

Swing-State Recounts in the 2016 Presidential Election

Great America PAC v. Wisconsin Elections Commission
(James D. Peterson, W.D. Wis. 3:16-cv-795),
Stein v. Thomas (Mark A. Goldsmith,
E.D. Mich. 2:16-cv-14233), and
Stein v. Cortés (Paul S. Diamond, E.D. Pa. 2:16-cv-6287)

Following the 2016 presidential election in which a candidate earned more votes in the Electoral College than the candidate who received the most popular votes, a minor party candidate sought recounts in the three states that the Electoral College victor won by the smallest margins. The matter was litigated in state courts and in federal courts in the Western District of Wisconsin, the Eastern District of Michigan, and the Eastern District of Pennsylvania with mixed results for the minor party candidate's litigation efforts and no change in the Electoral College outcome. The Pennsylvania case ended with a settlement agreement requiring a change in voting technology and a payment of attorney fees.

Subject: Recounts. *Topics:* Recounts; election errors; voting technology; matters for state courts; laches; intervention; recusal; case assignment; Electoral College; attorney fees.

In the 2016 presidential election, Donald Trump earned 306 electoral votes, and Hillary Clinton earned only 232 electoral votes, but Clinton received over 2.8 million more popular votes than Trump did.¹ Green Party candidate Jill Stein sought recounts in Michigan, Pennsylvania, and Wisconsin, the three states that Trump won by the smallest margins.² A computer scientist had called into question the reliability of some voting machines used in those states.³

An effort to recount the votes . . . led by Jill Stein, the Green Party candidate, was never viewed as very likely to change Donald J. Trump's election to the presidency, but it revealed something else in stark terms: 16 years after a different presidential recount in Florida dragged on for five agonizing weeks, bringing the nation close to a constitutional crisis, recounts remain a tangle of dueling lawyers, hyperpartisanship and claims of flawed technology.⁴

1. See Jonathan Martin & Michael Wines, *Trump's Win, but Little Else, Is Now Settled*, N.Y. Times, Dec. 20, 2016, at A1; Jo Craven McGinty, *The Numbers: Popular-Vote Push Faces Some High Hurdles*, Wall St. J., Dec. 3, 2016, at A2; Ed O'Keefe, *Electoral College Casts Votes for Trump*, Wash. Post, Dec. 20, 2016, at A1; Susan Sullivan & Ed O'Keefe, *Electors for Trump Urged to Have Second Thoughts*, Wash. Post, Dec. 7, 2016, at A4.

2. See Michael A. Memoli, *A Look at Wisconsin's Recount, and Why It's Unlikely to Change a Thing*, L.A. Times, Nov. 30, 2016, at A2; Byron Tau, *Green Candidate Requests a Recount*, Wall St. J., Nov. 26, 2016, at A4.

3. See Tau, *supra* note 2.

4. Monica Davey, Steve Eder & Julie Bosman, *Recounts Remain a "Political Horror Show"*, N.Y. Times, Dec. 10, 2016, at A11.

Recount litigation in state and federal courts resulted in mixed results for Stein, and to the extent that recounts were conducted there was no change in the assignment of Electoral College votes.⁵ On December 19, 2016, Trump was elected President by the Electoral College by a vote of 304 to 227; seven electors strayed from their pledged votes.⁶

Wisconsin

On December 1, two political action committees and a voter filed a federal complaint in the Western District of Wisconsin against the state elections commission to block a Wisconsin recount that might “unjustifiably cast doubt upon the legitimacy of President-Elect Donald J. Trump’s victory.”⁷ With their complaint, the plaintiffs filed a motion for a temporary restraining order.⁸ Judge Barbara B. Crabb recused herself from presiding over the case on the following day.⁹

On December 2, Judge James D. Peterson denied the plaintiffs a temporary restraining order

because plaintiffs have made no showing that they will be irreparably harmed by allowing the recount to continue during the time it would take to brief a motion for a preliminary injunction and give defendants an opportunity to respond to plaintiffs’ motion. But enjoining the recount would very likely prevent defendants from completing the recount by the deadline.¹⁰

Judge Peterson decided to treat the motion as a motion for a preliminary injunction, ordered a response by December 7, and set the case for hearing on December 9.¹¹

Jill Stein, the candidate who requested the recount, may seek to intervene. The court has not yet received such a motion from Stein, but if she files one, the court intends to grant that motion immediately. Stein’s response to plaintiffs’ motion, should she want to file one, will also be due Wednesday, December 7, 2016.¹²

Stein elected to intervene¹³ and she was represented at the hearing.¹⁴

5. See Jonathan S. Abady & Ilann M. Maazel, Op-Ed, *Lessons of the Recount*, Wash. Post, Dec. 18, 2016, at A23 (reflections by Stein’s lead attorneys in the recount litigation).

