

Unsuccessful Efforts to Enjoin Certification of the 2020 Presidential Election Results in Wisconsin

Feehan v. Wisconsin Elections Commission (Pamela Pepper, 2:20-cv-1771) and Trump v. Wisconsin Elections Commission (Brett H. Ludwig, 2:20-cv-1785) (E.D. Wis.)

About four weeks after the 2020 presidential election, two federal complaints in the Eastern District of Wisconsin sought to enjoin certification of Wisconsin's results because of alleged improprieties in the operation of the election. Two district judges dismissed the complaints as outside the federal court's jurisdiction.

Subject: Voting irregularities. *Topics:* Enjoining certification; Electoral College; case assignment; intervention; attorney fees; laches.

Two district judges in the Eastern District of Wisconsin denied suits to decertify the results of the 2020 presidential election in Wisconsin.

First Case

According to a federal complaint filed on Tuesday, December 1, 2020, in the Eastern District of Wisconsin, "This civil action brings to light a massive election fraud . . ."¹ A prospective member of the Electoral College and an apparently defeated congressional candidate filed the complaint against Wisconsin election officials.² The complaint alleged ballot stuffing using election software and hardware provided by a company founded by foreign oligarchs and dictators.³ The plaintiffs sought decertification of Wisconsin's presidential election.⁴ On the same day, the plaintiffs filed a motion for declaratory, emergency, and permanent injunctive relief.⁵

In a December 2 order, Judge Pamela Pepper enumerated defects in the plaintiffs' filings, noted that they had neither proposed a briefing schedule nor requested a hearing, and said that she would await the defendants' opposition brief unless the plaintiffs contacted chambers with defendants on the line to request a telephonic hearing.⁶ On December 3, the prospective Electoral College elector filed an amended complaint as the sole plaintiff,⁷ and he filed with it an amended injunction motion.⁸

1. Complaint at 1, *Feehan v. Wis. Elections Comm'n*, No. 2:20-cv-1771 (E.D. Wis. Dec. 1, 2020), D.E. 1 [hereinafter *Feehan* Complaint].

2. *Id.* at 1–9; *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596, 599–601 (E.D. Wis. 2020).

3. *Feehan* Complaint, *supra* note 1, at 1–3.

4. *Id.* at 47; *Feehan*, 506 F. Supp. 3d at 601–02.

5. Corrected Motion, *Feehan*, No. 2:20-cv-1771 (E.D. Wis. Dec. 1, 2020), D.E. 6; *Feehan*, 506 F. Supp. 3d at 602.

6. Order, *Feehan*, No. 2:20-cv-1771 (E.D. Wis. Dec. 2, 2020), D.E. 7.

7. Amended Complaint, *id.* (Dec. 3, 2020), D.E. 9; *Feehan*, 506 F. Supp. 3d at 603; *see* Nuha Dolby, *Where Wisconsin Lawsuits on Behalf of Trump Stand*, Milwaukee J. Sentinel,

On December 3, Judge Pepper denied the governor’s motion to reassign a December 2 case seeking similar relief to Judge Pepper, because the local rules “[do] *not* provide a mechanism for any party other than the plaintiff to file a motion asking for reassignment of cases based on the party’s view that cases are related.”⁹

On December 4, Judge Pepper ordered briefing on the plaintiff’s injunction motion completed by December 8.¹⁰ On December 7, she set the case for a telephonic status conference on December 8, posting contact information in the docket sheet.¹¹ She denied motions by the Democratic National Committee¹² and a voter¹³ to intervene in the case, but granted them permission to participate as *amici curiae*.¹⁴

Judge Pepper dismissed the action on December 9.¹⁵ “Does a federal court have the jurisdiction and authority to grant the relief this lawsuit seeks? The answer is no. Federal judges do not appoint the president in this country. One wonders why the plaintiffs came to federal court and asked a federal judge to do so.”¹⁶

On February 1, 2021, the court of appeals vacated Judge Pepper’s decision and ordered the case dismissed as moot.¹⁷ On August 24, 2022, Judge Pepper denied the governor’s March 31, 2021, motion for attorney fees and other sanctions, because the court no longer had jurisdiction over the case.¹⁸

The court of appeals affirmed the denial of a sanction on August 2, 2023:

Although we conclude that the district court did have jurisdiction to award sanctions under its inherent authority, the district court made clear that it would not have treated this as the sort of rare case where post-judgment

Dec. 9, 2020, at A4 (reporting that the dropped plaintiff never agreed to be a party in the case).

