CHAPTER 8

Losing in the State Court

Thursday, December 7. "Hear ye, hear ye, hear ye. The Supreme Court of the great state of Florida is now in session," cried the bailiff. He might have added, "And the presidency of the United States hangs in the balance." That unspoken thought seemed to humble Chief Justice Charles Wells as he began questioning David Boies at a session that would mark the beginning of five days of constitutional turmoil.

Should the Florida Supreme Court even be involved? Wells wondered. Didn't the U.S. Supreme Court rule just days ago that under a century-old precedent the state legislature has plenary power to provide for the selection of presidential electors? And hadn't the Florida legislature given the circuit court the power to resolve contest disputes with no reference at all to the supreme court's power of appellate review?

Both Boies and later Richard, representing Bush, seemed a bit nonplussed by the question. Neither had questioned the supreme court's power of appellate review as implicit in the process of judicial responsibility. In fact, with a touchy challenge to the absentee ballots of Seminole and Martin counties moving toward resolution in a circuit courtroom presided over by two unpredictable Democratic judges, the moment did not seem a propitious one in which to attack the

concept of appellate review. Still, the very question propounded by the chief justice suggested a far different atmosphere among the supreme court justices than the first time around.

Justice Peggy Quince wondered why during the contest period Gore should be able to potentially overturn a statewide election with selective county recounts. "And why wouldn't it be proper for any court, if they're going to order any relief, to count the undervotes in all of the counties where, at the very least, punch card systems were operating?"[1]

Boies had been facing variations on the same question from the media and the courts since the outset of the protest and his response was always a variation of his reply here: "I think the first difference is that that's where the ballots were contested."[2]

Boies further urged that Judge Sauls's decision had been based on three errors of law. First, that there was a need for a statewide recount; second, that the standard for judicial review was abuse of discretion by the canvassing boards; and third, that in order for the court to inspect ballots, Gore had first to show a reasonable probability that the result of a ballot recount would change the outcome of the election.

Justice Major B. Harding then hit Boies with the same question Terrell had reflected about during the trial below. "Did anyone ever pick up one of the ballots and hold it up and show it to the judge and say, 'This is an example of a ballot which was rejected but which a vote is reflected?'"[3]

Boies had no answer of consequence. At trial, he had simply put the ballots into evidence and urged the court to count them.

Richard was also asked to address the question of whether the court had jurisdiction to review the Sauls decision. "Indeed you do," he replied. "In fact this is nothing more than a garden-variety appeal from a final judgment by a lower court reviewed after a full evidentiary hearing."[4]

Among the Bush lawyers watching the argument in person or on television back at GOP headquarters, that response,

more than any other single event, produced instant heartburn and confirmed the suspicion of several that Richard was a glib but overrated ally. "Garden variety appeal," indeed! With the presidency of the United States up for grabs, the Gore team urging that what was involved was simply a state court interpreting state law, and constitutional scholars around the country debating whether there was a federal hook for U.S. Supreme Court intervention, the last thing in the world the Bush team wanted to be doing was trivializing the legal issues at stake. Rather than calling it "garden variety," it was in the interest of Governor George W. Bush to underline the fact that this was a unique and monumentally important case. At issue here was no county sheriff race, but one governed by a comprehensive federal scheme and strict rules passed by the state legislature, both of which severely proscribed the options of the state supreme court. No broad equitable powers could be invoked here, no muscling aside of legislative prerogatives. Change the law and your "safe harbor" is gone. Encroach on legislative mandates and you have trampled Article 2.

Justices Harry Lee Anstead and Barbara J. Pariente pushed Richard on the question of whether the trial judge had erred in refusing to review the ballots admitted into evidence. How, Justice Pariente asked, could Judge Sauls be said to have met the statutory mandate to "do whatever is necessary" to ensure that each allegation in the complaint is investigated without counting the ballots?

