

THE ECONOMIC CLUB

O F W A S H I N G T O N, D. C.

Virtual Signature Event

Political Law Experts Bob Bauer and Ben Ginsberg

Speakers

Bob Bauer

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Professor of Practice and Distinguished Scholar in Residence
New York University School of Law (on leave for fall semester)**

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**Veteran Republican Election Law Attorney
CNN Commentator**

Moderator

David M. Rubenstein

President

The Economic Club of Washington, D.C.

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ANNOUNCER: Please welcome David Rubenstein, President of The Economic Club of Washington, D.C.

DAVID M. RUBENSTEIN: Welcome to our members and thank you for joining us today. I'd like to welcome you to our eighth Virtual Signature Event of our 35th season.

So now let me go into introducing our two special guests today. First, I'll do it alphabetically.

Bob Bauer. Bob Bauer has been a lawyer in the political advocacy area for quite some time. He and Ben are probably the two deans of this area. Bob is now, after practicing law for many years at Perkins Coie now is teaching at NYU Law School. He has been also an advisor to President Obama and served as counsel to the president during President Obama's second term in office. He is also a graduate of Harvard University and the University of Virginia School of Law. And he and Ben Ginsberg at one point chaired a commission to look at ways in which we could improve the electoral process. And that was called the Presidential Commission on Election Administration.

So, Ben Ginsberg is – has been a lawyer for many years in Washington, a partner at two firms. One of them is the firm that he's just retired from, and that is Jones Day. And the other is Patton Boggs, where he was a partner there for a long time as well. Ben is somebody that is a graduate of the University of Pennsylvania – University of Pennsylvania as an undergrad, where he was the editor in chief of the newspaper. And he was a journalist for a number of years, and then decided to get into law, and went to Georgetown Law School. And he has written frequently on this area of political advocacy. And he was one of the lawyers that were deeply involved in the Bush v. Gore litigation years ago, and one of the lawyers that traveled to Florida. And we'll talk a little bit about that as we go forward.

So, let's dig in right away. And let's say to both of you: Do either of you or both of you think that this election will be resolved in everybody's mind by about midnight on election night next week? Bob, I'm looking at you on the screen first. Will the election be over at 12:00 so I can go to sleep – at 12:00, knowing who the next president is?

You've got your mute – you're on mute. Unmute yourself.

BOB BAUER: I apologize.

MR. RUBENSTEIN: OK.

MR. BAUER: With all the press that we've had about the potential for long delays, I think you could be reassured that sometime later on election night there's a high likelihood that we'll know who's winning this election. And by the next day, that certainty will grow. I know there's been a lot of talk about how it's going to go on for months and months before anybody has an inkling who will occupy the Oval Office beginning late January of this coming year, 2021. I don't think that's going to be the case.

MR. RUBENSTEIN: OK. Well, Ben, do you disagree with that?

BENJAMIN L. GINSBERG: No, I don't – I don't disagree with it. I don't think you're going to get your midnight wish just because of the volume of absentee ballots, and the fact that we'll need a few states in the – in the Mountain and Pacific time zones to come in with their results. But I do think that there will be a very clear idea of the winner by, say, Friday morning at the latest.

MR. RUBENSTEIN: OK. So last time, in the year 2000, the famous Bush v. Gore decision and case, it usually had been the case that state courts were the ones that resolved election issues. In that situation the federal courts go involved. Would you expect that if there were any disputes the Bush v. Gore precedent would be such that Bush v. Gore and the federal courts would really rule, or do you think the state courts would go back to being the leading decisionmaker in these elections that are contested?

Ben.

MR. GINSBERG: Well, I think, first of all, it's very rare that you get to a situation like Bush versus Gore, where an outcome-determinative state has such a narrow margin. And so, most of the activity you're likely to see post-election really will be conducted under state law and state proceedings. I mean, after all, the way the system works is it begins in precincts, and then builds up to counties, and then goes to a state level. Each state has its own set of laws. There is no national election law governing the time, place, and manner of elections. So, I think it goes to states and their courts, except in the most extreme conditions.

MR. RUBENSTEIN: Bob, do you agree with that?

MR. BAUER: I do, fundamentally, agree. And I would add, I think the Bush versus Gore decision was clearly a very controversial one, and it raised significant institutional issues for the court. I think the court will be reluctant, particularly in a case where I suspect one of the candidates is going to have a very substantial popular vote margin, to appear to be interceding in the election, and invite the sort of controversy that it encountered the last time. It's a very different matter.

MR. RUBENSTEIN: Well, if Jim Baker had been the lawyer for Al Gore, would Al Gore have become president of the United States in the year 2000?

MR. BAUER: So, can I say something that will probably not be popular with Ben? I have greatest respect of – did have the greatest respect, and continue to, for Jim Baker and for his career. Let's not forget this part: The Gore campaign had litigated through the Florida Supreme Court the counting rules. And when the Supreme Court decision on those counting rules at the – (inaudible, technical difficulties) – occurred – (inaudible, technical difficulties) – to have a recount that likely would have been very successful in the state of Florida. This case, Bush versus Gore, ultimately went against Gore by one vote on the United States Supreme Court. So, I don't really view that entirely as a triumph of Jim Baker. I think that the Bush forces benefited from an extraordinary and unforeseen intervention by the United States Supreme Court.

