

# Fighting the Ground War

From the moment Al Gore first requested recounts in four selected counties, the optimal Bush-Baker goal was to stop the recounts in the state or federal courts. Failing that, the Florida legislature was a potential trump card, but that looked much better on paper than in practice because the legislature could do very little before December 12, by which time developments on other fronts might well have preempted its realistic choices. The third necessary prong of the Baker strategy was to fight the ground war on recounts. This meant getting the most restrictive counting rules possible, keeping an eye on the counters to make sure the standards were being enforced, preparing to do battle in the local courts when the Gore team sought to change the recount rules, and mobilizing a presence in the state of outside political heavyweights to lean on local officials. The overwhelming need, Baker explained to his legal minions time and again, was to prevent Gore from pulling ahead. Gore being in the lead changes everything: the national political picture, the federal legal context, and the situation with the state courts and the Florida legislature.

This strategy meant playing defense, and as had been evident from the first machine recount, there are advantages to

being on the attack in terms of picking both the issues and the venues. Gore had gotten off to a running start because of the butterfly ballot problem in Palm Beach County. By midafternoon of Election Day, the DNC had retained TeleQuest, an Oklahoma-based telemarketing firm, to generate some mischief. Voters called were urged to vote for Gore. But the message continued: "If you have already voted and think you may have punched the wrong hole for the incorrect candidate, you should return to the polls and request that the election officials write down your name so that this problem can be fixed."<sup>1</sup>

The following day Jesse Jackson stormed into Florida charging that voting irregularities had cost Gore a clear win. He would join forces in the state with Kweisi Mfume, president of the NAACP, who promptly convened hearings designed to show that African-Americans had been systematically disenfranchised, and with Rabbi Steven Jacobs of Kol Tikvah Temple in Los Angeles, an old Jackson ally. Jackson led marches and addressed rallies in Miami, Fort Lauderdale, and Palm Beach. Directing one pitch to Jewish people, whom he once referred to as "Hymies," Jackson cried, "Once again, the sons and daughters of slavery and Holocaust survivors are bound together by their hopes and their fear about national public policy."<sup>2</sup>

"We must stand together or we will perish alone," Jacobs chimed in, in what must surely have been the most overblown rhetoric ever provoked by a butterfly ballot.<sup>3</sup>

In fact, charges of civil rights deprivations would shadow the Florida contest, surviving to the January 6 ceremonial counting of electoral votes, where members of the Congressional Black Caucus sought unsuccessfully to delay the event, and even beyond, as the United States Commission on Civil Rights took its own jaundiced look at Florida. One by one the charges of official racism evaporated even in the light of evidence the Commission chose to consider. For example, a police roadblock, allegedly designed to intimidate African-Americans and keep them away from the polls, turned out to be a routine spot check for driver's licenses at a site roughly equidistant

from one predominantly black polling station and one predominantly white one, and which resulted in more citations issued to white drivers. Also, charges of multiple identification checks of black voters were shown to have been attributable to occasional confusion resulting from clerical error.

By contrast, a December 1, 2000 report in the *Miami Herald* based on a review of 5,000 ballots cast in twelve Florida counties indicated that at least 445 convicted felons had voted illegally, and as many as 5,000 may have done so statewide. Of the 445 illegal ballots, 75 percent had been cast by registered Democrats, including sixty-two robbers, fifty-six drug dealers, forty-five killers, sixteen rapists, and seven kidnappers.

Baker was concerned that decisions would be made under political mob influence. He talked to Enright and others about some Republican counterweight. Slowly, pro-Bush Floridians were assembled at various nerve points in the recount battle. Republican congressional staffers and others flown in from out of town to keep the vigil would augment their numbers.

