

Challenges to a Secretary of State's Election Management

Common Cause of Georgia v. Kemp
(*Amy Totenberg, 1:18-cv-5102*) and *Brown v. Kemp*
(*William M. Ray II, 1:18-cv-5121*) (N.D. Ga.)

Two federal lawsuits filed on the day before and the day of a general election challenged a secretary of state's election oversight. The first case alleged susceptibility to tampering of voters' records. The second case challenged the propriety of a secretary of state presiding over an election in which he is running for governor. A related case from the previous year challenged the security of touchscreen voting machines. A federal judge ordered the use of provisional ballots as an interim remedy for voter record discrepancies, pursuant to the Help America Vote Act. Apparently the winner of the gubernatorial election, the secretary notified the judge in the other case of his resignation as secretary of state.

Subject: Voting procedures. *Topics:* Voting technology; provisional ballots; case assignment; Help America Vote Act (HAVA); laches; removal; enjoining certification.

Two federal lawsuits, filed in the Northern District of Georgia on the day before and on the day of the 2018 general election, challenged election oversight by Georgia's secretary of state. They were related to litigation initiated in 2017 over ballot technology.

Susceptibility to Security Breaches

[A cybersecurity sleuth] was taken aback when [a Google] query turned up a file with a list of voters and then alarmed when a subsequent simple data pull retrieved the birth dates, drivers' license numbers and partial Social Security numbers of more than 6 million voters, as well as county election supervisors' passwords for use on Election Day. He also discovered the server had a software flaw that an attacker could exploit to take control of the machine.¹

Common Cause of Georgia filed a federal complaint in the Northern District against Georgia's secretary of state on November 5, 2018, one day before the general election, alleging that the state's voter registration website was improperly susceptible to security breaches and urging the use of provisional ballots in cases of registration questions.² On the following day, Judge Eleanor L.

1. Ellen Nakashima, *Georgia Faces Legal Challenge Over Its Voting Technology*, Wash. Post, Sept. 17, 2018, at A13.

2. Complaint, *Common Cause of Ga. v. Kemp*, No. 1:18-cv-5102 (N.D. Ga. Nov. 5, 2018), D.E. 1.

Ross reassigned the case from herself to Judge Amy Totenberg as related to a 2017 case over which Judge Totenberg was presiding.³

Direct Recording Electronic Voting Machines

On August 8, 2017, state and county election officials removed to the Northern District's federal court a July 3 complaint filed in state court challenging the use of direct recording electronic (DRE) voting machines in a June 20 special congressional runoff election.⁴ "DREs do not create a paper trail or any other means by which to independently verify or audit the recording of each elector's vote."⁵ On August 12, the plaintiffs filed a motion for limited early and expedited discovery, disclosing an intention to seek a preliminary injunction barring DREs—also known as touchscreen voting machines—in the November 7 municipal elections.⁶ On August 14, Judge Totenberg observed that the record did not show service for seven of the defendants, although three consented to removal.⁷ Judge Totenberg ordered service on the remaining four defendants by 5:00 p.m. on the following day.⁸

On August 18, Judge Totenberg noted the filing in state court of a notice of a related case there, and she ordered the parties to provide her with the status and records of that case.⁹ She also noted the plaintiffs' right to file with her an amended state court complaint.¹⁰ At an August 22 telephonic status conference,¹¹ the plaintiffs' attorney noted that his clients' recent hiring of new counsel could delay their filing of the preliminary injunction motion.¹² Judge Totenberg sought guidance on the case's time pressure:

We're not facing a major election cycle. I'm not trying to minimize the officeholders who are up for election or what is happening in the city. But it is not clear to me that having a preliminary injunction hearing on a thin record under these circumstances or ruling, even if I have a hearing, is really in anyone's interest. Not that I won't do it if I think it is warranted. But I'm not clear what the emergency is at this juncture, other than obviously there is great value in voting and having integrity in the voting system. But why that

3. Order, *id.* (Nov. 6, 2018), D.E. 4; Transcript at 18, *id.* (Nov. 8, 2018, Nov. 10, 2018), D.E. 54 [hereinafter *Common Cause of Ga.* Transcript].

4. Notice of Removal, *Curling v. Kemp*, No. 1:17-cv-2989 (N.D. Ga. Aug. 8, 2017), D.E. 1; see Mark Niese, *Lawsuit Tries to Force Georgia to Use Paper Ballots*, Atlanta J.-Const., June 4, 2018, at 1A.

5. *Curling v. Kemp*, 334 F. Supp. 3d 1303, 1308 (N.D. Ga. 2018).

6. Motion, *Curling*, No. 1:17-cv-2989 (N.D. Ga. Aug. 12, 2017), D.E. 4.

In 2002, Georgia was the first state to adopt DRE technology for elections. See Nakashima, *supra* note 1; Mark Niese, *Paper Ballots Ruled Out, for Now*, Atlanta J.-Const., Sept. 19, 2018, at 1A.

7. Order at 2–3, *Curling*, No. 1:17-cv-2989 (N.D. Ga. Aug. 14, 2017), D.E. 5.

8. *Id.* at 3.

9. Order at 2, *id.* (Aug. 18, 2017), D.E. 14.

10. *Id.* at 1; see Amended Complaint, *id.* (Aug. 18, 2017), D.E. 15.

11. Minutes, *id.* (Aug. 22, 2017), D.E. 41.

12. Transcript at 6–7, *id.* (Aug. 22, 2017, filed Aug. 24, 2017), D.E. 42; see *id.* at 5 (Judge Totenberg's observing, "It seemed to me that I needed to chat with you about the status of this case as soon as possible at this juncture before we just splurged in ten different directions.").

won't be protected by having a more considered development of the record and a proper hearing at a later point in time I'm not clear.¹³

On the day after the conference, Judge Totenberg directed the plaintiffs to decide whether they wanted to move quickly to seek relief for the 2017 election or instead direct their efforts to the 2018 election:

The Court . . . encourages Plaintiffs' counsel to seriously review the information filed by Defendants . . . regarding the time schedule for election preparation . . . by August 29, 2017. . . . If Plaintiffs determine they wish to proceed with the current established schedule and plan, they are advised to focus their motion for preliminary injunctive relief realistically on the limited set of issues and claims they deem essential to be resolved in this current 2017 election cycle.¹⁴

On August 30, 2017, the plaintiffs filed a motion to grant them an extension until September 5 to file their preliminary injunction motion.¹⁵ At an August 31 conference,¹⁶ the plaintiffs stated that they could file the injunction motion by 6:00 p.m. on September 1,¹⁷ and Judge Totenberg allowed them to do that.¹⁸ The plaintiffs decided, however, not to immediately pursue a preliminary injunction.¹⁹

The plaintiffs filed a second amended complaint two weeks later²⁰ and a third amended complaint nine months after that.²¹ On August 3²² and 7,²³ 2018, each of two groups of plaintiffs filed a motion for a preliminary injunction requiring the use of paper ballots.

On September 12, "A crowd of more than 125 people spilled into an overflow courtroom during a long day of testimony from voting technology experts who warned of the dangers of hacking and election officials who said a quick switch to paper ballots would create more problems."²⁴ Judge Totenberg would have held the hearing in the larger overflow courtroom, but it was not equipped for some of the technology that the parties wanted to use.²⁵ "We are

13. *Id.* at 16–17.

14. Order, *id.* (Aug. 23, 2017), D.E. 40.

15. Motion, *id.* (Aug. 30, 2017), D.E. 51; see Transcript at 4, *id.* (Aug. 31, 2017, filed Sept. 8, 2017), D.E. 59 [hereinafter Aug. 31, 2017, *Curling* Transcript] ("THE COURT: Frankly, I just was surprised by the late motion for an extension.").

