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THE MYTH THAT EVERY VOTE IS COUNTED**

RICHARD C. BALOUGH

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THE 2000 PRESIDENTIAL ELECTION SHATTERED THE MYTH THAT EVERY VOTE IS COUNTED¹

RICHARD C. BALOUGH[†]

One of the fond memories of my youth in South Bend was tagging along with my father to vote. He and my mother always looked at voting as a sacred duty, something you wanted to do. When you went into the voting booth, which at that time was the old mechanical machines,² and pulled those levers down, your vote counted.

I was taught to vote because my vote was going to make a difference. I was led to believe that my vote was going to be recorded and tallied. I believed that when the voting was done on Election Day,³ the way I voted was going to affect our democracy.

1. This article is adapted from the opening remarks at The John Marshall Law School Center for Information Technology and Privacy Law's symposium on "E-lection 2004: Is e-voting ready for prime time?" conducted on October 1, 2004.

[†] Richard C. Balough is the Associate Director, Center for Information Technology and Privacy Law, The John Marshall Law School. Mr. Balough has written numerous articles on privacy and Internet law. He also practices in Internet law, privacy law and libel law. Prior to becoming an attorney, Mr. Balough worked as a journalist. He received a B.A. degree from Indiana University and his J.D. from The John Marshall Law School. He also received an LLM in Intellectual Property Law *cum laude* and an LLM in Information Technology Law *cum laude* from The John Marshall Law School. For more information on Mr. Balough, visit www.balough.com.

2. Mechanical voting machines are voting machines that use a mechanical mechanism to register the vote. The machines have a curtain in front that is opened and closed by the voter when he or she enters the voting machine. The voting apparatus consists of rows of toggle switch type levers that are pulled down over the candidate's name to vote. At the beginning of each row of names is the party affiliation lever. By pulling the Democratic or Republican lever, a voter can vote a "straight party" ticket that records a vote for all Democrats or Republicans listed in the row. When the curtain is opened, the vote is recorded. At the end of the voting, the results can be read on the mechanical counters by removing a back panel on the machine.

3. Presidential election days are the first Tuesday after the first Monday in November. 3 U.S.C. § 1. Primary elections can be conducted beginning in January and as late as June. The exact dates of primary elections are determined by the individual state legislatures. U.S. Congressional elections are held in the even numbered years. U.S. Const. art. I, § 2. Presidential elections are in the even numbered year every four years. U.S. Const. art. II, § 1; U.S. Const. amend. XVII. Municipal election dates can vary by local law.

Of course during that time there were also a lot of other things happening that ran counter to this ideal. There were stories about what was happening in cities such as Indianapolis. When voters went to the polls, especially in the black neighborhoods, there just happened to be a police car parked nearby, a window would roll down and one of the occupants would say to those who were approaching the polls: "Where are you going? I wouldn't go there if I were you." We did not think about it very much since it did not seem to affect us or the election.

When I came to Chicago in the early 1970s to work for the *Chicago Daily News*, Election Day took on a different tone. Many times early in the morning when the polls were just opening—again using the old mechanical voting machines—there would be problems. Some machines wouldn't work and had to be opened for repair. Strangely these machines that had not been used at all already had thousands of votes cast on them. Again, we took it with a grain of salt. After all we were in Chicago and things do happen.

When I was living in the near north 43d Ward, when you went to vote, the poll watchers would time you. Remember these were mechanical machines and you could actually then vote a straight party ticket by pulling a single lever. Well, it doesn't take long to vote a straight party, especially in Chicago, so if you were in the voting machine for more than thirty seconds, you would start getting these inquiries from the poll watchers. "You need some help?" "Are you having problems voting?" "Can we come in to assist you?" The watchers knew that the more time you took in the voting booth, the more likely it was that you were splitting your ticket. But such actions were accepted. Yes, there was game playing, but that happens. However, at the end of the day, I still believe that my vote is going to get counted.