Here Richard's response was in the right direction: "We had an absolute failure on the part of plaintiffs here. This court gave the plaintiffs the opportunity to have a trial to prove their case, and it was an absolute failure in the record of this case to establish an abuse of discretion by any of the canvassing boards."[5]

Then, in a sustained question and riposte exchange with Justice Pariente regarding the undervotes in Miami-Dade County, Richard failed to emphasize the statistical problem with the Gore case. If the mere number of undervotes equal

to or greater than the number of votes separating the candidates justifies a recount, then why did Gore's lawyers choose as one of their two witnesses a Yale statistician who sought to project a favorable recount outcome from what had been counted thus far? The reason was simply that he was trying to establish a case for the importance of a further recount. Due to Beck's withering cross-examination and effective testimony from a Bush rebuttal witness, the Gore team had failed miserably to do so. Not only was Judge Sauls on solid ground reaching that conclusion, but the evidence in the record against Gore's claim was so overwhelming, it might have constituted reversible error for Sauls to have gone the other way. Richard's failure to close that latch would let the Florida Supreme Court open the door to further mischief.

Richard also wandered back into the briar patch of voter error versus voter intent, claiming that for Gore to prevail, he had "to show that there was any reason to believe that any voter was denied the right to vote because of something other than the voter's own fault."[6] While the Florida Supreme Court in the first election case had specifically rebuked this standard, the issue had received continuing attention from the Bush lawyers. What standard should the courts or counters apply in determining whether a voter's less-than-perfect expression of his will should count? Terwilliger wanted no standard associated with the Bush forces; let the courts create their own problems. Beck urged backing for the Burton/Palm Beach County standard that dimpled chads don't count unless their pattern suggests voter intent. Terrell himself urged what he called the "statutory compliance" standard, that without proof that the voter sought to comply with directions to punch the hole with his stylus, his vote should be discarded.

At some point the issues merged. The more tolerant the standard for counting, the more undervotes would become votes for one candidate or the other. The more votes for one candidate or the other, the greater the likelihood a manual recount would alter the outcome of the battle. Ironically,

what the Bush lawyers never appreciated was that once Gore had skimmed the cream off his four selected counties, Bush had more to gain than lose by tolerant counting rules everywhere else. Contrary to the belief of the state GOP, subsequent recounts would show that Republicans were scarcely more immune than Democrats to voter error. The stylus proved a nonpartisan instrument of iniquity. In counties where there were more Republicans, there were more recoverable Republican votes.

Not until the closing moments of his argument did Richard return to the salient point of Gore's failure to sustain any burden of proof at trial. To order a new recount, he said, the court must conclude that such a recount would change the result of the election. "If you look at the evidence here and you look at the lower court judge's determination, no matter which standard you use, there was insufficient evidence to indicate that," said Richard.[7]

From his place at the counsel table where he was once again representing Katherine Harris, Joe Klock found the proceedings faintly ironic. Here was a court dealing with at least three different counting standards, none of which had been in place prior to November 7, each of which therefore violated the "safe harbor" federal law provision that the U.S. Supreme Court only days ago had urged the state court to respect. The same was true with the selective county recount. Even this court now seemed to recognize it as constitutionally offensive. Yet how could they change? "The Florida Supreme Court was caught between Sylla and Charybdis," Klock would later say. "If they don't articulate new standards both as regards ballot counting and having the recount go statewide, they run afoul of equal protection. If they do make the standards conform to equal protection, they have changed the law in violation of 3 U.S.C. § 5 and probably Article 2 as well. Particularly after the U.S. Supreme Court had warned the Florida court not to tamper with the safe harbor, they had nowhere to go." In his brief argument, Klock simply warned the court that should it decide to reverse Judge

Sauls and conduct new recounts, it would likely run afoul of the "safe harbor" warning "because the problem is that you have to create a pile of law to do it."[8]

In his final argument Boies showed himself at his most dexterous and arrogant. The dexterity involved the Miami-Dade recount. Under a statute that plainly on its face requires a recount of "all the ballots," Chief Justice Wells asked how the court, without legislating from the bench, could order only the 9,000 undervotes counted.

