

# Drawing the Battle Lines

Like most political intimates of George W. Bush, Ben Ginsberg, the general counsel of the Bush campaign, shared the pendulum-like swings of election night emotion in Austin, Texas. First came the tears as the three key battleground states—Michigan, Pennsylvania, and Florida—all seemed to fall into the Gore column. Then came the hope as Randy Enright, perhaps the soundest GOP consultant in Florida, and state chairman Al Cardenas assured the Austin people that the networks were wrong, and the state was still in play. Then that huge collective sigh of relief as the news organizations acknowledged their mistake and put Florida back into the “too close to call” category. Then the celebratory shouts, the hugs and high fives as the networks declared Bush the winner. The concession phone call from Gore. The drive to the capitol for the declaration of victory.

Ginsberg, who early in his professional life worked as a reporter in western Massachusetts, and now puts bread on the table by lobbying and lawyering with the well-wired Patton Boggs firm in Washington, never quite made it to the capitol that night. En route came the phone call from headquarters telling the motorcade that Florida was again “too close to call” and that Gore had phoned Bush a second time, now to

withdraw his concession. Ginsberg abandoned the procession and headed back to Bush campaign headquarters to check the latest Florida figures. Bush still led by nearly two thousand votes, this time with nearly everything counted that could be counted on election night. Several thousand absentee ballots, most from overseas military personnel, would dribble in during the next ten days, but that was good; they were expected to add to the Bush margin. Regardless, Bush could still theoretically lose Florida yet still win the election if he managed to sweep Iowa, Wisconsin, New Mexico, and Oregon—the remaining states still up for grabs. But he was trailing in at least three of those states, so that prospect was dim. The good news: the arithmetic precluded a Gore victory without Florida regardless of what he won elsewhere.

Around 4:15 A.M., with Bush still clinging to his slim Florida lead, Ginsberg was approached by Don Evans, the chairman of Bush's campaign. "I suppose there will be a recount now," he said.

"Yeah, it's automatic with these numbers," Ginsberg replied. In Florida, any contest where the final margin does not exceed one half of one percent is subject to an automatic machine recount.

"Well, you better get down there," said Evans.

By 10:00 A.M. November 8, Ginsberg was airborne en route to Tallahassee. He was not particularly concerned about the recount ahead. After dwindling in the early morning hours, the Bush lead had stabilized and now stood at 1,784. Moreover, after years as a counsel in political races, Ginsberg had developed a rule of thumb for recounts: "The good gets better and the bad gets worse." Rarely had he seen results reversed on the basis of a recount. Usually leads were stretched. Of course, the recount he had in mind was the automatic machine recount demanded by Florida law. He was not at this point familiar with much else. Unlike the Gore camp, which before election day had assembled a series of legal "SWAT" teams poised to slash their way into the post-election battle in

pivotal states, the Bush team had delegated to the Republican National Committee the task of assembling and learning the recount laws of all fifty states. There had been an RNC meeting on the subject, but the focus had been on races for the House of Representatives. A presidential recount was unprecedented, unforeseen, and unplanned for.

One could have forgiven Ginsberg a mild sense of *déjà vu* as he headed for Florida. Back in 1988 as a young counsel for the Republican National Committee, he had watched the Voter News Service, which was jointly owned at the time by the three major networks, AP, and UPI, use its exit polls to project Democrat Buddy MacKay the winner over Republican, Connie Mack, in their race for the United States Senate. ABC and CBS quickly followed suit. Overnight, however, Mack forged ahead and held on to win the seat. MacKay complained bitterly about undervotes. In four populous counties—Dade, Hillsborough, Palm Beach, and Sarasota—where he was thought to be leading, some 200,000 fewer votes had been cast in the Senate race than in the Bush-Dukakis presidential contest. MacKay demanded a manual recount in those four counties. Three declined, having found some evidence of machine malfunctions but none of fraud at a time when Florida law contained no provision for recounts triggered by an error in vote tabulation. Then, when a recount in Palm Beach County showed no material gain by MacKay as the recount progressed, the Democrat conceded and Mack took the seat.

