee members for their cooperation in giving of their time beyond the call of duty in this rather unpleasant situation.

Submitted by

Richard C. Soule, Chairman
Investigating Committee for
Chittenden County Senatorial Election"

Thereupon, Senator Westphal, on behalf of himself and Senator Newell, submitted a report as members of this special committee, as follows:

"REPORT TO THE SENATE BY SENATORS WESTPHAL AND
NEWELL

Re: S. R. 6

We entered upon this thoroughly distasteful task with the premise that it is for the Senate to decide whether the Chittenden County Senatorial election should be invalidated.

Our conclusion after participation on this committee: we cannot recommend an invalidation.

We have been made aware of election errors, omissions and irregularities but we have not been persuaded that fraud has been perpetrated. There is no actionable criminal fraud.

Subsequent to a legal recount, sustained by the Supreme Court which ordered a certificate of election, no new evidence has been developed suggesting actionable fraud. And in the absence of any prosecution of fraud on the part of the county officials who have thoroughly studied all aspects of the situation and in the absence of any overweening evidence presented to the Committee of fraud, we are convinced that no further action by the Senate is justifiable.

We reject the proposal for either an election or a referendum on the basis that no subsequent election or referendum can create the same participating body politic as participated last November. An election for all twelve candidates would be fairest yet that gives voters who did not vote at all in November, and voters who in November did not vote for either candidates Fayette or Smith the chance to reconsider their November action. This puts them at an advantage over voters in other counties who today could wish a chance to reconsider their senatorial vote of last November.

Further, a new election or referendum could open the affair to further litigation brought by a citizen or citizens, former election officials or any other candidates.

A referendum for which there is no precedent would not be legally binding.

We feel since it is constitutionally incumbent upon the Senate to decide and the Senate *will decide* eventually, the decision can and should be made now by the Senate.

We recommend the results of the recount be affirmed and that the certificates of election issued for the November 7, 1972 general election stand.

/s/ Fred Westphal
/s/ Graham S. Newell"

Thereupon, pending any action to be taken on these reports by the Senate, Senators Soule and Branon offered a resolution which was read and is as follows:

S. R. 7. Senate resolution relating to an advisory referendum in the town of Essex.

Whereas, Senate Resolution 6 established a committee to investigate the senatorial election in Chittenden County, and

Whereas, pursuant to that resolution the committee met and took testimony from the candidates, their representatives, the Attorney General, the Secretary of State, the Chittenden County Sheriff, the Chittenden County State's Attorney, the Chairman of the Recount Committee, the attorney for

committee: we cannot recom-

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s been perpetrated. There is no

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he committee met and took testi-
tives, the Attorney General, the
Sheriff, the Chittenden County
ount Committee, the attorney for

the town of Essex, the printer of the county ballots, and certain officials of the town of Essex, and

Whereas, the testimony, while conflicting, showed evidence of irregularities reflecting adversely on the integrity of the ballots in the town of Essex, yet showed no proof of actionable fraud in the election in that town, and

Whereas, the Senate is unable to determine from the evidence presented relative to voting in the town of Essex on the election and qualification of two candidates for the office of state senator from Chittenden County, *now therefore be it*

Resolved by the Senate:

That an advisory referendum shall be held to provide advice and assistance to the Senate in exercising its authority under section 19 of Chapter II of the Vermont Constitution by which the Senate shall decide on the election and qualifications of its members, *and be it further*

Resolved: That the advisory referendum be between only Senator Frederick P. Smith, winner of the recount completed in Chittenden County on December 13, 1972 and former Senator Frederick J. Fayette who petitioned the Senate on January 3, 1973 to disregard the results of that recount, *and be it further*

Resolved: That the advisory referendum be conducted only in the town of Essex in order to dispel the doubts cast upon the votes in that town and to provide advice to the Senate on the choice of candidates among the voters of that town, *and be it further*

Resolved: That the number of votes received by each candidate in the advisory referendum conducted in the town of Essex shall be added to the number of votes received on November 7 by each candidate in the remainder of Chittenden County excluding the town of Essex, as reported in the report of the recount committee filed with Superior Judge Robert W. Larrow on December 14, 1972, and that the candidate receiving the greatest total vote shall be accepted by the Senate as the duly elected Senator from Chittenden County and shall take his seat forthwith, *and be it further*

Resolved: That Senator Frederick P. Smith shall retain his seat in the Senate pending the outcome of the advisory referendum, *and be it further*

Resolved: That the advisory referendum shall be conducted by the Secretary of State who may utilize the services of the election officials in the town of Essex, *and be it further*

Resolved: That the committee appointed by the Senate pursuant to Senate Resolution 6 shall supervise the election and shall have two members of that committee, one from each political party, present at each polling place in the town of Essex, and shall have at least two members of that committee, one from each political party, present during the counting of all votes cast, and that the committee shall certify the results of the advisory referendum to the Senate forthwith, *and be it further*

Resolved: That the advisory referendum shall be held on February 3, 1973.

