

Fighting the Contest

David Boies did not wait for Katherine Harris to perform the ministerial act of certification Sunday evening, November 26, before sharing with the press his strategy for seeking to have the certification thrown out in a lawsuit to be filed in the circuit court for Leon County the following day. The 168 votes that Gore had picked up in the heavily Democratic precincts of Miami-Dade County during the aborted recount should remain with the vice president, because they were clearly legal votes, according to Boies. In addition, Boies said, “There are approximately 10,000 ballots [in Miami-Dade] that have never been counted once for the presidential election, and it is those so-called undervote ballots that we will be contesting.”¹

Boies also affirmed plans to include “the inexplicable actions in Nassau County” in the lawsuit. Due to human error, 218 votes tabulated on election night were not fed into computers during the automatic recount, resulting in a net loss of 52 votes for George W. Bush. Thanks to the extended certification deadline, Nassau officials had time to confer with the secretary of state, who advised the county simply to go back to the first, more accurate count. Understandably, the Gore team preferred the second, though inaccurate one.

Boies further suggested that Nassau officials had suddenly “replaced one member of its canvassing board with another individual, who appears to be ineligible under Florida law.”² The “new” board then went back to the initial total. Instead of seeking a manual recount—the obvious way to challenge the canvassing board’s final count—Boies said he would simply ask the circuit court to strike down its revised computation and subtract 52 votes from the Bush totals.

Boies also reminded reporters that Gore had problems with the Palm Beach counting techniques, not to mention Ms. Harris’s refusal to include recounted votes that had not met the 5 P.M. deadline imposed by the state supreme court.

And what about the December 12 deadline that had, during weeks of litigation, become the date before which all disputes, including appeals, must be resolved? That deadline was only 16 days away when Boies filed this contest motion. Could the thousands of ballots be counted and all judicial proceedings resolved within this time?

Boies offered one shortcut to help meet the date: “What we obviously would hope is that that process of reviewing ballots would start very promptly, hopefully as early as Tuesday. It’ll probably take until Tuesday to get the ballots from Dade County and from Palm Beach County.”³

From his office at the state Republican headquarters, Phil Beck watched Boies go through his routine like a commentator watching a champion figure skater work through his mandatory program. Beck, along with his partner, Fred Bartlit, and the bearish, supercompetitive Irv Terrell of Houston, would take the lead in interrogating and cross-examining witnesses for Bush. Each was regarded by colleagues—and by himself—as a fair match for David Boies. By contrast, Dexter Douglas, Mitchell Berger, Steven Zack, Kendal Coffey, and other Gore lawyers appeared as satellites bearing only the reflected luster of Boies, their star. Richard would deliver the opening and closing arguments for the Bush team. Beck had litigated against Boies once before, as the attorney for General Motors in its battle against H. Ross Perot, whom Boies repre-

sented. He thought of Boies as an excellent lawyer, a nice guy, friendly, civil, cooperative, and professional, but far from invincible.

Yes, Boies was good, smooth, and talented. But here in Florida, he had also become predictable, his repertoire well known. And with every press conference, every appearance on *Larry King Live*, he and his program became even better known. Obviously, the central issues in the litigation were as Boies had stated: the Palm Beach counting techniques, the deadline imposed by the supreme court, and the truncated Miami-Dade recount. The new disclosure was that Boies was going to try to get the counting going before prevailing on a single legal point in the circuit court. The Bush team would be ready for that.

Beck, whose assignment would be to handle the critical cross-examination of the Gore witnesses, also had a mental file on two he thought would be central to the Gore case. Kimball Brace, a New York-based election and redistricting consultant, and Nicholas Hengartner, a Yale statistics professor, had both filed affidavits before Judge Labarga in Palm Beach. Brace had offered an explanation as to how the deterioration of rubber coupled with the buildup of chads in the Votomatic machines can allegedly make it difficult to punch through the ballot. Hengartner projected a Gore pickup sufficient to win Florida if the complete results from Palm Beach County were included, the 157 net Miami-Dade Gore votes from the aborted recount were added, and the 9,000 remaining undervotes were examined. Beck thought neither witness impressive, and would be astonished when, at trial, they proved to be the only two Boies would put on the stand.

