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## LITIGATING THE PRESIDENCY

Stephen H. Norton<sup>†</sup>

*Breaking the Deadlock: The 2000 Election, the Constitution, and the Courts.* By Richard A. Posner. *Princeton University Press*, 2001. 266 pages. \$24.95.

While many headlines around the country the day after the 2000 election contained headlines such as, “Bush Wins Cliffhanger,”<sup>1</sup> it was not until December 13th that presidential hopeful Al Gore finally conceded defeat. In *Breaking the Deadlock*, Richard Posner discusses the political and legal aspects of the thirty-six-day standoff that occurred following a narrow vote around the country, but particularly in the state of Florida. Posner is a nationally-renowned judge in the United States Court of Appeals for the Seventh Circuit, senior lecturer at the University of Chicago Law School, and author of numerous books related to the law and its political implications. Based on his immense experience, Posner examines the election situation in Florida, including the role of the courts and other participants following the deadlocked vote. In his final chapter, Posner posits various state and national reforms that may begin to solve the devastating problems encountered in the country’s most recent presidential election.

*Breaking the Deadlock* begins with a discussion of the democratic system as it stands in the United States today. Unfortunately, the reality is that only roughly fifty percent of the eligible voters in the United States actually cast a ballot in the 2000 election for president.<sup>2</sup> While many Americans<sup>3</sup> believe that their personal vote is a direct factor in the election of the next president, Posner accurately points to the Electoral College as the body that casts the

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1. MINNEAPOLIS STAR TRIBUNE, November 8, 2000, at A1.

2. RICHARD A. POSNER, *BREAKING THE DEADLOCK: THE 2000 ELECTION, THE CONSTITUTION, AND THE COURTS* 14 (Princeton University Press 2001).

3. Referring to citizens of the United States.

ultimate vote for president. And, as was the case in the 2000 election, the winner of the popular vote was not ultimately successful in obtaining enough electoral votes to be elected president.<sup>4</sup> However, this was not the first election in which the winner of the popular vote may have failed to be elected president.<sup>5</sup>

Following his discussion of the historical aspects of the Electoral College and the five presidential elections that yielded erratic decisions, Posner begins his analysis of the 2000 election. In particular, he examines an assortment of statistical probabilities and the effects they may have had on the election. By far, the most intriguing of the statistics analyzed is that of voter error caused by illiteracy. Posner accurately equates the effects of literacy on the results of the election to that of literacy tests as prerequisites to voting.<sup>6</sup> Federal law has outlawed literacy testing as a prerequisite to voting,<sup>7</sup> but the use of the punchcard<sup>8</sup> ballot has a stifling effect on less educated voters, causing an increase in the spoilage of votes.<sup>9</sup> However, when the marksense<sup>10</sup> ballot system is used, the amount of spoilage is drastically reduced because of the ease of use.<sup>11</sup> Not only does the punchcard system have a high rate of over- and undervotes among less educated voters, it is also physically more difficult for elderly voters to use the punchcard as opposed to the marksense.<sup>12</sup>

It is the various forms of "chads"<sup>13</sup> produced by the inferior punchcard system that brought about the dispute of the Florida election, which ultimately reached the U.S. Supreme Court. Posner's examination of the decisions by the Florida Supreme Court and the U.S. Supreme Court are on point and well reasoned. First, Posner states that the Florida courts should have avoided the

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4. See POSNER, *supra* note 2, at 40. While Gore obtained the majority of the popular vote around the U.S., Bush was ultimately elected by the Electoral College based on the amount of electoral votes obtained based on the popular vote. *Id.*

5. *Id.* at 38. Posner points to presidential elections of 1800, 1824, 1876, 1888, and 1960 in which, for various reasons, the winner of the popular vote was not, or may not have been, elected president. *Id.*

6. See *id.* at 29, 72-82.

7. *Id.* at 29.

8. *Id.* at 7-8. The voter uses a small tool to punch a hole in the ballot, which is then read by a machine using a system of lights and optical recognition. *Id.*

9. POSNER, *supra* note 2, at 73.

10. *Id.* at 51. The voter marks a circle or oval on a piece of paper with a pencil, much like the LSAT, SAT, ACT, and other standardized tests. *Id.*

11. *Id.* at 73-75.

12. *Id.* at 83.