In the battle for the presidency in 2000, however, Ginsberg would witness no such speedy resolution. Rather, he was flying into the heart of a Democratic free-fire zone designed to delegitimize the narrow Bush victory in Florida and overturn the results of the contest, thus making Al Gore and not George Bush the forty-third president of the United States. The elements of this strategy had already begun to take shape with complaints about an “illegal” ballot in Palm Beach County that had allegedly entrapped thousands of Gore supporters into casting their votes for the Independent

Party candidate, Patrick Buchanan. The principal elements of the Democratic strategy were:

1. Establish the moral basis for the effort by emphasizing the Gore-Lieberman victory in the popular vote
2. Promote the claim that large numbers of Floridians had been disenfranchised for reasons that ranged from faulty voting machines to racism
3. Play for time both with the public and the Democratic party by claiming that what the strategy is really defending is the right of all citizens to vote and to have their votes counted
4. Demand manual recounts employing the most flexible methods, in the most favorable jurisdictions
5. Attack the election results in the courts, directly where consistent with what became the “count all votes” mantra, and through allies and surrogates where direct involvement carries political liability
6. Try to make the liberal, activist Democratic Florida Supreme Court the ultimate arbiter of the Florida vote

On Wednesday morning Gore announced that he was sending William Daley, his campaign chairman, and former Secretary of State Warren Christopher to represent his interests in Florida. Daley, the son of one Chicago mayor and brother of another, had never provided evidence of having inherited his fair share of the family political genes. Christopher, dour and humorless, had spent much of his life handling sensitive political tasks, and choosing him seemed to be like choosing someone “above politics.” For example, as Deputy Secretary of State in the Carter Administration, Christopher had been tapped to negotiate the release of the U.S. hostages held by Iran. More recently, as head of a reform commission, he had waded through the mess of the Los Angeles Police Department without ever muddying his cordovans.

“Because of what is at stake, this matter must be resolved expeditiously, but deliberately and without any rush to judgment,” said Gore.<sup>1</sup>

Daley combined several “talking points” into a single response to a reporter’s question as to whether he thought Gore had won the election: “There’s no question he’s ahead in the popular vote and ahead in the electoral vote. There is one state left to be decided. We believe, when those votes are counted and that process is complete, totally complete, Al Gore will have won the Electoral College and the popular vote and therefore will be the next president.”<sup>2</sup>

The Bush team had its own former Secretary of State in the wings, James A. Baker, III. A shrewd Texan who had been the longtime friend and political strategist of former President George H. W. Bush, Baker had served as President Ronald Reagan’s Chief of Staff before swapping jobs with Donald Regan to become Secretary of the Treasury in the second Reagan term. Later, as Bush’s Secretary of State, he had helped persuade his Soviet counterpart, Edward Shevardnadze, to accept both the breakup of the Soviet Empire and the inclusion of a reunited Germany in NATO. He had also helped knit together the thirty-eight-state international coalition that expelled Iraq from Kuwait in the Persian Gulf War. But Baker’s stint in Washington had ended unhappily when, responding to an eleventh-hour plea from Bush, he had taken over the President’s faltering 1992 campaign, only to find it beyond resuscitation. Coming to the White House with four protégés—Margaret Tutwiler, Robert Zoellick, Janet Mullins, and Dennis Ross—Baker did little to disguise the fact that he resented having been forced to give up his job as the nation’s top diplomat to take over a campaign from the incompetents who had been running it. White House staffers and those who had been part of the Bush campaign resented this sort of treatment from the “gang of five.” They circulated word of how they stuck to themselves, even at the White House mess, never missing an opportunity to bad-mouth the way the campaign had been run before they got

there. No one could pretend that the campaign had been run like a well-oiled machine, but with H. Ross Perot feeding off the normal Republican base and the economy barely arousing itself from recession, 1992 was a tough year, particularly with a man who made a better President than candidate.