6. www.archives.gov/federal-register/electoral-college/2016/certificates-of-vote.html (compilation of the certificates of Electoral College votes); see Byron Tau, *Electors Line Up Behind Trump*, Wall St. J., Dec. 20, 2016, at A1.

7. Complaint, *Great America PAC v. Wis. Elections Comm’n*, No. 3:16-cv-795 (W.D. Wis. Dec. 1, 2016), D.E. 1; see Monica Davey, Julie Bosman & Steve Eder, *Trump and Supporters Go to Court to Block Recounts in Three States*, N.Y. Times, Dec. 3, 2016, at A15.

8. Temporary Restraining Order Motion, *Great America PAC*, No. 3:16-cv-795 (W.D. Wis. Dec. 1, 2016), D.E. 2.

9. Recusal, *id.* (Dec. 2, 2016), D.E. 13.

10. Opinion at 1, *id.* (Dec. 2, 2016), D.E. 17 [hereinafter W.D. Wis. Temporary Restraining Order Opinion]; see Davey et al., *supra* note 7.

11. W.D. Wis. Temporary Restraining Order Opinion, *supra* note 10, at 2; see Minutes, *Great America PAC*, No. 3:16-cv-795 (W.D. Wis. Dec. 9, 2016), D.E. 36.

12. W.D. Wis. Temporary Restraining Order Opinion, *supra* note 10, at 2.

13. Intervention Motion, *Great America PAC*, No. 3:16-cv-795 (W.D. Wis. Dec. 2, 2016), D.E. 20.

14. Transcript, *Id.* (Dec. 9, 2016, filed Dec. 9, 2016), D.E. 37.

Judge Peterson told the parties at the hearing, “The only question that I have is whether this case has to be dismissed for lack of standing because it’s clear that on the merits I will deny your request for an injunction.”¹⁵ The plaintiffs voluntarily dismissed their action on December 19.¹⁶

As the result of the Wisconsin recount, Trump’s margin of victory increased by 162 votes.¹⁷

Michigan

On Friday, December 2, Stein and a voter filed a federal complaint in the Eastern District of Michigan against Michigan’s director of elections and board of state canvassers seeking an injunction requiring that a Michigan recount begin in time to be completed by the vote of the Electoral College.¹⁸ With their complaint, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.¹⁹ Also on December 2, Trump and Michigan’s attorney general filed actions in Michigan’s court of appeals seeking a writ of mandamus against a Michigan recount.²⁰

The actions were filed following a deadlock in the board of canvassers’ review of Trump’s objections to the recount.²¹ Michigan law required at least two business days to pass following the completion of the canvassers’ review, which would mean at least four calendar days because of the intervening weekend.²² “This four-day delay made unavailable about one-third of the time allocated to complete the recount, on the assumption that the recount would have to be completed by December 13, 2016—the so-called ‘safe harbor’ date for the selection of presidential electors.”²³

On Saturday, December 3, Eastern District of Michigan Mark A. Goldsmith set the federal case for hearing on Sunday morning.²⁴ At the hearing, Judge Goldsmith granted a motion to intervene by Michigan’s Republican Party.²⁵ On Monday, Judge Goldsmith granted the plaintiffs an injunction against a recount delay.²⁶ On Tuesday, the U.S. Court of Appeals for the Sixth

15. *Id.* at 12–13.

16. Notice, *id.* (Dec. 19, 2016), D.E. 38.

17. See *Pennsylvania and Wisconsin End Recount Efforts*, N.Y. Times, Dec. 13, 2016, at A18.

18. Complaint, *Stein v. Thomas*, No. 2:16-cv-14233 (E.D. Mich. Dec. 2, 2016), D.E. 1.

19. Motion, *id.* (Dec. 2, 2016), D.E. 2.

20. Docket Sheet, *Trump v. Bd. of State Canvassers*, No. 335958 (Mich. Ct. App. Dec. 2, 2016); Docket Sheet, *Schuetz v. Bd. of State Canvassers*, No. 335947 (Mich. Ct. App. Dec. 2, 2016); courts.mi.gov/opinions_orders/case_search/Pages/default.aspx; Brief, *Schuetz*, No. 335947 (Mich. Ct. App. Dec. 2, 2016), moritzlaw.osu.edu/electionlaw/litigation/documents/2016.12.01_Schuetz_Brief_on_Recount_544177_7.pdf; see Davey et al., *supra* note 7.