8. Amended Motion, *Feehan*, No. 2:20-cv-1771 (E.D. Wis. Dec. 3, 2020), D.E. 10; *Feehan*, 506 F. Supp. 3d at 603.

9. Order at 3–4, *Feehan*, No. 2:20-cv-1771 (E.D. Wis. Dec. 3, 2020), D.E. 19, 2020 WL 7079256; see Motion, *id.* (Dec. 3, 2020), D.E. 16.

10. Order, *id.* (Dec. 4, 2020), D.E. 29, 2020 WL 7121803; *Feehan*, 506 F. Supp. 3d at 603.

11. Docket Sheet, *Feehan*, No. 2:20-cv-1771 (E.D. Wis. Dec. 1, 2020); see Audio Recording, *id.* (Dec. 8, 2020), D.E. 70; see also *Feehan*, 506 F. Supp. 3d at 603.

12. Motions, *Feehan*, No. 2:20-cv-1771 (E.D. Wis. Dec. 4 and 5, 2020), D.E. 22, 40.

13. Motions, *id.* (Dec. 3 and 4, 2020), D.E. 14, 33

14. *Feehan v. Wis. Elections Comm’n*, 506 F. Supp. 3d 640 (E.D. Wis. 2020) (voter); Opinion, *Feehan*, No. 2:20-cv-1771 (E.D. Wis. Dec. 6, 2020), D.E. 41, 2020 WL 7182950 (Democratic National Committee); *Feehan*, 506 F. Supp. 3d at 603.

15. *Feehan*, 506 F. Supp. 3d 596; see Patrick Marley, *Judge Says Trump Is Asking for Remarkable Court Ruling*, Milwaukee J. Sentinel, Dec. 11, 2020, at A4; Riley Vetterkind, *Time Running Out on Trump*, Wis. State J., Dec. 11, 2020, at A1.

16. *Feehan*, 506 F. Supp. 3d at 600 (paragraph break omitted).

17. Order, *Feehan v. Wis. Elections Comm’n*, No. 20-3448 (7th Cir. Feb. 1, 2021), D.E. 16.

18. Opinion, *Feehan*, No. 2:20-cv-1771 (E.D. Wis. Aug. 24, 2022), D.E. 113, 2022 WL 3647882; see Motion, *id.* (Mar. 31, 2021), D.E. 97; see also Patrick Marley, *Evers Seeks \$250,000 from Trump*, *Official*, Milwaukee J. Sentinel, Apr. 2, 2021, at A3; Riley Vetterkind, *Evers Wants Attorneys Fees*, Wis. State J., Apr. 2, 2021, at A3.

sanctions imposed under inherent authority would have been needed to protect the court's institutional integrity.¹⁹

Second Case

The case that the governor wanted reassigned to Judge Pepper was filed in the Eastern District on December 2, 2020, by President Trump against state and local election officials.²⁰ The complaint alleged,

A striking characteristic of the November 3, 2020, election in Wisconsin is that it involved a number of *ultra vires* acts by Wisconsin public officials charged with administering the election that were inconsistent with state law and the directions of the Wisconsin Legislature as set forth in the Wisconsin Election Code.²¹

Among the remedies sought was a remand of the issue to Wisconsin's legislature.²² With his complaint, the President filed a motion for expedited declaratory and injunctive relief.²³

