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Office of Legislative Counsel
General Assembly of Georgia

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Senator John Kennedy
District 18
By E-mail to john.kennedy@senate.ga.gov and jkennedy@jamesbatesllp.com

Re: Election Audits

Dear Senator Kennedy:

You have requested some information on who in Georgia has the constitutional or legal authority to conduct an audit of an election that has already occurred.

Types of Audits

As an initial matter, we would need to determine what type of audit is being requested. The idea of a forensic election audit has been suggested as the basis for an investigation. As I understand the term as it is generally used, a forensic audit in the financial world is one designed to review the financial records of a business to determine if illegal activities are present, such as embezzlement, fraudulent charges, etc., and document such activities for use in court. As will be discussed below, this would not be a proper purpose for legislative inquiry, but should be within the realm of the executive branch of government.

Presently, there are audits provided for in Georgia law in the form of risk-limiting audits. O.C.G.A. § 21-2-498. A risk-limiting audit is "an audit protocol that makes use of statistical methods and is designed to limit to acceptable levels the risk of certifying a preliminary election outcome that constitutes an incorrect outcome." O.C.G.A. § 21-2-498(a)(3). This, however, is also in the purview of the executive branch of government to administer and enforce.

Limitations on Access to Ballots

Any audit which involves an examination of the actual ballots cast would face a number of obstacles. All cast ballots and similar official records of the election, following tabulation and certification of the votes, are to be delivered under seal to the clerk of the superior court in the case of federal, state, and county elections and to the city clerk in the case of municipal elections. Such items are to remain there unless otherwise ordered by a superior court judge of competent jurisdiction. O.C.G.A. § 21-2-500. In addition, federal law also imposes a requirement that such documents be protected for federal races. The Civil Rights Act of 1960, 52 U.S.C. §§ 20701-20706, governs the maintenance of records, including voted ballots, for presidential electors and races for the United States Senate and United States House of Representatives. Placing these documents under seal preserves the chain of custody of such documents and maintains their evidentiary value in a court of law should it ever be necessary to use them. Because of this stringent protection of the ballots, it would be necessary to obtain a court order to permit them to be examined and such an order would only be granted by a judge upon good cause being shown to do so. In other words, there would have to be a demonstration in court that there is a good reason to examine the ballots and not just mere speculation or allegations but demonstrable proof of a need to review them. On July 28, 2021, during the audit of 2020 ballots ordered by the Arizona Senate, the United States Department of Justice issued a bulletin reminding state and local election officials of the constraints federal law places on post-election audits, and the potential penalties that election officials record custodians could face if the document preservation requirements of federal law are not met.

The law takes this sealed protection seriously. In the case of *Smith v. DeKalb County, et al.* 288 Ga App 574 (2007), the court granted an injunction prohibiting the release of such election records under the open records laws because they were under seal and not subject to the open records laws. They are instead required to be maintained in a strict level of protection. Even then, a demonstration of a good reason to examine the records would face an enormous uphill battle. It is instructive to see this principle and another principle in action in an election contest case. In the case of *Martin, et al. v. Fulton County Board of Registration and Elections, et al.*, 307 Ga 193 (2019), the Georgia Supreme Court considered a challenge to the 2018 election for lieutenant governor, alleging that the computer voting equipment was flawed as shown by the fact that there were 159,024 fewer votes cast in the lieutenant governor's race than the governor's race, a difference of approximately 4 percent when the historical difference over the past four elections for lieutenant governor had been at an average of 0.8 percent. Two principles were clear from that case. First, there must be some finality to an election and it must occur timely. The court stated:

> Elections are critical to our democratic republic. We give great credence to the choices citizens make when they engage in the democratic process by voting to select their representatives. And because we place so much value on that exercise of democracy, we afford great weight to election results. Indeed,

> [t]he setting aside of an election in which the people have chosen their representative is a drastic remedy that should not be undertaken lightly, but instead should be reserved for cases in which a person challenging an election has clearly established a violation of election procedures and has demonstrated that the violation has placed the result of the election in doubt. *Hunt v. Crawford*, 270 Ga. 7, 10 (507 S.E.2d 723) (1998).

> Georgia law nonetheless allows elections to be contested through litigation, both as a check on the integrity of the election process and as a means of ensuring the fundamental right of citizens to vote and to have their votes counted accurately. See O.C.G.A. § 21-2-520, et seq. But an election contest is, by statutory design, an expedited proceeding - and one that vests in trial courts broad authority to manage the proceeding, including to "proceed without delay to the hearing and determination of" the election contest. See OCGA § 21-2-525 (b). This system balances citizens' franchise against the need to finalize election results, which, in turn, facilitates the orderly and peaceful transition of power that is a hallmark of our government.

