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# Counting Votes and the Rule of Law

There are few reads as distressing as Tracy Campbell's, Deliver the Vote. The corruption in American elections, whether it be to disenfranchise African Americans after the Civil War or the machine politics which put both Lyndon Johnson and Harry Truman in the Senate, is difficult fully to grasp. It is almost as though voter fraud is endemic to American history.

The age of stuffing ballot boxes, threats or even killing voters has given way to more sophisticated ways to affect the outcome of an election. The overriding problem in the American electoral system is our decentralization. Votes are counted at precinct, ward and county levels. The votes stream into a central state authority, having made their way through at least 5 or 6 different entities, some of which may not be very trustworthy.

My own experience as an election lawyer had to do with challenging regionalized school districts after a Pennsylvania census. While reapportionment of school districts was addressed by state law, the statute was observed in the breach. Many school districts did not know it existed and school district solicitors were just as happy to do nothing. One time I was told by a Common Pleas Judge, "Cliff, no matter how many times you challenge this, the result is going to be the same." Eventually the Commonwealth Court, after reversing the county on multiple occasions, stopped the election and simply took reapportionment under its own jurisdiction. *Petition of Board of Directors of Hazleton Area School Dist*., 527 A.2d 1091, 107 Pa. Cmwlth. 110, (Pa. Cmwlth. 1987)

Courts in Pennsylvania have had the opportunity to address challenges by President Trump and his supporters to the Pennsylvania Presidential election results. See, i.e., *In Re: Canvass of Absentee & Mail-In Ballots of November 3, 2020,* Pa. LEXIS 5989; *Bognet vs. Sec'y Pa*., 2020 U.S. App. LEXIS 35639; and *Donald J. Trump for President, Inc. vs. Kathy Boockvar, et al.,*

All three courts essentially took a hands-off position based upon a lack of "fraud or irregularity" and narrowly construed principles of standing.

*In Re: Canvass of Absentee & Mail-In Ballots of November 3, 2020*, s*upra*, Justice Donahoe announced the judgment of the Court and in the first paragraph stated that "no fraud or irregularity has been alleged." The ballot is not to be invalidated, wrote the Justice, based upon a directive from the legislature that was not followed. There is a difference between matters made "mandatory" by the Election Code as opposed to "directory." The latter signifies a "directive from the Legislature that should be followed but the failure to provide the information does not result in invalidation of the ballot." at slip opinion Page 2.

The Court thus concluded that the Election Code does not require boards of election to disqualify mail-in or absentee ballots submitted by qualified electors who

signed the declaration on their ballot's outer envelope but did not handwrite their name, their address, and/or date, where no fraud or irregularity has been alleged.

Finally, "Here we conclude that while failures to include a handwritten name, address, or date in the voter declaration on the back of the outer envelope, while constituting technical violations of the Election Code, do not warrant the wholesale disenfranchisement of thousands of Pennsylvania voters." At slip opinion Page 45. Ballot irregularities are only to be stricken for compelling reasons.

In election cases, Pennsylvania courts will look to the overall viability of the election, and essentially supply no remedy to legislative violations. Unfortunately, the courts do not look to prospective injunctive relief, so that the violation does not reoccur.

In *Bognet vs. Sec'y Pa.*, s*upra*, the Third Circuit ruled that a tally which includes false or fraudulent votes is not equivalent to a tally that includes votes that are or may be unlawful for non-fraudulent reasons. The Court conflated the lack of standing with a failure of proof. It is troubling that standing was not found for those who claim that their vote is degraded by the electoral disability of others. It was not, said the Court, a disadvantage to the Plaintiffs. At bottom, there was a failure to prove that enough votes were involved to make any difference. "We hold only that when voters cast their ballots under a state's facially lawful election rule and in accordance with the instructions from the state's election officials, private citizens lack Article III standing to enjoin the counting of those ballots on the grounds that the source of the rule was the wrong state organ or that doing so dilutes their votes or constitutes differential treatment of voters in violation of the Equal Protection Clause." at Slip Opinion Page 61.

