Preparing for “Overtime”

Managing the risk of litigation that would decide the presidential election

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Initial returns & provisional ballots

2004:
- Bush’s lead in initial vote count: 136,483
- Number of provisional ballots: 155,337

2008:
- Obama’s lead in initial vote count: 206,830
- Number of provisional ballots: 206,859
What will happen on Nov. 6-7?

1976:
- Carter’s margin of victory: only 11,116
- Pre-HAVA, so no fight over provisional ballots

2012:
- Assume initial returns show margin of 10,000
- Expect 150,000 provisional ballots (like 2004)
- 2010 had 105,195 provisional; 4 million total
- 2004 & 2008 had 5.7 million total
## Uncounted ballots: 2008 & 2010

<table>
<thead>
<tr>
<th>Type</th>
<th>2008</th>
<th>2010</th>
</tr>
</thead>
<tbody>
<tr>
<td>Provisional (total)</td>
<td>39,989</td>
<td>11,772</td>
</tr>
<tr>
<td>Provisional (unregistered)</td>
<td>18,860</td>
<td>4790</td>
</tr>
<tr>
<td>Provisional (wrong precinct)</td>
<td>14,335</td>
<td>5309</td>
</tr>
<tr>
<td>Provisional (flawed or no ID)</td>
<td>1990</td>
<td>444</td>
</tr>
<tr>
<td>Provisional (flaw on envelope)</td>
<td>2201</td>
<td>675</td>
</tr>
<tr>
<td>Absentee (domestic)</td>
<td>23,217</td>
<td>15,505</td>
</tr>
<tr>
<td>Absentee (overseas)</td>
<td>436</td>
<td>419</td>
</tr>
</tbody>
</table>
Key Dates, 2012

11/6(T)  Last day for casting ballots (Election Day)

11/16(F)  Last day provisional voters can add info;
          Last day for absentee ballots to arrive

11/17(Sa) Local boards can begin official canvass

11/27(T)  Local boards must end official canvass;
          SoS orders recount if margin <0.25%

12/2 (Su)  Earliest local boards can begin recount

12/11(T)  Safe-Harbor Deadline; recount must end

12/17(M)  Electors must meet for official vote
Federal court litigation: 3 periods

1. Before canvass begins on Nov. 17
   - Decide rules to apply in canvass & recount
   - Imperative not to delay start (or end) of canvass!

2. During canvass, Nov. 17 to Nov. 27
   - No fed court interference if local boards follow rules

3. After canvass ends, Nov. 28 to Dec. 11
   - Resolve claims that canvass applied rules improperly
   - Let recount proceed according to rules; no delay beyond Safe-Harbor Deadline if rules are followed
Docket management ideas

1. Single federal judge for all cases with potential to affect count of ballots in presidential election

2. Immediate interlocutory appeal of all questions of law that affect conduct of canvass & recount

3. All appeals heard “en banc” by Sixth Circuit in first instance; no time for initial 3-judge panels

4. Coordinate with U.S. Supreme Court, so it has enough time to review before & after canvass

5. If state law unclear on key point, construe in favor of counting ballots of eligible voter
Estimate of Risk

- Odds of being struck by lightning: 1 in a million
- Odds of being in airplane crash: 1 in 10 million
- Odds of big earthquake at Perry, OH nuclear plant: 1 in 50,000
- Odds of big asteroid hitting earth in next two centuries: 1 in 1000, or 1 in 10,000? (NASA)
- Odds of outcome-determinative 2012 disputed presidential election in Ohio: 1 in 100, less ???