The case had been assigned to Judge Sanders Sauls, a burly, courtly man with a taste for homily and a touch of temper. In an earlier era, Sauls might well have been described as a “Yaller-Dog” Democrat, one more likely to cast a vote for a yellow dog than a Republican. But Strom Thurmond, Barry Goldwater, and Ronald Reagan had turned many a “Yaller-Dog” Democrat into a Republican, and many of those, like Sauls, who for

personal reasons remained within the Democratic Party, had time and again shown themselves more comfortable with Republican candidates at the national level than their own party's candidates. Sauls, in short, was about as good a selection to preside over the contest trial as the Bush team could have hoped for, and as tough as the Gore camp could have feared.

As Boies had indicated, Gore filed his suit November 27, attacking the votes recorded in Palm Beach, Miami-Dade, and Nassau Counties and requesting the advertised relief. It was the first time the certified results of any presidential election had been challenged in the courts and the first contest ever of a statewide Florida race. The section of the Florida code under which the action was brought was 102.168. The relevant grounds for contesting an election under that section include "receipt of a number of illegal votes or rejection of a number of legal votes sufficient to change or place in doubt the result of the election." These grounds stated in the Florida code gave rise to two questions that would dominate the trial before Judge Sauls as well as the argument before the state supreme court.

First, what standard of evidence must a plaintiff meet to "place in doubt the result of the election"? Boise would claim that if the results of the recommended recount could be projected as breaking in the same ratio as the partial recount, the outcome of the contest could be changed and Gore would have satisfied the statute, thus earning the judicial recount. The Bush team would argue that Gore must establish by a preponderance of the evidence a reasonable probability that the results would be different.

Second, does the circuit court assess the evidence *de novo*, in essence becoming an automatic recount service for Gore, or must the vice president establish that the canvassing boards or state election officials abused their discretion in presiding over the counts? The latter standard establishes a very heavy burden on a plaintiff; the former wipes the slate clean of much of what happened during the protest period, even if the actions of election officials were perfectly correct.

As promised, Boies came to court Monday with a motion to begin counting the approximately 9,000 remaining Miami-Dade undervotes. Regarding their relevance, the Boies motion maintained that “if the remaining 9,000 uncounted undervote ballots result in the same proportional increase in net votes as the ballots that were counted by the Board before it stopped counting, these ballots would result in approximately 600 net additional votes for Gore/Lieberman.” Enough, of course, to change the election outcome. Further, “Any effective legal relief will require the remaining undervote ballots themselves, which are the ‘best evidence’ of how the voters voted, to be counted.”⁴

Moreover, according to Boies, time was of the essence:

The work required to complete the vote count in Miami-Dade County must begin now to ensure that any judicial relief rendered in this proceeding will be timely. The counting of these ballots, already improperly delayed, cannot await the final resolution of the legal issues in this contest if the unique electoral college deadline imposed by Federal law is to be met. If a completed count of these ballots must await the prior resolution of these legal proceedings, there could very well be insufficient time to carry out this task and vindicate any relief ordered by this court.⁵

In light of subsequent events, one might be tempted to compliment Boies for his prescience. Beck and Terrell could not help but wonder why Boies seemed so insistent on planting this date, December 12, as the point of no return. However, they would do nothing to change that notion by arguing that the proceedings could well stretch to December 18—when the electoral college met—or even beyond with no reasonable prospect of calamity. Instead, Richard merely argued that to grant the Boies motion would be to provide Gore with the relief he sought without first establishing his legal right to that relief.

Judge Sauls denied the motion, whereupon Boies appealed that interim order directly to the Florida Supreme Court, which also denied relief. If Boies was going to get those ballots counted, he would have to do it after prevailing on the merits of his case.

“That’s the way he played it and he had to live by the results,” Terrell later recalled. But what would have happened if

Boies had simply asked for access to the undercount ballots for purposes of having his expert witness interpret them and then to introduce them into evidence? “Now that might have given us trouble,” Terrell acknowledged.