MR. RUBENSTEIN: OK. Ben, you were down in Florida then, and you had a lot of young lawyers who were helping you. Let's see, Ted Cruz was one of them, a guy named John Roberts I think was there. Justice Kavanaugh was there. Amy Coney Barrett was there. Of all those lawyers, who was the smartest?

MR. GINSBERG: Every time I will answer that Jim Baker.

MR. RUBENSTEIN: OK. All right. Well, I guess that's a politically correct –

MR. GINSBERG: And they would all agree.

MR. RUBENSTEIN: OK. So, let me ask you – put this in setting. Let's suppose both of you are wrong and we don't know by election night and, in fact, it doesn't get resolved in the courts it gets resolved in the Congress. Can you go through how this gets resolved in the Congress? Suppose Congress has to come up with the decision about who's going to be the next president? What does the constitution and the surrounding law say? Ben?

MR. GINSBERG: Well, it all – this will arise if there can't be a clear winner in the Electoral College. And then we go into a law called the Electoral Count Act of 1887. And I believe that there will be at least two substantive sides on every point that comes out of that act. It is fairly indecipherable and open to many interpretations. So, I think that you'll see novel litigation should we – should we go to that stage. And it is an act that has never been litigated, never been stress tested. So, what I'm about to say I will – I think we have to caveat with the uncertainty that would come about.

But basically, the House and the Senate would be called upon to play various roles and could judge, probably, competing slates of electors that would emerge from the states. That gets into a very arcane process, where the House as a first – as an initial matter would have to choose which of the competing slates they agree with. The Senate plays a role. Part of the answer to the question of how complicated it is, is whether there is split control between the House and the Senate. It would be a lot quicker resolution should one party control both chambers. But ultimately there has to be a winner of the Electoral College for a new president to take office.

MR. RUBENSTEIN: All right. Well, either you or Bob, explain this to me, make sure I understand it. When the electors are – the electors meet in each state sometime in – I guess it's mid-December. And the state legislature has to approve those electors. Is that how it works?

MR. BAUER: Well, yeah. The electors meet. However, what Ben is referring to is the possibility that a legislature in a state where the electors slate is determined by the popular vote suddenly take the position that the popular vote is contaminated by fraud, and that the legislature itself, not the voters, should determine who the electors should be. So, you could imagine a case where candidate A wins the popular vote and the electors determined by the popular vote go to Congress, the legislature says, no, not at all. That's not the right slate. It's contaminated by fraud, or it was produced by fraud or irregularity. And the legislature sends its own slate to the United States Congress.

That's what the Florida legislature was prepared to do in Florida in 2000. Never had to do it because of the Supreme Court intervention in Bush versus Gore. And so that's how you end up with alternative elector slates that may be presented to the Congress, and where the congressional battle then begins. And there are a whole host of bizarre developments that can go from there. Theoretically – and I don't think this is going to, could happen – by the time January 20th comes around if no president has been determined through the Electoral College, the vice president could wind up becoming president of the United States, or neither of them are president and it's the speaker of the House. We can walk through that, but I think that's not going to happen, but it's very, very complicated.

MR. GINSBERG: Yeah, and one scenario that's worth mentioning is that a state's count gets so close or so clouded that there is no winning slate to come out of that state. In other words, the state is unable to certify its election results, so that there is no official certified slate that goes up to Washington. That's where Bob's scenarios of state legislatures or governors putting in slates comes from.

MR. RUBENSTEIN: Right. Let's suppose – on what date do the elector – the state legislatures have to send to the Senate the names of the electors and who won in their state. What date is that? Is that December?

MR. GINSBERG: Yeah. December 14th, I believe.

MR. BAUER: Yes.

MR. RUBENSTEIN: All right. All right.

MR. GINSBERG: And there's a safe harbor provision of December 8th.

MR. RUBENSTEIN: OK. So, they send in December. And if no – and the vice president of the United States, I guess, presides then. And if nobody gets 270, does it go to the House then? Is that correct?

MR. BAUER: That's correct.

MR. RUBENSTEIN: But does it go to the new House or the old House?

MR. GINSBERG: New House.

MR. BAUER: New House.

MR. GINSBERG: New House is sworn in on January 3rd. And the electoral – the slates are opened up on January 6th.

MR. RUBENSTEIN: OK. So, it goes to the new House. And the new House – the House votes by state delegation. So, if you're a Republican – California's a Democratic delegation. Let's say

they would vote – they have one vote. And if Montana’s Republican, they would have one vote as well. Is that right?

MR. GINSBERG: Yeah.

MR. BAUER: That’s correct.

MR. RUBENSTEIN: Currently there are 26 Republican state delegations, 24 Democratic ones. If that didn’t change, the Republicans, presumably if they voted for the Republican candidate he would win, is that right?

MR. GINSBERG: Yeah. That is correct. It’s why – I mean, it was very interesting to see Nancy Pelosi and now the Democratic Congressional Campaign Committee target certain states where the margins between the delegations are narrow. So, the speaker has started talking about trying in the election to win over slates.