Boies's reply: "But I think that's right, Your Honor. I think that you could interpret the law that way. I think you could also interpret the law in the sense of saying all the ballots that were requested to be manually recounted. If neither party requested the others to be manually recounted, and if the machine was recording votes, I don't think you would necessarily, under that statute, have to interpret it that you would have to do that."[9]

Of course, Boies had reason to feel confident that a majority of Florida justices would interpret clear statutory provisions as meaning the opposite of their plain definitions. Just two weeks earlier the same court had done so in writing new deadlines for completing manual recounts.

Finally, Boies once again was asked to defend recounting the ballots in four Democratic counties but ignoring those counties that voted heavily for Bush. Boies replied that "every party has a right to contest, but no party is required to contest. What the sense seems to be is that somehow Governor Bush's campaign should be protected from Governor Bush's lawyers. If they didn't ask for a recount, and therefore, there should be a recount anyway, even if they didn't ask for it."[10]

Boies's smug put-down of the Bush lawyers was as legally flawed as it was inappropriate. Although any party can request a recount in the early protest period, only the losing candidate can contest a recount following certification. Thus even if Bush had sought to reverse an election he had won, Florida state law would have prevented him from doing so.

Why the certified victor would undertake such an effort is a question that would tax even the subtle and complex intellect of David Boies.

The Bush team had mixed feelings about the Florida Supreme Court argument. One certainly sensed a thirst for closure, a disinclination to disturb the judgment of the lower court among a few of the justices. Even the more activist justices could provide no real answer to the question of how any new recount could be accomplished by the December 12 deadline, now less than five days away. Finally, there was a sense that Richard had not enjoyed his best day. He had mentioned the court's limited jurisdiction, but not really driven the point home. He had not been particularly effective in responding to Boies's erroneous claim that the completed recount in Palm Beach County produced a net gain of 215 votes for Gore rather than the correct figure, 174. He had not been powerful enough in emphasizing that permitting the figures from Miami-Dade's partial recount to stand would violate the equal protection clause if not the Voting Rights Act of 1965.

How much of this concern was rational and how much was the product of fatigue, tension, frustration, jealousy, and political bias is tough to judge. Clearly, December 7 had not been Richard's finest day as an attorney, any more than November 20 had been Michael Carvin's. But this was a court that followed its own zealous instincts, controlling through questions from the bench the issues counsel could fruitfully address.

Still the conversation at GOP headquarters continued. From the course of the argument there was agreement that at least three justices—Wells, Harding and Shaw—seemed likely to vote to affirm the decision of the lower court. Pariente and Anstead were hopeless. Quince had some problems with equal protection and Lewis was a mystery. Maybe there was some way to get one last thought before the court that might sway a wavering justice for the vote needed to put George W. Bush in the White House.

The discussion turned to Wells's opening questions on jurisdiction. Clearly some reminder of the limited nature of the court's function was called for. But what about the contest statute itself? Did it really apply to presidential contests? In earlier proceedings the Bush team had conceded that it did, as ill-suited as it was for any statewide race. Some on the Bush team had continued to question its applicability and it had only been at the eleventh hour that they had decided not to argue against contests in their motion to dismiss the Gore complaint before Judge Sauls.

