

## Defining the Issues

The results of the recount reported on November 10 showed Bush with a lead of three hundred votes. With the final crop of military-dominated absentee ballots not scheduled for counting until ten days after the election, Bush's only fear was a series of tricky and dilatory Gore moves that could endanger if not overturn the results. So as Olson finished preparations to launch his federal suit to be filed Saturday, November 11, Bush and Baker moved in concert to redefine the political landscape on which the post-election battle was being fought. They sought to mobilize public opinion. No longer would Gore's challenges be indulged as a reasonable test of the accuracy of Tuesday's count. Now they would be characterized as an act of self-indulgence, a willingness to exploit every loophole in the law to produce a result that reflected what Gore wished had happened on Tuesday instead of what did happen. In fact, as the absentee ballots would confirm, George W. Bush was the winner. It was time to move on to the transition period so the new president could begin putting together his administration. The cost of delay would be a prolonged period of instability, which would be damaging to the nation at home and abroad.

“The vote here in Florida was very close, but when it was counted, Governor Bush was the winner,” Baker declared on November 10. “For the good of the country and for the sake of our standing in the world, the campaigning should end and the business of an orderly transition should begin.” Baker urged the country to “step back for a minute and pause and think about what’s at stake here. . . . The purpose of our national election is to establish a constitutional government, not unending legal wrangling.” Baker acknowledged that the Bush team was contemplating a resort to the federal courts challenging manual recounts. “The more often ballots are recounted, especially by hand, the more likely it is that human errors, like lost ballots and other risks, will be introduced. This frustrates the very reason why we have moved from hand counting to machine counting.”<sup>1</sup>

In Austin, Bush brought his chief of staff, Andrew Card, top economic advisor Lawrence Lindsey, national security advisor Condoleezza Rice, domestic advisor Clay Johnson, and his running mate Dick Cheney before reporters as a way of underlining the message that the race was over and that the transition to the Bush administration had begun. “There was a count on election night and there’s been a recount in Florida and I understand there are still votes to be counted, but I’m in the process of planning, in a responsible way, a potential administration,” Bush said. “And I think that’s what the country needs to know, that this administration will be ready to assume office and be prepared to lead.” Bush did stop short of urging Gore to fold his tent. “You know, I think each candidate and each team is going to have to do what they think is best—in the best interests of the country,”<sup>2</sup> he said. But neither Baker nor Cheney had similar inhibitions; like tag-team wrestlers, they would take turns during the weeks ahead urging Gore to end his challenge to the Florida vote.

Bush’s “let’s move on” message would wax and wane over the next month in synchronization with the ebb and flow of the legal and political tide in Florida. As a counter to the Gore “count every vote” mantra, it worked reasonably well.

Polls would show a modest but steady majority supporting the notion that the legal wrangling should end and that Bush should be declared the winner in Florida and in the presidential contest. And while Gore through supreme personal effort was able to sustain support for his Florida contest from his own party leaders and the editorial boards of newspapers that had supported his candidacy, there was a time-urgent quality to his effort that may have led his legal team to impose unnecessarily harsh deadlines on their claims for relief—deadlines later adopted by both state and federal courts.

By the time Olson filed his suit November 11, recounts were underway in Volusia and Palm Beach counties, and Broward and Miami-Dade had not yet decided whether to undertake full manual recounts. Baker sought to put the best light on what he knew would be accusations from the Gore camp that he was seeking to block a fair vote count. “The manual vote count sought by the Gore campaign would not be more accurate than an automated count,” Baker told reporters. “Indeed it would be less fair and less accurate. Human error, individual subjectivity, and decisions to ‘determine the voter’s intent’ would replace precision machinery in tabulating millions of small marks and fragile hole punches.”<sup>3</sup>

The Gore camp was quick to strike back, with Daley and Christopher convening a press conference. “If Governor Bush truly believes he has won the election in Florida, he should not have any reason to doubt or to fear to have the machine count checked by a hand count,” said Christopher. “This procedure is authorized under Florida law, under Texas law, and under the law of many other jurisdictions.”<sup>4</sup>

The Texas statute, passed during the administration of Governor George W. Bush, was something of an embarrassment despite Baker’s reply that, unlike Florida, the Texas law “sets out some objective standards to guide the election officials in performing the recount. It doesn’t just give them carte blanche authority, so that they can come in, and through human error or even, indeed, mischief, count ballots for whomever they favor.”<sup>5</sup>

In fact, the Texas law simply forbids the categorical exclusion of dimpled chads, permitting their inclusion when there is independent evidence of voter intent.