16. Minutes, *id.* (Aug. 31, 2017), D.E. 54.

17. Aug. 31, 2017, *Curling* Transcript, *supra* note 15, at 6, 9.

18. Order, *Curling*, No. 1:17-cv-2989 (N.D. Ga. Aug. 31, 2017), D.E. 53.

19. See Transcript at 4, *id.* (Sept. 1, 2017, filed Sept. 8, 2017), D.E. 60.

20. Second Amended Complaint, *id.* (Sept. 15, 2017), D.E. 70.

21. Third Amended Complaint, *id.* (June 13, 2018), D.E. 226.

22. Preliminary Injunction Motion, *id.* (Aug. 3, 2018), D.E. 258; see Mark Niese, *Judge Might Shift Georgia Voting to Paper Ballots by November*, Atlanta J.-Const., Aug. 9, 2018, at 1B.

23. Preliminary Injunction Motion, *Curling*, No. 1:17-cv-2989 (N.D. Ga. Aug. 7, 2018), D.E. 260; see Amended Preliminary Injunction Motion, *id.* (Aug. 20, 2018), D.E. 271.

24. Mark Niese, *Judge May Force Paper-Ballot Vote*, Atlanta J.-Const., Sept. 13, 2018, at 1B.

25. Transcript at 9–10, *Curling*, No. 1:17-cv-2989 (N.D. Ga. Sept. 5, 2018, filed Sept. 17, 2018), D.E. 307.

making available, of course, the audio in the overflow courtroom as well as . . . screens in there that will show any exhibits. But unfortunately or fortunately you won't get to see some of the witnesses. There is no video presentation."²⁶

Acknowledging the merits of the plaintiffs' claims, Judge Totenberg ruled on September 17 that the motions had been filed too late for effective relief in the 2018 general election.²⁷ On the one hand, "[t]he State of Georgia Defendants have delayed in grappling with the heightened critical cybersecurity issues of our era posed for the State's dated, vulnerable voting system that provides no independent paper audit trail."²⁸ On the other hand, "[l]ast-minute, wholesale changes in the voting process operating in over 2,600 precincts, along with scheduled early voting arrangements, could predictably run the voting process and voter participation amuck."²⁹

Plaintiffs shine a spotlight on the serious security flaws and vulnerabilities in the State's DRE system—including unverifiable election results, outdated software susceptible to malware and viruses, and a central server that was already hacked multiple times. . . .

...

While Plaintiffs have shown the threat of real harms to their constitutional interests, the eleventh-hour timing of their motions and an instant grant of the paper ballot relief requested could just as readily jeopardize the upcoming elections, voter turnout, and the orderly administration of the election.

...

The Court attempted to expedite this case at earlier times to no avail. . . .

Meanwhile, the State Defendants have also stood by for far too long, given the mounting tide of evidence of the inadequacy and security risks of Georgia's DRE voting system and software.

...

... [T]he Court finds that the Plaintiffs have not carried their burden of persuasion to establish these prerequisites for such extraordinary injunctive relief in the immediate 2018 election time frame ahead.

V. Conclusion

While Plaintiffs' motions for preliminary injunction are **DENIED**, the Court advises the Defendants that further delay is not tolerable in their confronting and tackling the challenges before the State's election balloting system. . . .

...

... The 2020 elections are around the corner. If a new balloting system is to be launched in Georgia in an effective manner, it should address democ-

26. *Id.* at 10.

27. *Curling v. Kemp*, 334 F. Supp. 3d 1303 (N.D. Ga. 2018); see Ellen Nakashima, *Motion to Force Georgia to Use Paper Ballots in Midterm Elections Is Denied*, Wash. Post, Sept. 19, 2018, at A3; Niese, *supra* note 6.

28. *Curling*, 334 F. Supp. 3d at 1307.

