

Rewriting the Law

It has long been a humorous adage among lawyers that when the law is against you, argue the facts, when the facts are against you, argue the law, and when both are against you, pound the table. A reading of the Gore/Boies brief and a review of Boies's oral argument before the Florida Supreme Court suggests a bit of tinkering with the third prong: when both the law and the facts are against you, argue that some guiding value transcends the importance of both. Thus did Boies contend that the right to vote and to have one's vote counted is more important than a "hypertechnical compliance" with a deadline in the law. Despite clear statutory language to the contrary, the brief argued that "the secretary has no discretion to reject the results of a manual recount." Otherwise the law would permit the secretary "to reject ballots that are conceded to have been validly cast, and that were identified in a properly initiated and conducted recount, simply because they reached the secretary later than a deadline so short as to preclude the completion of the recounts provided for by statute."¹

The Boies brief further argued, with no ascertainable basis in fact, that the delay of the three counties in meeting the

deadline was substantially due to the secretary's erroneous interpretation of the "error in vote tabulation" requirement.

In their reply brief, Carvin and his colleagues practically ridiculed Boies's interpretation of the law. Noting that the case was controlled by two statutes, one of which says the Election Canvassing Commission *shall* ignore late-filed returns and one of which says the Commission *may* ignore such returns, the Bush brief noted that the Gore lawyers "in contrast, argue that the two statutes together mean that the Commission *can never* ignore late filed returns, but must hold the results of a national election indefinitely pending completion of selective manual recounts in individual counties."²

Additionally, the Bush/Carvin brief succinctly addressed the federal issues, first noting that federal law requires states to choose their electors by laws on the books prior to Election Day. Compliance with this provision meant state electors would face no congressional challenge, the so-called "safe harbor" that would later play a prominent role in U.S. Supreme Court deliberations. The brief also made the Due Process and Equal Protection arguments against selective recounts that treat voters in different counties differently "by counting their votes differently depending upon where they reside." The brief also argued that "because the manual recount statute prescribes no meaningful standards for officials conducting such recounts, it permits the invasion of the liberty interest in voting in an arbitrary and capricious manner."

In yet another pre-argument filing, the Bush team's Response in Opposition to (the Gore) Reply brief, the Bush lawyers dealt succinctly with what for them was a nightmare scenario: the possibility that the Court would not only permit the counting to continue, but would accept an invitation in the Boies brief to impose the most liberal counting rules on the county boards. Noting that the issue had not been in the pleadings, the Bush lawyers claimed the Court was without power to decide it, certainly without a

separate proceeding to hear evidence and argument on various methods.

The Bush reply brief also warned the Court against pushing the protest deadline too far back, since that would inevitably encroach on the contest litigation. Given the hearings and appeals involved in that process, the Bush brief argued that any counting deadline that extended past November 20 would necessarily impose on the contest period and likely would threaten the safe harbor status so important to the state. Less than three weeks later, the truncated contest period left by the Florida Supreme Court would lead the Supreme Court of the United States to resolve the dispute with finality rather than sending it back to Florida for further proceedings.

At Monday's oral argument, Paul Hancock, a highly capable appellate lawyer, represented the state attorney general's office. Klock represented Secretary Harris. Carvin and Richard argued the case for George W. Bush. From the outset, questions by the Justices betrayed a Court that knew where it wanted to go and sought just a bit of help from the petitioners in getting there. Hancock provided much of that assistance by emphasizing a 1972 U.S. Supreme Court case, *Roudebush v. Hartke*,³ involving a U.S. Senate contest in Indiana in which the trailing candidate had turned the election around by requesting a recount in just one of the state's ninety-two counties. The Court had affirmed the result, holding that the procedure fell comfortably within the state's constitutional mandate providing for the selection of senators.

The Florida court appreciated that any extension of the recount deadline would necessarily push back the certification date, which in turn triggers the so-called contest period wherein the trailing candidate may challenge the results in court. A truncated contest period could run up against the federal deadline for the certification of Florida's electors. The failure to meet that deadline could strip from the chosen electors their immunity from challenge by the Congress.

So, early in the session Chief Justice Charles Wells asked, “What’s the date, the outside date that we’re looking at and which puts Florida’s votes in jeopardy?”