Rumors that Baker had fallen out of favor with the Bush family, particularly former First Lady Barbara Bush, were probably false. After all, among the plans he abandoned to come to Florida was a hunting excursion with the former President and Prince Bandar, the Saudi Arabian Ambassador to Washington. Now an extremely fit seventy, Baker would impress both new and veteran members of the Bush team with his coolness under fire, the soundness of his political instincts, and his ability, shared with great quarterbacks, to see a situation developing over the entire field of play. "This campaign made a number of calls in Florida, none of them inevitable, all of them hotly debated at the time, and, in the end, virtually all of them right," recalled Kenneth Juster, a savvy Washington lawyer who worked in Florida through nearly all the thirty-six-day battle. "And Jim Baker was right every time."

"He can see around corners," said an admiring Margaret Tutwiler, who along with Zoellick joined Baker in Florida a day after the vote for what would prove a happier reunion than 1992. Ross, the remaining veteran of the unsuccessful 1992 political rescue mission, now running the Mideast peace effort from the State Department, would devote his energy this time around to sifting through the wreckage of the final Clinton initiative, hoping to leave the next president, regardless of identity, with something to work with.

Within 48 hours of his arrival, Baker, his longtime colleagues, and Ginsberg had put together the principal elements of a strategy to counter the Gore effort. Like Gore's strategy, it had both legal and political elements. The principal ones:

1. Claim the election was over, that Bush had won, and that the public interest demanded "finality."

2. Try to stop the counting, using the courts as the party of first resort, and if that fails, by urging strict interpretation of Florida statutory law.

3. Fight the “ground war” in the recount jurisdictions to limit the discretion of canvassing boards to find new votes in ballots rejected by voting machines.

4. Use the constitutionally mandated “plenary power” of the Republican-dominated legislature to determine how presidential electors are selected to offset the Democratic advantage among the vote counters and with the Florida Supreme Court.

5. Do not fall behind in the vote count.

6. Try to make the conservative Republican United States Supreme Court the ultimate arbiter of the Florida vote.

By the evening of November 8, Baker and Ginsberg had joined forces in Tallahassee, and both had met with the governor and his top political strategists to get a sense of where things stood. Governor Jeb Bush had earlier in the day recused himself from direct involvement in trying to sort out the Florida result, but he had already nailed down the services of the state’s top election dispute lawyer, Barry Richard, of the Tallahassee firm of Greenberg Traurig. Moreover, his acting counsel, Frank Jimenez, had made certain that none of the state’s top law firms would be hiring out to the Gore camp. The first day of the recount had gone uneventfully; Gore had picked up a total of eight votes, no danger signs there. Jimenez, State GOP Chairman Al Cardenas, and consultant Randy Enright had done their best to get GOP representatives to as many counting centers as possible. They found some of their best workers AWOL, having already departed on preplanned vacations. But they still managed to get warm bodies to about two-thirds of the centers. The Bush team needed all the local help it could get. The Gore campaign plane had flown seventy-two people into the state, and trial lawyers nationwide were being asked to volunteer

for service in Florida. The Bush team, anticipating a two- or three-day electronic recount, numbered no more than a dozen outsiders.

The biggest furor seemed to be taking place over the so-called butterfly ballots of Palm Beach County. Designed by County Election Supervisor Teresa LePore to provide lettering large enough for the nearsighted elderly to read, the ballots presented candidates listed alternately on both sides of the ballot with punch holes running down the center. Gore's name was listed second on the left side of the ballot, but his punch hole was the third one down, just below that of Patrick Buchanan, whose name was on the right side. Despite large arrows directing voters to the appropriate holes, a number of voters apparently intending to vote for Gore may have mistakenly punched the Buchanan hole. Controversy over the confusing ballot had begun before noon. LePore's office had been asked by anxious party officials at midday to make certain the complexities were being explained in each precinct. Still, Buchanan received 3,411 votes in Palm Beach county, more than three times his total of 1,013 in Pinellas county, his second-best showing in the state.

By November 8, the first of the lawsuits by Gore supporters challenging the ballots and seeking a revote had been filed. Two days later, Daley told reporters that "our legal team has concluded that the ballot in Palm Beach County was unlawful."<sup>3</sup> In Washington, Gore's press secretary, Chris Lehane, suggested that when a similar problem had arisen in Tampa, the courts "took a statistical analysis of what the voting patterns had been throughout that city for a particular district . . . and they then took that statistical measure and applied it to that district."<sup>4</sup> In fact, no such remedy had ever been applied by the Florida courts absent a showing of massive fraud.