Boies shunned this direct approach either because it was too simple to engage his brilliant, complex mind or because he had some reason for thinking he would not get the court to concur. Instead, he continued to press for a decision granting access regardless of what had gone before. “The fact that those votes exist is what is important, not whether or not they were certified, and not even whether or not they should have been certified,” ran Boies’s argument.⁶

Richard was at his best in reply to the Boies opening statement. What Boies demanded, Richard said, is “both unreasonable and contrary to Florida law. That this court should disregard all of the actions of the various canvassing boards that are under challenge here, and should begin anew an assessment and a count of all the votes that the plaintiffs challenge.”⁷

“What then are the canvassing boards for?” Richard continued. If Boies is right, there was no need to count the votes election night. Gore and his team had to show that the boards abused their discretion, that they “acted in a fashion which no reasonable person could have done, given the facts known to them at the time.”

If Boies was off to a shaky start in his argument, his case got worse as his witnesses took the stand. Kimball W. Brace, an election data consultant, tried to make the case that the Votomatic machines create problems through the buildup of chads over the voting holes as the voters fail to fully dislodge the paper. However, punching holes proved to be so easy that as Brace tried to demonstrate the making of dimples, his stylus punched right through.⁸ As to the buildup of chads from voters incapable of punching holes, Beck asked sarcastically, “So as long as you got one big brute every 20 people or so that was actually able to vote, whatever chads are in there are going to get pushed off to the side, right?”

“Well there’s a trough that they go into,” replied Brace, his testimony wounded.⁹

Boies was trying to show that imperfections in the voting machine could explain how a voter intending to vote for Gore could leave a dimple instead of a hole, thus padding the case for interpreting dimples as reflecting intent. But the remedy—a manual recount—could create errors of its own. Beck, for example, confronted the witness with a National Bureau of Standards publication that warned that chads may be unintentionally “loosened in the handling” or through “lack of care in tearing off the stub of the chad.”

Brace completed his testimony having done little or nothing for Gore. But compared to Gore’s second and final witness, Yale Department of Statistics Professor Nicholas Hengartner, Brace had been a star.

Gore attorney Jeffrey Robinson took Hengartner on an excursion of recovery rates—the percentage of undervote ballots on which intent could be discerned under the particular standard being employed by the canvassing board. It was 26 percent in Broward County, and 22 percent in Miami-Dade, but only eight percent in Palm Beach. Beck saw the development of those numbers as more helpful to Bush than Gore. Rather than affirming the need for revised standards in Palm Beach, it helped confirm the critical point that the recount was a random, standardless operation, denying due process to the candidate at risk.

Hengartner’s statistics were no more helpful to Gore than Brace’s. Asked by Robinson how the new votes produced by recounts tended to break down, the witness replied that “the votes that were uncovered seemed to follow in the same proportions than [*sic*] the ones that the machines counted previously.”¹⁰ That played right into Beck’s hands. Starting from scratch, Hengartner’s crude projection could be of some use to Gore, because he had carried Miami-Dade County. But with the recount thus far limited to overwhelmingly Gore precincts, the balance of the undervotes

would almost certainly favor Bush, thus undercutting the rationale for performing the exercise.

Hengartner's worst moment was still to come. In a sworn affidavit, part of the Gore team's proffer in support of their effort to get the counting started early, Hengartner had referred to the state elections of 1998, which involved contests for both the U.S. Senate and Governor. More Floridians had voted in the gubernatorial contest. The probable reason, according to Hengartner's sworn statement, was that the senatorial race appeared in column one of the ballot and the gubernatorial contest appeared in column two, and that the system apparently had not recorded all of the votes cast in column one. Although this would have reinforced Gore's claim that either a chad buildup or rubber erosion was responsible for some of the dimples, it was a high-risk, low-payoff line of attack because the Florida Supreme Court had already held that no machine or computer error was necessary to justify a manual recount. To the contrary, the court had specifically overruled Katherine Harris on this point, holding that even voter error could justify the search for voter intent.

