

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: