

German High Court's Ruling Strikes Down Electronic Voting Under Principles of Democracy Signed by and Imposed by USA After WWII

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According to a ruling by Germany's highest court yesterday, computerized voting machines used by 2 million of Germany's 5 million voters in 2005's parliamentary elections are unconstitutional because they are not in line with democratic standards and principles -- especially the "publicity" of the vote counting (i.e. transparency, visibility). The court added that "specialized technical knowledge" may not be demanded of observing citizens, and that government-defined checks or audits are no substitute for the constitutional requirement of publicity via observation.

The ruling of Germany's highest court affirmed the principles required for a constitutional voting system that makes Self-Government possible, which include the following tests:

1. **No "specialized technical knowledge" can be required of citizens** to vote or to monitor vote counts. (This is a simple application of democracy's equality principle combined with an aversion to an aristocracy of experts.)
2. The **constitution requires a bona fide publicly observed vote count**. (The court noted that the government substitution of its own check or checks in any amount, or substitution of what we'd probably call in the USA an "audit" is no substitute at all for the constitutional requirement of public observation or "publicity." Publicity was the term of art favored by Founders of the USA, and the term still used by the German (High) Federal Constitutional Court.)
3. **A paper trail does not suffice to meet the above standards where ballots are not publicly counted on election day**, the court holds generally, in its ruling on the NEDAP push-button DRE electronic voting system used in the 2005 Bundestag elections in Germany.
4. **The German Federal Constitutional Court threw out the German Voting Machine Act completely (the analog in the US would be HAVA – the "Help America Vote Act.")** Message to Congress: We don't need YOUR help. especially since your help comes with concealing the vote counts on computers like optical scans and touch screens so we can't tell on election night if the counts are genuine results or not.!
5. **CONCLUSION ON THE EFFECT OF THE OPINION'S HOLDING:** As a result of these principles, a source in Ireland concludes that **"all independent**

observers” conclude that “electronic voting machines [are totally] banned in Germany” because no conceivable computerized voting system can cast and count votes that meet even just the two most basic requirements of publicity: being both publicly observed and not requiring specialized technical knowledge on the part of the public in order to exercise the right of observation (transparency).

6. CONCLUSION ON THE OUTLOOK IN GERMANY ITSELF: Moreover, any resumption of any kind of optical scan or touch screen voting of any kind would require the Bundestag to first pass a new Voting Machine Act that complies with the constitutional principles set forth in the Courts opinion. About the only kind of electronic voting that would be constitutionally permissible would be that strictly limited to those who need a computer’s help to cast a ballot, because in that case only would the right to vote FAVOR technology such that concerns of constitutional magnitude (quite unlike speed, efficiency or other such business-based non-constitutional values) would come into play and be balance against the constitutional command for publicity/transparency of vote counts and “all essential steps.” A little non-transparency in how individual small numbers of disabled persons cast their ballot is not an “essential step” given the secret ballot, so long as the output of the process is a ballot that can be publicly counted like all the others.

Sources for the above (except my Conclusions sections): European media (links at bottom.)

Consequently, the 2009 elections in June and September in Germany may not use existing machines and will be on paper, hand counted. No optical scan or touch screen voting can ever resume in Germany until the Bundestag passes a constitutional voting machine act which would be hard to do indeed.

The March 3 ruling specifically interprets the German Constitution, which became effective right after the December 10, 1948 passage date of the Universal Declaration of Human Rights by the United Nations. Soon thereafter, Germany’s new Constitution “came into effect May 23, 1949, **with the signature of the Allies,” specifically including the United States.** <http://en.wikipedia.org/wiki/Grundgesetz> (paragraph one)

Approval of the German Constitution by the United States and occupying powers was conditional on two non-negotiable terms: (1) Complete rejection of master race theory and with it the treatment of other groups with barbarism or worse, and (2) **an unequivocal commitment to the inviolability and inalienability of human rights.** <http://en.wikipedia.org/wiki/Grundgesetz> , At “Drafting Process”

Inviolability and inalienability together mean never to be violated and incapable of being forfeited or lost. **The human rights having this status, which the United States absolutely insisted on for Germany, and signed off on, specifically include genuine elections.** Under Article 21 of the Universal Declaration, “human rights” includes

“freely chosen” elections measuring the “genuine” “will” of the people, which is “the basis of the authority of government.” and “Free” or “genuine” elections are ones with “universal suffrage” that are free from force, fraud or other tampering, so that the genuine will of the people is heard in the totals. See <http://www.un.org/Overview/rights.html>

Without publicity and observable elections, at best Democracy is in a top secret detention camp in an unknown condition or status. But even prisoners of war have the right to Red Cross visitation.