As can be seen, elections may be contested but, at some point, an election has to be finalized and everyone move on with the transition of power.

The court in the *Martin* case also noted:

> To prevail [in an election contest], a party contesting an election must therefore offer evidence - not merely theories or conjecture - that places in doubt the result of an election.

Additionally, the court cited one of a line of cases which state that election contests must be decided rapidly and finally. *Head v. Williams*, 269 Ga. 894, 895 (1998).

> The Court also denied any error based upon the denial of a discovery request to examine the computer voting system (direct recording electronic voting machines) and software since it was not based upon any demonstrable evidence that anything would be found but only a possibility of a discovery of something amiss. The court balanced the security concerns against the demonstrated likelihood of finding something improper and found the evidence of such likelihood wanting. This underscores the difficult nature of accessing voted ballots for reviews or audits unless there is proof that something is amiss that could be determined based upon a review of the ballots.

<u>Executive Authority</u>

As for who in Georgia is authorized to undertake an audit of an election, we will first look at the authority of the executive branch of government. The first stop will be with the State Election Board. The State Election Board is the primary enforcer of the state election laws. The State Election Board has the duty to "investigate, or authorize the Secretary of State to

investigate, when necessary or advisable the administration of primary and election laws and frauds and irregularities in primaries and elections and to report violations of the primary and election laws either to the Attorney General or the appropriate district attorney who shall be responsible for further investigation and prosecution." O.C.G.A. § 21-2-31(5).[1]

The State Election Board has "the right to institute or to intervene as a party in any action in any court of this state or of the United States, seeking mandamus, injunction, or other relief, to compel compliance with any election or primary law of the state or with any valid rule or regulation of the board, or to restrain or otherwise prevent or prohibit any fraudulent or other illegal conduct in connection therewith, including the right to seek such relief for any anticipatory breach." O.C.G.A. § 21-2-32(a).

The State Election Board also has the power to conduct hearings, take testimony under oath, and subpoena witnesses and documents. As a result of such a hearing, the State Election Board can impose a variety of sanctions. O.C.G.A. §§ 21-2-33.1; 21-2-33.2.

The second stop is with the Secretary of State. As noted in O.C.G.A. § 21-2-31(5), the Secretary of State can be authorized by the State Election Board to investigate election irregularities. However, that is not the primary function of the Secretary of State with regard to elections. The Secretary of State is the person chiefly responsible for the administration of election law at the state level. The Secretary of State receives and determines the sufficiency of all sorts of form and filings with regard to elections and candidates. For example, the Secretary of State determines challenges to candidate qualifications for candidates for federal or state offices. O.C.G.A. § 21-2-5. The Secretary of State also handles recount requests and recounts for offices voted upon by the electors of multiple counties. O.C.G.A. § 21-2-495(d). The Secretary of State is the primary administrator of election laws at the state level.

The final stop in the executive branch is with the Attorney General and to a somewhat lesser degree with the district attorneys of the various judicial circuits. As noted above, the State Election Board has the duty "to report violations of the primary and election laws either to the Attorney General or the appropriate district attorney who shall be responsible for further investigation and prosecution." The Attorney General and the district attorneys are the prosecutors of election law violations.

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[1]As of the date this letter was issued the 2022 General Assembly has passed SB 441, which would also provide the GBI with original jurisdiction to investigate violations of state election law"which if established are sufficient to change or place in doubt the results of an election." The GBI would have the power to compel the production of any records necessary to conduct its investigation of such violations. At this time, SB 441 has not been signed or vetoed by the Governor, but if it is approved the GBI would also have concurrent jurisdiction with the State Election Board to investigate certain violations of state election law.

Legislative Authority

The role of legislative branch in elections is limited to the drafting of election laws and investigations as to the operation of current election laws and potential changes to the same. Under the Georgia Constitution, the General Assembly determines what the laws shall be but not what they were or said and not how or when the laws should be enforced and administered as it applies to current or past events. The legislative function is prospective in nature. As it has been said by the Georgia Supreme Court, "[n]either of the cases [cited] denied the legislative power to serve as a check upon the Executive and Judicial Departments. And this function is properly performed by enactment of laws. If the legislature wishes to have the law other than what the Judiciary construes it to be, it has the power and the duty to so write it within the limits of the Constitution." *Bedingfield v. Parkerson*, 212 Ga. 654, (1956). Therefore, it is up to the General Assembly to determine what the law should be and its powers and duties should be construed with that purpose in mind.

The law recognizes the power of legislative bodies to investigate matters affecting their respective jurisdictions. See, e.g., National Conference of State Legislatures, MASON'S MANUAL OF LEGISLATIVE PROCEDURE § 795 (11th ed. 2010) ("An investigation into the management of the various institutions of the state and the departments of the state government is at all times a legitimate function of the legislature.). In reference to the United States Congress, the United States Supreme Court has stated:

> The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects in our social, economic or political system for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.
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> *Watkins v. United States*, 354 U.S. 178, 187 (1957).