29. *Id.*

racy's critical need for transparent, fair, accurate, and verifiable election processes that guarantee each citizen's fundamental right to cast an accountable vote.³⁰

Voting machines used in the 2018 election were sequestered pending further litigation, pursuant to Judge Totenberg's December 2017 preservation order.³¹ In an interlocutory appeal, the court of appeals determined on February 7, 2019, that "the State Defendants are neither entitled to Eleventh Amendment immunity nor legislative immunity and their standing arguments are not yet reviewable."³²

Suit Seeking the Recusal of Georgia's Secretary of State

On November 6, the day of the 2018 general election, five voters filed a federal complaint in the Northern District seeking relief from Georgia's secretary of state's administering the election while also seeking the office of governor.³³ Among the allegations in the complaint was a claim that the secretary falsely and publicly accused the opposing party of cybercrimes.³⁴ With their complaint, the voters filed a motion for a temporary restraining order against the secretary's exercising any authority over the election.³⁵

On the next day, the plaintiffs provided notice that the case was related to the one filed by Common Cause a day earlier,³⁶ and Judge William M. Ray II set the case for hearing on the morning after that.³⁷ At the hearing, Judge Ray received a copy of the secretary's letter of resignation.³⁸ Two days after the election, it appeared that the secretary probably had enough votes to win the governorship without a runoff election.³⁹ His challenger conceded defeat on November 16.⁴⁰

30. *Id.* at 1322, 1326–28 (record citation omitted); see Alan Judd & Bill Rankin, *Security Doubts Not Over After Race Ends*, Atlanta J.-Const., Nov. 18, 2018, at 1A.

31. See Preservation Order, *Curling*, No. 1:17-cv-2989 (N.D. Ga. Dec. 15, 2018), D.E. 122; Mark Niese, *Why Did Some Voting Machines Sit Unused?*, Atlanta J.-Const., Nov. 8, 2018, at 1A.

32. *Curling v. Kemp*, ___ F. App'x ___, ___, 2019 WL 480034 (11th Cir. 2019) (p.5 of opinion filed at 11th Cir. No. 18-13951).

33. Complaint, *Brown v. Kemp*, No. 1:18-cv-5121 (N.D. Ga. Nov. 6, 2018), D.E. 1.

34. *Id.* at 8–10.

35. Temporary Restraining Order Motion, *id.* (Nov. 6, 2018), D.E. 2.

36. Notice, *id.* (Nov. 7, 2018), D.E. 8.

37. Order, *id.* (Nov. 7, 2018), D.E. 3; see Richard Fausset & Alan Blinder, *Republican in the Lead, Georgia Governor Race Quickly Goes to Court*, N.Y. Times, Nov. 8, 2018, at F15.

38. Minutes, *Brown*, No. 1:18-cv-5121 (N.D. Ga. Nov. 8, 2018), D.E. 15; see Bill Barrow & Kate Brumback, *Georgia's Democratic Candidate for Governor Vows to Fight On*, Miami Herald, Nov. 9, 2018, at 7A; Jim Galloway, *Amid Ballot Fight, a Race to Decide Who Should Count Them in Future*, Atlanta J.-Const., Nov. 14, 2018, at 1B; Judd & Rankin, *supra* note 30; see also *Common Cause of Ga.* Transcript, *supra* note 3, at 5, *Common Cause of Ga. v. Kemp*, No. 1:18-cv-5102 (N.D. Ga. Nov. 8, 2018, Nov. 10, 2018), D.E. 54 (statement by an attorney for the secretary of state that "Secretary Kemp has resigned effective noon today.").