Now Bolton, Juster, and others suggested that the group begin to write something that might be filed as a supplementary brief to the state supreme court case just argued. In its final form the short supplemental brief would include sections on the court's jurisdiction, the Palm Beach count, Miami-Dade, and the supposed nonapplicability of the contest option to a presidential election. In a sharp footnote to its December 8 decision, the court called attention to the "substantial and dramatic change of position after oral argument in this case," and the fact that the new Bush position had been expressly disowned by both Carvin and Richard in their respective arguments before the court.[11] Indeed, Carvin in open court had argued that a principal reason not to extend the initial certification deadline would be to avoid stepping on the contest period where Gore could make his case to the courts. Not only did the switch fail to attract an additional vote on the court, but also it provided a foul whiff of legal opportunism to what otherwise had been a compelling case. "It was something we did in haste and under incredible time constraints," one Bush lawyer later explained. "And while I think there is merit to the contention that Florida's contest provisions are unworkable in the presidential context, in light of our previous positions, it would have been better not to have introduced the argument at the time and in the way we did."

Still some of the Bush lawyers remained confident. The combination of the Sauls decision and the first ruling by the

U.S. Supreme Court, together with a sense in the media that the Gore effort was entering its final days, had produced a feeling of mild euphoria among many. About the only blip on the screen had been that on December 6, the 11th Circuit Court of Appeals had voted 8–4 to again deny Bush's motion to stop the recount on the grounds that it had not caused him "irrevocable harm," because he had been certified the winner despite the recount. That decision had been widely expected and, again, had not affected the merits of the challenge to the Florida recount. Now that the ground wars had been fought, briefs written, and the cases argued, the end of the fight seemed at hand. Lawyers and laymen to whom 18-hour days had become a way of life now reestablished contacts with families and loved ones. Serious packing got underway. Departures began and soon evolved into a rather substantial exodus. Even an adverse Florida Supreme Court decision would likely affect only three or four counties. The core of the task force remained in place, but most others could head for home.

Early in the afternoon of December 8, Judges Nikki Ann Clark and Terry P. Lewis rejected Democratic claims in Seminole and Martin counties respectively, allowing the absentee ballots to stand and ending a lethal if long-shot threat to the Bush certification. The Gore campaign was now down to its last hope. In Washington, Gore, who had insisted publicly that his chances of winning were "50–50," and Lieberman later disclosed that they had gone to work on concession statements. Instead of delivering them, however, the two Democrats received an eleventh-hour reprieve from the Florida Supreme Court. As a joyful David Boies told his client and the television cameras, "Four to three is better than 50–50."[12]

The unsigned opinion held that Judge Sauls had erred in refusing to count the 9,000 undervotes in Miami-Dade County, in failing to add to Gore's total the 168 votes picked up during the suspended Miami-Dade recount, and in supporting the secretary of state's refusal to accept the late-filed recounted ballots from Palm Beach County. It ordered the counting of the Miami-Dade undervotes to begin

immediately and, to skirt equal protection problems, a manual statewide recount of all undervotes to begin on Saturday, the following morning.

The court affirmed Judge Sauls's refusal to question the counting techniques of Judge Burton and his Palm Beach colleagues, and his rejection of Gore's challenge to the Nassau County certification of its election night count rather than the erroneous mandatory machine recount.

The court made a perfunctory effort to address concerns raised by the U.S. Supreme Court decision it had yet to respond to, quoting the 3 U.S.C. § 5 requirement that the election be determined by procedures in place before the vote, and claiming its decision was based solely on statutes on the books before November 7.

Gore's challenge rested on the "rejection of a number of legal votes sufficient to change or place in doubt the result of the election." On the basis of no case law whatsoever, the court overturned Sauls's ruling that, to prevail, the plaintiffs must prove that the canvassing boards abused their discretion regarding which votes to count. Instead, it held that "the board's actions concerning the elections process may constitute evidence in a contest proceeding," a far easier barrier for Gore to overcome.[13]

The court also found that a plain reading of the statute refuted Sauls's conclusion that all votes must be counted in a contest proceeding. Instead, only the ballots challenged for having been illegal but counted or legal but not counted need be assessed. However, the court stated that Gore's selective recount strategy could not limit the remedy:

> We do agree, however, that it is absolutely essential in this proceeding and to any final decision that a manual recount be conducted for all legal votes in this State, not only in Miami-Dade County, but in all Florida counties where there was an undervote, and hence a concern that not every citizen's vote was counted. This election should be determined by a careful examination of the votes of Florida's citizens and not by strategies extraneous to the voting process.[14]

Regarding the burden of proof, the court, employing what can most charitably be described as an awesome contempt for judicial precedent, held that Sauls had erroneously required Gore to show "a reasonable probability" that the undercount ballots would have changed the result. Instead, it held that the 1999 contest law required only a number of undervotes "sufficient to change or place in doubt" the results, despite the fact that the legislative history made it plain that the legislature had intended only to codify existing law.

Then what must a challenger show? According to the Florida court, only that a sufficient number of undervotes exist "which, if cast for the unsuccessful candidate, would change or place in doubt the result of the election."[15] To fully appreciate the weirdness of this new judicial formulation, take the case where Gore was trailing by 570 votes with 10,750 undervotes still at issue in Miami-Dade County. Assuming a "recovery rate" of 22 percent legal votes—the actual Miami-Dade experience—an additional 1,265 legal votes would be recovered, or more than twice the number needed to satisfy the new Florida Supreme Court standard. Assume further that the newly discovered votes break down similar to the vote recorded November 7 in the county, 52 percent for Gore and 47 percent for Bush. Then, on the basis of reasonable statistical projection, Gore could expect to receive about 658 additional votes from the county, and Bush an additional 595. The net Gore pick-up of 63 votes was almost precisely what independent counters found months later using the most liberal counting techniques. Had the Florida Supreme Court employed even the most basic concepts of statistical analysis, it would have concluded that Gore not only failed to meet the "reasonable probability" standard articulated by Judge Sauls, but that the likelihood of his overtaking the Bush statewide lead with a big showing in Miami-Dade resided somewhere in the most remote regions of the bell-shaped curve. Yet this was the standard the court declared had been embraced by a 1999 law the legislature believed simply codified existing standards.

Of all the elements of the state supreme court decision, Phil Beck found this to be the dead giveaway of the court's lack of balance. "If the Florida Supreme Court had its way, a disappointed candidate could always get a recount if the number of undercounted votes was greater than the difference between him and the winner," he later noted. "And that's absurd."

After next proclaiming, as it implicitly had in its earlier *Gore v. Harris* decision, that "a legal vote is one in which there is a 'clear indication of the intent of the voter,'"[16] the court said Judge Sauls had committed reversible error "by failing to examine the specifically identified group of uncounted ballots that is claimed to contain the rejected legal votes." In the view of the court, "The trial court has presented the plaintiffs with the ultimate catch-22, acceptance of the only evidence that will resolve the issue but a refusal to examine such evidence."[17]

This was a crudely worded if not thoroughly intemperate misstatement of what Sauls had done. Sauls did not randomly refuse to examine the ballots. Rather, as is routinely done at trials, he demanded that Gore establish a predicate for its introduction with credible statistical projections that the undervotes would be meaningful. Boies understood the rules. Why else would he have brought a statistician to make those projections under oath? But Beck's cross-examination and the testimony of a rebuttal expert witness destroyed the testimony of Boies's statistician. Even then, had Boies been on top of his game, he would have sought to restore the importance of the ballots by allowing an expert witness to inspect some of them and testify regarding their ability to reverse the certified election result. For reasons best known to himself, Boies never sought to go that route. Rather than "the ultimate catch-22," Boies had received his day in court and had suffered a simple failure of evidence.

The court next found error in Sauls's failure to count 215 votes from Palm Beach County allegedly certified by county officials after the 5 P.M. November 26 deadline—a deadline

established by the state supreme court itself in the first *Gore v. Harris* case. The 215 figure was erroneous, the apparent product of Judge Burton's faulty recollection at the contest trial and repeated by Boies with glee long after the error had been called to his attention.[18] The more interesting question, however, is not the staying power of this faulty figure, but how the court found its way around its own clear deadline. Said the majority: "The deadline was never intended to prohibit legal votes identified after that date through ongoing manual recounts to be excluded from the statewide official results in the election canvassing commission's certification of the results of a recount of less than all of a county's ballots."[19] If the words seem indecipherable, the logic is no more clear.