The underlying logic of the Court is indisputable. "We are in unchartered territory when we are asked to declare that a tally that includes false or fraudulent votes is equivalent to a tally that includes votes that are or may be unlawful for non-fraudulent reasons, and so is more aptly described as 'incorrect'. *Cf. Gray*, 372 U.S. at 386 (Harlan, J., dissenting). ([I]t is hard to take seriously the argument that 'dilution' of a vote in consequence of a legislatively sanctioned electoral system can, without more, be analogized to an impairment of the political franchise by ballot box stuffing or other criminal activity.") At slip opinion p. 46, 47. Not "…every such 'false' are incorrect tally is an injury in fact for purposes of an Equal Protection Clause claim." At Slip Opinion p. 47. In other words, without the fraud that was customary to Tammany Hall, the Pendergast Machine or others, there would be a lack of standing to complain of a poorly run election. Restated, standing is said to depend upon the seriousness of the injury. Whether that constitutes a legitimate definition of standing is a worthwhile question.

Finally, Middle District Federal Judge Matthew Brann in *Donald J. Trump for President, Inc. et al., vs. Kathy Boockvar, et al.*, *supra,* took his cue from the other opinions. "…Plaintiffs asked this Court to disenfranchise almost 7 million voters. This Court has been unable to find any case in which plaintiffs has sought such a drastic remedy in the context of an election, in terms of the sheer volume of votes being asked to be invalidated." at Slip Opinion Page 2. The Court likewise found a failure of "rampant corruption…." id. Again, a failure of proof, which was manifested, *inter alia*, as a lack of standing.

In the *Donald J. Trump for President* decision, the "notice-and-cure policy" was at issue. This decision, along with others, distinguished *Bush vs. Gore*, 531 U.S. 98 (2000), which found standing on the part of the Bush Organization to challenge a recount in Florida on equal protection grounds. The Court relied, as indeed it was required to, on the *Bognet* decision. The *Donald J. Trump for President* decision further broadened the prohibitory affect of standing. The relief sought by Plaintiffs in the decision was the non-certification of election results. This would not, noted the Court, "reinstate the Individual Plaintiffs' right to vote." At Slip Opinion Page 18. What it would do is deny more than 6.8 million people their right to vote. The Court would have the power in a federal election contest, to order either a recount eliminating offending votes or potentially a new election. All of this was too much for any judge absent overwhelming evidence of a rigged election. Following precedent, the Court simply could not, on the facts and theory presented, find standing on the part of the Plaintiffs to request non-certification of the Pennsylvania results.

Clearly, the Court's view of standing was heavily influenced by the remedy requested, invalidating the ballots of those who voted in Pennsylvania. Is there a remedy which Plaintiffs could have requested which would have provided them standing? The equal protection claim was equally weak, alleging as it did, the failure by Republicans to be able to observe counting.

What is similar between all of these cases and *Bush vs. Gore*, s*upra*, is that the courts are resistant to torture the recounts or interfere with election results absent a "shock the conscience" standard.

For those lawyers who regularly bring constitutional or civil rights claims, a narrow view of standing is a scary prospect. While it may have worked to prevent meddling by sore losers, it does have the potential to foreclose legitimate claims in a variety of other cases. Standing has a sorted history in the annals of the law beginning in the early 1970's. At one time the United States Supreme Court found a lack of standing to challenge malapportionment. *Baker vs. Carr*, 369 U.S. 186 (1962), changed all of that.

The concept of "standing" is one of the more slippery concepts in the law, depending as it does on strength of the underlying claim. When a plaintiff has a clearly definable harm which has occurred under one of the established principles of law, standing will be found. Where the claim is weak and the potential remedy dramatic, standing will not be found.

My first case in the Pennsylvania Supreme Court was a standing decision, *In Re: El Rancho Grande, Inc.*, 437 A.2d 1150, 496 Pa. 496 (Pa. 1981). This statutory standing case, based on Pennsylvania law, involved the right of neighboring liquor licensees to challenge or not the grant of a new license.

The fact that the Trump Plaintiffs had no standing because they had little to no evidence of quantifiable election fraud, does that mean that we have an uncritical system in this country for local or national elections? Much needs to be done to create a workable, reliable election system that all voters can have confidence in. This is not a Republican or Democratic agenda, but one that should be of concern to all people.

The honorable and thoughtful judges who decided the cases discussed *infra* made the only decisions which they could under the circumstances of little evidence "strained arguments" and a simple, ordinary failure of proof by the Plaintiffs.

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**CAR/srb**