Bush and Cheney and Republican voters in the four counties selected by Gore were the principal plaintiffs in the Olson complaint. They claimed that the manual recounts provided so much latitude to the counters as to violate the Due Process and Equal Protection clauses of the Fourteenth Amendment. They further claimed that by undermining the right to vote, the recount was interfering with the right to assemble peaceably guaranteed by the First Amendment, a Christmas tree legal ornament if ever one existed. Bush voters from other counties also joined the suit as plaintiffs, claiming that by generating additional votes for Gore in the selected counties, the manual recounts would dilute the value of their own ballots. This was the legal theory behind many of the successful “one man, one vote” decisions of the 1960s. This Equal Protection argument would remain pertinent for the remainder of the litigation.

The abuses alleged in the Olson pleadings were largely theoretical, because the counting was only beginning in three of the counties on the date his motion was filed before District Court Judge Donald M. Middlebrooks, a Clinton appointee. But by oral argument time counsel could draw on a few real examples. These included the apparent mutilation of ballots in the process of being counted, the failure to keep orderly records of objections by Bush observers, and most important, the nearly standardless discretion afforded members of the three-person canvassing commissions to determine which ballots should be counted and which should not.

Drawing on affidavits from his observers in the field as well as statements by officials themselves, Olson documented a change in the method of counting Palm Beach County ballots from the guidelines that had governed counting there since 1990. The question involved marks made on a section of the voting card known as a “chad,” a word that would quickly ingratiate itself into the lexicon of American politics

as well as late-night television comedy. In counties using voting cards that had to be punched through with the aid of a blunt-edged instrument called a stylus, voters were instructed to punch the stylus down through the card next to the preferred candidate or issue position they supported. Problems could arise when the area behind the hole—the chad—was not completely punched through or dislodged, in some cases exhibiting no more than a small indentation or dimple. But voters who started to punch their ballots for a candidate and then changed their minds, or some who carelessly scratched an area near one hole or another could also leave dimpled chads. In her *Guidelines on Ballots with Chads Not Completely Removed*, written November 2, 1990, Theresa LePore, the Palm Beach County Supervisor of Elections, wrote

The guidelines assume that these directions have been understood and followed. Therefore, a chad that is hanging or partially punched **may** be counted as a vote, since it is possible to punch through the card and still not totally dislodge the chad. But a chad that is fully attached, bearing only an indentation, should not be counted as a vote. An indentation may result from a voter placing the stylus in the position, but not punching through. Thus an indentation is not evidence of intent to cast a valid vote.

Now, a decade later, Palm Beach County was considering a more lax standard while the other counties wrestled with the question of what standards to use. In the end, Palm Beach would change the old LePore standard only slightly, deciding—in most but not all cases—to count dimpled chads when a pattern of such indentations suggested the voter thought a light brush with the stylus was sufficient to vote. Broward, on the other hand, would count dimpled chads, or even marks near a perforation, as valid votes if they appeared to conform to the political profile of the remainder of the ballot.

The question of change would prove significant because federal law stipulated that the Congress would confer conclusively presumptive legitimacy (a “safe harbor”) for any state electors chosen under rules in place prior to the November

vote.<sup>6</sup> Whether Florida had defied that principle either through its manual recount rules or by the Florida Supreme Court extending the deadline for such recounts to be completed became important issues in subsequent litigation before the U.S. Supreme Court.