In 1960, the allegation was made that somehow Chicago was extremely slow in counting the ballots in the Kennedy-Nixon presidential race. It was widely suspected that the first Mayor Daley was waiting for the results from downstate Illinois before he released the vote count in Chicago. Of course, lo and behold, when those votes did come in, Illinois went for Kennedy.⁴

In August 1948, there was effort to increase voter turnout in the Democratic Party runoff to determine the candidate for a Senate race. This larger turnout occurred in Jim Wells County Texas, not in Illinois. When they finished voting in Jim Wells County, the records showed that the last 201 people to vote happened to vote in alphabetical order, the exact same order in which their names appeared on the voter registra-

4. Theodore H. White, *The Making of a President 1960*, (Atheneum House 1961). In 1960, John F. Kennedy received 2,377,846 votes in Illinois compared with Richard M. Nixon's 2,368,998 votes. Nationwide, Kennedy received 34,221,463 to Nixon's 34,108,582.

tion rolls.⁵ It was thanks in part to those 201 votes that a new Senator named Lyndon Baines Johnson won the Democratic nomination that made him the new Senator from the State of Texas by a total of 87 votes.⁶ This earned him the nickname "Landslide Lyndon"—and not from his later election as President.⁷

We knew these things were going on. However, underlying all this was the belief that eventually all votes will get counted and these glitches are harmless.

Then came the year 2000; the myth was shattered.⁸ We found that many votes really do not get counted.⁹ Not only do they not get counted because of dimpled chads,¹⁰ or because of hanging chads but that inherent in the overall system is a margin of error. Some votes always won't be counted. More troubling is the fact that sometimes the margin of er-

5. Robert A. Caro, *The Years of Lyndon Johnson: Means of Access* 328 (Knopf 1990). In examining Box 13 of Jim Wells County during the contested recount, investigators found that the last 201 names on the list of voters were written in different ink from those that appeared before and in the same handwriting. They noticed something more: "that the 201 names were in alphabetical order—the first few names starting with 842 began with A, the next few with B, until about 915, when the end of the alphabet was reached; then the A's began again—as if whoever had been writing the names had miscalculated and gotten to the end of the alphabet too fast, and had thereupon simply gone back to the A's and started over."

6. *Id.* at 317.

7. Robert Dallek, *Flawed Giant Lyndon Johnson and His Times 1961-1973* 183-184 (Oxford U. Press 1998). In the election in 1964, Johnson resoundingly beat Republican Barry Goldwater. Johnson carried forty-four states to Goldwater's six giving Johnson 486 Electoral College votes to Goldwater's fifty-two. Johnson's 43,129,484 popular votes against Goldwater's 27,178,118 "represented the largest vote, the greatest margin, and the biggest percentage (61 percent) ever received by a President to that point in U.S. history."

8. Brian Kim, *Recent Development: Help America Vote Act*, 40 Harv. J. on Legis. 579, at 579 (Summer 2003). "The outcome of the 2000 presidential election remained undecided for several weeks after Election Day, with only several hundred votes separating Republican Governor George W. Bush and Democratic Vice President Al Gore in official vote tallies in the decisive state of Florida." *Id.*

9. "While Florida was at the center of the national media coverage with its much-criticized punch card voting machines, other states could just as easily have shared Florida's spotlight in 2000 had they represented as many electoral votes as Florida or had their statewide margins of victory been as narrow as Florida's. In fact, Georgia, Idaho, Illinois, South Carolina and Wyoming had higher rates of uncounted ballots than Florida. In addition, Gore won Iowa by only 4949 votes out of more than 1.2 million votes cast and Wisconsin by only 6099 votes out of more than 2.4 million votes cast. A study by the California Institute of Technology and the Massachusetts Institute of Technology estimates that between four and six million votes for president across the country were not counted in the November 2000 election." *Id.* at 584.