Because Gore had introduced no evidence to dispute the counting techniques employed by Palm Beach County, and had demanded no recount in Nassau County, the court found for Bush on these two issues.

That left the matter of the 168 net votes Gore had picked up in the heavily Democratic precincts of Miami-Dade County prior to the canvassing board's decision to stop counting. Astonishingly, the state supreme court held that Gore was entitled to these votes, which by any sane analysis tended more to distort than reflect the Miami-Dade vote. The stated rationale was that these were "legal votes and these votes could change the outcome of the election."[20] But counting them presented a grossly distorted picture of the Miami-Dade vote.

"The Florida Supreme Court showed its bias by ordering a complete recount except where Gore had already won," Beck later observed. "It was ludicrous."

The court ordered the Miami-Dade recount of remaining undervotes to begin at once with the statewide undervote recount to begin at 8 A.M. the following morning. The canvassing boards could retain extra help, if necessary, in the counting. The court majority hoped to see all ballots counted, all ballot disputes resolved, and all judicial appeals

exhausted in four days. In a footnote, the majority conceded the near impossibility of the ordered undertaking. "While we agree that practical difficulties may well end up controlling the outcome of the election we vigorously disagree that we should therefore abandon our responsibility to resolve this election dispute under the rule of law."[21]

The opinion of the court majority contained not a single reference to the U.S. Supreme Court decision of just four days earlier. Neither had the court revised its earlier opinion in light of the expressed U.S. Supreme Court concerns. Both in manner and in substance, the majority justices of Florida seemed intent on playing an "in-your-face" brand of jurisprudence that invited critical review by the nation's highest tribunal.

Chief Justice Wells and Justices Harding and Shaw dissented. Writing for himself alone, the Chief Justice warned, "the majority's decision cannot withstand the scrutiny which will certainly immediately follow under the United States Constitution." Justice Wells wrote

> The majority returns the case to the circuit court for this partial recount of undervotes on the basis of unknown or, at best, ambiguous standards with authority to obtain help from others, the credentials, qualifications, and objectivity of whom is totally unknown. That is but a first glance at the imponderable problems the majority creates.
>
> Importantly to me, I have a deep and abiding concern that the prolonging of judicial process in this counting contest propels this country and this state into an unprecedented and unnecessary constitutional crisis.[22]

In the absence of "dishonesty, gross negligence, improper influence, coercion, or fraud in the balloting and counting processes," the test must be abuse of discretion on the part of the canvassing boards. Here, wrote Wells, the majority has ordered a manual recount simply because Gore has charged that "enough legal votes were rejected to place in doubt the results of the election. Following this logic to its conclusion would require a circuit court to order partial manual recounts upon the

mere filing of a contest. This proposition plainly has no basis in the law."[23]

Chief Justice Wells articulated three additional problems with the majority opinion that would prove prescient. First, in a footnote he wondered why only undervotes—ballots on which no vote for the presidency were recorded—would be recounted while overvotes—ballots disqualified because two or more presidential votes were observed—were left to stand. In Palm Beach County a name with a punch hole through it trumped one with a mere dimple. In counties where there had been no manual recount, those same ballots would have been excluded.