What's more, Hengartner had gotten his facts wrong. Producing a sample 1998 ballot, which he highlighted on a screen for all to see, Beck picked up the cross-examination:

- Q: Read, please, for the court, because this is out of focus, what is the race here up at the top of column one?
- A: This is the congressional United States Senator.
- Q: And then what's right underneath the United States Senator in column one?
- A: State Governor and Lieutenant Governor.
- Q: So what you said in your sworn affidavit was in column two was actually in column one, right?
- A: It was the second race.
- Q: Was it in column one on that ballot or not?
- A: My understanding, it was the second race, and it should have been in column one, a mistake, it was the second race, and that's what I meant.

- Q: Well, in your affidavit, you didn't say it was the fact that it was the second race is what's important. You said that the fact that the senate was column one, and the governor was in column two, why, that seemed to suggest that the voting machine wasn't recording all the votes cast in column one, because the guys in column two were getting more votes? Do you remember that?
- A: I said that this was possible, yes.
- Q: And you can see here that that sworn affidavit of yours, as well as the proffer that the lawyers submitted to this Court, and the Florida Supreme Court, that just wasn't true, was it?
- A: It contained a mistake.
- Q: And as you said it, notwithstanding what your affidavit said about a closer inspection of the ballot, you never even looked at the ballot, right?
- A: I've looked at the order in which the races were ran [*sic*], sir.
- Q: And when you signed that sworn statement, you were relying on the Gore legal team to give you the straight facts, weren't you?
- A: Well, I relied on the facts that I received, yes.

As in their effort to convert the Pullen case in Illinois into precedent for counting dimpled chads, the Boies team had put false information before the court in an affidavit swearing that the information was true. It was, at best, extremely careless lawyering.

Boies then told the court he would put no more witnesses on the stand. This surprised both Beck and Terrell. Given the likelihood that Judge Sauls would make Gore meet the "reasonable probability" standard in order to get his manual recount, they had expected Gore to mount more of an evidentiary case. Gore had offered no evidence to suggest that the Miami-Dade decision to stop counting was wrong, or that inappropriate counting standards were used in Palm Beach County, or for that matter, that anything inappropriate was done in Nassau County, beyond merely asserting that it was.

Beck had also been surprised at what he would later describe as the "ridiculously dismal quality of the expert witnesses" Boies had placed on the stand. "This was professionally offensive to me in an important case," he recalled. "Their quality was similar to what you would get

in a ‘strike suit’ product liability case where you put a lousy expert on the stand and then try to extract a settlement.”

Beck and Terrell shared the view that Boies should have gone for the big hit by himself counting a sampling of undercount ballots and introducing the results as evidence interpreted by a qualified expert witness. By insisting that Sauls count them and appealing his refusal to the State Supreme Court, Boies had painted himself into a corner on the question of time while securing no relief.

As the Gore team concluded its case, Terrell glanced across the room at David Leahy, the Miami-Dade election commissioner whom he assumed would be a witness for Gore. True, he might have said some things about the suspension of the count that Gore might not have liked, but he might also have defended the way the ballots had been looked at in producing a 22 percent recovery rate. He might have explained how manual recounts could be conducted without degrading the ballots. He might have given a human face to the “count every vote” Gore slogan by showing how, with patience and diligence, it could actually produce a fair result. Why hadn’t Boies called Leahy? Terrell thought the reason was uncertainty because he, Terrell, had initially placed Leahy on the Bush witness list, just in case he were needed to justify the November 22 decision to suspend the recount.

The Bush team was confident that Gore had failed to make a reasonable case for contesting the certification and they counted on their witnesses to put an exclamation point to the proceedings. As he had before Judge Labarga in Palm Beach County, Judge Charles Burton made a superb witness, brimming with common sense, an ethic of public responsibility, and by now, a practical familiarity with the vagaries of machine-made dimples and manual recounts. Why did he eventually opt for a conservative approach that disallowed most of the dimples? Simply because he experimented with the voting machines himself and found it hard to credit the notion of widespread inability to follow directions and punch holes. He recalled that prior to his testimony on No-

vember 22 before Judge Labarga, “I was asked to bring along a voting machine, and I tried it before, and it was very difficult to make an indentation like that, because it seemed it was quite easy for me to pop out the chad.”¹¹

One of the more revealing moments of the contest trial occurred when Burton was explaining his opposition to the standardless count that the board had undertaken in the sample precincts and his initially unsuccessful effort to impose more rigorous procedures. “Since that day I guess I’ve been the one accused of trying to block this recount, which is not the case,” said Burton.