Hardly had the oral arguments before him been completed than Judge Middlebrooks, in a twenty-four-page opinion, denied the Bush injunction request. Relying largely on points made in the brief filed on behalf of Vice President Gore, the court first noted the extremely high burden on the part of one seeking to enjoin a recount to show his constitutional argument will prevail and the greatly proscribed role of the federal courts in tampering with state election practices. As to the heart of the Olson argument, “that Florida’s decentralized county-by-county electoral system can yield disparate tabulating results from county to county,” and that the counting of previously discarded ballots in one selected county but not another, dilutes the vote of the latter, the court said that was a reasonable price to pay for decentralization. After all, said the court, both the Constitution and the Congress have made the individual states supreme in this area:

Unless and until each electoral county in the United States uses the exact same automatic tabulation (and even then there may be system malfunctions and the like), there will be tabulating discrepancies depending on the method of tabulation. Rather than a sign of weakness or constitutional injury, some solace can be taken in the fact that no one centralized body or person can control the tabulation of an entire statewide or national election. For the more county boards and individuals involved in the electoral regulation process, the less likely it becomes that corruption, bias, or error can influence the ultimate result of the election.<sup>7</sup>

Judge Middlebrooks denied the relief sought and Olson began an appeal to the Atlanta-based U.S. Court of Appeals for the Eleventh Circuit. Neither he nor Baker and Ginsberg were particularly surprised by the outcome, but Judge Middlebrook’s decision had come closer to adjudicating the merits of the case than they would have wished.

While the Bush team was assuring itself access to the federal courts, both sides began jockeying for position on two issues central to whether Gore would get the recounts he sought during the so-called protest phase of the post-election period. The first was whether the ability to discern a voter's preference in the presidential contest after the machines had discarded the ballot as an undervote exposed the sort of "error in vote tabulation" that could justify a manual recount. The second was the extent to which the Secretary of State was compelled to exercise her discretion to include the results of manual recounts not completed within the statutory period of seven days from the election.

Both questions placed Secretary of State Katherine Harris in the eye of the political storm and in the cross hairs of the big Democratic guns. Before the Florida Courts appropriated her issues, Harris would find herself called a "hack" and a "lackey for George W. Bush" by Gore's press spokesman, Chris Lehane, who also likened her to a "Soviet commissar." The liberal press seemed endlessly fascinated by her eyebrows, her makeup, her pumps, and her dresses. Former Clinton aide Paul Begala said she looked like "Cruella De Vil coming to steal the puppies." Harvard law professor Alan Dershowitz called her "a crook."<sup>8</sup>

Ms. Harris had, in part, brought the problem upon herself, not only by having served as one of Bush's eight cochairmen in the state, but also by having campaigned for him in New Hampshire. But she was no cipher. Far more independent and strong-willed than given credit for, Harris had defied Jeb Bush to defeat his candidate for the Secretary of State's job, a perch from which she hoped to vault to a position as an international trade negotiator in a Republican administration. It was at a Republican Institute session on trade where she met Robert Zoellick, who regarded her as intelligent and strong-willed, but sometimes lacking in self-confidence. He, Allbaugh, and Baker paid a courtesy call on her in Florida, where he recalls telling Harris, "You are going to be under incredible pressure. Get the best legal help

you can, take your position, and stick to it. Once you start moving, you'll never get your feet back on the ground."

Harris took Zoellick's advice to heart and retained Joe Klock of Miami, a slightly ruffled, plain-spoken, passionate Democrat whose knowledge of state election law is encyclopedic. Klock told Harris to avoid all further contact with the Bush team and assured her that he would not allow her to issue any ruling or opinion inconsistent with Florida statutory and case law, as he and his partners and associates understood it.

Harris and L. Clayton Roberts, the director of the Division of Elections, dealt first with the question of whether the term "error in voting tabulation" justifying a manual recount included situations where the failure to count the vote was due to voter error in punching the ballot. The issue had been raised in letters from Al Cardenas, the GOP State Chairman, and Judge Charles E. Burton, Chairperson of the Palm Beach County Canvassing Board, requesting advisory opinions. As would also be the case in Broward and Miami-Dade Counties, the four-precinct Palm Beach County sample had found no problems with tabulation hardware or software, only some number of improperly punched ballots where voter intent could still be determined.