MR. RUBENSTEIN: But if the House of Representatives cannot agree on somebody on January the 20th, automatically the speaker of the House becomes president. Is that correct?

MR. BAUER: No. I believe, and Ben can correct me if I’m mistaken, but I believe that the Senate determines who was elected vice president. And if a president isn’t selected, the vice president – the newly elected vice president – assumes office until the presidential election is resolved.

MR. RUBENSTEIN: Oh, OK. So, the speaker doesn’t automatically become – the Senate has to find somebody to be vice president. But if they can’t find somebody or they can’t agree, then it goes to the speaker, is that right?

MR. BAUER: Correct, under the Presidential Succession Act, correct.

MR. GINSBERG: And the Senate might be equally muddled as the House would be.

MR. RUBENSTEIN: OK. All right. Well, I got to think through all that. That’s complicated. But let’s ask – let’s go to a couple other things. Both of you headed the presidential commission to look at the election and the way it’s done. Is it your view, both of your views, that there is a lot of voter fraud out there, or there really isn’t?

MR. GINSBERG: Well, let me – let me take that one first. I’ve spent nearly four decades actively involved in Republican election day operations. Which means I’ve been in precincts. I’ve been part of countywide teams that go to look at problems that arise in polling places. I’ve been part of nationwide boiler rooms to get all the reports from individual jurisdictions. Both parties have the right to have poll watchers in every polling place that they – that they wish to staff to find fraud, to look for irregularities, to resolve problems. It’s an integral part of our system. And the simple fact is that in all the time that people have been in polling places and looking for fraud, there simply is not evidence to sustain a charge of systemic voter fraud.

MR. RUBENSTEIN: Not systemic, but occasional.

MR. GINSBERG: There is occasional vote fraud, yes. It is caught. It is corrected. But it is – but it is occasional.

MR. RUBENSTEIN: All right, Bob, do you agree with that?

MR. BAUER: I totally. It's surpassingly rare, either of the in-person variety or of the mail-in variety, surpassingly rare.

MR. RUBENSTEIN: Let's say it is rare, Bob. But let's suppose you wanted to vote twice. You know how the system works pretty well. How would you be able to vote twice? Let's suppose you wanted to break the system down, or just you wanted to show the system wasn't perfect because you wouldn't want to break the law as an officer of the court. But just suppose you were asked to figure out how you could vote twice, how would you vote twice?

MR. BAUER: Well, you know, I haven't given a great deal of thought to how to commit voter fraud. So, to be honest with you, I'm about to give you kind of a rough answer. But I suppose one way you do it is you vote under one name in one precinct and you vote under a different name, knowing that you have the name of someone who's not going to show up, at another precinct. The problem with these schemes, of course, is – and this was always true particularly of the longstanding claims about the in-person voting fraud that have now given way to claims about mail voting fraud, is that you can't commit enough in-person voting fraud to really swing the outcome of the election. So, it's not clear why anybody would go to that trouble or expose himself or herself to criminal penalties.

MR. RUBENSTEIN: OK, Ben, how would you vote twice if you wanted to?

MR. GINSBERG: Well, if you – if you look at the cases that have come out where people have been caught, probably the most prevalent one – and this is more often by mistake than deliberate – is that people vote in two states. That they used to live in one state, continue to get an absentee ballot from that state, in fact have moved to another state and vote in their new jurisdiction as well. And it tends to occur more in primaries, because the primaries in the two states are not on the same day. And there are now active programs to basically compare who voted in different states to be able to find that.

MR. RUBENSTEIN: OK. So, can you, either or both of you, explain this? It was said by many people that in the last election the Russians tried to interfere, and did interfere according to most people, in the election. How did they actually interfere? What did they do that interferes with the election? Is it by putting, you know, things on Facebook, or is it by actually affecting the way people vote? How do they actually interfere, did the Russians, as far as you know?

Ben, any views on that?

MR. GINSBERG: Well, there are a couple of different ways that it might happen. I mean, certainly disinformation through social media sites is one possibility. Messages that tend to stir

up dissent and strife in the country is one. Another that the government is well-aware of is trying to hack into voter registration databases and manipulate them somehow so that you could create chaos in the polling place if the voter registration lists were somehow messed with. There are always theories that the voting machines, the tabulation machines themselves are hacked. That's more difficult, maybe not for a great reason but just because there are 10,500 jurisdictions in the country that deal with the counting and casting of ballots. And a lot of those machines, as Bob and I saw at the commission, are very, very old. And it would be really hard to hack into the results to be able to affect an election.