13. *Id.* at xv-xvi.

litigation that occurred after November 8, 2000. This is true because the Florida election laws establish that an extension of the recount is permissible in a situation in which there is an error in the tabulation of votes, fraud, statutory violations, or some sort of natural disaster, not based on voter error.<sup>14</sup> Thus, Katherine Harris, the Republican Secretary of State, properly rejected recounted ballots that came to her after the November 14th deadline.<sup>15</sup> Additionally, since the Florida statute limited those that could bring a claim contesting the outcome of the election, the Florida courts should have rejected Al Gore and Joe Lieberman's claims based on a lack of standing.<sup>16</sup> Secondly, while the Florida courts may have erred in allowing the matter to enter the courts, the U.S. Supreme Court properly stopped the recounts and put an end to the belabored 2000 election.<sup>17</sup> However, Posner does not believe that the Court used the proper rationale in coming to this decision.<sup>18</sup>

While the Court based its decision on the Equal Protection Clause of the Fourteenth Amendment, Posner believed that it should have been grounded in the "Manner directed" clause of Article II of the Constitution.<sup>19</sup> The "Manner directed" clause allows the states to appoint their presidential electors,<sup>20</sup> and Posner properly suggests an interpretation of the clause to allow the legislature of the state to choose the electors, without interference from the governor or the judicial branch of a state.<sup>21</sup> Had the Supreme Court taken on such an interpretation, it would have prevented the possibility of multiple electors being appointed, as well as stopping any recounts not ordered by the legislature.<sup>22</sup>

Posner's critique of the legal participants does not stop with the courts. Many legal analysts criticized the lawyers that represented Bush and Gore for supposed legal and tactical errors. However, Posner takes quite the opposite view. His belief is that the attorneys involved in the litigation did a phenomenal job in

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14. POSNER, *supra* note 2 at 93-98.

15. *Id.* at 94.

16. *Id.* at 109 (noting neither Gore nor Lieberman were among the classes of people that were permitted to bring such a suit).

17. *Id.* at 128.

18. *Id.*

19. POSNER, *supra* note 2, at 151-52.

20. *Id.* at 155.

21. *Id.* at 156.

22. *Id.*

light of the enormous pressure, legal complexities, and time constraints involved with the litigation.<sup>23</sup> While Posner praised the efforts of the attorneys directly involved in the litigation, he has quite the opposite view of many of the legal professors who chose to comment on the 2000 election. In fact, Posner states that, “many law professors’ ‘real-time’ reactions (in radio and television appearances) concerning the unfolding drama and impending crisis had been hasty, one-sided, sometimes poorly informed, and (particularly in predicting the course of the litigation) surprisingly inaccurate.”<sup>24</sup> There is most certainly validity to his critiques of these communities, but it must be remembered that Posner, having the luxury of time, is able to analyze the interactions of the courts, lawyers, and legal community with depth and care. On the contrary, the communities he comments on were forced to make immediate decisions on an extremely complex legal situation. It is possible that some of the deference paid to the lawyers involved should be cast towards the courts and law professors, as they too were being bombarded with information and questions regarding the election. For it must be remembered that not all commentary on the election by professors was “hasty, one-sided, sometimes poorly informed, and . . . surprisingly inaccurate.”<sup>25</sup>

Posner’s final, and most interesting, chapter provides suggestions for reforms to the Electoral College and the election process itself. It is not Posner’s belief that the Electoral College should be abolished, but he does believe that, as it stands today, it is an unreliable system to choose the president.<sup>26</sup> The first suggestion offered for the Electoral College is to adopt a system that would guarantee that electors were chosen via the popular vote, and that the electors, once chosen, would be required to vote along the party line they were chosen for.<sup>27</sup> In order to bring about this change, Posner suggests a Constitutional amendment in order to ensure its adoption.<sup>28</sup> By combining this reform with other clarifications to the election laws, Posner establishes an election system that is far less ambiguous and would help stop another thirty-six-day fiasco in future elections.

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23. *Id.* at 190.

24. POSNER, *supra* note 2, at 201.

25. *Id.*

26. *Id.* at 235.

27. *Id.* at 235-37.

28. *Id.* at 238.

Posner's second reform is unrelated to election laws, but it is definitely practical and needed in light of the problems that were brought about by the punchcard ballot systems. In order to eliminate the inadequacies of the current system, he suggests that the marksense technology be implemented around the country.<sup>29</sup> Some cost estimates for nation wide implementation have been as high as \$9 billion.<sup>30</sup> However, as Posner is quick to point out, the costs are far less than that, about \$600 million, which could be allocated among the various districts over a four year period of time.<sup>31</sup> Therefore, since the overall costs of implementing the marksense technology around the country is low, and the benefits that are obtained through a dramatically superior technology are commanding, all districts should be ordered to begin using marksense technology.

The 2000 Presidential election was most certainly wrought with confusion, procedural inadequacies, and complicated legal questions. Posner's in-depth analysis of the election provides not only clarification and a critique of the process and players involved, but also suggestions for electoral reforms that would help prevent a similar situation from taking place in a future election. While some of Posner's criticisms are overly harsh at times, his recommendations for changes to the Electoral College and the physical process of voting should be closely examined and implemented, as they are sure to provide for a smoother and less ambiguous election process in the future.

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29. Posner, *supra* note 2, at 241.

30. *Id.*

31. *Id.* at 242-43.