Thereupon, the pending question, Shall the resolution be adopted? was decided in the negative on a roll call, Yeas 7, Nays 21.

Prior to the calling of the roll, Senator F. Smith requested and was granted leave to be excused from voting on this resolution and any other matters relating to the Report of the special election committee pursuant to Senate Rules 69 and 71.

Senator Soule, having demanded the yeas and nays, they were taken and are as follows:

ROLL CALL

Those Senators who voted in the affirmative were: Branon, Crowley, Daniels, Niquette, O'Brien, Sorrell, Soule.

Those Senators who voted in the negative were: Alden, Bedford, Bloomer, *Boylan, Buckley, Cooley, Doyle, Gannett, Gibb, Harwood, Jones, Morse, Newell, Ogden, Orzel, Partridge, Purdy, Shea, *Smallwood, D. Smith, Westphal.

Those Senators absent or not voting were: Janeway (presiding), F. Smith (excused).

*Senator Boylan explained his vote thus:

"Mr. President:

In voting on this resolution I am torn between long outstanding friendship with the challenger for this Senate Seat and what seems to be just and right. I have listened to the Committee reports with no evidence of fraud indicated. Having participated in many local and statewide elections, I am aware that there have been errors and careless handling of ballots in many of the cities and towns throughout the state. I suspect even in this recent election there have been similar irregularities to those in Essex Junction in many other areas of the state. On the basis of the evidence, I must, therefore, vote in opposition to this resolution. My vote is 'No'."

*Senator Smallwood explained his vote thus:

"Mr. President:

I vote 'No' on the ground that I favor a special county-wide runoff election between Senator Smith and Mr. Fayette to resolve the issue of the Senate seating challenge in Chittenden County."

Thereupon, Senator Westphal moved that the Senate deny the Petition submitted by Frederick J. Fayette of South Burlington relating to the general election held on November 7, 1972, pertaining to senatorial seats in Chittenden County, and filed with the Senate on January 3, 1973,

Which was agreed to on a roll call, Yeas 20, Nays 8.

Senator Westphal, having demanded the yeas and nays, they were taken and are as follows:

be held on February 3,

resolution be adopted? was 21.

Smith requested and was resolution and any other on committee pursuant to

nays, they were taken and

were: Branon, Crowley,

were: Alden, Bedford, Gibb, Harwood, Jones, Shea, *Smallwood, D. Smith,

Janeway (presiding), F.

en long outstanding friend- what seems to be just and with no evidence of fraud d statewide elections, I am ndling of ballots in many of t even in this recent election ssex Junction in many other ; I must, therefore, vote in

cial county-wide runoff elec- resolve the issue of the Senate

the Senate deny the Petition ington relating to the general to senatorial seats in Chitten- ry 3, 1973,

0, Nays 8.

reas and nays, they were taken

ROLL CALL

Those Senators who voted in the affirmative were: Bedford, Bloomer, Boylan, Buckley, Cooley, Doyle, Gannett, Gibb, Harwood, Jones, Morse, Newell, Ogden, Orzel, Partridge, Purdy, Shea, Smallwood, D. Smith, Westphal.

Those Senators who voted in the negative were: Alden, Branon, Crowley, Daniels, Niquette, O'Brien, Sorrell, Soule.

Those Senators absent or not voting were: Janeway (presiding), F. Smith (excused).

Thereupon, Senator Niquette moved that the Senate affirm the election of Frederick P. Smith as a Senator from Chittenden County for the 1973 biennial session of the General Assembly,

Which was agreed to.

JOINT RESOLUTION ADOPTED IN CONCURRENCE

Joint resolution originating in the House of the following title was read and adopted in concurrence, and is as follows:

J. R. H. 10. Joint resolution relating to weekend adjournment.

Resolved by the Senate and House of Representatives:

That when the two Houses adjourn on Friday, January 12, 1973, it be to meet again on Tuesday, January 16, 1973, at ten o'clock in the forenoon.

MESSAGE FROM THE HOUSE

A message was received from the House of Representatives by Mr. Giuliani their Second Assistant Clerk, as follows:

Mr. President:

I am directed to inform the Senate the House has on its part adopted a Joint resolution entitled:

J. R. H. 8. Joint resolution ratifying a joint resolution of the Congress of the United States of America, entitled, "Joint resolution proposing an amendment to the Constitution of the United States."

In the adoption of which the concurrence of the Senate is requested.

JOINT RESOLUTION COMMITTED

Joint resolution originating in the House of the following title was read the first time and is as follows:

J. R. H. 8. Joint resolution ratifying a joint resolution of the Congress of the United States of America, entitled "Joint resolution proposing an amendment to the Constitution of the United States".