At a December 4 telephonic status conference, Judge Brett H. Ludwig set the case for a final videoconference hearing on December 10.²⁴ Members of the public could listen to live audio of the conference on the court's YouTube channel.²⁵ On December 8, he granted intervention motions by the NAACP and the Democratic National Committee.²⁶

Judge Ludwig dismissed the action on December 12.²⁷

This is an *extraordinary* case. A sitting president who did not prevail in his bid for reelection has asked for federal court help in setting aside the popular vote based on disputed issues of election administration, issues he plainly could have raised before the vote occurred. This Court has allowed plaintiff the chance to make his case and he has lost on the merits.²⁸

The court of appeals affirmed the dismissal on December 24: "Wisconsin lawfully appointed its electors in the manner directed by its Legislature."²⁹

19. Opinion at 2, *Feehan v. Evers*, No. 22-2704 (7th Cir. Aug. 2, 2023), D.E. 54, 2023 WL 4928520.

20. Complaint, *Trump v. Wis. Elections Comm'n*, No. 2:20-cv-1785 (E.D. Wis. Dec. 2, 2020), D.E. 1 [hereinafter *Trump* Complaint]; *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 923 (7th Cir. 2020); see Molly Beck, *Trump Sues to Have State Legislature Award Electoral Votes*, Milwaukee J. Sentinel, Dec. 4, 2020, at A11; Dolby, *supra* note 7.

21. *Trump* Complaint, *supra* note 20, at 4.

22. *Id.* at 72.

23. Motion, *Trump*, No. 2:20-cv-1785 (E.D. Wis. Dec. 2, 2020), D.E. 6.

24. Minutes, *id.* (Dec. 4, 2020), D.E. 45; Transcript, *id.* (Dec. 4, 2020, filed Dec. 7, 2020), D.E. 53; see Transcript, *id.* (Dec. 10, 2020, filed Dec. 10, 2020), D.E. 130.

25. Protocol Order, *id.* (Dec. 9, 2020), D.E. 116.

26. Opinion, *id.* (Dec. 8, 2020), D.E. 61, 2020 WL 7230960; see Motions, *id.* (Dec. 3 and 4, 2020), D.E. 16, 23.

27. *Trump v. Wis. Elections Comm'n*, 506 F. Supp. 3d 620 (E.D. Wis. 2020); *Trump v. Wis. Elections Comm'n*, 983 F.3d 919, 924 (7th Cir. 2020).

28. *Trump*, 506 F. Supp. 3d at 639.

29. *Trump*, 983 F.3d at 927; see Bill Glauber, *Appeals Court Rejects Trump Bid to Overturn Results*, Milwaukee J. Sentinel, Dec. 27, 2020, at A8.

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The Supreme Court denied expedited consideration of petitions for certiorari on January 11, 2021,³⁰ and denied certiorari on March 8.³¹

As Judge Pepper did, Judge Ludwig denied the defendants an award of attorney fees, because “a district court lacks jurisdiction to grant [fees] if the movant waits to seek relief until after the conclusion of an appeal on the merits.”³²

30. *Trump v. Wis. Elections Comm’n*, 592 U.S. ___, 141 S. Ct. 1045 (2021).

31. *Trump v. Wis. Elections Comm’n*, 592 U.S. ___, 141 S. Ct. 1516 (2021); see Molly Beck, *Court Won’t Hear Election Lawsuit*, Milwaukee J. Sentinel, Mar. 9, 2021, at A7.

32. Opinion, *Trump v. Wis. Elections Comm’n*, No. 2:20-cv-1785 (E.D. Wis. Dec. 6, 2021), D.E. 178, 2021 WL 5771011; see Brent Kendall & Alexa Corse, *Election Suits Prompt Bids to Punish Lawyers*, Wall St. J., May 10, 2021, at A4; Marley, *supra* note 18; Riley Vetterkind, *Cities Ask Trump to Reimburse Legal Fees*, Wis. State J., Apr. 6, 2021, at A3; Vetterkind, *supra* note 18.