“December 12, Your Honor, is my understanding,” Hancock replied.⁴

From his seat at the counsel bench, Carvin couldn’t believe what he was hearing. He had been prepared to make a strong but, in his view, not altogether convincing argument that December 12 was the date by which all disputes had to be resolved, and now here was an opposing counsel making the point for him. If that was the presumed date, the court would have to squeeze both the protest and contest periods into a period of roughly three weeks or cede to the legislature responsibility for picking the electors. Carvin waited to see what Boies would have to say on the subject.

Before Boies argued, Andrew Meyers, representing the Broward County Canvassing Board, appeared briefly to defend a change in counting rules adopted subsequent to the beginning of the count. At first, the board had followed the procedure, which had also governed neighboring Palm Beach County, whereby only hanging chads were counted as votes. But under legal and political pressure exerted by the Gore team, the county had changed midstream to a system that allowed more counter discretion.

This seemed perplexing to Justice Major Harding, who understood the federal admonition against changing the rules after the vote. He asked, “Isn’t there something unusual about changing the rules in the middle of the game?”

“I don’t think so, Justice Harding,” replied Meyers. “I think the important thing is that we do what’s right.”⁵

Now it was Klock’s turn to shake his head. Everyone seemed to want to legislate in this case without even a nod in the direction of federal law, which warns states against changing the rules, on or after election day. “This will never survive appeal,” he reflected, as he watched David Boies rise to present his argument.

David Boies has the bearing of a man who believes himself to be just a smidgen smarter than anyone else in the room. This confidence makes him a trifle more forthcoming in dealing with the press, a little less hesitant in exposing his strategy to opposing counsel, and a bit more intuitive in a court of law. He reads the way the court wants to go and manages to find a route to get them there. He studies precedent but appears less bothered by departure from it than many an attorney lacking both his intellectual gifts and self-confidence. Others may worry about defending bad law on appeal. Boies seems to feel his intuition will prevail there too. It is not that he revels in inconsistency; it is simply that he knows the difference between tacking and changing direction.

Boies came out of the chute with a ready-made formula for allowing a court dominated by activist justices to go anywhere they wanted. The seven-day mandatory filing provision? Fine. Make the counties file whatever returns they have compiled by then. But by virtue of a twenty-year-old consent decree with the federal government, the state must count military absentee ballots received up to ten days after the election. So those original returns, “will then be supplemented by manual recounts, by absentee ballots; and then there will be an official return, and that official return will then be certified.” Under Boies’s reasoning, the only concrete date spelled out by the Florida legislature—the seven-day deadline—becomes just so much wallpaper, totally trumped by a selective recount that, however long it runs, the secretary lacks any discretion to reject.⁶

The chief justice wanted to know whether Boies accepted December 12 as the deadline by which all controversies must be finally determined.

“I do, Your Honor,” said Boies.⁷

With that in mind, can the need to meet the December 12 deadline impose some earlier deadline on the protest period recounts?

Boies stated, “I think, Your Honor, you could say . . . that as long as the manual recounts will not impair the [state’s

ability to determine] the final certification in time to permit the selection of electors by December 12, that those manual recounts must be included.”

Justice Barbara Pariente, widely regarded as the paradigm of liberal activism on the bench, asked Boies to address the question of the wide disparity in counting techniques.

Parient asked, “Is the uniformity of how these manual recounts are conducted essential to the integrity of the process or also to the constitutionality of the statute?”

Boies replied, “Your Honor, I think it is important to the integrity of the process. I think if you had very wide variations you could raise constitutional problems.”

Boies was less concerned about discrimination against voters in those counties not undergoing recounts because “any candidate could have requested a manual recount in any county.”

Returning to the wide disparity in counting methods and again addressing Justice Pariente, Boies urged the Court to take matters into its own hands. “I would say that I think that it, for the reason you point out, it is quite important that this court be as specific as possible in terms of the standard to be applied so that we will have uniformity. I also think, Your Honor, that if you concluded that it was essential to avoid unfairness or some kind of overweighing of one county’s vote, this court has within its equitable power to have a statewide recount, if you concluded that that was necessary.”⁸

Considering the fact that he and his colleagues were already resigned to a ruling for Gore, Carvin felt the petitioner side of the argument had been a net plus for the Bush case. Boies conceded that December 12 was critical, conceded that differing counting techniques raised serious constitutional issues, and even suggested that to avert the problem of vote dilution in the sixty-three counties not conducting recounts, the Court could decide to invoke its equitable powers to order a statewide recount.