Bush's Florida election law specialists were certain that no challenge to the Palm Beach County ballots would be sustained. First, the design appeared to comply with Florida law. Second, a full description had been circulated to and



approved by representatives of both political parties as well as the Secretary of State in advance of election day.

Additionally, a 1974 ruling by the Second District Florida Court of Appeals in *Nelson v. Robinson* had established unambiguous precedent to the effect that mere confusion engendered by the ballot design “does not amount to an impediment to the voters’ free choice if reasonable time and study will sort it out. . . .”<sup>5</sup> In *Nelson*, the large number of offices and questions on the ballot had led officials to list certain candidates on a line under the one identifying the race and listing several candidates for it.

Furthermore, even had that judicial hurdle been surmounted, Gore’s butterfly ballot case was doomed by the nonexistence of any appropriate remedy. That a court would simply apportion some unspecified number of votes along the lines of votes cast was unthinkable. And a revote was constitutionally impermissible. The United States Constitution provides that “the Congress may determine the time of choosing electors, and the day on which they shall give their vote; which day shall be the same throughout the United States” (Article 2, Section 1, clause 4). Accepting that authority, Congress passed 3 U.S.C.A. Section 1, which provides that “the electors of President and Vice President shall be appointed, in each State, on the Tuesday next after the first Monday in November in every fourth year succeeding every election of a President and Vice President.” That day—November 7, 2000—already having come and gone, the courts were powerless to impose a date of their own choosing.

Legal remedies aside, Bush’s Austin advisors felt that Gore was scoring some political points with the butterfly ballot dispute. Jesse Jackson was already in Florida beginning to kick up a fuss and others were on the way. To counter that ruckus, Evans organized a press briefing on November 9 at which Bush’s political mastermind, Carl Rove, suggested that rather than ballot confusion, the Buchanan showing was the product of hard work. “Not that we’re defending Pat Buchanan, but to set the record straight, there are 16,695

voters in Palm Beach county who registered as members of the Independent Party, the Reform Party or the American Reform Party, which were the labels borne this year by the reform effort in Florida.”<sup>6</sup> Rove noted that the registration for these parties had increased by 110 percent since 1996, compared to 38 percent in the rest of Florida. Neighboring Broward County, for example, had only 476 voters registered in one of the three independent parties. Rove might have added that local factors similar to Palm Beach County’s vote for Buchanan happened elsewhere even without the butterfly ballot. In Volusia County, for example, Libertarian Party Candidate Harry Browne received 3,211 votes—five times his best showing in any comparable county.

So Rove certainly had a point, even if Buchanan’s savage fight for the Reform Party nomination had cost him dearly with party members and his forlorn, embittered campaign had pushed him practically off the charts from coast to coast. But Buchanan himself had already undermined Rove’s argument by conceding to reporters that his showing in Palm Beach county was inflated and undoubtedly included the votes of many intending to cast their ballots for Gore.

Baker was not happy with the way Bush’s Austin advisors had handled the issue. Trying to persuade the country that Pat Buchanan had surged in Palm Beach County was a tough sell. The basic message was that under Florida law the ballot was perfectly legal, and even if it wasn’t, the time for Gore to protest was before the vote. Making a scene now was an act of political gamesmanship.

From this point on, Austin would generally defer to Tallahassee on the handling of Florida issues. On November 10 Baker took the opportunity in a statement to the press to address the butterfly ballot controversy in his own way: “There is a rule of law to be followed for elections. The state of Florida has established legal procedures to design, approve, publish, and if need be, to protest ballots before the election. A Democratic election supervisor designed the ballot. She approved it. The Democratic Party did not question it before the

election. This butterfly-type ballot was used in recent elections in the same county under the same rules. Again, the Democrats did not complain. The overwhelming majority of voters who used the ballot understood it and cast valid votes. Our lawyers have confirmed the legality of this ballot and we have copies of the relevant Florida statute available for you to see.”