With Harris's approval and on the basis of Klock's legal analysis, Roberts replied to Cardenas on November 13, "An 'error in the vote tabulation' means a counting error in which the vote tabulation equipment fails to count properly marked marksense or properly punched punchcard ballots.

. . . The inability of voting systems to read improperly marked marksense or improperly punched punchcard ballot is not a 'error in vote tabulation.' . . ."<sup>9</sup> Thus, a ballot adorned with pregnant or dimpled chads rather than properly punched holes could not trigger the full recount provided for by statute. Similar letters were sent to Burton and Jane Carroll, the supervisor of elections for Broward county. Klock's reasoning was that the statute had been amended after the 1988 McKay-Mack contest to provide a recount



remedy for instances where the vote tabulation equipment is found to be defective, as had been the case in that election. Further, the companion remedies, authorizing the canvassing boards to “correct the error and recount the remaining precincts with the vote tabulation system,” or to “request the Department of State to verify the tabulation software,” were clearly directed at errors in the equipment.

The Harris-Roberts view, had it prevailed, could well have resolved the Florida battle on the spot, but it was immediately challenged by an opinion from Attorney General Robert A. Butterworth, who had been state chairman of the Gore campaign. Strangely, no one termed Butterworth a “hack,” a “commissar,” or a “crook,” no one seemed to care a whit about the way he dressed, and no one suggested that he was being manipulated like a puppet by his political masters. Indeed, only a few intrepid souls thought it noteworthy that Butterworth’s entrance into the manual recount debate was highly officious, because such matters were totally beyond his jurisdiction, his own Web site advising that “questions under the Florida Election Code should be directed to the Division of Elections in the Department of State.” Also responding to a letter from Judge Burton, Butterworth, on November 14, concluded that the Division of Elections interpretation was “clearly at variance with Florida statutes and case law,” and insisted that the term “error in vote tabulation” includes “a discrepancy between the number of votes determined by a vote tabulation system and the number of votes determined by a manual count of a sampling of precincts.”<sup>10</sup>

Virtually ignored at the time was a second letter sent by Butterworth to Judge Burton outlining the legal dangers ahead should Florida proceed with its system of manual recounts in a handful of counties, or what Butterworth termed a “two-tier system.” He wrote:

A two-tier system would have the effect of treating voters differently, depending upon what county they voted in. A voter in a county where a manual count was conducted would benefit from

having a better chance of having his or her vote actually counted than a voter in a county where a hand count was halted.

As the State's chief legal officer, I feel a duty to warn that if the final certified total for balloting in the State of Florida includes figures generated from this two-tier system of differing behavior by official canvassing boards, the State will incur a legal jeopardy, under both the U.S. and State constitutions. This legal jeopardy could potentially lead to Florida having all of its votes, in effect, disqualified and this state being barred from the Electoral College's selection of a President.<sup>11</sup>

While Butterworth was specifically addressing a situation where one county granted a request for a manual recount and another didn't, his legal logic ran parallel to that of Bush and his team. It was to be analysis later shared by both the Florida and U. S. Supreme Courts. Either Gore and his legal team deluded themselves into thinking they could get by gaming the system as one would a race for county sheriff, or they were convinced that if they could quickly capture the lead, Bush would never be able to dislodge them.

The Harris and Butterworth opinions on the definition of "error in vote tabulation" came only a day apart. With no additional delay, Palm Beach County took the precaution of obtaining an order from Circuit Court Judge Jorge Labarga permitting the count to begin. The second matter involving the Secretary's discretion whether or not to wave statutory deadlines for the certification of manual recounts would become one of the defining issues in the battle. Florida law unambiguously requires each county to file its returns with the secretary of state as soon as they are counted. Each canvassing board then has a week to officially certify the returns, which must be filed with the secretary of state. But what if a county misses the deadline? Under one provision of the Florida Code, "If the county returns are not received by the Department of State by 5 P.M. of the seventh day following an election, all missing counties **shall** be ignored (emphasis added), and the results shown by the returns on file shall be certified." But another provision, passed several years later, states that when a county misses the seven-day 5 P.M. deadline,