21. *Stein v. Thomas*, 222 F. Supp. 3d 539, 541–42 (E.D. Mich. 2016).

22. *Id.* at 1–2; see Mich. Comp. Laws §168.882(3).

23. *Id.* at 2; see 3 U.S.C. § 5 (2015).

24. Order, *Stein*, No. 2:16-cv-14233 (E.D. Mich. Dec. 3, 2016), D.E. 4.

25. Docket Sheet, *id.* (Dec. 2, 2016) [hereinafter E.D. Mich. Docket Sheet].

26. *Stein*, 222 F. Supp. 3d at 545.

Circuit affirmed the injunction by a two-to-one vote on appeals by intervenors Michigan's Republican Party and attorney general.²⁷

At 6:15 p.m. on the same day as the federal appellate ruling, Michigan's court of appeals decided that Stein could not seek a recount because she could not "allege a good faith belief that but for mistake or fraud, the candidate would have had a reasonable chance of winning the election."²⁸ Stein and the voter filed an amended complaint in federal court that same evening alleging additional grounds for a recount.²⁹

On December 7, Judge Goldsmith dissolved his injunction.³⁰ The plaintiffs were not entitled to a recount outside of Michigan's statutory scheme because, "There is no case law recognizing an independent federal right to a recount that either this Court or the parties have come across, in the absence of actual deprivation of voting rights."³¹

Although the recount was stopped,³² litigation remained pending in Michigan's supreme court.³³ Two justices recused themselves because they had been named during the presidential campaign by Trump as two of 21 persons on a list of top contenders for the United States Supreme Court.³⁴ Justice Joan L. Larsen "conclude[d] that the unique circumstances of this case demand my recusal," although, "I did not seek inclusion on the list, had no notice of my inclusion before its publication, and have had no contact with the president-elect, or his campaign, regarding the vacancy."³⁵ Chief Justice Robert P. Young, Jr., also acknowledged his inclusion on "the president-elect's infamous list of United States Supreme Court potential appoin-

27. *Stein v. Thomas*, 672 F. App'x 565 (6th Cir. 2016).

The court of appeals granted intervention to the attorney general, *id.* at 557 n.1, and Judge Goldsmith also granted the attorney's motion to intervene on December 6, 2016, E.D. Mich. Docket Sheet, *supra* note 25.

28. *Att'y Gen. v. Bd. of State Canvassers*, 318 Mich. App. 242, 252, 896 N.W.2d 485, 490 (Mich. Ct. App. 2016); *see* Monica Davey, *Courts Duel Over Michigan Vote Recount*, N.Y. Times, Dec. 7, 2016, at A16.

29. Amended Complaint, *Stein*, No. 2:16-cv-14233 (E.D. Mich. Dec. 6, 2016), D.E. 30.

30. Opinion, *id.* (Dec. 7, 2016), D.E. 36 [hereinafter E.D. Mich. Opinion Dissolving Injunction]; *see* Monica Davey, *3 Days Into Michigan's Presidential Recount, a Federal Judge Clears the Way to End It*, N.Y. Times, Dec. 8, 2016, at A23.

31. E.D. Mich. Opinion Dissolving Injunction, *supra* note 30, at 7.

32. *See* Byron Tau, *Michigan Suspends 2016 Election Recount*, Wall St. J., Dec. 9, 2016, at A6.

33. Docket Sheets, Nos. 154862, 154868, 154886, and 154887 (Mich. Dec. 2, 2016).

34. Statement, *Att'y Gen. v. Bd. of State Canvassers*, No. 154862 (Mich. Dec. 8, 2016), D.E. 63 [hereinafter Young Recusal], publicdocs.courts.mi.gov/sct/public/orders/154886_63_01.pdf (Young); Statement, *id.* (Dec. 8, 2016), D.E. 64 [hereinafter Larsen Recusal], publicdocs.courts.mi.gov/sct/public/orders/154886_64_01.pdf (Larsen); *see* web.archive.org/web/20170314010805/donaldjtrump.com/press-releases/donald-j.-trump-adds-to-list-of-potential-supreme-court-justice-picks (archiving www.donaldjtrump.com/press-releases/donald-j.-trump-adds-to-list-of-potential-supreme-court-justice-picks); Alan Rappeport & Charlie Savage, *Trump Offers a List of Possible Supreme Court Nominees Who Reflect His Principles*, N.Y. Times, May 19, 2016, at A16.