Of the three remaining counties selected by Gore for recounts, two—Broward and Miami-Dade—decided at first not to proceed. Broward, using the “hanging chad” standard endorsed ten years earlier by Theresa LePore in Palm Beach County, turned up only four additional net Gore votes after sampling some 4,000 ballots. On November 13 the canvassing board voted 2–1 against a broad recount. Judge Robert Lee, the chairman and a Democrat, explained that he had cast his “no” vote on the basis of the director of elections’s opinion that “errors in vote tabulation” did not embrace voter mistakes. The following day, however, with the Butterworth advisory opinion contradicting Harris-Roberts, and with Democrats threatening to take the majority Democrat board to court, Judge Lee reconsidered, joining Democrat Suzanne Gunzburger in voting “yes.” Jane Carroll, the lone Republican on the board, voted against reconsideration. She would resign on November 21, to be replaced by Judge Robert Rosenberg, the Republican whose earnest squinting search with a magnifying glass for light at the end of the

chad would turn him into a national emblem signifying the folly of the procedure.

However, when it began its recount on November 15, the Broward board adopted an objective standard, counting “hanging” or “swinging” chads—those with at least two corners detached—but not “pregnant” or “dimpled” chads, which showed bulges or indentations, but still had all four corners attached. According to Judge Lee, “We did it at the advice of the county attorney so that no one could say later we were trying to guess back and forth was that a vote, was it not a vote.”<sup>4</sup>

Baker sent Mike Madigan, an experienced Washington hand, who had served as chief counsel to Senator Fred Thompson’s special committee investigating campaign fundraising abuses, to represent Bush’s interests in Broward County. Madigan knew that the absentee ballot count would likely double or triple Bush’s 300-vote lead and that after Miami, Broward, and Palm Beach, Gore had nowhere else to go for votes. So Madigan figured the Democrats would pull out all stops to bolster the Gore vote in Broward. On November 17, the Democrats sued in the circuit court, asking Judge John A. Miller to order the counting of dimpled and pregnant chads. Boies appeared and maintained that Broward should adopt the same liberal standard followed by Massachusetts in the 1996 *Delahunt v. Johnson*<sup>5</sup> case and Illinois in the 1990 *Pullen v. Mulligan* case. Both, said Boies, had recognized the dimpled chad as a valid vote. To underline the point, he presented an affidavit from an Illinois lawyer, Michael E. Lavelle, who represented Ms. Pullen in the case, to describe the decision in which at least some dimpled chads were counted.

Both cases fell short of being dispositive of the issue. *Delahunt* involved a special primary election with only a single contest on the ballot, thus negating the notion that a voter would come to the polls but choose not to vote in one particular election. Yet 22 percent of the ballots were blank in some precincts. Why? Delahunt told the *Washington Post*

that a severe thunderstorm the day of the vote had left many ballots soggy and hard to punch through.<sup>6</sup>

The *Pullen* decision did not hold that dimpled chads must be counted, simply that visual inspection of ballots to discern voter intention in cases where the tabulating machine had failed to count them was appropriate, and that the court below should examine each ballot for voter intent rather than exclude entire classes of ballots, such as those where the chad was not at least partially detached. A close reading of both the Lavelle affidavit and the Illinois decision does not support the allegation that either Lavelle or Boies misled the Court, any more than it supports the claim that under *Pullen*, all dimpled chads must be counted. Indeed, both Broward and Palm Beach counties may each have thought they were applying the *Pullen* standard, but they ended up establishing sharply different evidentiary standards for interpreting voter intent. The difference between the 1990 Illinois race and the 2000 Florida race was simply that the former involved a single state legislative district while the latter involved sixty-four state counties, each with the potential, while adhering to the same general standard, to interpret that standard in vastly different ways.

In Broward, canvassing board chairman Lee, who often seemed to be more at the mercy of events than in control of them, was candid about what was at stake. “If we are required to change the procedure of evaluating the ballot, there are clearly literally going to be hundreds of more votes in this county that will be counted,” he said. “In all likelihood, the majority of those will go to Al Gore. And I want that to be clear.”<sup>7</sup> Judge Miller stopped short of issuing the order sought by Gore, but made on-the-record comments suggesting a broader standard. Clearly, the counters were now able to do a bit of freelancing.