“such returns **may** be ignored (emphasis added) and the results on file at that time may be certified by the department.”<sup>12</sup>

The Gore people and officials in at least three of the counties selected for manual recounts quickly realized that strict adherence to the seven-day deadline would doom their effort. While Gore had requested the recounts within the prescribed seventy-two-hour window, only Volusia had moved promptly to take the sample precinct counts and begin the larger effort. The other three counties would have had great difficulty establishing they had made a good faith effort to meet the deadline had anyone demanded such a showing. Palm Beach County had decided on November 9 to conduct the partial recount necessary to establish a predicate for the full recount but delayed five days before starting the real thing. Broward County commenced its full recount on November 15, missing the statutory deadline by a full day, after first voting not to proceed because the sample count had turned up only four net additional votes for Gore. The Miami-Dade County Canvassing Board held its decision meeting on November 14, the day of the statutory deadline, and decided not to proceed with the manual recount. Three days later, after considerable pressure from the Gore camp and political demonstrations throughout the area, the board reversed its decision.

Harris met with both camps on November 13, informing them that she intended to stick to the November 14 deadline. Publicly, the Gore camp reacted angrily. “Her plan, I’m afraid, has the look of an effort to produce a particular result in the election,” said Daley, “rather than to ensure that the voice of all the citizens of the state would be heard.” Daley charged Harris with “another effort in a series of efforts to obstruct the work of these counties to count the votes of the people of Florida.”<sup>13</sup> He said the Gore people would likely challenge Harris’s decision in the Florida courts.

Meanwhile, members of the Bush legal team were dismayed that Harris was telegraphing her punches, giving both the Gore people and the Florida judiciary time to contemplate

their next move. “We might have been better off if the secretary of state had simply allowed the counting to go on and then certified the results when the statutory deadline occurred without the manual recounts having been completed,” said Ken Juster, who was involved in marshalling arguments that went into the Bush court battles.

Baker and his team also took note as Gore brought in David Boies, a heavyweight trial and appellate lawyer from New York, to assume the role of legal quarterback. Fresh from a massive federal district court victory in the Microsoft antitrust case, Boies would combine courtroom skill with an affinity for spinning the press. Baker made a mental note to find lawyers familiar with Boies’s technique. He found one, Irv Terrell, in his own firm and another, Phil Beck, a distinguished Chicago trial lawyer. Both had notches in their belt with the Boies name on it. Without fanfare or a great deal of Larry King-type hullabaloo, Baker would bring both to Tallahassee, where each would continue his winning streak against Boies.

Circuit Court Judge Terry Lewis, a respected jurist and middle-of-the-road Democrat, was given jurisdiction of the Gore motion for a preliminary injunction blocking Harris from certifying the Florida results until the manual recounts were tabulated. Harris took something of an absolutist view of her discretion under Florida law, claiming that absent an act of God, she could extend the deadline for manual recounts or decline to do so as she saw fit. This was further than Lewis was willing to go. On November 14, he issued an order requiring the canvassing boards to file their incomplete returns that evening, but to keep counting past the deadline and to submit amended returns when their recount was completed. “The secretary of state may ignore such late-filed returns, but may not do so arbitrarily, rather only by the proper exercise of her discretion after consideration of all appropriate facts and circumstances.”<sup>14</sup>

Now Lewis introduced a theme that the Gore team would emphasize when the case reached the state Supreme Court

and which that Court would seize as its own. A candidate had three days under Florida law to request a recount. Full consideration of that request could delay commencement of the recount until the very eve of the deadline, functionally eliminating the more populous counties from completing it on time. "It is unlikely that the legislature would give the right to protest returns, but make it meaningless because it could not be acted upon in time," wrote Lewis. "To determine ahead of time that such returns will be ignored, however, unless caused by some act of God, is not the exercise of discretion. It is the abdication of that discretion." He further warned Harris that the Florida Supreme Court has held that "substantial compliance" is sufficient to comply with a mandatory filing deadline.