Austin agreed that Florida, as the venue of the contest, should also be the venue of the principal public relations operation. Henceforth, the daily conference call would continue, as would the hundreds of daily calls between the two Bush operations. Baker was wary of using himself up during the first few days of battle, as Daley and Christopher had, in his view. Before long, visiting Republicans like Governor Marc Racicot of Montana, former senator Bob Dole, and New Jersey Governor Christie Todd Whitman would hold forth with reporters. Austin would complain that Baker did not maintain a forceful public presence in the state. But he would resist pressure from afar to get too deeply into the daily political savagery.

Baker had far more immediate concerns than butterfly ballots. Rather than confirming or even expanding Bush’s election night lead, the electronic recount was producing something of a meltdown. The net gain for Gore in Duval County was 168; in Polk County, 137. In Gadsden County, where Gore picked up 153 net votes, officials had interpreted 187 total votes that had been rejected by the machines on Election Day, thus foreshadowing the manual recount controversies ahead. There were lesser Gore gains elsewhere, and in about two dozen counties—most of them rural—Bush had actually gained some votes.

Then came two disasters. Officials in Palm Beach County reported that their machine recount had provided a net gain of 859 votes for Gore, and those in Pinellas said that human error on election night had resulted in the failure to count several hundred absentee ballots that, when now run through the system, contributed to a net Gore recount gain of 478 votes.

Ginsberg, who had been trying frantically to keep abreast of developments in the counties, could not believe what he was seeing. Never in his experience had a lead the size of Bush's evaporated during what should have been a routine second run of the vote-tabulating equipment. Baker too could feel the whole thing slipping away. "They're stealing the election," he told Zoellick, not the last time he would express that sentiment and not the last time he would be wrong. As suddenly as it had started, the hemorrhaging stopped. In the final few counties to report, Bush actually picked up a handful of votes. The recount had devastated Bush's margin but not eliminated it. With all sixty-seven counties reporting, the Texas governor clung to a lead of just three hundred votes.

It had been a curious process. Three weeks after its end, the Bush Florida team would receive an unsolicited statistical analysis dated December 2, 2000, from a man identifying himself as Matthew Spiegel of the Yale School of Management. Himself a Democrat, Mr. Spiegel entitled his paper, "Are Chads Democrats? An Analysis of the Florida Presidential Recount." Reviewing the machine recount in every county, Spiegel concluded: "Estimates indicate that on average if a ballot's status changed from no vote to a vote, the chance that it went to Gore was about 15 percent higher than one would expect given his fraction of the county's vote. Overall then, controlling for each candidate's vote in a county and the type of ballot used, this paper estimates that Gore picked up 903 too many votes in the recount relative to what would have been expected by chance machine read errors."<sup>7</sup>

Viewed another way, Spiegel calculated that the recount had produced a total of 4,245 "revisions," defined as "any event that changes either candidate's total." Gore had picked up more than 1,400 votes in the recount, but according to Spiegel, "If the revisions are unbiased then the probability that 4,245 revisions events will produce 1,225 or more net positive outcomes for one candidate is about zero (*t*-statistic

of 18.8). Even if you exclude both Palm Beach and Pinellas Counties on grounds that both are unusual for some reason there still remains almost no chance the results were due entirely to luck (*t*-statistic of 18.8).<sup>8</sup> In layman's terms, the suggestion of wrongdoing was statistically persuasive.

But Spiegel's theory would never be tested. Although the Bush team took some perfunctory steps toward obtaining explanations from the two counties, they would for broader political reasons decide against demanding recounts in any of the sixty-seven counties. And since Palm Beach County was later subject to a complete manual recount, it is very likely that whatever glitch occurred during the electronic recount was rendered moot.

On November 9, even before the machine recount was completed, Gore raised the stakes. His team announced that it would ask for manual recounts in four counties: Volusia, Miami-Dade, Palm Beach, and Broward. Publicly, the Gore forces explained their choice of the four counties as though political calculations were the furthest thing from mind. "The only four counties in which hand counts were requested were counties where there was [*sic*] real anomalies that showed up—real irregularities,"<sup>9</sup> said Christopher on November 11. To reporters covering Gore's Florida challenge, however, the campaign made no effort to conceal the thinking behind its choice: These were the four counties where, considering both vote totals and percentages, Gore had made his strongest showings and where Democratic officials were in majority control of any recount process. A recount in each of the four counties, particularly one conducted under rules vesting considerable discretion in the counters, could generate hundreds, perhaps thousands, of additional votes for Gore, possibly providing him with a narrow victory.