MR. RUBENSTEIN: I see. Well, Bob, how many states do you think still use the same type of voting mechanisms that they did in the year 2000 – the year of Bush v. Gore? In other words, if I was voting in the year 2000 in any state, would I – and I voted this year, would I be using the same either paper ballots, or electronic ballots, or everybody's changed and nobody's using –

MR. BAUER: Well, the key change – not everybody has changed. The key change, of course, was in 2000 there was a lot of attention to the failure of voting machinery. And so, Congress in the last major effort to really revamp the electoral process or reform it for the better gave the states huge amounts of money to retire the so-called punch-card machines, what we called the hanging chad problem that became so famous during Bush versus Gore. So that certainly changed after 2000. But as Ben points out, there is a remarkable amount of stasis in the electoral system. The pace of technology turnover is way too slow because jurisdictions don't have the money. And so, in many respects we just have too many jurisdictions that are operating with resource shortages that make it difficult for them to turn over the machinery and to make other changes that would make the electoral process more efficient.

MR. RUBENSTEIN: OK. Let me ask you about the way that people count these ballots. If you vote absentee ballot – let's say mail-in ballot absentee for a moment – are the states allowed to count them before election day generally, or not? They have to wait till election day to count?

MR. GINSBERG: Well, generally they don't count them. What they do is process them. Which means they do the verification on an outer envelope, then take the ballot itself – which is in a secrecy envelope – and prepare it to be put into the machines on election day or, in fact, in some cases, remove them from the secrecy envelope and actually queue them up in the machines. But, Bob, I don't know of any instance of a state that's supposed to count its ballots before election day.

MR. BAUER: I think there is – there's some rule, as you say, pre-canvassing and preparing for the count. It does vary by state law. Certainly, one of the concerns this year, particularly because of the heavy surge of mail voting, was to have states at least begin to process, in the way that Ben described, the votes for the quickest possible count on election day.

MR. RUBENSTEIN: OK. So, some states I think are not supposed to count – or, are not required to count absentee or mail-in ballots until as late as November 17th, I think. So, is that true? In other words, some states have another week or two after the election to really count the absentee ballots. Is that a problem?

MR. GINSBERG: Well, they have that time to receive ballots that are postmarked on election day. And that can create a lag in getting the results, which would get in the way of your goal of being able to go to bed at midnight on election day knowing the results. Of the battleground states, it's really Pennsylvania and Wisconsin that wait until election day to begin the process at all. And Michigan is just the day before. So, if any of those three states are outcome determinative, then there will be a period of time where we won't know the winner.

MR. RUBENSTEIN: I see. And if I said I wanted to pick a state as the best state, that has the best process for counting, the best process for voting, what state would that be? Which state do you think has done the best job in modernizing their process? And I assume you don't want to tell us which state is the worst but tell us what's the best.

MR. BAUER: Well, I feel like I shouldn't pick out a favorite child here. I don't think that would be highly diplomatic. There are – I will say one thing generically. There are some that may fall into the should keep up better with the class category. But Ben and I have discovered – and I do want to – I do want to emphasize this, that it's important because it doesn't always emerge in the press coverage – people would be surprised at how hard election officials, both Democratic and Republican work, given, again, the paucity of resources, to put on an election. And I think you're going to see a performance.

And I'm setting aside now the effects of disruptive litigation and threats about, you know, allegations of fraud. But you will see probably better performance on election day, including the speed of the vote count and the reliability of the vote count, than many people assume. These election officials for the better part of the year, and clearly accelerating when the pandemic hit, have really put a major amount of effort into thinking through how to make this work. And so, some states where I might have had some real concerns about three months ago have made an enormous amount of progress – and has, by the way, been visible. I should mention, between 60 to 70 million Americans have voted. And the number of problems that have developed that have been reported – and, by the way, run to ground – have been very few.

MR. RUBENSTEIN: By the way, who actually counts the ballots? Does a Democrat and a Republican have to be sitting there counting the ballots together? Or is somebody that's supposedly impartial? Or, who actually does the counting when humans are counting it?

MR. GINSBERG: Well, in most jurisdictions it's actually machines that do it. So, when it does come down to human beings counting ballots it is both Democrat and Republican have people there to do it. And more often than not, the human element in this election is going to be in taking the absentee ballots and putting them through the verification process in the state. And there are Democrat and Republican representatives there.

MR. RUBENSTEIN: So, when I first started voting many years ago I thought you had to vote on election day. When did the idea of early voting come in, except for absentee ballots? When did the idea of early voting arise?

MR. GINSBERG: It's been a gradual progression really from the '80s, I think, if you look back. You know, one of the things that we talked about on the commission – which was mid of the last

decade – was really the advantages of being able to have early voting simply because if you have a throng at a polling place and long lines, then you ought to be able to ease that pressure by early voting. And the convenience of every qualified voter to be able to vote seems to be a paragon virtue you should strive for.

MR. RUBENSTEIN: Suppose you voted early and then something bad happened to one of the candidates you voted for and you didn't like that candidate anymore. Can you call up and say, I want to get my ballot back, or that doesn't work?

MR. GINSBERG: Nope. It does not work. Now, if you've marked the ballot, and you've kept it, and you decide to destroy it and you have a replacement ballot then you have a chance for the second chance. But if it's been tallied, there is no way of pulling it back.

MR. RUBENSTEIN: All right. Let's suppose that somebody votes and he or she goes to the polls and votes, and then publicly says on social media: I voted for Joe Blow or I voted for somebody. And then the person dies the next minute. Does that ballot still count?

MR. BAUER: Yes. If it's been cast and submitted.