In the face of principles that overwhelmingly crush them, vendors of computerized voting machines are attempting to claim solace, citing that the court ‘in principle’ did not outlaw all computers.

This is misleading, because courts are required not to make peremptory or “advisory” rulings on cases not before them, but they instead focus on the immediate case (NEDAP and 2005) and often recite that they are not prejudging other cases. Consequently, the reported comments of a single judge (Herr Vossruhle) to the effect that the opinion itself doesn’t ban all computerized voting is technically correct but misleading in that the case is precedent and the principles laid down by it which must be applied in future cases make computerized voting impossible. Predicting the legal future is precisely where judges are forbidden from going, but exactly where lawyers advising clients go every day, and it is also where citizens must go, in order to follow the law. Nobody needs a lawyer to apply the principle holdings of the case to potential new computerized systems.

Simply put, by the application of Reason to those principles that are now precedent, it is readily seen the principles will result in successful challenges to any future computerized voting system that’s implemented, even if they are not yet “banned” as a class because that was not the case before the court. All e-voting is secret vote counting on hard drives using invisible electrons, and even “open source” computing requires specialized computer knowledge, therefore all computerized vote recordation and computerized vote counting is impermissible as a class.

The principles strongly affirmed by Germany's highest court, I emphasize, make it impossible that a computerized vote recordation or count can ever be valid under the law of any REAL democracy of self-government.

Some may yearn for the United States to be like Germany’s court, but the truth is, the American public is still ahead of Germany, it is only our government and media that is not. The media simply doesn’t report the facts below, and so we don’t “see” each other, or feel our collective strength. Yet, here are the uncontested facts about American public opinion, which should be read with the question in mind: *“How can anyone in Washington DC possibly justify ignoring the rights asserted by close to 92% of all Americans?”*

1. Polling by Zogby International that I commissioned in August 2006 and paid for with help from Nancy Tobi and Michael Collins, showing that **92%**

of Americans agreed that **“Citizens have the right to view and obtain information about how election officials count votes.”** (link at bottom)

2. Similar high numbers, even when the question is strengthened to emphasize corporate “intellectual property rights” have confirmed the original poll results. For example, an exit poll via telephone in November 2006 done by Zogby professionals in consultation with this author in a traditionally conservative California congressional district still reported support for the Right of observable counts exceeding 80%.

The six percent in the original nationwide poll that apparently did not agree that observing vote counts was specifically a “right” should not be assumed to support vendors or oppose conditions necessary for self-government. These respondents may well have fallen for a common confusion upon observing that present day vote counts haven’t been transparent for a while: This confusion is namely *confusing the violation of a right with the non-existence of the same right.*

To illustrate this critical point, *anything valuable, including a valuable right or a valuable car, is subject to being stolen.* However, even if something’s “gone,” if the right to have it is *violated* one may justly pursue return of, one’s right to vote or to property, but *if the right doesn’t exist, then there is no hope* for a just return of that vote or that property. If the right doesn’t exist, then reclaiming your own stolen car would just be “stealing it back.” Thus, with important rights, even if they’re violated for long periods of time (as with slavery) they simply become all the more infamous, but they never become Justice itself, just abuses under cloak of law. As LBJ’s Attorney General put it “A right is not what someone gives you; it’s what no one can take from you” because that would be Wrong, not Right.

The whole idea of the Declaration of Independence is to protect rights from becoming political footballs by keeping them outside the scope of legitimate government tinkering or manipulation. These inalienable rights are beyond “all mortal power” to modify, so if these rights were in the Constitution they would be, by definition, apparently modifiable via amendment by Congress and ¾ of the state legislatures. Thus, our most important rights, like the right of self government, the right to have children, rights of (at least) traditional marriage, the right to vote, and the right to information/knowledge are all so fundamental to a free society they are inalienable. Because governments exist to guarantee fundamental rights, not to grant them, the US Supreme Court has long recognized these as fundamental constitutional rights, the debate has historically been over discrimination in who precisely gets to exercise those rights – an Equality debate.

The German high court as well as the American people totally get it: To secure freedom we must have publicly observed vote counts without needing specialized knowledge, or else at the very moment when we most need our vote (to kick out corrupt incumbents) we are the least likely to have a meaningful, guaranteed right to vote.