In many ways Gore was following textbook political strategy. Small wonder. Three veteran Democratic trench warriors had written the booklet, *The Recount Primer*, in the mid-1990s: Timothy Downs, Chris Sautter, and John Hardin

Young, Hardin and Sautter were now members of the Gore Florida team. The booklet states “If a candidate is ahead, the scope of the recount should be as narrow as possible, and the rules and procedures of the recount should be the same as those used election night. A recount should duplicate the procedures of election night to correct arithmetical or counting errors.”<sup>10</sup>

The trailing candidate takes the opposite approach: “If a candidate is behind, the scope should be as broad as possible, and the rules should be different from those used election night. A recount should be an audit of the election to ensure the accuracy and honesty of the results.”<sup>11</sup>

Then why not seek recounts in all the counties rather than the four selected? “That’s exactly what we should have done,” Young later declared. “Sautter and I were screaming not to limit the recount.” It has been speculated that Gore feared a public relations disaster should he seek to invoke recount procedures in all sixty-seven counties. And, of course, the decision whether or not to initiate the requested recounts would have rested with the individual canvassing boards, many controlled by Republicans. “I think Gore picked the places he thought might get him ahead quickly,” recalled Young. “Once we’re up for 24 hours, the entire dynamic of the fight changes.”

For Baker, who suspected from the outset that the Gore Florida strategy amounted to little more than “slash and burn,” the manual recount request confirmed those suspicions. More important, it laid to rest any notion of a three- or four-day confrontation after which the Bush team could go home a winner. This was becoming a war.

Wars need soldiers and officers, in this case lawyers, lawyers, and more lawyers. A good leadership cadre was already on hand or en route. Baker and Ginsberg, of course. Ted Cruz from the Bush campaign staff was also in Tallahassee. So were Bob Zoellick and George Terwilliger III, former Deputy Attorney General and now a senior partner with White and Case in Washington. Terwilliger’s partner, Timothy Flanigan, was also on hand. Ted Olson, a tough trial and

appellate lawyer from Washington, D.C., had been contacted while flying to Los Angeles and was now en route to Florida. Josh Bolten, of the Gore staff, would also soon arrive. One stroke of good luck was having Bobby Burchfield of Covington and Burling already in place in Miami. Burchfield, general counsel to President George Bush's 1992 reelection campaign, had spent election night in Austin preparing to celebrate the victory and was thus among the first of the lawyers to be sent to Florida. In Miami, he would join forces with Marcos Jimenez, a Miami-based White and Case partner, and Ken Mehlman, national field director of the Bush campaign, who would take charge of strategically deploying the Bush legal and political forces to wherever they were most needed in the state.

Now Baker and Ginsberg sent out an SOS for more lawyers—lawyers who would be ready to do battle for as long as it would take. Michael Carvin, a respected trial and appellate lawyer from Washington, was brought down. Soon Tallahassee was teeming with this “second wave” of lawyers, including John Bridgeland, Ken Juster, Alex Azar, Bill Kelley, John Bolton, Mike Madigan, and others. Some, like Bolton and Madigan, were sent to fight the ground wars in Palm Beach and Broward Counties; others—partners in some of the nation's most prestigious law firms—were asked to research legal issues, write briefs, compose “talking points,” and generally perform the kind of work their own associates had been doing for them only days before. Baker next turned to his own law firm, Baker Botts, and brought in Kirk Van Thyne, who would play a critical role in coordinating legal research for the many court battles ahead. Eventually, Baker would bring from Houston and Chicago two teams of high-powered trial lawyers to handle the contest phase of the Gore challenge, demonstrating that his compartmentalized teams of specialists were more than a match for David Boies, who would become the “Jesus Christ Superstar” of the Gore team. “This was the biggest group of egos not flexing their egos I've ever been associated with,” Ginsberg would later remark.