Lewis then presented Harris with a virtual blueprint for winning her case in his court and insulating herself against state Supreme Court reversal. He did so by suggesting a series of questions she might address in exercising her discretion: "If the returns are received from a county at 5:05 P.M. on November 14, 2000, should the results be ignored? What about fifteen minutes? An hour? What if there was an electrical power outage? Some other malfunction of the transmitting equipment? More particularly related to this case, when was the request for recount made? What were the reasons given? When did the Canvassing Board decide to do a manual recount? What was the basis for determination that such a recount was the appropriate action? How late were the results?"<sup>15</sup> Had Harris addressed each of these questions in specific terms rather than rejecting categorically the idea of extending the deadline in anything less than cataclysmic circumstances, she would have fortified Lewis' subsequent decision in her favor, making it tougher even for an activist Florida Supreme Court to credibly reverse the Circuit Court.

Even the state that hosts the Grapefruit League had rarely seen so many fat pitches served up in a single appearance at the plate. Harris could well have kept silent, allowing the process to continue for a few days while awaiting the final

batch of absentee ballots. Palm Beach, Broward, and Miami-Dade counties would by then have been three days past the original deadline with no end imminent and with no real excuses for the substantial delay. Miami-Dade and Broward had first voted to reject the manual recounts. Indeed, Broward had reversed itself after the sample precincts had failed to meet the statutory criterion for initiating the full manual recount. And Palm Beach had sleepwalked its way past the deadlines, not even beginning its recount until the critical moment was at hand. Again, had Harris chosen that route, it is difficult to see how even an activist state Supreme Court could have found any abuse of discretion.

Instead, Klock decided to substitute precedent for the sort of freewheeling discretion Lewis had urged. By 5:00 P.M. that evening, Volusia County had completed its recount, meeting the statutory deadline and providing Gore with an additional 98 votes. Harris then announced that her director of elections had instructed the three remaining counties to state their reasons in writing for failing to meet the deadline and to have the documents in her hand by 2:00 P.M. November 15.

Unless I determine in the exercise of my discretion that these facts and circumstances contained within these written statements justify an amendment to today's official returns, the State Elections Canvassing Commission, in a manner consistent with its usual and normal practice, will certify statewide returns reported to this office today. Subsequently, the overseas ballots that are due by midnight Friday will also be certified and the final results of the election for President of the United States of America in the state of Florida will be announced.<sup>16</sup>

Harris's purpose in devising this two-stage certification was clear: had she waited until the absentee ballots were counted, she might well have received completed manual recounts and then decided they were too late to be counted, which would have put her in a politically and—most likely—legally untenable position.

Almost as a footnote to her day's activities, Harris filed a motion with the Florida Supreme Court asking it to block the

continuing manual recounts, or barring that, to mandate a single statewide standard for counting undervotes, and to consolidate all the election cases in Tallahassee's Leon County. The Court rejected her motion the following day.

The Gore camp, which of course wanted Harris to simply accept the late recounts, complained about her request for letters from the counties about to miss the deadline. Daley called her action "unfortunate and inexplicable." The Bush camp was no less upset. Already concerned about Harris telegraphing her punches, they shuddered to think that she had tried to consolidate and expedite all the legal activity in Florida. Their strategy was to let the clock wind down, not to find new ways to grease the mechanism. Moreover, Judge Lewis' ruling posed some danger. Not only had he let the recounts continue past the deadline, he seemed to want Harris to exercise her discretion broadly and forgivingly, coming down on the side of counting votes rather than on the side they preferred—of finality of process.

Harris received letters of explanation from the three counties still recounting and promptly announced that they were "insufficient to warrant the waiver of the unambiguous filing deadline."<sup>17</sup> Klock had thoroughly researched Florida case law to determine the grounds on which extensions had been approved in the past. Those cases involved proof of voter fraud that might have affected the election's outcome, indications of substantial noncompliance with election procedures that cast doubt on whether the election expressed the will of the voters, or situations involving circumstances beyond the control of election officials, such as an act of God, a power failure, or an equipment or mechanical malfunction that interfered with the good faith efforts of officials to complete the recount on time.