10. *Bush v. Gore*, 531 U.S. 98, 104-106 (2000). In using punch card balloting machines, there can be ballots that are not punched in a clean and complete way by the voter. This occurs when the stylus fails to fully perforate the card. In some cases a piece of the card—a chad—is hanging, say by two corners. In other cases, there is no separation at all, just an indentation.

ror is higher than the margin by which someone is elected or defeated.¹¹

Part of our reaction was to turn to technology to solve that problem. In 2002, Congress passed the Help America Vote Act ("HAVA").¹² We had the 2002 primaries and were developing systems that involved at least some technologies in those elections. But as people looked at those systems, they found problems such as:

- Security. Can those systems be trusted? Are there back doors somehow built into the software that will affect the outcome of an election?
- Privacy. Will people know how I voted if I vote electronically?
- Intimidation. If you go to the technology of touch screen voting, will some voters be intimidated by the technology itself?
- Trust. Can the systems be trusted? Look back to the situation with Social Security Administration attempting to convert Social Security recipients to receive their monthly payments electronically rather than by a check. These recipients resist because they want the paper check. They do not trust the technology even though the technology appears to be much safer than getting a check in the mail and taking it to the bank to cash or deposit.

We are going to examine all of these issues today but at the same time we need to place it into perspective and we should not be clinical. We need to stop and remember what we are trying to do—what all of this is trying to accomplish: Which is to find a better way to ensure that our votes count and to instill in the public the feeling that their votes will be counted.

I want to go back to something that I read a long time ago. I think it describes, maybe in a naïve way, maybe not, about how we feel about elections in this country. Theodore White, who is the author of book series on the Making of the President, in his first book on the 1960 election race between John F. Kennedy and Richard M. Nixon, in his first chapter, gives us an overall picture of what we are trying to accomplish, what we are trying to talk about:

It was invisible, as always.

11. John Mark Hansen, *To Assure Pride and Confidence in the Election Process August 2001: Task Force report to accompany the Report of the National Commission on Election Reform*. In a report by one of the task forces preparing the Report of the National Commission on Election Reform, it noted that if the margin of victory is less than a percentage point is within the margin of error, then in "an average presidential election, the results in two or three states are within the margin of error." *Id.* Moreover, the report found that in the last 50 years, "every state but two has had at least one federal or gubernatorial election that was within the one-percent margin of error." *Id.*

12. Pub. L. No. 107-252 (Oct. 29, 2002).

They began to vote in the villages of New Hampshire at midnight as they always do, seven and a half hours before the candidate rose. His men had canvassed Hart's Location in New Hampshire days before, sending his autographed picture to each of the twelve registered voters in the village. They knew they had five votes certain there, that Nixon had five votes certain—and that two were still undecided. Yet, it was worth the effort, for Hart's Location's results would be the first flash of news on the wires to greet millions of voters as they opened their morning paper over coffee. But from there on it was unpredictable—invisible.

By the time the candidate had left his Boston hotel at 8:30, several millions had already voted across the country—in schools, libraries, churches, stores, post offices. These, too, were invisible, but it was certain that at this hour the vote was overwhelming Republican. On Election Day America is Republican until five or six in the evening. It is in the last few hours of the day that the working people and their families vote, on their way home from work or after supper; it is then, at evening, that America goes Democratic if it goes Democratic at all. All of this is invisible, for it is the essence of the act that as it happens it is a mystery in which millions of people each fit one fragment of a total secret together, none of them knowing the shape of the whole.

What results from this fitting together of these secrets is, of course, the most awesome transfer of power in the world—the power to marshal and mobilize, the power to send men to kill or be killed, the power to tax and destroy, the power to create and the responsibility to do so, the power to guide and the responsibility to heal—all committed into the hand of one man. Heroes and philosophers, brave men and vile, have since Rome and Athens tried to make this particular manner of transfer of power work effectively; no people have succeeded at it better or over a longer period of time than the Americans.¹³

That is something that we need to keep in mind today. The transfer of power in a democracy must be made in a way and in a manner that people respect and trust. When that respect and trust disappears, so too will the success of the transfer of power.

13. White, *supra* n. 4, at 3-4.