MR. RUBENSTEIN: So, you don't have to be alive for it to be counted, is that right?

MR. BAUER: You have to be alive when you vote.

MR. RUBENSTEIN: OK.

MR. GINSBERG: Yes, correct.

MR. RUBENSTEIN: OK. Now, are both campaigns, to your knowledge, having lawyers lined up in every single precinct, or is it every state? How do they do that? And how many lawyers are there available to do this?

MR. GINSBERG: Bob, that's yours. [Laughs.]

MR. BAUER: Yes. Well, Ben and I – the United States, you can call it blessed or cursed with an abundance of lawyers. So, recruiting lawyers for a whole host of tasks – both senior lawyers to help direct and actually run litigation if it's necessary, and then lawyers, for example, that serve other functions in the states, like poll watching, there's just a huge number. And just the core of lawyers who are in the midst of preparing legal analysis and paper, should it become necessary, to address litigation is in the hundreds. I mean, I'm talking about the ones who actually put pen to paper, do research, review papers, and the like. It's in the hundreds. When you start going to the number of lawyers who are supporting us in the states in a whole host of capacity, you're into the thousands.

Now, I just want to mention, each side tends to bid up the numbers as part of a public relations gambit to show they're more over-lawyered than the other. I think we have a lot of lawyers. I think it's the right number of lawyers. But it is certainly a very large number.

MR. RUBENSTEIN: So, based on – I'm sorry, go ahead, Ben.

MR. GINSBERG: Oh, the RNC has put out press releases talking about 50,000 poll watchers. A number of those – a large number of those will be lawyers. The question isn't finding enough lawyers. The question is finding enough caffeine to keep the lawyers going for that long.

MR. BAUER: Yes.

MR. RUBENSTEIN: Speaking of this, what about people, like my age, who are administering the process. Is it hard to get younger people, people younger than me, to be the poll watcher – you know, the people that administer the process and check you in. Or is there no – it's not realistic to get young people to do that job, it's an older-person, volunteer kind of job?

MR. BAUER: This year we've made some significant progress. So many older voters during the pandemic, because of health concerns, basically resigned their commission and informed the election authorities they wouldn't participate this year. So, a major effort underway in all the states was to recruit younger poll workers who could step in and replace the ones who were stepping aside. And that has actually turned out to be successful. So, we'll probably have for the first time in decades, that I can remember, Ben, a younger average age across the board, certainly in the battleground states, than we've ever had before.

MR. GINSBERG: I think that's – I think that's absolutely right, from all I hear. And it's interesting, many companies, as I've learned from panels that I've done, feel the need to get involved in the process this year because their employees and their customer base are so involved. And one of the ways they've done that, a number of companies, is to give paid time off to any employee who wants to work as a poll watcher or election official. And that's helped immensely in the recruitment process.

MR. RUBENSTEIN: It used to be the case that the networks took great pride in calling a presidential election as soon as it possibly could. And they would say, well, we called it at 9:00, or 10:00, or 11:00. Do you think this year they want to have – they want to be the last one to call it, because they're afraid of making a mistake because all the ballots haven't been counted, or do you think there's still a sense that the networks really want to call it early?

MR. GINSBERG: I think they're all very concerned about getting it right as opposed to getting it first. All the networks and the news leaders have said that's the paramount importance. I think the number of absentee ballots makes it even more imperative that they do that. So, I think you'll see a lot of coverage of comparing vote totals in 2016 to what's coming in so far in spotting trends, but not calls.

MR. RUBENSTEIN: So, I think President Trump has made a point of saying that there's a difference between an absentee ballot, or a ballot that you're getting in the mail and you didn't request it, and it comes kind of, you know, just over the transom to you. Is there a difference between one or the other in your view, in terms of fraud or anything else? And how many states just send out ballots to anybody, even without requesting them?

MR. BAUER: Some do, and some decided to do this cycle to sort address the surge in mail voting, concerns with the pandemic. The distinction that Mr. Trump has drawn doesn't actually make any sense. His argument has been that when you mail it out to people then there's just absentee ballots floating around absolutely everywhere. That's certainly not the experience of mail balloting states. And that this sort of flood of ballots that are unaccounted for all over the place promote fraud. There's no basis for that belief. So, I'd have to say that I don't credit it, and I don't think there's any actual data that – or experience to support that.

MR. GINSBERG: Yeah. I mean, there are nine states that mail out ballots to every registered voter. And to the extent he has a point about any of this, people do move and die. So, there are live ballots in those nine states that theoretically could be voted by somebody else. I'm not sure there's an actual fraud problem that's been uncovered, but there is an appearance of fraud about it. But every other state requires an application to get a ballot. And that's more – that's far more trustworthy.

MR. RUBENSTEIN: So, as you look at our country compared to other countries, are there other countries that you think really do their voting much better than we do in terms of the – you know, the systems, the counting and so forth, and registration. Are there better systems than ours in any country that you would cite?