In tailoring the Harris response to a narrow reading of Florida precedent, Klock had given both Lewis and potentially the Florida Supreme Court some elbow room to overturn her ruling. He had also given the Bush team, as parties to the dispute, the task of defending a ruling the Bush lawyers

might have written differently. Klock had drawn his legal authority from cases involving election *contests* in the courts where overturning an election result requires clear proof that the will of the electorate was thwarted. Thus Harris had ignored most of the recommended questions Judge Lewis had laid out for her. Even more to the point, many Bush lawyers concluded that there was no compelling reason for her to say anything. Their advice to Harris would have been to just sit tight, count the absentee ballots on Friday, certify the election, and get out of Dodge. “Reporters tended to assume a degree of coordination between ourselves and the secretary of state that simply didn’t exist,” a Bush lawyer later confided. “To a lesser extent, that was true of the state legislature too. We certainly were in contact. But while our interests overlapped, they were not identical.”

The Florida sparring was punctuated by a moment of political drama on November 15 as Gore strode before television cameras at the White House shortly after the 6:30 P.M. network newscasts hit the air, and offered to end the legal battles in Florida if Bush would accept the recount results from Palm Beach, Broward, and Miami-Dade counties, or agree to a statewide manual recount. “We need a resolution that is fair and final,” said Gore. “We need to move expeditiously to the most complete and accurate count that is possible.”<sup>18</sup> Gore also proposed a private meeting with Bush.

Both in Tallahassee and in Waco, Texas, where Bush had been working from his ranch, Gore’s proposals were viewed as a political stunt, not unlike Baker’s “generous” offer earlier in the week to accept manual recounts completed by the November 14 deadline if Gore would agree to quit pressing for recounts anywhere else. Were he serious, he would have first contacted Bush to explore whether agreement in principle was possible and whether any accord on modalities—including counting rules—could be achieved. Now Gore wanted Bush to give up his legal and constitutional claims and drop his federal suit for the privilege of giving Gore precisely what he was



seeking in the first place and with no accord on standards. Moreover, the 72-hour deadline for requesting manual recounts had long since passed, so Gore was cavalierly suggesting a remedy illegal under Florida law. And even if the parties should wait to the post-certification contest phase before seeking statewide manual recounts, at that stage only the candidate who lost the certification battle had the right to request anything. So the offer that gave Gore's supporters some rhetorical ammunition was as close to a facetious proposal as one could imagine.

Yet Bush had to reply publicly, so as aides worked preparing his remarks, Bush sped the nearly one hundred miles to the governor's mansion to deliver his prime-time reply live. Noting that he had prevailed not only on election day, but following multiple recounts in some counties, Bush said the good of the country required "a point of conclusion, a moment when America and the world know who is the next president." He continued: "I was encouraged tonight that Vice President Gore called for a conclusion to this process. We all agree. Unfortunately, what the Vice President proposed is exactly what he's been proposing all along: continuing with selective hand recounts that that are neither fair nor accurate, or compounding the error by extending a flawed process statewide."<sup>19</sup>

The consensus at the Tallahassee headquarters was that Bush had come out of the evening fairly well, given that the advantage usually rests with the attacker. The common assessment was that he had appeared a bit nervous; like a deer in the headlights. But Gore had nothing to show for his night's work except, perhaps, a consensus from restless Democrats to fight on. Bush faced no similar problem with party cohesion. Also, the Governor had again spelled out what was at heart a fairly difficult case to sell. Selective recounts are problematic because they discriminate against voters in counties that rely exclusively on the machine tallies. But extending the recount to every county is worse because the process itself is hopelessly flawed. It was a political sell that

Bush seemed able to make effectively to the constituencies he most cared about. But how would it play in the courts?

