

**Senate State Government Committee
Public Hearing
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**Written Testimony of Elizabeth L. Howard
Counsel, Brennan Center for Justice at NYU School of Law**

The Brennan Center at NYU School of Law thanks Chairman Folmer, Minority Chair Williams and members of the Senate State Government Committee for the opportunity to provide written testimony regarding election security and in support of immediate financial assistance to counties transitioning to new paper-based voting systems. The Brennan Center is a nonpartisan law and policy institute that works to reform, revitalize – and when necessary, defend – our country’s systems of democracy and justice.

For over a decade, we have studied America’s election infrastructure and promoted common-sense policies to protect and secure our electoral system. In addition, as the former Deputy Commissioner of Elections in Virginia, I have significant professional experience with voting equipment security issues. In conjunction with the Commissioner, I coordinated two separate paperless voting equipment decertifications which resulted in the statewide implementation of paper-based voting systems as of September 2017.

The Commonwealth and this committee are at a challenging crossroads. Suddenly facing “real and evolving”¹ threats from foreign nation states, underfunded local and state election officials must take immediate steps to improve their election security posture and harden the entire Pennsylvania electoral system against attack or error. What can be done and what must be done?

While a small number of local election officials may disagree, the unanimous national security and scientific community consensus is that replacing all paperless voting machines with equipment that creates a paper record of every vote cast is the simple solution to today’s realities and an essential step in creating a resilient electoral system. Further, voters also agree that paper record will make our elections more secure.

The courts have taken notice of this consensus. Voters in three states, including Pennsylvania, have alleged that the ongoing use paperless voting machines violates their constitutional rights.

¹ Sec’y Kirstjen M. Nielsen, Remarks to the National Election Security Summit, September 10, 2018, <https://www.dhs.gov/news/2018/09/10/secretary-kirstjen-m-nielsen-remarks-national-election-security-summit>.

In *Curling v. Kemp*, the court recently admonished Georgia election officials who “buried their head in the sand”² and “stood by for far too long, given the mounting tide of evidence of the inadequacy and security risks of Georgia’s [paperless] DRE voting system and software.” While denying Plaintiffs’ preliminary request to immediately prohibit the continued use of paperless voting machines just weeks before the midterms, the court cautioned “continued reliance on the use of DRE machines in public elections likely results in ‘a debasement or dilution of the weight of [Plaintiffs’] vote[s],’ even if such conduct does not completely deny Plaintiffs the right to vote.”³ In a direct warning to state election officials, the court stated, “Plaintiffs are substantially likely to succeed on the merits of one or more of their constitutional claims.”

At a minimum, *Curling*, coupled with a Pennsylvania federal court’s recent denial of state election officials’ request to dismiss similar constitutional claims, leaves local election officials in Pennsylvania open to litigation unless the transition to paper-based voting equipment is accomplished promptly after the 2018 election.

Failure to provide immediate support to local and state election officials in their efforts to replace paperless voting machines across the commonwealth subjects Pennsylvania’s electoral system, voters and taxpayers to the unnecessary risks associated with untimely voting equipment decertifications, expensive litigation and the erosion of public confidence in our electoral system. I urge this committee to support your election officials and their efforts to promptly make Pennsylvania’s election system more secure.

National security and scientific experts recommend implementation of paper-based voting equipment by 2020 election.

“Election security is national security,” Department of Homeland Security Secretary Kirstjen Nielson frequently reminds us.⁴ In a speech earlier this year “timed to [the] anniversary of the 9/11 terrorist attacks,” she highlighted election security as an area of significant concern and asked state and local election officials to take concrete steps to make our election system more secure: “Today, I am calling on every state in the Union to ensure that by the 2020 election, they have redundant, auditable election systems. The best way to do that is with a physical paper trail and effective audits so that Americans can be confident that – no matter what – their vote is counted and counted correctly.”⁵

² *Curling v. Kemp*, No. 1:17-cv-02989-AT, slip op. at 45 (N.D. Ga. Sept. 19, 2018), *available at* https://www.courtlistener.com/recap/gov.uscourts.gand.240678/gov.uscourts.gand.240678.309.0_2.pdf).

³ *Id.* at 33.

⁴ *See, e.g.*, Sec’y Kirstjen M. Nielson, Statement on President Trump’s Election Security Executive Order, September 13, 2018, <https://www.dhs.gov/news/2018/09/13/secretary-nielson-statement-president-trump-s-election-security-executive-order> (“As I have said on numerous occasions, election security is national security...”).

⁵ Nick Miroff, “*Hacking, cyberattacks now the biggest threat to U.S., Trump’s Homeland Security chief warns*,” WASH. POST, September 5, 2018, https://www.washingtonpost.com/world/national-security/hacking-cyberattacks-now-the-biggest-threat-to-us-trumps-homeland-security-chief-warns/2018/09/05/d0045800-b119-11e8-a20b-5f4f84429666_story.html?utm_term=.18a153f76d24.