In Georgia, the power of the General Assembly to investigate is also codified in O.C.G.A. § 45-15-19, which, in pertinent part, states:

> In addition to the power conferred upon the Attorney General in this article, the Governor or the General Assembly is authorized likewise to make investigations, including investigations of the Department of Law or the .offices of the Attorney General or any agency under his control, and all authority and rights granted to the Governor and the General Assembly shall be as complete and absolute as those granted to the Attorney General.

The authority of the Attorney General to investigate is contained in subsections (a) and (b) of O.C.G.A. § 45-15-17 which provide:

(a) The Attorney General, as head of the Department of Law and as chief legal officer of the state, is authorized to institute and conduct investigations at any time into the affairs of the state; or of any department, board, bureau, commission, institution, authority, instrumentality, retirement system, or other agency of the state; or into the affairs of any person or organization to the extent that such person or organization shall have or shall have had any dealings with the state or any department, board, bureau, commission, institution, authority, instrumentality, retirement system, or other agency of the state.
(b) For the purpose of conducting any investigation as provided in this Code section, the Attorney General shall have the power to administer oaths; to call any party to testify under oath at such investigations; to require the attendance of witnesses and the production of books, records, and papers; and to take the depositions of witnesses. For such purposes the Attorney General is authorized to issue a subpoena for any witness or a subpoena to compel the production of any books, records, or papers.

However, one should keep in mind that, while these powers are the same, the purposes for which they are to be used are not the same. The Attorney General has these powers, as does the Governor, to explore whether someone has or is engaging in improper conduct which may result in prosecution or civil action. The General Assembly has these powers to determine if and to what extent legislation is needed to address a problem for the future. As the United States Supreme Court stated in *Watkins*, supra 354 U.S. at 187:

> [B]road as is this power of inquiry, it is not unlimited. There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. … Nor is the Congress a law enforcement or trial agency. … No inquiry is an end in itself; it must be related to, and in furtherance of, a legitimate task of the Congress.

Therefore, legislative investigations should have as their purpose to ascertain the need and scope of legislation for the future. Any purpose other than this would not be within the scope of a legislative investigation. Turning again to MASON'S MANUAL OF LEGISLATIVE PROCEDURE, Section 797(2), (4), and (7), we see that:

> 2. The legislature has no right to conduct an investigation for the purpose of laying a foundation for the institution of criminal proceedings, for the aid and benefit of grand juries in planning indictments, for the purpose of intentionally injuring such persons or for any ulterior purpose.
> …
> 4. An investigation instituted for political purposes and not connected with intended legislation or with any of the matters upon which a house should act is not a proper legislative proceeding and is beyond the authority of the house or legislature.
> …
> 7. The investigatory power of a legislative body is limited to obtaining information on

matters within its proper field of legislative action.

In addition to O.C.G.A. § 45-17-19, O.C.G.A. § 28-1-16 provides certain additional powers to the ethics committees of both the Senate and the House of Representatives to compel the production of documents and witnesses necessary for the "effective functioning of the committee." Under the current rules of Senate, the investigatory powers of the Ethics Committee are limited to investigations of violations of the Senate's ethics and code of conduct rules. Senate Rules 1-4.1 - 1.4.13. The Rules of the House of Representatives similarly limit the scope of that chamber's ethics committee to ethics and code of conduct matters. To expand the scope of the investigatory powers of such committees to matters of general legislation would require changing the rules of the applicable chamber. Absent such a rule change, the power to subpoena documents or witnesses beyond ethical matters is limited to exercise by either the full Senate or full House of Representatives, and is not given to any committee of either chamber.

Finally, Article I, Section I, Paragraph X of the Georgia Constitution prohibits retroactive laws, and Article II, Section I, Paragraph I requires that elections "be conducted in accordance with procedures provided by law." For such procedures to be provided by law, the procedure must be approved by majorities of both chambers of the General Assemble and then approved by the Governor prior to their implementation.

If the General Assembly wants to investigate the 2020 elections, or any other elections that has already occurred, for the purpose of ascertaining how the elections were administered or ascertaining if changes need to be made to the elections law, that would be a proper purpose for such an investigation. If the General Assembly is investigating for the purpose of finding a basis for prosecution for election offenses or to overturn or cast doubt on the results of the elections, that would not be a proper purpose.

Please do not hesitate to contact me if you have any questions or if I can be of further assistance.

Sincerely,

/s/ D. Stuart Morelli
D. Stuart Morelli
Deputy Legislative Counsel

Approved for release: _/s/RR__