MR. BAUER: I don't know that I can say a particular country right now off the top of my head. This much I will say, and I don't know when that this is ever going to happen, but our commission concluded that we, surprisingly, in the United States commit very little in the way of serious resources to the electoral process. It falls off the budget priority list very quickly as soon as an election is over. Congress, since 2000, and the Florida election has been unwilling to take a hand in devoting significant money to help the states, for example, replace aging equipment.

The locality – states and localities we discovered in testimony before the commission by and large shuffle election administration to the bottom of their priority list. It is actually really quite surprising and disturbing. And I think we're going to pay a price for it. We paid a price for it in 2000. Then there was a brief reform effort. When that was over with, it really wasn't replaced by another.

MR. GINSBERG: Bob is totally right about that. And we made a decision as a country that probably if you were beginning today you wouldn't do, which is to have 10,500 jurisdictions actually with responsibility for the voting process. There'll be some inconsistencies amongst that many jurisdictions.

MR. RUBENSTEIN: So, when I went to law school I don't remember their having a course in election law. Maybe they did. How does one become an expert in that? Did you go to law school saying this is what I wanted to do? And how did you drift into this area, or how did you plunge into this area? Ben, how did you do it?

MR. GINSBERG: Totally by accident. I was a – I was a cub reporter and decided I didn't know enough about the subjects I was covering and went to law school, became a media lawyer for a

while. And there were some folks in my firm who were doing this interesting election law work. I did a history of recounts in the House of Representatives in 1982, first time I met Bob Bauer in a recount. And in 1984 there was a major House recount, and my career launched totally serendipitously.

MR. RUBENSTEIN: And, Bob, how did you get into this? Did you go to law school saying: I want to be an election law expert?

MR. BAUER: No. I went into law school knowing I wanted to be involved in politics. I had been, you know, volunteering for campaigns and parties, and worked on the Hill when I was in college. So, I was always interested in politics. And then this field opened up after the country began to reform its campaign finance system in the 1970s. And that's when I came out of law school. So, all of a sudden there was a lot of focus on the form of the political process, campaign finance regulation occurred, reform of the congressional ethics code occurred, public corruption cases were brought in much larger number on very elastic theories about what duties officeholders owed the public. And so, politics and law seemed to me the route to go.

It is true – I want to say, it's true I met Ben during a recount in 1982. He gave me a really hard time, but we became good friends ever since. So, it goes to show, you don't end having to always be enemies even if you're professional adversaries.

MR. RUBENSTEIN: Now, every year – every time there's an election the major networks contract with people to run exit polls. That means that they ask people when they leave the polling booth, who'd you vote for? And some people tell them, I guess. And these exit polls seem to be reasonably accurate, in some cases, not always. But now if 60 or 70 percent of the people voted before election day, when you're doing exit polls on election day how accurate are these polls likely to be, and do you think they're still going to be used?

MR. GINSBERG: Well, there are two consortiums that are collecting this year. And both will tell you that they're doing telephone polls with people who voted early. And it is possible to get ahold of the names of people who have voted. So, they're taking a sampling. They say they're taking that into account.

MR. RUBENSTEIN: OK. And if either of you were going to reform the existing process we have – let's say you had one big recommendation that you could come up with and everybody had to comply with it to make the election process better – what would that reform be – other than more lawyers? [Laughter.]

MR. GINSBERG: I'm retired. I don't even need to buy into that now. Look, I think that 10,500 jurisdictions is the largest impediment to really a well-run election system. I think you take into account the fierce federalism under which the country operates and have each state design a uniform system within its state.

MR. BAUER: And I would just – yeah. And I would add to that, ongoing federal resources to accomplish things like upgrading the voting machinery. And then one last, very difficult reform, removing partisan control in the states over election administration. We just have – it's simply

not sustainable. And I think, by the way, something other countries – not all countries, but other countries – avoid, which is to have partisan elected officials, who by the way have ambitions for higher office, in charge of election administration in particular states. And I think this just arouses suspicion of the electoral process, and it also does something that our commission would like very much not to see. It is a tension with the goal of professionalizing election administration and treating it like a public administrative service like any other.

MR. RUBENSTEIN: You mean, if the secretary of state in one state in charge of counting the ballots, and that secretary of state is also running for governor, that person shouldn't be in charge of counting the ballots, you think?

MR. BAUER: Yeah. I don't think a secretary – I don't think an elected official, a partisan election official, should be in charge of election administration, period. Now, we recommended in our commission that at a minimum we would want to see the secretaries of state's office employ election administrative professionals, so that at least the ultimate responsibility day-to-day resided with them. But there's still an appearance problem. And we saw that play out many, many times over the last several decades.

MR. RUBENSTEIN: You know, I notice that people are staying in line – or walking – standing in line for 10 hours, 11 hours, or so forth. You know, in other parts of society you can get a – you know, you can buy a super-ticket to get in the Disney – head of other lines and break in the lines. How come that's never happened in the election process? You pay a little bit extra and you get up to the front of the line? That doesn't work, right? [Laughter.]

MR. GINSBERG: Funny you should mention that. One of the things we did in our commission was to visit Disney World to see how they managed to do lines. And actually, that is kind of one of the recommendations that we made, is that there at least be appointments that you can make to vote or, at the very least, that there – if you go in to vote and there is a line, you can get a time for when you can come back and count your vote. And a number of jurisdictions have actually put that into place.