“They changed the rules so they could manufacture additional votes for Gore,” charged Montana Governor Racicot. “It is wrong, it is flawed, and it is a process that is simply and quite honestly not worthy of our democracy.”<sup>8</sup>

Madigan was having problems even apart from the counting standard. He saw hundreds of counters and observers “manhandling ballots.” He observed chads “all over tables, all over the floor.” Other GOP observers watched one Democrat eat two chads and another stuff one in her pocket. Madigan protested one instance where a group of eighty absentee ballots arrived with the Bush chad punched through but taped over and the Gore chads cleanly punched through. Madigan suspected that the Democrats wanted to “generate enough confusion to create 3,000 challenged ballots.” After counting about 55,000 ballots in the Government Hurricane Center, the board decided to repair to the county courthouse and continue the counting in the context of a formal meeting. The change represented more than terminology. At a meeting, Florida’s sunshine laws apply less sternly. This allowed the board to bar speakers and truncate arguments, permitting only observers.

On November 19, Broward County Attorney Andrew J. Meyers, fresh from his Supreme Court argument on behalf of Gore, advised the board that its standards were “impermissibly narrow,” and that the board must “determine the clear intent of each ballot whenever that intent can be determined.” He added that it would be “problematic to articulate specific parameters” in determining whether to count a vote.<sup>9</sup> The Board then changed the rules in the middle of the recount and decided to review the undervotes, which had failed to pass the previous “hanging” or “swinging” chad test. Still, no one seemed able to articulate the new standard, least of all Chairman Lee. On November 22, he said, “It’s not objectively subjective or subjectively objective, but I think it’s somewhere in the middle. It’s not a whim.”<sup>10</sup>

Madigan and another Bush lawyer, Patrick Oxford, had by now moved from disaster prevention mode to calamity prevention mode. They went to court on Thanksgiving Day, still arguing over standards, and got into a near shouting match with Gore’s lawyers over the Pullen case affidavit. Tallahassee sent Governor Marc Racicot of Montana to Broward, where he demanded to address the board on the counting

issue. When Madigan sought to make a record of his objections at the meeting, Lee threatened to have him thrown out. Lee ordered police to expel GOP attorney Bill Scherer for repeated objections to the counting of dimpled chads.

“Am I under arrest?” Scherer demanded.

“No,” was the reply.

“Then take your hands off me.”

They did, but after lunch Judge Lee did not permit Scherer to return to the counting room.

As the counting proceeded, Democrat Gunzburger appeared never to see a dimple she couldn't interpret, Republican Rosenberg sought to apply the two-corner rule wherever possible, and Judge Lee seemed to go in whatever direction caprice suggested.

By November 25, Baker was desperate and increasingly pessimistic. Not only was the counting going badly, but MSNBC was reporting—erroneously, it turned out—that 500 new absentee ballots from Israel had showed up in Broward County. “Broward is killing us,” Baker complained. “They're going to steal the election.” He decided to pour celebrities into the breach. Broward could soon boast more political elders than a Chinese strategy session on Tiananmen Square. Bob Dole and Governors Christie Todd Whitman of New Jersey, Frank Keating of Oklahoma, and John Engler of Michigan were among those who came to the Broward counting room to bear witness to the debacle and convey the unfairness to a perplexed nation.

“They've gone from counting votes to looking for votes to now manufacturing votes,” complained Representative John E. Sweeney, a New York Republican.<sup>11</sup>

“I literally can't sleep over this,” remarked Governor George Pataki of New York, another Broward visitor. “I have never been as appalled in my life. It really makes me disillusioned with government. How can you hour by hour change the rules to try to come up with the right results? This is not something you do in America.”<sup>12</sup>

There was yet another reason for the parade of notables. “We were tracking everything on our computers,” Madigan later recalled. “The presence of celebrities negatively influenced the discovery of new votes. Even Gunzburger didn’t find Gore votes at the same rate when Christie Whitman was in the room. We decided, with celebrities around they cheat less.”

Still, Gore gained 567 net votes in Broward. If he could have matched that in Palm Beach or Miami-Dade, the Bush lead would have evaporated, and Florida would have been Gore’s to lose.