35. Larsen Recusal, *supra* note 34.

tees” and recused himself “[w]ith reluctance,” noting, “The conflict supposed by intervening defendant is both speculatively hypothetical and, in my case, improbable [because of age].”³⁶ Chief Justice Young’s service as chief ended on January 6, 2017,³⁷ and he retired from the bench in April.³⁸ Justice Larsen was confirmed as a circuit judge on the U.S. Court of Appeals for the Sixth Circuit on November 1.³⁹

On December 9, 2016, by a vote of three to two, Michigan’s supreme court decided not to review the court of appeals’ determination that Stein was not entitled to a recount.⁴⁰ On March 31, 2017, Judge Goldsmith accepted a voluntary dismissal of the action.⁴¹

Pennsylvania

Unsuccessful in Pennsylvania’s state courts,⁴² Stein and a voter filed a federal complaint in the Eastern District of Pennsylvania on December 5 against state election officials which sought declaratory judgments against Pennsylvania’s election procedures.⁴³ The complaint alleged, “The Pennsylvania election system is a national disgrace. Voters are forced to use vulnerable, hackable, antiquated technology banned in other states, then rely on the kindness of machines. There is no paper trail. Voting machines are electoral black sites: no one permits voters or candidates to examine them.”⁴⁴ The plaintiffs also sought recounts in counties that used optical scan ballots and forensic

36. Young Recusal, *supra* note 34.

37. See Holly Fournier, *Markman to Be Chief Justice*, Detroit News, Jan. 7, 2017, at A3.

38. See Michael Gerstein, “One of a Kind” Justice to Retire from High Court, Detroit News, Mar. 30, 2017, at A6; Emily Lawler, *Justice Announces Retirement*, Grand Rapids Press, Mar. 30, 2017, at A14; see also Melissa Nann Burke, *Young Set to Challenge Stabenow, Official Says*, Detroit News, June 21, 2017, at A5; Paul Egan, *Ex-Chief Justice Young Says He Is Joining U.S. Senate Race for GOP*, Detroit Free Press, June 21, 2017, at A4.

39. www.congress.gov/nomination/115th-congress/371; see Melissa Nann Burke, *Senate Confirms Larsen for Appeals Court*, Detroit News, Nov. 2, 2017, at A3; see also Joe Paul Egan, *Trump Names Justice Larsen to U.S. 6th Circuit*, Livingston Cty. Press, May 9, 2017, at A4; Brent Kendall & Aruna Viswanatha, *Party-Line Vote Approves 3 Trump Picks*, Wall St. J., Oct. 6, 2017, at A4; Joe Palazzolo, *Conservatives Nominated for Appeals Courts*, Wall St. J., May 9, 2017, at A6.

40. Att’y Gen. v. Bd. of State Canvassers, 887 N.W.2d 786 (Mich. 2016); see *id.* at 792 (Justice McCormack, dissenting: “The stakes in this case may be low, but the public significance of the issues presented could not be higher. I . . . would . . . give this Court an opportunity to consider the important legal questions implicated here.”); *id.* at 794 (Justice Bernstein, dissenting: “I would reverse the Court of Appeals and allow the recount to resume.”); see Davey et al., *supra* note 4.

41. Order, *Stein v. Thomas*, No. 2:16-cv-14233 (E.D. Mich. Mar. 31, 2017), D.E. 41; see Notice, *id.* (Dec. 19, 2016), D.E. 38.

42. See *Stein v. Cortés*, 223 F. Supp. 3d 423, 428–29, 437 (E.D. Pa. 2016); *Green Party Drops Penn. Recount Effort*, Miami Herald, Dec. 4, 2016, at 23A.

43. Complaint, *Stein v. Cortés*, No. 2:16-cv-6287 (E.D. Pa. Dec. 5, 2016), D.E. 1 [hereinafter E.D. Pa. Complaint]; see *Stein*, 223 F. Supp. 3d at 429; Steve Eder, *Call Rises for Recounts Outside Trump’s Door*, N.Y. Times, Dec. 6, 2016, at A17.