MR. RUBENSTEIN: So –

MR. BAUER: And I would –

MR. RUBENSTEIN: Go ahead.

MR. BAUER: Pardon me. No, I would just add that I don't think that you can give people who have the resources the opportunity to buy themselves to the head of the line. I think that would really be resisted.

MR. RUBENSTEIN: It was tongue in cheek, but yes I agree. [Laughter.]

So, let's suppose – let's suppose, do you think the networks would like to see this resolved, let's say, by midnight, or actually it would be better for ratings if it went on for a

couple days or weeks? Do you have any sense of whether people in the media business really care whether it's resolved quickly or not, or they don't – they're agnostic?

MR. GINSBERG: I think they are not playing for sustained ratings. I think like virtually every American would like to see this resolved quickly, but accurately.

MR. BAUER: I agree with that.

MR. RUBENSTEIN: OK. And if some young lawyer is watching now, and he or she is saying I really want to be in election law as my specialty, would you highly recommend this as an area for one to go into, or would you say find a more lucrative area? [Laughter.]

MR. GINSBERG: I think it's a wonderful area.

MR. BAUER: My advice –

MR. GINSBERG: Go ahead, Bob.

MR. BAUER: Well, I was going to say, I probably wouldn't go to whether or not it's lucrative – although, by the way, litigating in the voting rights area can, in fact, be quite lucrative. However, I would say that generally speaking – I tell people who are young lawyers, I would wait to make a specialization decision, take two or three years, sharpen up your legal skills, know where you're heading in life before you take off into this very niche specialty that Ben and I have occupied for so many years. I think that's a big decision to make, to narrow yourself that quickly.

MR. GINSBERG: Yeah, I would agree with that.

MR. RUBENSTEIN: Now, sometimes elections, they have recounts in precincts or states. To do a recount you have to hold the ballots a certain way. How long do you have to hold the ballots, and who actually does the recounting? Is it somebody different than who did the original counting, typically?

MR. GINSBERG: Well, every state and jurisdiction is different, and it has its own very idiosyncratic rules for recounts, which is part of why Bob and I have stayed in business for all these years, actually. So, in most instances you have to bring in many more people to help in a recount because it's a more laborious process. So, it's still supervised by the people who did the original count, but there often will be additional personnel brought in.

MR. RUBENSTEIN: OK. Bob, if you had a chance to redo 2000 and Bush v. Gore, is there anything that the Gore people could have done differently that might have produced a different outcome?

MR. BAUER: So, I'm going to – I'm going to say, again, a variant of what I said earlier. I think there's been a little bit of an urban myth that falls into two parts that somehow – and by the way, with all great to Ben, who's a phenomenal lawyer, to Jim Baker, for sure, and the rest of the team

that had been assembled in Florida. But I think the Gore campaign actually did a very good job of litigating its position, and but for want of one vote on the United States Supreme Court couldn't continue a count that probably would have ended up going in its direction. So, I think one day there'll be some revisionism of that history.

MR. GINSBERG: I'm going to disagree a little bit with who would have won the recount, OK? [Laughs.]

MR. RUBENSTEIN: So, let me ask you this, as I'm sitting home for the Zoom period of time I get a lot of calls from political polling firms. They want me to participate in a polling exercise. And they say it will take, you know, only 15 or 20 minutes. And I say, I don't have 15 or 20 minutes. Who are the people that actually say, I do have 15 or 20 minutes, and frankly I was looking for somebody to talk to? And are those people – or how many people really participate in these polling exercises. Is it very hard to get people to participate, do you think? Do you get those at home yourself?

MR. GINSBERG: I mean, I ignore them always. My pollster friends tell me that it is harder and harder in the cellphone era to get people to participate in polls. One of the things that the reporting – the detailed reporting on polls is telling us a little bit about what samples are used and how are pollsters weighting their samples, which is kind of the magic formula for the pollsters exerting judgement based on their judgement and a little bit of history. So, I think that there are problems getting enough people in a cross section to participate.

MR. RUBENSTEIN: So, Bob, if I didn't really want to wait up till midnight, because I'm tired and I'm getting older and I just wanted to go to sleep by 10:00, is there one or two states that I could say, based on your experience in this election and your working on the campaign, are there one or two states that if they came in a certain way I could go to sleep early and know that the election went a certain way?

MR. BAUER: Well, yes, now of course the answer to that question depends sort of on the current strategic position of the – and the route to 270 votes of the candidate. But I think it's fair to say that if Florida flips this year, and it's clear that Florida is flipping, then that's just one of the ways, and it will be clear that Donald Trump will not be reelected.

MR. GINSBERG: So, there are some states that traditionally get their results in earlier than others that you should look at. Florida, for sure, is one. Georgia and North Carolina, that the president has to have. The three states Hillary Clinton won narrowly that if Donald Trump wins this time – New Hampshire, Minnesota, Nevada, Maricopa County in Arizona will be a key state, Ohio will be a key state.