“Absolutely not,” drawled Sauls from the bench. “I’ll have to salute you as a great American.”¹² There seemed little danger of the court disowning Burton’s methodology, or his results.

Beck put his own expert witness, statistician Laurentius Marais, on the stand to clean up the statistical mess left by Boies and Hengartner. Recalling the Gore assertion that Miami-Dade could generate an additional 600 net Gore votes if the pattern established by the initial manual recount was continued by the remaining 9,000 undervote ballots, Beck questioned Marais.

Q: Now is that approach that is laid out in the Gore-Lieberman complaint a valid one from a statistical point of view?

A: It is not, and it makes for an unreliable and inaccurate projection, because it is based on a false premise.

Q: What is the false premise?

A: The false premise is stated in the portion of the text that you read. That is, if the proportion of net votes gained by the Gore side were the same in the remaining, approximately 9,000, then a certain result would follow.

But to interpret that and assess it, one needs to know that the portion of the precincts that were recounted by hand were heavily Democratic, in fact, those are precincts in which Gore won over Bush by a margin of greater than 75 percent to 25 percent. That is very different from the remaining precincts where, in fact, in the underlying machine recount totals, Bush beats Gore by a margin of about 52 to 48 percent.¹³

Beck had faced one interesting dilemma in attempting to rebut Hengartner's testimony to the effect that the high percentage of undervotes in Palm Beach County—2.2 percent—suggested problems with the Votomatic machines there. Beck knew an alternative explanation: voters were confused by the butterfly ballots in that county and had made all sorts of random marks while deciding how to vote for the presidential candidate of their choice. Convincing? Perhaps, but it would certainly reinforce the complaint of Gore supporters that the butterfly ballot had been responsible for their man losing Florida.

Beck raised the matter with Ben Ginsberg, who told him to use the confusion explanation if it would help his contest case. After all, the butterfly lawsuits were failing on every front. The presidency would likely be decided in the contest trial. Now was not the time to be erecting monuments to consistency, or the next monument erected could be a memorial to the Bush candidacy.

Armed with Ginsberg's approval, Beck asked the witness whether the confusing ballot, rather than rubber or other machine problems, could be the reason why people either didn't vote at all or "claim they were so confused by the ballot that they ended up voting for two people?"

"It's one of the things one would want to consider," Marais replied.

Q: And would you also want to consider, if you were going to do thorough investigation, that there were other people who claim that they were confused by the ballot and they ended up voting for the wrong guy?

A: That would suggest another explanation to be investigated, yes sir.

Q: So would you want to investigate whether there was a possibility that with that same butterfly ballot that people complained about, some people might have just thrown their hands up in the air and said, "I can't figure this out, I'm not going to vote for any of these guys"?

A: It would be a factor to consider.¹⁴

Not all of the Bush team moves were as inspired. John Ahmann, a former IBM engineer who had updated that company's Votomatic machine and who held patents on later machines, was called to rebut the notion that machine failure had been responsible for many of the undervotes even though this was a matter of complete irrelevancy under the first of the Florida Supreme Court decisions. "I seriously doubt that the voter would be unable to push the chad through on a normal voting device," he testified.¹⁵ Later he rejected the claim that most dimples represent attempts to vote for the candidate near whose name it appears. Instead, "An indentation may result from a voter placing the stylus in the position, but not punching through."¹⁶

Ahmann also found unimpressive the Gore claim that chad buildup could somehow prevent the stylus from punching through. "I know of no way it could happen," he said.¹⁷

So far, so good. But Steven Zack, one of the Gore lawyers, immediately began to cross-examine Ahmann on a patent application he had filed in 1982 for an automatic voting machine designed to eliminate some of the problems with its predecessors, models that happened to have been used in those Florida counties that still relied on the punch-card method. The Bush lawyers exchanged nervous glances. None had known about the patent application Zack was talking about.