Secretary Nielson’s recommendations are consistent with the strong consensus of cyber security, national security, and election administration experts that paperless voting machines present a security risk and must be replaced promptly. Most recently, the National Academies of Sciences, Engineering and Medicine issued a report recommending that “[a]ll local, state and federal elections [] be conducted using human-readable paper ballots by the 2020 presidential election.”⁶

Voters believe that paper ballots make elections more secure.

Voters are also concerned. While few may be fluent in election equipment configurations, attack vectors and system vulnerabilities, voters intuitively understand the importance of a simple paper backup. In a recent poll, “68 percent of voters — including strong majorities of Democrats, Republicans and independents — said paper ballots would make U.S. elections more safe from interference.”⁷ Failure to transition to paper-based voting systems jeopardizes voters’ confidence in the integrity of Pennsylvania’s electoral system.

Recent decisions by federal courts suggest that continued use of paperless DREs may violate voter’s constitutional rights.

Earlier this month, two federal courts addressed matters related to the continued use of paperless voting machines. In *Stein v. Cortes*, U.S. District Judge Paul Diamond refused to dismiss constitutional claims lodged against Pennsylvania election officials based on (a) the use of paperless Direct Recording Electronic (“DRE”) voting machines in some Pennsylvania counties, but not all, and (b) the risk of casting an ineffective vote on DRE machines.⁸

In *Curling v. Kemp*, U.S. District Judge Amy Totenberg expressed significant concern that the ongoing use of paperless machine may violate Georgia voters’ constitutional rights, stating “Plaintiffs have demonstrated a real risk of suffering irreparable injury without court intervention.”⁹ The court also indicated intolerance for any delay in addressing these concerns stating, “if the case stays with or comes back to this Court, the Court will insist on further proceedings moving on an expedited schedule. The 2020 elections are around the corner.”¹⁰

⁶ National Academies of Sciences, Engineering, and Medicine, 2018, *Securing the Vote: Protecting American Democracy*, Washington, DC: The National Academies Press, <https://www.nap.edu/catalog/25120/securing-the-vote-protecting-american-democracy>.

⁷ Derek Hawkins, “*The Cybersecurity 202: A new poll shows voter views on election security largely line up with experts’ positions*,” WASH. POST, September 18, 2018, https://www.washingtonpost.com/news/powerpost/paloma/the-cybersecurity-202/2018/09/18/the-cybersecurity-202-a-new-poll-shows-voter-views-on-election-security-largely-line-up-with-experts-positions/5b9fccc41b326b47ec95965a/?utm_term=.d36d0977e9ac (citing Election Security Poll, NPR-Marist (September 2018), http://maristpoll.marist.edu/wp-content/uploads/2018/09/NPR_Marist-Poll_National-Nature-of-the-Sample-and-Tables_September-2018_1809111654.pdf).

⁸ *Stein v. Cortes*, No. 2:16-cv-06287-PD, slip. op. (E.D. Pa. Sept. 7, 2018).

⁹ *Curling v. Kemp*, No. 1:17-cv-02989-AT, slip op. at 40 (N.D. Ga. Sept. 19, 2018), *available at* https://www.courtlistener.com/recap/gov.uscourts.gand.240678/gov.uscourts.gand.240678.309.0_2.pdf).

¹⁰ *Id.* at 45-46.

Most troubling, the court acknowledged the potential intangible impact on voters stating, “a wound or reasonably threatened wound to the integrity of a state’s election system carries grave consequences beyond the results in any specific election, as it pierces citizens’ confidence in the electoral system and the value of voting.”¹¹

A decision on the merits in either of the above cases may result in a court-ordered – and abrupt – transition to voting equipment that employs a paper record. Even worse for local officials may be the fact that although the courts have yet to address the underlying constitutional claims, these recent opinions leave the door open for litigation at the local level.

Pennsylvania election officials are much better suited to direct this process than the courts, and they are working to replace paperless voting equipment across the commonwealth. Your immediate support of their transition efforts will decrease the likelihood that election officials face time-consuming and costly litigation, and court intervention.

Conclusion

The Brennan Center appreciates this committee’s ongoing commitment to election security and the opportunity to provide testimony on this matter. We support common-sense policies that make our elections more secure. Promptly implementing paper-based voting systems across the commonwealth will not only make our elections more secure, but also protect voters, taxpayers and election officials from many unnecessary costs associated with expensive litigation, abrupt voting equipment transitions and the erosion of public confidence in Pennsylvania’s electoral system. Many of the remaining thirteen states with paperless voting systems have already made significant progress in the transition process.¹² Several election security and administration experts, including those at the Brennan Center, have experience with this process and are prepared to assist state and local Pennsylvania election officials with the implementation of paper-based voting systems.

Your support of local and state election officials in their efforts to transition to new paper-based voting systems is an integral component of a successful and expeditious transition. We urge this committee to support the financial assistance required for a smooth transition to a more secure election administration system in Pennsylvania.

¹¹ *Id.* at 45.

¹² *E.g.*, Arkansas (single remaining paperless DRE county’s transition to paper-based voting system scheduled promptly after 2018 election); Delaware (statewide transition to paper-based voting system scheduled for 2019); Louisiana (statewide implementation of paper-based voting system expected by 2020).