Madigan, Oxford, and others returned to Tallahassee to organize their records in preparation for future litigation. “We knew there was going to be a contest,” Terwilliger later recalled. “What we didn’t know was whether we would be playing offense or defense.”

Two weeks later, Phil Beck, Bush’s lead attorney in the contest lawsuit, would decide against putting the Broward evidence before Judge Sanders Sauls. “It was a strong case, but my judgment was we didn’t need it.” Beck later recalled. “The Gore case had been so weak, I just wanted to get the trial over and get out of there.”

If the Broward results failed to send the Gore team into paroxysms of joy, the reason was that it contained the lone good news among the three counties in play. Palm Beach had adopted a counting system that was generating new votes with only 8 percent of the ballots, compared to 24 percent in Broward County. And Miami had stopped counting altogether, its canvassing board coming to the unanimous conclusion that it could not complete even a truncated and probably illegal count of some 10,500 undervotes by the court-imposed deadline.

## MIAMI-DADE

Baker and Ginsberg sent Bobby Burchfield, general counsel for the 1992 Bush reelection campaign, to fight Gore’s recount in Miami-Dade County. Burchfield thought the task



would be difficult. "It's O.K. to attack in a state like Florida, but it is very hard to defend," he later recalled. "It was imperative that we always stay up because we felt the media would turn on us the moment we fell behind."

But Miami-Dade was far from the bleakest battleground in the state for Bush. For one thing, the county vote had been rather close, 53–46 for Gore, nothing like the landslide margins in Palm Beach and Broward Counties. This limited somewhat Gore's potential for a big vote pickup in the manual recount, regardless of the counting system used. Another key asset was the large, predominantly Republican Cuban community. Forty years in the country, a powerful force in Florida politics, and with its sense of outrage and activism freshly stoked by the Elian Gonzalez affair, "Little Havana" could provide able and sophisticated attorneys to help in the battle and, if necessary, spirited groups to take their campaign to the streets. Miguel De Grandy, a partner in Greenberg Traurig, and former U.S. Attorney Roberto Martinez were already on hand, ready to do battle. And the Democrats were far from united. Blacks, Jews, and non-Cuban Hispanics did not always speak with a single voice and frequently had trouble organizing and executing a cohesive political strategy. Finally, the canvassing board itself held some promise. De Grandy and Rodriguez held out little hope for Judge Lawrence King, the chairman, whom they regarded as a partisan Democrat, but Democrats Miriam Lehr, and David Leahy, the county supervisor of elections, were given to episodic attacks of reason.

The Democrats started slowly, first requesting a recount and then withdrawing the request, substituting instead the request to manually recount only the undervotes. On November 14, the original deadline for certification, the board finally moved to conduct a sample recount in three precincts representing three percent of the total vote that had gone for Gore by margins approaching or exceeding 9–1. Prior to initiating that recount, the board rejected Leahy's proposal to adopt a two-corner counting standard, preferring to make

judgments of voter intentions on the fly. Despite such lax standards, the net Gore pickup was only six votes. Leahy argued that the change did not show an “error in the vote tabulation sufficient to change the result,” and that no reasonable extrapolation could indicate a potential change sufficient to affect the election results. With Judge King dissenting, Leahy and Lehr, on November 14, voted 2–1 against proceeding with a full manual recount. The board voted 3–0 against simply counting undervotes, concluding that the act would violate Florida law, which in cases of manual recounts mandates the counting of all ballots. Al Gore promptly denounced the decision.

After meeting with the board on the evening of November 15 to urge reconsideration of the decision, local Democratic officials contacted Lehr the following day and urged her to resign so she could be replaced with a more dependable partisan, Miami-Dade Commissioner Gwen Margolis. Lehr declined to walk that plank, but at a meeting on November 17 to reconsider the earlier decision, she joined forces with King, providing a 2–1 margin for initiating the recount. She claimed she was influenced by the hefty Gore totals that had been or were being run up in Volusia and Broward counties.