44. E.D. Pa. Complaint, *supra* note 43, at 1.

analyses of electronic voting machines.⁴⁵ On the day that the complaint was filed, Trump, his electors, and the state’s Republican Party filed a motion to intervene.⁴⁶ Judge Paul S. Diamond granted the motion on the next day.⁴⁷ On December 6, the plaintiffs sought an expedited hearing on a preliminary injunction motion.⁴⁸

Judge Diamond set the case for hearing on December 9.⁴⁹ He allowed three amicus curiae briefs.⁵⁰

On December 12, Judge Diamond concluded, “There are at least six separate grounds requiring me to deny Plaintiffs’ Motion. Most importantly, there is no credible evidence that any ‘hack’ occurred, and compelling evidence that Pennsylvania’s voting system was not in any way compromised.”⁵¹ Judge Diamond decided that two doctrines compelled him to abstain:⁵² (1) the *Rooker-Feldman* doctrine, which states that among federal courts only the Supreme Court has appellate jurisdiction over state court proceedings,⁵³ and (2) the *Younger* doctrine, which counsels against federal jurisdiction over controversies that would result in undue interference with state proceedings.⁵⁴

In addition, Stein lacked standing⁵⁵ and inexcusably delayed in bringing her suit.⁵⁶ “Finally, granting the relief Plaintiffs seek would make it impossible for the Commonwealth to certify its Presidential Electors by December 13 . . .”⁵⁷

Reviewing an amended complaint,⁵⁸ Judge Diamond held on September 7, 2018, that Stein and Pennsylvania voters had standing to challenge the accuracy of Pennsylvania’s voting procedures for future elections.⁵⁹

45. *Id.* at 18.

46. Intervention Motion, *Stein*, No. 2:16-cv-6287 (E.D. Pa. Dec. 5, 2016), D.E. 2.

47. Order, *id.* (Dec. 6, 2016), D.E. 22; *Stein*, 223 F. Supp. 3d at 429; see Order, *Stein*, No. 2:16-cv-6287 (E.D. Pa. Jan. 9, 2017), D.E. 67 (granting the intervenors’ post-election motion to withdraw from the case).

48. Motion *Stein*, No. 2:16-cv-6287 (E.D. Pa. Dec. 6, 2016), D.E. 4; *Stein*, 223 F. Supp. 3d at 429.

49. Order *Stein*, No. 2:16-cv-6287 (E.D. Pa. Dec. 6, 2016), D.E. 23; see *Stein*, 223 F. Supp. 3d at 429.

50. Order *Stein*, No. 2:16-cv-6287 (E.D. Pa. Dec. 8, 2016), D.E. 45; Order, *id.* (Dec. 8, 2016), D.E. 40; Order, *id.* (Dec. 8, 2016), D.E. 36.

51. *Stein*, 223 F. Supp. 3d at 426.

52. *Id.* at 426, 434–37.

53. D.C. Ct. of Appeals v. Feldman, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923); see also Martin A. Schwartz, Section 1983 Litigation 21–24 (Federal Judicial Center 3d ed. 2014).

54. *Younger v. Harris*, 401 U.S. 37 (1971).

55. *Stein*, 223 F. Supp. 3d at 426, 431–34.

56. *Id.* at 426, 436–37.

57. *Id.* at 426.

58. Amended Complaint, *Stein v. Cortés*, No. 2:16-cv-6287 (E.D. Pa. Feb. 14, 2017), D.E. 71.

59. Opinion, *id.* (Sept. 7, 2018), D.E. 98.

Judge Diamond dismissed the case as settled on November 29, retaining enforcement jurisdiction at the parties' request.⁶⁰ The settlement agreement required new voting systems in Pennsylvania to meet three criteria: "a. The ballot on which each vote is recorded is paper; b. They produce a voter-verifiable record of each vote; and c. They are capable of supporting a robust pre-certification auditing process."⁶¹ The defendants agreed to pay the plaintiffs \$150,000 in attorney fees and costs.⁶²

60. Order, *id.* (Nov. 29, 2018), D.E. 110; see Settlement Agreement at 4, *id.* (Nov. 28, 2018), D.E. 108-1 [hereinafter E.D. Pa. Settlement Agreement] ("The parties agree that this Agreement between the parties must be considered a private settlement agreement, does not require court approval, and that the parties are not seeking Court approval.")

61. E.D. Pa. Settlement Agreement, *supra* note 60, at 2 (footnote omitted); see Jan Murphy, *Pa. to Share Vote Machine Cost*, Harrisburg Patriot News, Dec. 2, 2018, at A18.

62. E.D. Pa. Settlement Agreement, *supra* note 60, at 4.