

Voter GA Case History

by Garland Favorito. 9.3.09

Our Georgia Supreme Court case is picking up some national attention and as a result, several people have asked for a brief history of the case and its status so here it is: In 2002, Georgia became the first (and now only) state to conduct statewide elections with unverifiable voting equipment that has no means to the audit vote recording of actual ballots cast on Election Day.

Unbeknownst to us, the law at the time required that any new voting machines “shall have an independent audit trail of each vote cast”. None of the voting machines procured, piloted, allegedly certified, and acquired with \$54 million of tax money had any form of audit trails that are independent of the vote recording process such as standard Voter Verified Paper Audit Trails that were available even at that time.

Prior to the acquisition, the need for audit capabilities, voter verification and recount retention had already been documented in Senate meetings, by the Fulton County Elections chief, in the state’s 21st Century Voting Commission report, by the general public and in plaintiff Emails that were authenticated under oath by the former Assistant Elections Director. Therefore, the acquisition could not have been a mistake.

In July of 2006, after attempts fell short to resolve the problem through the legislature, a politically diverse group of plaintiffs filed a voting rights suit against former Secretary of State Cathy Cox and other officials. The Plaintiffs chose to file the case in Fulton County Superior State Court rather than federal court because there were more obvious violations of state law than federal law.

The lawsuit challenged the legality and constitutionality of the Diebold AccuVote TS R6 voting machines, state election procedures and Georgia Election Code laws used to conduct the elections. During the discovery period as the parties received documents and admissions from each other, more potential violations of law were identified, including those that involved both the Georgia and U.S. Constitutions. The suit was eventually expanded to include 13 counts. Some of the key Constitutional counts include:

- Failure to require elections by ballot according to the Georgia Constitution;
- Violation of Constitutional due process by not protecting the vote count;
- Failure to provide protection equal to that for absentee voters in regards to voter verification, recount completeness and discrepancy investigation;

Two of those counts were filed to prevent the state from purchasing AccuVote TSX machines temporarily used in a 2006 audit trail pilot because, as the current Secretary’s own 2007 Voter Verified Audit Trail report admitted: “the sequential printing of the VVPAT paper ballots does not guarantee voter anonymity as required by Georgia law”. Those machines rolled up elections results sequentially into a sealed canister rather than cutting the ballots and dropping them into a secured ballot box.

The lawsuit was drawn up so that if the Plaintiffs won any single other single count against the currently used voting machines, procedures and election code, the state would be enjoined from using all of the machines and any procedures that violated the rights of the voters. When deposing the Defendants’ witnesses during the extensive discovery period, the Plaintiffs obtained key admissions that were over and above what was expected. Therefore, In March of 2008, the Plaintiffs filed a Motion for Summary Judgment on five of the counts, contending that there was no need for a trial since the Defendant’s own witnesses had admitted key elements of the case as necessary for a favorable judgment.

Immediately afterwards, the Defendants also filed a Motion for Summary Judgment requesting that all counts be dismissed without a trial. If a court is to uphold any such motion by either side there must be no dispute of material facts.

Oral arguments were eventually scheduled for September 8, 2008. These arguments are a formality since a judge's decision must be based on the briefs that were previously submitted. That day, Judge Michael Johnson denied our Motion for Summary Judgment and upheld the Defendant's motion to dismiss all counts. He also stated in court that he would produce a Final Order stating the rationale for his decision by the end of that week.

For the next few months Plaintiffs, media representatives, interested parties and even a state legislator repeatedly contacted the Judge's staff attorney, Steven Jones, to get a copy of the order. During that time, Judge Johnson was reelected to another term while running unopposed. On February 20, 2009, one hour after a legislator called the judge's office for the second time, the order was released.

After a quick review of the fairly simplistic order we were amazed to find that the court:

- Never considered in its order, a shred of the extensive evidence we provided;
- Made at least 6 conclusions that were in direct conflict with the evidence we presented in the case;
- Made at least another 9 conclusions citing facts that were actually in dispute and thus should have required the court to conduct a trial;
- Never ruled on nearly all of the arguments we presented;
- Failed to rule or even understand several counts of the case;
- Repeatedly lacked rationale as to why our arguments were invalid;
- Misinterpreted key case law that confirms our constitutional arguments;

Because of this bizarre ruling, we have never been able to publicly present our evidence in an open court of law. Since there were Constitutional issues at stake, we prepared an appeal straight to the Georgia Supreme Court.

The appeal that was filed on June 1, 2009 cites two main thrusts of errors committed by the lower court. These are:

- The court unjustly denied our right to a trial when it upheld the Motion to Dismiss and made 17 conclusions that were not supported by, or in direct conflict with, the evidence of the case.
- The Court misapplied case law when it denied our Motion for Summary Judgment and ruled in conflict with all U.S. Supreme Court case law for ballot counting and recounting.

On June 30, 2009 the Defendants (known as Appellees) filed their response. On July 13, 2009, exactly three years after our initial filing, the Georgia Supreme Court heard oral arguments. At that hearing, we provided a supplemental brief, filed on July 17, 2009, citing 41 disputes of facts that were contained in the Defendants' Supreme Court brief.

During the hearing, one of the justices requested a letter from the Defendants to detail a ballot access case that they cited as a U.S. Supreme Court ruling in their favor. We responded with our own letter explaining that:

- The case cited was immaterial because it was not about ballot counting;
- The Defendants have yet to cite a single U.S. Supreme Court ruling regarding ballot counting that is in their favor;
- Virtually all U.S. Supreme Court case law regarding ballot counting and recounting is in our favor.

The Georgia Supreme Court is now in a difficult position. To rule against us, the justices will have to conclude that:

- None of the 41 factual disputes that we have cited are valid;
- All U.S. Supreme Court case law that strictly scrutinizes the fundamental right of ballot counting and recounting does not apply to this case;

We will soon learn if there is any justice left in Georgia