What was Gore up to? Why was he pursuing what Carvin believed to be a risky and lawless strategy, pouring every-

thing into the protest period when an adverse court decision or the failure to win enough votes in the counting process would leave him with a truncated contest period in which to reverse the certified results? Carvin concluded that Gore felt the payoff of plowing into the lead early was so great that he was willing to risk everything to do it. “I always thought the Gore people knew the risks but believed that the Florida Supreme Court would find a way to uphold any lead Gore got and that the U.S. Supreme Court would feel constrained not to overturn the decision of a state court interpreting state law,” Carvin later recalled, adding “Another reason, they wanted to take the state legislature out of play. They never thought the legislature would have the guts to undo a Gore victory, as opposed to preserving Bush’s certification.”

Klock’s message to the Court was simple: the seven-day statutory period is not frivolous. Rather it is an essential prerequisite to certification that triggers the contest period when the election outcome can be challenged in the courts and recounts ordered where warranted. Even a dispute about the disqualification of military absentee ballots cannot commence prior to certification. “Once the election is certified, the contest period can begin,” argued Klock. “The petitioners are trying to conduct a contest proceeding prior to certification, not for legal reasons, but for political reasons.”⁹

Moreover, argued Klock, every legislative indication is that the lawmakers placed a low priority on manual recounts. If a county does not wish to undertake them during the protest period, its discretion is absolute. That was affirmed only two years prior to this election in *Broward County Canvassing Board v. Hogan*,¹⁰ when the state Supreme Court upheld the canvassing board’s rejection of a recount request even though the difference between the two candidates was only three votes. As Judge Terry Lewis had found, the Secretary has great discretion to require deadline compliance. In a classic response to the question about the impossibility of completing a recount begun just a day before the deadline, Klock

compared that situation to the preparation of a high school term paper. “You can start the term paper the night before, if you want to, but it is unlikely that you’ll be able to turn it in the next day when it’s due.”¹¹

To reach a decision for the petitioners, said Klock, would require a vast amount of judicial legislation. The Court would have to do away with the seven-day rule, the protest laws, and the secretary’s discretion, “and then the Court enters the great universe of chad to decide, on the record you have, whether or not two corners are enough or three corners are enough.”¹²

Klock also noted that there was nothing on the record to suggest that Secretary Harris’s views on the question of errors in vote tabulation had delayed any of the counties from proceeding with their recounts.

Carvin faced intense and at times hostile questioning from the bench and enjoyed what was far from his finest day as an appellate lawyer. At one point Justice Pariente seemed to be scolding him for raising parallel questions in the federal courts, asking with a touch of edginess, “You don’t think that the state court has it within its jurisdiction to decide whether a statute is being constitutionally applied?”¹³

In response to other questioning, Carvin tried awkwardly to parry questions about the Texas recount statute by protesting that he knew nothing about Texas standards or those of any other state, though such comparisons might have been relevant. He seemed flustered when trying to answer questions on the fate of incomplete manual recounts once the time limit expired.

Carvin had some difficulty arguing on the one hand that recounts in selective counties raised constitutional problems while insisting on the other that Bush had no interest in a broader recount. But he rallied when he told the Court that the matter had been made moot by the passing of the deadline for requesting recounts and that the Court had no power now to revive the issue. “My answer is that anything which departs from the rules that were set before November 7, be-

fore the election, by the Florida legislature would be a gross abuse of discretion and impermissible.”¹⁴

In contrast to the judicial slugfest Carvin had endured, Richard was treated with some deference by the bench, permitted first to articulate his theory of the case and then presented with polite, relevant questions. Following closely to the themes laid out in the Bush brief, Richard argued that the Court was being asked to change clear pronouncements by the legislature on the time limit for certification, the discretion of the secretary of state, and the standards for overturning the secretary’s decision.

