

**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.<sup>1</sup>

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.

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<sup>1</sup> 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.