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Counting on Controversy

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Presidential elections are not always decided on Election Day. In 1800, the election produced an Electoral College tie, resolved after seven contentious days in the House of Representatives in favor of Thomas Jefferson over Aaron Burr on the 36th ballot. The 1876 election took several months and the creation of a special commission consisting of members of Congress and Supreme Court justices before Rutherford B. Hayes prevailed over Samuel Tilden by a single vote in the Electoral College.

And no one can forget the five weeks of tumultuous legal theatrics, including three decisions from the Florida Supreme Court and two from the United States Supreme Court, culminating in the razor-thin Bush-Cheney victory over the Gore-Lieberman ticket in 2000.

Are we destined to experience something similar this year? The leading political and legal indicators all suggest that the possibility is not trivial.

First, if the polls are even remotely accurate, the election promises to be exceedingly close. Tight elections offer hope to the trailing candidate and an incentive to challenge the outcome.

Second, Ralph Nader's involvement, despite his diminished standing with voters this year, may mean that neither candidate will receive a majority of the popular vote. That, standing alone, is not all that unusual. Eighteen presidential elections have been decided in favor of a candidate who did not achieve a majority of popular votes, and four presidents (John Quincy Adams, Hayes, Benjamin Harrison and George W. Bush) have won despite losing the popular vote.

Winning the popular vote is therefore akin to amassing the most hits in a baseball game. Nice, but not how the contest is scored. Nevertheless, litigation is a great deal less likely if one candidate not only wins a decisive Electoral College victory, but the popular vote as well. Candidates tend not to want to appear to be a sore loser to a popular opponent.

Third, the number and types of opportunities for election litigation seem to be limitless this election. For example, new federal legislation requires the use of provisional ballots for voters whose names do not appear on the list of eligible voters at their polling places. How and under what circumstances these requirements will be administered, as well as how and when provisional votes will be tallied, are matters already being disputed in numerous states. There were 10,000 provisional votes in just one county in Ohio in the last election. At the same time, the outcome in states like Florida and New Mexico was decided by less than 1,000 votes. The potential for contests and challenges over provisional votes is great if the election is close.

Provisional ballots are only one potential tinderbox. There are many other issues that could become crucial: disputes over absentee ballots, voter identification systems, military ballots, the voting rights of felons, and registration and voting by mail. There are concerns over computerized voting and the threat of hacking, as well as punch-card ballots and the infamous hanging, pregnant or dimpled chads. There are accusations of gerrymandering in redistricting after the 2000 census. And

there are complaints about every kind of voting mechanism from paper ballots to touch screens and optical scanners. The United States has already sued Pennsylvania regarding the time that overseas voters are given to cast their ballots - an issue that has produced legal disputes in eight swing states.

In short, for disappointed candidates and their lawyers, litigation fruit is abundant and hanging within easy reach.

Fourth, in this election, the stakes are not only the presidency, but also the House and Senate. And neither campaign has forgotten that the presidency and the Senate hold the key to the selection of justices of the Supreme Court, and a potential generational shift in the balance on the court. All three branches of government are in play. The stakes could not be higher.

Regiments of lawyers have already been assembled and sent to battle stations in anticipation of next week's election. New campaign finance laws provide opportunities for fund-raising for this purpose. Anyone who thinks that these litigation-hungry warriors will not do what they have been born, bred, paid and inspired to do if the election is close does not understand the species. Even a candidate otherwise inclined to accept a defeat graciously will be hard pressed to go quietly in the face of an army of highly charged, well-financed litigation teams eager for courtroom victories.

It would be vastly better for our Republic, of course, to avoid the chaos, uncertainty and lingering hostility that a lawsuit-driven presidential election would inevitably produce. But it seems unlikely that either campaign would be inclined to open negotiations for something analogous to a prenuptial agreement in order to forestall a postelection war. You might get better odds on an Israeli-Palestinian peace treaty.

The best chance for the American electorate is to avoid a postelection repeat of 2000 is to re-elect George W. Bush decisively - or to defeat him overwhelmingly. I, of course, recommend the former.

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