David Boies now led his team into action against Katherine Harris, claiming that she had failed to obey Judge Lewis's order to exercise her discretion as to whether or not to count late-filed recount results, instead treating the issue with a closed mind. He filed with Judge Lewis an emergency motion to compel compliance with his injunction. Stunningly, the Gore counsel also urged that Harris be held in contempt. Lewis said he would issue his opinion at 10:00 A.M. on November 17.

While both sides awaited Lewis's decision, the Florida Supreme Court on November 16 issued a unanimous, one-paragraph ruling permitting the recounts in Palm Beach and Broward Counties to continue. The Gore camp, beginning to sense a trend in state court rulings, thought Friday would bring a favorable decision from the circuit court.

But Lewis gave short shrift to the Gore case. Noting the "broad discretionary authority" vested in the secretary of state, Lewis held: "On the limited evidence presented, it appears that the Secretary has exercised her reasoned judgment to determine what relevant factors and criteria should be considered, applied them to the facts and circumstances pertinent to the individual counties involved, and made her decision. My order requires nothing more."<sup>20</sup> The Boies motion was rejected.

The GOP headquarters exploded with joy. War whoops were shouted and high fives exchanged. The press was reporting that Boies planned no immediate appeal to the state Supreme Court. The reason, most at Bush headquarters felt, was that he knew he had no case. Now Harris could finish tallying the absentee ballots, where Bush was expected to pick up between 500 and 1,000 votes, and certify the governor as the winner. Did that mean it was all over, or would be in another 24 hours? Not quite. There was still a contest period ahead, and who knew what Gore and his trial lawyers had up their sleeves. Nonetheless, the victory was one hell of a momentum builder.

The euphoria was short-lived. At 4:00 P.M. the Florida Supreme Court, without being asked, issued the following Stay Order: "In order to maintain the status quo, the Court, on its own motion, enjoins the Respondent, Secretary of State and Respondent, the Elections Canvassing Commission, from certifying the results of the November 7, 2000 presidential election, until further order of this Court. It is NOT the intent of this Order to stop the counting and conveying to the Secretary of State the results of absentee ballots or any other ballots."

Baker delivered a mandatory public statement putting what had been a hefty blow to the solar plexus in the best light. He suggested that "the court's action is designed to maintain the status quo until its hearing on Monday." Although neither side had requested the order, the action "is not an order on the merits of the case. We remain confident that, for all of the reasons discussed by the trial court in its two opinions, the Supreme Court will find that the secretary of state properly exercised her discretion and followed the law."

In fact, however, the Florida Supreme Court order left no grounds for self-deception among members of the Bush team. Instead of certification and a big step toward victory, the weekend would be spent writing briefs and keeping an eye on the recount proceedings now under way in all three counties. Further, it was the sort of order, undertaken with no request from the Gore team, that provided a revealing glimpse as to how the Court was likely to rule on the merits.

The briefs were due Sunday with oral argument scheduled for Monday. Mike Carvin would present most of the Bush case, with Richard adding a few words and Klock representing Harris. The sua sponte stay order of the Court had done little to shake Carvin's confidence. "I've done a lot of redistricting, which is very political, and a lot of civil rights, which is very ideological, but this was the simplest case of statutory construction I've ever seen," he recalled. "To lose this case, you'd have to have an utterly lawless court." As more colleagues who knew the court portrayed it as seven

activists running out of control, Carvin began to develop doubts. Richard tried to reassure him, saying the Court was liberal but not partisan. His doubts intensified on the day of the oral argument when a colleague handed him a note saying the decision had already been written: it was 7–0 for Gore with a five-day deadline for completing the count.

In truth, Baker had been so convinced that the “Florida Supremes”—a term of non-endearment invariably used by the Bush team in private conversation—would rule for Gore that he had instructed aides to draft a statement blasting the Court for use after its decision came down. He also became more convinced that the U.S. Supreme Court would ultimately resolve the case and instructed Carvin to make certain he preserved the potential federal points in his oral argument. Both Baker and his colleagues still maintained a long-shot hope for the best, but they were already looking past the Florida Supreme Court to the nine-member U.S. Supreme Court in Washington.