MR. RUBENSTEIN: Let me ask you a final question. In the old days I remember that sometimes mayors or important politicians would hold back votes. They'd say we haven't had the votes yet, we haven't counted them yet, they needed to see how many votes they might need. Is that system still around, where people can hold back the votes to see how many they might need to win, or that's the old days and that's apocryphal anyway? Is that true or not?

MR. BAUER: Those are the old – I’m not sure, by the way, it’s apocryphal. That’s certainly what I have to say Richard Nixon thought had been done unto him in 1960. But it does not exist anymore, no.

MR. RUBENSTEIN: Yeah, I think in 1960 John Kennedy called Mayor Daley. And Mayor Daley said, well, with the help of a few friends, I think we’re going to win this state. And he did win Illinois. But Ben?

MR. GINSBERG: Well, social media makes it much more difficult for shenanigans to take place. And one of the things you see on almost a minute-by-minute basis on the networks these days is which parts of the state have come in. So, if all of a sudden there is a void in an area where the results aren’t in, you can rest assured that there will be social media scrutiny, but also reporters scrambled to see what’s up.

MR. RUBENSTEIN: OK. Well, look, this has been very interesting. I assume both of you think that the process is better than it was in 2000 in terms of voting and machines working and so forth. Is that right? Both of you think that it’s better than 2000, or not?

MR. BAUER: Yes. On the whole – it’s not perfect.

MR. GINSBERG: It’s not perfect but – not perfect, but better, yeah.

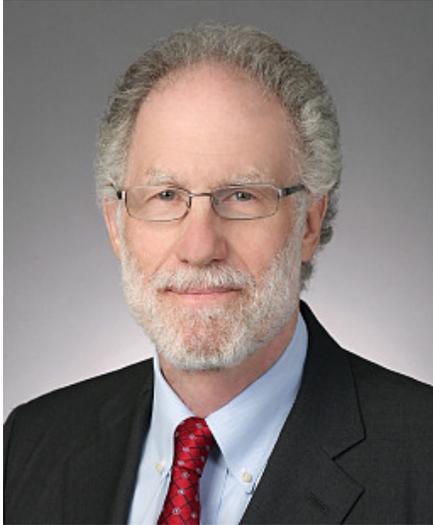
MR. BAUER: Better, I agree.

MR. RUBENSTEIN: Well, I am going to be watching up until midnight, I think, on election night, and see whether you both are right, and I can go to sleep early knowing. But I’m not sure; who really knows.

But thank you both for a very interesting conversation. And thank you for letting us know exactly how this process really works, a lot better than we knew before. Thanks a lot, Bob. And thank you, Ben. Thank you.

MR. BAUER: It was a pleasure.

MR. GINSBERG: Thank you.



Bob Bauer
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Bob Bauer is Professor of Practice and Distinguished Scholar in Residence at NYU Law, and Co-Director of NYU's Legislative and Regulatory Process Clinic. He served as White House Counsel to President Obama and returned to private practice in June 2011.

In 2013, the President named Bauer to be Co-Chair of the Presidential Commission on Election Administration, which in January of 2014 submitted to the President its findings and recommendations in "The American Voting Experience: Report and Recommendations of the Presidential Commission on Election Administration."

Bauer was General Counsel to Obama for America, the President's campaign organization, in 2008 and 2012. Bob has also served as co-counsel to the New Hampshire State Senate in the trial of Chief Justice David A. Brock (2000) and counsel to the Democratic Leader in the trial of President William Jefferson Clinton (1999).

He is the author on books on campaign finance law and articles on various topics for law reviews and periodicals. He is a contributing editor of *Lawfare* and writes legal commentary for *Just Security*, and has published opinion pieces in *The New York Times*, *The Washington Post*, *The Atlantic* and other publications. In 2000, he received the "Burton Award for Legal Achievement" for his legal writing.

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Benjamin L. Ginsberg
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Ben Ginsberg represents numerous political parties, political campaigns, candidates, members of Congress and state legislatures, governors, corporations, trade associations, vendors, donors, and individuals participating in the political process. He represents a variety of clients on election law issues, particularly those involving federal and state campaign finance laws, ethics and gifts rules, pay-to-play laws, election administration, government investigations, redistricting, communications law, and election recounts and

contests.

Prior to joining Jones Day in 2014, Mr. Ginsberg served as national counsel to the Bush-Cheney presidential campaigns in the 2004 and 2000 election cycles and played a central role in the 2000 Florida recount. In 2012 and 2008, he served as national counsel to the Romney for President campaign. He also has represented the campaigns and leadership PACs of numerous members of the Senate and House as well as the national party committees. He serves as counsel to the Republican Governors Association and has extensive experience on the state legislative level through Republican redistricting efforts.

Before entering law school, Mr. Ginsberg spent five years as a newspaper reporter at *The Boston Globe*, *Philadelphia Evening Bulletin*, *The Berkshire Eagle* (Massachusetts), and *The Riverside Press-Enterprise* (California). He has been a guest lecturer at the Stanford University Law School, a Fellow at Harvard University's Institute of Politics, and an adjunct professor of law at Georgetown University Law Center. Mr. Ginsberg recently served as co-chair of the Presidential Commission on Election Administration.

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