Within days, the Baker and Ginsberg recruits started pouring into Tallahassee, most winding up at the three-story red brick building that served as headquarters for the Republican Party in the lazy state capital. Office space was limited, secretarial help almost nonexistent, computers at a premium, and the mood of both the new arrivals and the veterans, surly and perplexed. “Tallahassee,” noted John Bolton in his diary, “is a city where there are small armies of lawyers running around everywhere engaging in pitched battles with one another . . . and those are just the Republicans.”

Enter Joe Allbaugh, Governor Bush’s campaign manager. The crew-cut, husky former Marine began by “tossing everybody out,” reassigning office space on the basis of priority, and locating enough office equipment to service a large law firm, which is exactly what the Tallahassee operation was becoming. Phone service was upgraded. Staffs of couriers and drivers appeared as if by magic. Secretaries came later. Most importantly, a three-meal-a-day catering service was initiated. There are today a score or so of Bush Florida veterans who can count on the fingers of one hand the number of restaurant meals they ate while in the state.

While the troops were assembling, Baker was now facing an urgent decision: how should the Bush team respond to the Gore demand for manual recounts? One option was to respond in kind, targeting a handful of Republican counties to offset whatever Gore might pick up in the Democratic strongholds. Baker intuitively disliked that option because it let Gore set the terms of the debate. “I thought we held the high moral ground,” he would later recall. “Our position was: It’s over. We won. Let’s stop counting. Let’s go home.” His intuition was reinforced by advice from Cardenas, Enright, Jimenez, and other Republican strategists. The Republicans had been in overdrive working to get out the vote, they said. In nearly all precincts, they had exceeded their targets. They worried that there may be very few Republican votes left to be counted. Further, even in Republican counties, like Duval, a high percentage of the undervotes—those



ballots containing no vote for the presidency—had been concentrated in Democratic precincts. Difficulty following voting instructions seemed to be correlated with language problems or illiteracy and the incidence of both was higher among Democrats.

The Bush team would not demand any manual recounts. That meant a redoubled effort to block Gore from having his selected counties conduct their own. Here Baker saw as key allies Katherine Harris, the Secretary of State, and L. Clayton Roberts, Director of the Division of Elections. Harris had served as one of Bush's eight state cochairmen, a Florida political tradition which nonetheless would provide ammunition for charges of bias by Gore and his allies, part of an ugly campaign of character assassination waged by high-ranking Democrats and even many in the press whose own impartiality is, at the very least, open to question.

The question of enforcement of the seven-day statutory deadline for completing recounts would come to dominate the legal battle through the end of the protest period. The initial determination involved the circumstances under which a full county recount could be undertaken. There was little doubt that under Florida law the county canvassing boards had absolute discretion to decline to begin a recount.<sup>12</sup> Once they decided to honor the request, they were obligated to manually recount at least three precincts designated by the protesting candidate amounting to at least one percent of the county vote. Florida law provides "that if the manual recount indicates an error in the vote tabulation which could affect the outcome of the election, the county canvassing board shall: (a) correct the error and recount the remaining precincts with the vote tabulation system; (b) request the Department of State to verify the tabulation software; or (c) manually recount all ballots."<sup>13</sup> The critical early question was whether "error in vote tabulation" meant only a problem where the vote tabulation equipment failed to count a properly marked ballot or whether it included the failure to count ballots where the voter had failed to follow

instructions but where visual inspection of the ballot could indicate the voter's intent to vote for one candidate. Shaping up, Baker and his fellow lawyers concluded, was a potential fight between the Secretary of State and the Gore lawyers, which called for no immediate Bush action at the state level.

That left the question as to whether Bush should initiate action in the federal courts seeking to block the manual recounts. The team on hand quickly found itself divided. Zoellick, Flanigan, and Josh Bolten had difficulty finding a federal question. After all, there were dozens of states with recount provisions, most involving manual recounts, and Florida's was just beginning in Volusia and Palm Beach counties, the two counties that had decided to proceed. At the very least, resorting to the federal courts was premature, because Bush had as yet suffered no demonstrable harm. An early loss in the federal courts could set the tone for a consideration of election issues by a far less sympathetic state Supreme Court. Indeed, the latter court could regard such a federal decision as precedent for a decision against Bush. Moreover, advocates of the federal gambit were undermining conservative legal theory endorsed by Bush, which frowns on federal preemption of state issues and prerogatives.