The right to vote has always included with it the right to have that vote counted properly, without which the right to vote is rendered meaningless. This is the perfect example of something so obvious to Founders (who often voted openly by raising hands) that it wouldn't occur to them that later generations would be so deluded to think that giant holes were placed in the Constitution because it is silent on the issue of secret vote counts, or that the arrival of new technology like computers requires the Constitution to be amended to comply with the technology, instead of technology being required to adapt to and serve democracy and the Constitution.

The decision is astounding and miraculous, and yet also, at the very same time, as obvious as the Emperor's missing clothes. Self-government, to be meaningful, requires that voters control the election process and watch it as necessary like sentinels of liberty.

To have the former Nazi Germany recognize that technology is the servant of We the People and not our master, is as stirring and historic as having an African-American elected from the Land of Lincoln, if not more so. A President can only serve two terms, while principles of democracy are timeless.

Luckily for the world, Germany's experience with fascism is recent and powerful and concluded by defeat such that they clearly distinguish how tyranny parades as "perfectly legal."

Now we must insist on applying the principles inherent and necessary for self-government, as the German High Court did, recognizing that to compromise a fundamental right is the same as to violate and steal that right. We are now insisting that our government learn the principled lessons we ourselves imposed at Nuremburg, from the German Constitution we helped draft, and We are saying to ourselves, each other, and especially to our public servants, Never Again.

There are some things governments simply can never do, even in times of war: genocide, torture, slavery, mistreatment of prisoners, and terminating elections -- or reserving to itself the power change any election it doesn't like -- which is the functional equivalent of termination of elections. Computerized secret vote counting allows the change of any election government doesn't like, so Lincoln's maxim applies: "Important principles may and must be inflexible."

Or, if vigilant demands in defense of freedom and democracy is not your style, we can instead all get on our knees and beg for at least the mercy and justice given to conquered Nazi Germans after World War II (the German Constitution) signed by the United States of America.

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The Decision (in German):

http://www.bundesverfassungsgericht.de/entscheidungen/cs20090303_2bvc000307.html

(English translation due out in a day or two)

Excerpts from European and American based media outlets:

International Herald Tribune:

"Federal Constitutional Court upheld two complaints about the use of the machines in 2005. It found they violated provisions requiring that **voters be able to assure themselves - without specific technical knowledge - that their vote was recorded correctly.**"

<<http://www.iht.com/articles/ap/2009/03/03/europe/EU-Germany-Voting-Machines.php><http://www.iht.com/articles/ap/2009/03/03/europe/EU-Germany-Voting-Machines.php>

IT Examiner:

"The court made it clear that **a simple print-out or flashy icon displaying what party or person was voted for is not enough.** / Not only that, any constraint on **the people's right to know cannot be alleviated by having a state institution check machines to make sure they have not been tampered with.**"

<<http://www.itexaminer.com/voting-machines-outlawed-in-germany.aspx><http://www.itexaminer.com/voting-machines-outlawed-in-germany.aspx>

Radio Netherlands reports that elections later this year must be on pencil and paper, counted publicly.

<<http://www.radionetherlands.nl/news/international/6199272/Germany-rejects-computer-voting><http://www.radionetherlands.nl/news/international/6199272/Germany-rejects-computer-voting>

"[Plaintiffs] complained that push button voting was not transparent because the voter could not see what actually happened to his vote inside the computer and was required to place "blind faith" in the technology." <<http://www.dw-world.de/dw/article/0,,4069101,00.html><http://www.dw-world.de/dw/article/0,,4069101,00.html>

Here's a link to the national Zogby poll official press release expressing an apparently unprecedented 92% level of support for the proposition that Americans have "the right to observe vote counting and obtain any and all information about vote counting"

<http://www.zogby.com/news/readnews.cfm?ID=1163>

An op-ed I wrote that puts the 92% figure in context, it's higher support than Bush's approval after 9-11, approval ratings for anyone (ever), higher than the percentage of

people who wouldn't mind having a personal tax cut, etc., or who can do long division:
<http://www.opednews.com/articles/genera_paul_leh_060823_zogby_poll_3a_strong_.htm
http://www.opednews.com/articles/genera_paul_leh_060823_zogby_poll_3a_strong_.htm

The detailed demographics and cross tabs for this specific question are at:
<http://www.voterconfidencecommittee.org/Documents-Static/Zogby8-23-06.pdf>

More discussion at:
http://www.democraticunderground.com/discuss/duboard.php?az=view_all&address=389x5180310

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