Both the federal and state constitutions, Richard argued, have delegated the power to write election law to the legislature, which in turn delegated certain of those powers to the Secretary. “Now in order for us to do anything else, this court would have to disregard the most fundamental principles of separation of powers and do what these appellants are asking, to step into the shoes of both the legislative and the executive branches, to rewrite these statutes, and to begin the process, which I suggest to this court is never-ending, of sitting as a determiner or an ultimate arbiter of the minutiae of facts that go into the election process.”¹⁵

What about the Boies notion of serial certifications as the recounts came in? Boies stated, “The suggestion by appellants that there can be continuous certifications and supplement certifications is not what the statute says. If you’ll read the statute, it says there is one certification mandated by 5 P.M. seven days after the election and that’s the only one.”¹⁶ Only the military ballots can come three days later, and that is a function of federal law, which is binding, on Florida.

At the Bush headquarters, low expectations were mixed with some anguish for Carvin’s tough afternoon. Baker had watched the session closely and felt that Richard’s fine performance was due in part to his own skills and in part to the Court’s deference to a fellow Floridian. Richard, he and Ginsberg decided, should be the constant in all state court trials and arguments, playing a starring role in the most important

arguments and little more than a cameo role in the lesser disputes. This decision did not sit well with many of the legal eagles grinding out briefs and talking points for the frontline advocates or battling Gore's shock troops in the recount trenches. To them, Richard was something of a legal dandy, glib and smooth, but not terribly studious and occasionally prone to inexplicably exclude a leading case or point of law. He was a hired-gun Democrat and they were true-believing Republicans. They resented his relatively short ten-hour work-days because they sweltered round-the-clock, and they resented his daily presence at Tallahassee's finer eateries while they gulped cold cheeseburgers from paper bags. They resented his Boies-like appearances on national television while they were cultivating the sort of contempt for the liberal media they would need to get along in a Bush administration. On one occasion, Richard's participation in a staff discussion of an upcoming case was interrupted when his media man appeared to announce that it was time to leave for Larry King Live. Were mental images translatable into reality, Richard might well have been found later that evening dangling from a tree by a pair of garish suspenders.

On November 21, in a unanimous *per curiam* opinion, the Florida Supreme Court ruled for Gore. Secretary Harris's interpretation of the term "error in vote tabulation" was wrong, the Court held. The Court adopted Boies's formulation of separating manual recounts from the seven-day statutory deadline. Further, the Court found that the secretary had extremely limited discretion to disallow manual recount results, whenever completed:

We conclude that, consistent with the Florida election scheme, the Secretary may reject a Board's amended returns only if the returns are submitted so late that their inclusion will preclude a candidate from contesting the certification or preclude Florida's voters from participating fully in the federal electoral process.¹⁷

This was an extremely strange bit of lawmaking. Why ask the secretary to determine on an ad hoc basis, when extend-

ing the protest period will unduly constrict the contest period, when that judgment had already been made in the most concrete way by the legislature that had established the deadlines in the first place? The answer seems to be that the legislative formula did not produce the results desired by the Court, so it set about to rewrite that formula. In the end, of course, it was this judicial revision of the law that would lay waste to the contest period, leaving the vice president and his supporters feeling cheated. For this predicament, the Florida Supreme Court must bear substantial responsibility.

Having decided to ignore the statutory timetable, the Court searched hard for a colorable pretext. It found two Florida provisions that, it concluded, rendered the seven-day requirement ambiguous. One involved the recount laws identified by Judge Lewis, which could give the canvassing boards only a day to conduct their recounts. The second was a provision fining members of the board \$200 apiece for each day's delay beyond the seven-day deadline. Were the late recount results to be excluded, said the Court, the canvassing board would have no reason to submit them, thus incurring a fine, so the provisions for such fines would be meaningless. Even by the elastic standards of this particular Court, this represented a stretch. Suppose, for example, that the board, through laziness or negligence files the returns three days late. The secretary, in her discretion, could well decide to accept the late-filed returns and enforce fines totaling \$600 against each member. There simply was no conflict save that invented by the Court itself.