Another experienced appellate lawyer, Mike Carvin, also thought the federal case was weak. There is no way to plausibly argue that manual recounts are unconstitutional, he maintained. Four-fifths of the country uses them. The only argument against manual recounts is that the standards differ from place to place depending on who is doing the counting. And that's a long shot.

Further, there was a chance that a challenge to existing Florida law would backfire. One of the principal Bush assets in the state was the Republican-dominated state legislature. And here were the Bush forces about to target as unconstitutional a statute enacted by that legislature. Would that undermine the legislature's authority? Would it encourage the Florida Supreme Court to tamper with state legislation in

order to correct some deficiency depicted by Bush's own lawyers? The move to invoke federal power was not merely a long shot; it was a serious potential risk, which should not be lightly taken.

Baker, Terwilliger, and Olson came down on the other side. From the outset, Terwilliger felt that the case would wind up in the federal courts and it might just as well be on a series of legal issues framed by the Bush forces. Olson had confidence in the brain trust's ability to come up with a federal issue, though at the outset he couldn't identify one with much precision.

Baker's view was more pragmatic. He thought this was the moment to expand the Bush options, not to foreclose even one. The Florida battle could be resolved by actions of the Secretary of State or the Florida legislature. It could be resolved by one of the candidates faced with public impatience with his fight, or even the impatience of his own party. It could come down to a decision of the Florida Supreme Court or the Supreme Court of the United States. Of these possibilities, the state Supreme Court seemed the least promising to Baker. He had already been told about its penchant for liberal activism. What's more, Baker had once been a close friend with Florida's late Governor Lawton Chiles. The two had regularly attended prayer breakfasts in Washington during Chiles's senatorial years (another regular participant had been Senator Al Gore). Baker had also found in Chiles an enthusiastic fellow turkey hunter and on at least one Florida shoot, Chiles had brought along his friend and counsel, W. Dexter Douglas. "Dexter is a liberal southern Democrat," Baker later recalled, "and I knew he had recommended to Lawton six of the seven justices now on the Florida Supreme Court. So I was wary of that group."

Baker called Bush on the night of November 9 to bring him up to date on the debate. Bush deferred to the legal and political advice of his family friend. If Baker was saying go to the federal courts, that was good enough for the Governor of Texas.

Baker's final objective in connection with the federal lawsuit was to bring in an outside lawyer of great stature to argue the case alongside Olson, "a Charles Allen Wright" type as he later would say. Wright, the late, great Texas legal scholar, had represented Richard Nixon in two historic cases, the Pentagon Papers and the Watergate Tapes disputes, majestically losing both. Baker settled on former Senator John Danforth, a well-liked and fair-minded man, but hardly a constitutional giant. Baker found Danforth vacationing in Cancun and asked him whether he would consider flying to Florida to help represent Bush. Danforth instead began lecturing Baker on the folly of the case and how it would backfire politically and hurt Bush, preventing this young man who had run so credible a campaign from ever again seeking the nation's highest office. Baker decided that Danforth and Cancun deserved each other and made no further effort to interrupt the Missouriian's vacation. The ball was then in Olson's hands. Olson set off for Miami to file his motion in the U.S. District Court for the Southern District of Florida. Baker asked his staff to prepare a statement for the press announcing the decision to go to court. At the GOP headquarters in Tallahassee and in law offices there and in Miami and Washington, computers ran all night and lawyers, who might be charging private clients \$500 per hour for similar services, pecked away at their keyboards.

The following day, Olson strode into court with a thick legal packet including his motion, such legal precedent as could be assembled to support it, and a number of affidavits documenting the chaos that the Bush team claimed was resulting from reliance on manual recounts. With additions and variations, this would be the kind of material he would bring to the United States Supreme Court the following month when the presidency would hang in the balance.