Second, Wells wrote, "I conclude it is plain error for the majority to hold that the Commission abused its discretion in enforcing a deadline set by the Court that recounts be completed and certified by November 26, 2000. I conclude that this not only changes a rule after November 7, 2000, but it also changes a rule this Court made on November 26, 2000."[24]

Finally, the court had let stand vastly different counting rules in different counties:

> Should a county canvassing board count or not count a "dimpled chad" where the voter is able to successfully dislodge the chad in every other contest on that ballot? Here, the county canvassing boards disagree. Apparently, some do and some do not. Continuation of this system of county-by-county decisions regarding how a dimpled chad is counted is fraught with equal protection concerns which will eventually cause the election results in Florida to be stricken by the federal courts or Congress.[25]

Said the Chief Justice: "My succinct conclusion is that the majority's decision to return this case to the circuit court for a count of the undervotes from either Miami-Dade or all counties has no foundation in the law of Florida as it existed on November 7, 2000, or at any time until the issuance of this opinion."[26]

Justice Harding, joined by Justice Shaw, concluded that the case came down to a failure of proof and an impossible remedy. "I would find that the selective recounting requested

by Appellant is not available under the election contest provisions of section 102.168," wrote Justice Harding. "Such an application does not provide for a more accurate reflection of the will of the voters but rather, allows for an unfair distortion of the statewide vote."[27]

Indeed, Harding felt that Gore should not have been allowed to hand-pick counties during a contest period, first because he had won those counties and second because the contest challenges the results of an election and permitting Gore to raise issues only with a particular subset of counties is not probative of what a statewide recount would show. Yet even on his own terms, Gore had failed "to provide any meaningful statistical evidence that the outcome of the Florida election would be different if the 'no vote' in other counties had been counted; their proof that the outcome of the vote in two counties would likely change the results of the election was insufficient."[28]

Moreover, the court should not be in the position of ordering the lower court to perform tasks that are impossible to execute. All agreed that December 12 is the critical date. Harding wrote, "I am more concerned that the majority is departing from the essential requirement of the law by providing a remedy which is impossible to achieve and which will undoubtedly lead to chaos."[29]

At the Bush headquarters in Tallahassee, the mood had gone from building euphoria to shock and stunned disbelief. "It was worse than the first Florida Supreme Court decision," one Bush lawyer later recalled. "We thought Judge Sauls had given us several different ways to win. We thought his decision was bulletproof."

John Bolton found himself gasping for breath. "I felt like those Russian sailors on the *Kursk* must have felt," he remembered. "All you could do was stand by and feel your air run out."

Baker was bitter. To a colleague he remarked, "Florida is a state where the zombies don't stay dead."

There was no time for self-pity. Beck and his colleagues had to gather back at the circuit court, where Judge Sauls, angry and bitter, had recused himself from presiding over implementation of the state supreme court order and had been replaced by Judge Terry Lewis. Most of the 450 members of the field operations team, who had dispersed like dandelions in the breeze, had to be brought back to Tallahassee for midnight briefings and then flown to their assigned counties to represent Bush the following day. To beat Gore on the ground, the Bush team had to beat him on the logistics.

In addition, teams of brief-writers had to go back to work. The most critical task was to get the contest back to the U.S. Supreme Court before the count had gone too far. The state supreme court, by ordering that the 174 Palm Beach and 168 Miami-Dade numbers be included in the count, had narrowed Bush's lead to 195 votes. With tens of thousands of undervotes now subject to recount, Gore could move into the lead at any time, changing the entire dynamic of the contest. Baker, Olson, Terwilliger, and the other strategists knew that Bush must quickly ask the Court to stay the Florida recount and to treat the application for a stay as a request for certiorari.

There were also issues to get before Judge Lewis, suddenly presiding over his third major Florida recount case. The protest period had taught the Bush team the necessity of battling for the best results on the ground even while trying to preempt that battle in the courts. Their team met in preparation for the 8 A.M. session with Judge Lewis and decided to emphasize the need for strict counting standards and instant appeals by observers on the scene, safeguards they felt were essential to a fair process.