39. See Fausset & Blinder, *supra* note 37.

40. See Alan Blinder & Richard Fausset, *Democrat Ends Bid in Georgia for Governor*, N.Y. Times, Nov. 17, 2018, at A1; Vanessa Williams & Felicia Sonmez, *Abrams Acknowledges Kemp's Gubernatorial Win, Remains Critical of Election*, Wash. Post, Nov. 17, 2018, at A4

Judge Ray dismissed the case as moot on November 30.⁴¹

Further Litigation on Provisional Ballots

Common Cause filed a motion for a temporary restraining order and expedited discovery on November 7, election day.⁴² That day, Judge Totenberg set the case for hearing on the following day.⁴³ On November 7 and November 8, Judge Totenberg issued three orders explaining to the parties what information she required them to present at the hearing.⁴⁴ On November 9, Judge Totenberg ordered the plaintiffs to file by 3:00 p.m. that day an affidavit from a qualified statistician “regarding whether or not there is a statistically significant increase in the percentage of provisional ballots cast, relative to the total number of ballots cast” comparing the 2018 election with the elections in 2014 and 2016.⁴⁵

On November 12, Judge Totenberg ordered, pursuant to the Help America Vote Act,⁴⁶

the Secretary of State's Office to immediately establish and publicize on its website a secure and free-access hotline or website for provisional ballot voters to access to determine whether their provisional ballots were counted and if not, the reason why. The Court further **ORDERS** the Secretary of State to direct each of the 159 county election superintendents to similarly publicize the availability of the hotline or secure website on the county and county election websites.⁴⁷

Further Litigation on Election Management

Pending before Judge Steve C. Jones is a November 27 complaint filed in the Northern District generally challenging Georgia's oversight of elections.⁴⁸

(“Kemp's 50.22 percent of the tally put the Republican just above the 50 percent-plus-one-vote threshold required to avoid a runoff election in December.”).

41. Order, *Brown*, No. 1:18-cv-5121 (N.D. Ga. Nov. 30, 2018), D.E. 16.

42. Motion, *Common Cause of Ga.*, No. 1:18-cv-5102 (N.D. Ga. Nov. 7, 2018), D.E. 15.

43. Order, *id.* (Nov. 7, 2018), D.E. 17.

44. Orders, *id.* (Nov. 7 and 8, 2018), D.E. 18, 20, 21.

45. Order, *id.* (Nov. 9, 2018), D.E. 41.

46. Pub. L. No. 107-252, 116 Stat. 1666 (2002), *as amended*, 52 U.S.C. §§ 20901–21145 (2016). *See generally* Marie Leary & Robert Timothy Reagan, *The Help America Vote Act* (Federal Judicial Center 2012); Symposium, *HAVA @ 10*, 12 *Election L.J.* 111 (2013).

47. *Common Cause of Ga. v. Kemp*, 347 F. Supp. 3d 1270, 1299–300 (N.D. Ga. 2018); *see* Greg Bluestein & Mark Niese, *Vote Count Plays Out in Counties, Courts*, *Atlanta J.-Const.*, Nov. 14, 2018, at 1A; Allison McCann & Karen Yourish, *In Some Races, Results May Still Be Weeks Away*, *N.Y. Times*, Nov. 14, 2018, at A18; Sean Sullivan, Beth Reinhard, Vanessa Williams & Lori Rozsa, *New Court Moves Could Prolong Fla., Ga. Races*, *Wash. Post*, Nov. 14, 2018, at A1; *see also* Judd & Rankin, *supra* note 30 (“last week, Totenberg detailed instances of mismanagement by county election officers”).

48. Complaint, *Fair Fight Action v. Crittenden*, No. 1:18-cv-5391 (N.D. Ga. Nov. 27, 2018), D.E. 1; Docket Sheet, *id.* (Nov. 27, 2018); Amended Complaint, *id.* (Feb. 19, 2019), D.E. 41; *see* Valerie Bauerlein, *Suit Alleges Georgia Curbed Black Voters*, *Wall St. J.*, Nov. 28, 2018, at A4; Richard Fausset, *Supporters of Candidate Who Lost Georgia Race Take the State to Court*, *N.Y. Times*, Nov. 28, 2018, at A19; Vanessa Williams, *Lawsuit by Abrans's PAC Alleges Voter Suppression in Georgia*, *Wash. Post*, Nov. 30, 2018, at A4.