They would soon learn about it. In describing the old machines, the application stated: "Therefore, the material typically used for punch board and punch card voting can and does contribute to potentially unreadable votes because of hanging chad or mispunched cards."¹⁸

Another problem identified on the application: "If chips are permitted to accumulate between the resilient strips, this can interfere with the punching operations. . . . Incompletely punched cards can cause serious errors to occur."

Moreover, both in deposition and on the witness stand, Ahmann agreed with one of the central Gore contentions: Zack asked, "In close elections a hand recount is advisable, correct?" Ahmann replied, "In very close elections, yes."¹⁹

Beck was embarrassed but not particularly troubled by the Ahmann admissions. Clearly, it had changed the ambiance in the courtroom from one of an untrammelled Bush march to victory to something rather less. Legally speaking, however, Beck would later call it a “nonevent.” Recounts, after all, were not the central issue. Gore had requested and received recounts in only four counties. The issue was the disposition of those recounts by the canvassing boards whose actions were now in dispute. If the court adopted Boies’s reasoning that their actions were irrelevant and the closeness of the election per se entitled Gore to the recounts of his choice, then very little that had gone on in the court would matter. If, on the other hand, Gore had to prove by a reasonable preponderance of the evidence that the boards had abused their discretion and that more counting was likely to change the results, he had failed miserably. His statistics were flawed and his evidence nonexistent. Despite all the talk about uneven rubber wear and chad buildup, Boies hadn’t offered a shred of evidence of a single machine malfunction.

The remaining witnesses covered other bases of the Bush position: The counting techniques varied from county to county, and in the case of Miami-Dade, from one canvassing board member to another. The Miami-Dade sampling was egregiously weighted in favor of heavily Democratic precincts. Voters in non-recount counties had their votes diluted by the manual recounts. A voter who had started to vote for Gore and changed his mind, intending in the end to cast no vote for president, testified he was certain he had left a dimpled chad next to Gore’s name. Shirley King, the supervisor of elections for Nassau County, gave a matter-of-fact recitation of the “lost” 218 presidential votes, which she had corrected via procedures so open and aboveboard that one could feel the sting going out of the Gore complaint. The Bush team offered no evidence to challenge the counting techniques employed in Broward County, in part because their collective judgment was that Gore had presented too weak a case to require it and in part because they felt there

might still be time to offer “remedial” evidence if Gore did prevail.

Like Beck, Terrell suffered a moment of embarrassment. Paul Spargo, a Republican election lawyer from Albany, New York, came to Miami on November 18 to assist in monitoring the actions of the board. He testified about the process of “chad mutilation” attendant to the counting and at one point claimed to have seen at least a thousand loose chad pieces on the floor, all the product of a single day’s counting. Regarding the condition of the ballots, Spargo said, “Well, the handling of them, at least the ones that have been counted, are—have been subjected to a lot of mishandling, if you will, to the extent they’ve been impounded, they’ve been twisted, they’ve been moved around, rubbed up against each other, and I think, to many degrees, to the extent that new chad has accumulated, those ballots have been substantially changed.”²⁰

Not the testimony on which the election would likely hinge, thought Terrell, but a useful fleshing out of the Bush position that new manual recounts would as likely be a source of mischief as enlightenment.

But the second question from Gore lawyer Kendall Coffey almost knocked Terrell off his chair. “Isn’t it true,” Coffey began, “that the last time you were on the witness stand on matters of reliability and integrity in an election scenario, you took the Fifth Amendment nineteen times?”²¹

Terrell leapt to his feet. “This is what you call your basic bushwhack,” he complained. “He knows it’s not proper. He’s coming in to embarrass him [Spargo] and I suggest he tender whatever evidence he’s got. I think it’s irrelevant.”

Technically Terrell knew he was right. Spargo had never been convicted of anything and had faced no disciplinary proceeding with the New York State Bar Association or the courts over the incident, which had occurred more than a decade ago. The question was out of order and, after a short conference in chambers, Judge Sauls ruled the issue closed. Still, Terrell hadn’t known a thing about it, and that bothered

him. Plus the bolt from the blue had again unsettled what had been a long and smooth Bush run.