In practice, they would get nothing of the sort. Judge Lewis had ordered a team headed by David Leahy to begin counting the Miami-Dade undervotes at 8 A.M. Saturday in the Leon County Library. Two judges would be on hand to settle any disagreements. If they split, then Lewis himself

would resolve the matter directly. As to the other counties, the canvassing boards were given until noon Saturday to organize themselves and convey their protocols to Lewis. Because of the leeway afforded trial judges to fashion remedies during the contest period, Lewis said he would not permit observers of either team to interrupt the counting process with objections, although they were free to take notes and argue their case with him at a later time.

Lewis would issue no guidance to the boards regarding the counting rules to be applied. Why not? "The supreme court has twice been given the opportunity and requested to give more specific criteria in terms of how to count ballots manually. They've declined to do so, and I'd see in that a clear indication that they'd wish to leave that to the canvassing boards and the persons that do the manual counting guided only by that principle that's laid out in the opinion."[30] That principle: determine the "clear intent" of the voter. Lewis would also order those engaged in the counting to provide no partial recount numbers to any party. Ron Klain, the senior Gore official on the scene, would routinely herald results from one county or another, claiming Gore was narrowing the gap minute by minute. His source of information, if any, remains a mystery to this day.

Beck, again representing Bush in a contest proceeding, was ready the following morning with a volley of legal shots at the revived count. Bush objected to the Lewis order on all the statutory and constitutional grounds he had been asserting since the opening effort to get the federal courts to halt the recount. The counting rules had been changed in midstream. The standardless counts violated the equal protection clause of the Fourteenth Amendment. Article 2 of the U.S. Constitution was being violated because the courts and not the legislature were making the law.

Now the Voting Rights Act of 1965 was also brought into play because of the state supreme court's bizarre endorsement of the 168-vote pick-up in Miami-Dade. There, only five of 199 predominantly Hispanic (mostly Cuban) precincts in the

county had been included while African American and other pro-Gore constituencies had much higher percentage representation.

In one separate motion, Beck sought to exclude the "spoiled evidence" of the Miami-Dade ballots, because they had been degraded as county workers, with the delicacy of offensive linemen, sought to separate the undervotes. By now, Beck charged, they bore only scant relation to the ballots first counted on November 7. Beck also filed an emergency motion to take evidence on the "illegal votes" counted in Volusia and Broward counties due to the improvised permissive standards for counting dimpled chads. In fairness, his position here would have been stronger had he introduced evidence to that effect at the contest trial before Judge Sauls.

Lewis took the various Bush motions under advisement. In Washington, Olson, having filed the motion for a stay Friday night, gathered with colleagues to review the draft of a supplemental memorandum in support of the stay petition drafted by Cruz and Juster overnight. The memorandum pointed out a host of new legal and factual issues raised by Judge Lewis's ruling on how to conduct the recount. Throughout Saturday morning, it was truly a work in progress, changing and expanding as new information about the recount underway came to light.

Lewis took the various Bush moves under advisement. In Washington, Olson filed his motion for a stay. In Leon and most other counties across Florida, the counting began.

The resulting product, embracing both law and facts as fresh as the morning coffee, argued that the recount ordered by Judge Lewis was bound to produce chaos and injustice. The document included complaints about the following:

- The absence of statewide counting standards.
- The failure to ensure that counting would be conducted by impartial officials.
- The danger that some of the undervotes could be counted twice due to technical flaws in the process.

- The exclusion of three of the selective Gore counties and part of the fourth from the recount despite quirky and inconsistent counting techniques.
- The "bizarre" hybrid treatment afforded Miami-Dade County by the Florida Supreme Court, counting the Gore votes accumulated during the partial recount of heavily Democratic areas but only the undervotes in the remainder of the county, where Bush had won an Election Day majority.[31]

Ginsberg approved the memorandum, which was further massaged by Olson and his colleagues in Washington and filed with the U.S. Supreme Court. No one in Tallahassee could think of anything else to do. So they watched the manual recount proceed, and they waited for word from Washington.