Although the court paid lip service to legislative intent as the "polestar" guiding its decision, the court paid considerable attention to Florida constitutional provisions exalting the right to vote. But having made a hash of the election laws passed by the legislature, the Court declined to suggest new dates or timetables. "We decline to rule more expansively, for to do so would result in this Court substantially rewriting the Code. We leave that matter to the sound discretion of the body best equipped to address it—the Legislature."¹⁸

What then to do about the chaos now that not a single legislative provision or executive prerogative was left standing? Any action by the court might be considered legislating from the bench in contravention of federal law. "Because of our reluctance to rewrite the Florida Election Code," wrote the demure Justices, "we conclude that we must invoke the equitable powers of this Court to fashion a remedy that will allow a fair and expeditious resolution of the questions presented here."¹⁹

The Court established Sunday, November 26, at 5 P.M. as the new deadline for filing amended certifications, provided the secretary's office was open. If not, the deadline would be 9 A.M. on Monday, November 27. The justices said nothing about appropriate counting standards, but they cited with approval the words of the Illinois Supreme Court in the 1990 case of *Pullen v. Mulligan*,²⁰ which concluded that slavish devotion to any means of tabulating votes should yield to the effort to interpret the intent of the individual voter. Indeed, "where the intention of the voter can be fairly and satisfactorily ascertained, that intention should be given effect," the Illinois court ruling stated. In Palm Beach County, Boies would try unsuccessfully to use *Pullen* as a bludgeon in order to force the liberal counting of dimpled chads.

That the decision had been anticipated at Bush headquarters in Tallahassee made it no less painful. The counting practices in the three remaining counties had taken on a circus quality, and there was no way of predicting what numbers might be produced. Gore was winning on the political front and on both the state and federal legal fronts. To add insult to injury, the Florida Supreme Court had thrown in a footnote quoting Judge Middlebrooks's salute to manual recounts from the case lost just a week previously.

Tired and bitter, Baker, for the first time since his arrival in Tallahassee, looked his age as he read a statement attacking the Court's decision:

Today, Florida's Supreme Court rewrote the legislature's statutory system, assumed the responsibilities of the Executive branch, and sidestepped the opinion of the trial court as the finder of fact.

Two weeks after the election, that Court has changed the rules and invented a new system for counting the election results. One should not now be surprised if the Florida Legislature seeks to affirm the original rules.²¹

Many commentators would find Baker's remarks intemperate, but to the sullen, deflated crowd at state GOP headquarters they struck a welcome tone of pluck and resistance. As he strode back into the building, Baker received a long standing ovation.

The Baker team still had an important decision to make: whether or not to file a writ of certiorari asking the U.S. Supreme Court to review the Florida decision. Once again, Baker, Ginsberg, Olson, Terwilliger, Zoellick, and Josh Bolten gathered to discuss the options. Olson saw only a 35 to 40 percent chance the court would take the case, though if it did, he reasoned the chances of prevailing were better than 50 percent. He liked the case already in the federal courts better, although just days earlier the court of appeals for the eleventh circuit had declined to overturn Judge Middlebrook's decision denying immediate relief. Like Middlebrooks, the appellate court had expressly deferred to the State of Florida, which it held should be given the first shot at adjudicating the matters raised by Bush. Still, Olson felt that the issues in that case were cleaner, there was less interpretation of state law involved, and there was no need for reversal of the state courts. Others saw the legislature as the best hope and thought a rush to the U.S. Supreme Court would cloud that option, particularly if the legislature joined the case. They asked: What could we expect from the U.S. Supreme Court? It will probably take a week or ten days to get a decision, even if they grant the petition. By then the recounts will be history. Certification will have taken place. If Gore has won, will the court take away his votes? And if they do, won't he get them right back in the contest period?

But Baker, Terwilliger, and Ginsberg took an insistent stance: This is a multi-front war and it must be fought everywhere at once. This is no time to get squeamish. What the

Florida court did was so brazen, it's hard to believe that the U.S. Supreme Court would let it stand. Besides, don't ever think of the Florida legislature as the final arbiter to this campaign. If we're ahead as December 12 approaches, they may confirm our victory. But if Gore is certified by then, it's questionable what they can or will do. And it's also questionable if Bush will want a state legislature to place him in the White House after he's lost the national popular vote and the vote in Florida, however it's counted.

Once again the decision to go federal was made in Tallahassee, and once again the folks in Austin-Crawford confirmed it.

Baker thought about the period immediately ahead. Not too much was going to be happening in the courts in the next five days. The action was plainly in Miami-Dade, Broward, and Palm Beach counties. That's where the presidency could be lost; that's where the ground war must be won.