For reasons that were not evident at the time and are no more apparent today, Beck decided against introducing evidence to challenge the liberal counting rules of Broward County which had netted Gore 567 votes. Beck would later maintain that he knew Gore's case had failed and decided to let well enough alone. But the decision seems one of those mistakes from which lucky lawyers escape unharmed and unlucky ones—or at least their clients—suffer. With nothing on the record to support the claim of poor methodology, the state supreme court was quite correct when, days later, it considered the recount results final and exempted Broward County from the statewide recount it ordered. Had the U.S. Supreme Court then remanded the Florida ruling with instructions to resume the recount under a single counting standard, it too could have exempted Broward County as settled. As gifted as was his destruction of the Gore expert witnesses, Beck left slightly ajar a door to disaster that readily could have been closed.

Little in the closing argument of either side could be characterized as particularly noteworthy. The lawyers had made the central points in briefs and opening statements and there was now little left to say. Richard, in his closing argument for Bush, did try to distinguish the protest and contest periods on the issue of voter error and intent. Whatever rule the state supreme court had applied to the protest period, he argued, voter error could not possibly be a basis for overturning a certified election. That would be like a voter saying that because he forgot to vote on election day, he was entitled to have the polls opened for his benefit sometime later.

A lawyer named William Jenkins, who had represented five individual Bush supporters, did offer in his closing argument perhaps the most candid statement of Bush's opposition to manual recounts from Day One of the battle: "Governor Bush got his undergraduate degree from Yale University, Your Honor, he got an MBA from Harvard, he's been successful in many businesses. I suggest to the Court that there

is absolutely no way that he is going to ask for any recount in the statewide election that he already won.”²²

By the time the last lawyer had finished the last argument before Judge Sauls, it was 11 P.M. on Sunday, December 3, and the parties had spent 14 hours of their day in court. Despite the mental and physical fatigue, the Bush camp was optimistic. They had been bitter when Gore had announced his intention to contest the certification. Even Bush, in a private conversation with Baker had expressed “shock” that Gore “will not stop at anything.” To Bush, who rarely personalizes his political battles, Gore had shown he had “no sense of decency.” Now, the men and women who had worked to defeat Gore in the postelection battle felt he was about to get his comeuppance. “We were a little nervous, but we thought we had won,” recalled Kenneth Juster. Phil Beck thought that “Gore had essentially presented no evidence to support his claims.”

True enough, but as the hour for the Sauls decision drew near, MSNBC reported that twenty-five counting teams had been assembled at the circuit court. That could mean a decision for Gore, with the counting to begin immediately after its announcement. Bush lawyers shuddered at the thought and then rejected it as the body rejects a foreign organ: No, the case had gone too well. No trial court could hold against us on this record. Victory is at hand.

The taste of impending victory became stronger when the U.S. Supreme Court handed down its decision vacating the first Florida Supreme Court case. Then word came that Judge Sauls would announce his decision at 4 P.M. Walking to the courthouse, Fred Bartlit warned his colleagues to keep a poker face no matter what happened. As an old trial lawyer, he may have been a bit superstitious. Or he may have been thinking that there would still be legal battles ahead and he wanted no one to take offense at an arrogant Bush team celebration.

Sauls began reading his opinion. His recitation of the issues seemed to drag on forever, but after reviewing the Gore charges of mistakes and irregularities, he set the bar high: “It is not enough to show a reasonable possibility that election

results could have been altered by such irregularities or inaccuracies. Rather, a reasonable probability that the results of the election would have been changed must be shown.” Then came the clincher: “In this case, there is no credible statistical evidence and no other competent substantial evidence to establish by a preponderance a reasonable probability that the results of the statewide election in the state of Florida would be different from the result which has been certified by the State Elections Canvassing Commission.”²³

Sauls proceeded to find for Bush on every material issue:

- There is “no authority under Florida law for certification of an incomplete, manual recount of a portion of or less than all ballots from any county.”
- There is no authority to “include any returns submitted past the deadline established by the Florida Supreme Court.”
- Regardless of voter error or equipment problems, Gore failed to show that a full recount in Miami-Dade County would be likely to reverse the statewide outcome.
- There was no abuse of discretion—a necessary element for Gore to succeed—by the canvassing boards.
- The Palm Beach County Canvassing Board had acted within its discretion in establishing counting standards.
- A two-tier system giving voters in recount counties a greater chance of having their ballots counted may well violate the equal protection clause.
- The Nassau County Canvassing Board acted properly in substituting its election night ballot count for the inaccurate mandatory machine recount figure. Moreover, had Gore sought to challenge the result, he should have sought a recount.²⁴

There were screams and cheers and high-fives all over the GOP headquarters. Back at the court, one Bush lawyer scribbled “Home Run” on his legal pad and handed it to a colleague. The colleague added his own postscript: “Total

Fucking Victory!” A more sober Phil Beck said, “This was as complete a victory as I’ve ever gotten at a trial.”²⁵

“They won. We lost. This is going to be resolved by the Florida Supreme Court,” snapped Boies with unusual brevity. “I think whoever wins at the Florida Supreme Court, we’ll accept that.”²⁶

Yes, the case would go to the Florida Supreme Court. The Bush lawyers knew that as well as anyone. Yet there was no discounting the importance of the Sauls decision. First and foremost, there had not been a single vote counted in Florida since November 26—eight days before—and none would be counted at least until after the Florida Supreme Court ordered recounts to resume. Gore was being backed up against a deadline. It may already be too late for him to prevail. And his ability to forge ahead in the recount, thereby preempting the Florida legislature, was destroyed.

Second, Sauls had found for Bush both on the law and on the facts. The Florida Supreme Court might have its own idea of the law, but they would owe considerable deference to the trial judge’s finding of facts. And in any event, those facts, particularly regarding the weird and standardless counting procedures, would still be on the record, ready to influence the U.S. Supreme Court should it decide to hear arguments of equal protection and due process.

Third, as feisty as that supreme state tribunal had been in the past, it was now surrounded on three sides. The Sauls opinion had been based on an underlying factual record that would be hard to ignore. True, the judge’s opinion amounted to little more than a series of sweeping statements and evidentiary findings without specific citation to the testimony on which it was based, but that record was there for a reviewing court to examine. And if that court chose to go off on another frolic of its own, the U.S. Supreme Court had just shown it was not reticent about vacating state Supreme Court decisions grounded in hyperactivism. Further, the Florida State Legislature was contemplating a special session to appoint a slate of Bush electors. With time desperately

short, the state court still had one more move to make. Could it impose its naked will on the process? Probably not.

As he left the courthouse, Irv Terrell played the kind of mental game trial lawyers often play, putting themselves in the adversary's situation and thinking how they might have handled things had the roles been reversed. "I think David was so confident he'd get the results he wanted in the Florida Supreme Court that he never paid as much attention as he might have to building a good record," Terrell later recalled. "His approach was to throw spaghetti on the wall and see if it sticks. David thought he could win with a lot of confusion, a lot of chaos, and that with standardless counting he'd be okay." Boies, he felt, never built a good statistical case. And he was stretched very thin. The Bush team was organized into a group of strategic thinkers at the top, supported by trial lawyers and brief writers, plus the people who ran the ground war in the recount jurisdictions. Together they had beaten a team led by a talented superstar but with a supporting cast boasting few candidates for the litigation hall of fame. The Bush team was in good shape now. All they needed was one more win, and it could come from almost anywhere.

In fact, the odds looked so good that there was hopeful speculation that Gore might choose this moment to give up his battle. Baker remembered that Tom Feeney had by coincidence scheduled a press conference to discuss legislative plans to name a list of Bush electors. This was a poor moment for that. Baker liked and respected Feeney, but also saw him as a tough little burr who could easily get under the blanket of the Democratic donkey and turn its backside raw. This was one of the only times during the postelection battle for Florida that Baker called Feeney directly, asking him to hold off while everyone watched Washington for Gore's next move. Feeney agreed and postponed his conference.

Gore stayed in the fight.