During the next few days, the board seemed confused as to whether to begin counting all votes or simply the undervotes. Martinez and Rodriguez filed a lawsuit seeking to block the counting, but the circuit court dismissed the suit, saying the issues were already before the state supreme court. On November 19, the board ran the ballots through machines designed to scrape away hanging chads and separate undervotes. It also decided 2–1, with Leahy again dissenting, to count “rogue dimples,” where the presidential contest alone was marked by a dimpled or pregnant chad. The counting itself began on November 20, six days after the statutory deadline for certified returns to be filed. The following day the Florida Supreme Court approved the manual recounts, but also established the November 26 deadline.

That night the board held a meeting with representatives of the Bush and Gore teams. Despite twenty-five counting tables that had been organized on the eighteenth floor of the Stephen P. Clark Government Center, the board estimated that it would take until early December to complete the recount. Burchfield predicted that it would take longer than that.

Sensing weakness and concerned that they had been outmanned and out-demonstrated up to that point, the Republicans struck back. Baker asked two congressmen, Lincoln Diaz-Belart of Florida and John Sweeney of New York, to attend the next day's counting session. Republican telephone banks were urging party members to go to the Government Center the following morning to protest the count. Radio Mambi, the leading Spanish-language radio station in the area, urged Cuban-American Republicans to demonstrate. Newly arrived Washington staffers were ready for deployment. GOP observers could man every counting table on the floor and then some. Mehlman, moving bodies from his Miami base, was showing an extraordinary flair for logistics.

Early on November 22, the board announced that it could not complete the manual recount by the court deadline. Instead, it proposed moving from the eighteenth to the nineteenth floor to tabulate only the 10,750 undervotes.

Burchfield protested heatedly. The applicable law requires the counting of all ballots once a manual recount was started and makes no provision for isolating overvotes, undervotes, or any other single category. Moreover, the nineteenth floor provided smaller areas, one able to accommodate only two observers from each side, and no media. Reporters from the *New York Times*, the *Wall Street Journal*, and CNN and others complained bitterly that the new arrangement violated Florida's Sunshine Law (which requires opening most government proceedings to the public); they circulated a petition protesting the action, implicitly threatening a lawsuit. Most offended were the GOP observers who had been divided among the twenty-five counting tables; they were now threatened with expulsion. Augmented by Washington "imports,"

a few dozen took up positions outside the new counting facility and began chanting “let us in” and “no justice, no peace.” Outside, a crowd briefly surrounded Joe Geller, the Miami-Dade Democratic chairman, and accused him of stealing a ballot. He was not touched and was escorted from the scene by police. Upstairs, the *New York Times* would report that “several people were trampled, punched or kicked when protesters tried to rush the doors outside the office of the Miami-Dade supervisor of elections.”<sup>13</sup> The report was exaggerated; there were no confirming witness accounts and no evidence of any injuries.

At 1:30 P.M. the board reconvened on the eighteenth floor and announced that its members were unable to complete even the tabulation of undervotes by the November 26 deadline. They asked for comments. At the time they stopped, the board had counted in what was essentially a north-south direction and had completed Precincts 101 through 137, situated along the heavily Jewish Gold Coast, and Precincts 138 through 200 in the predominantly African-American sections of Miami. Only five of the 199 Cuban-American community precincts had been counted and most of the affluent Republican pockets north of Miami had not been counted at all. Altogether, 139 precincts had been manually recounted, about 20 percent of the Miami-Dade total, with much of the rest in areas that had supported George W. Bush. Nor was it entirely clear what standard, if any, the board had used. Leahy seemed to adopt some form of two-corner standard but King seemed to feel that if it’s on the ballot and near the Gore hole, it’s a vote. Lehr was somewhere in between. Altogether the canvassing board was finding recoverable votes in about 22 percent of the undervotes, compared to 26 percent in Broward County and 8 percent in Palm Beach.

In that context, the 168 votes Gore had picked up under counting rules that maximized his potential were not particularly impressive, and the opinions of vote projection experts in both camps would be that Gore would gain little, and could

even lose votes, were the process to be resumed where it left off. In response to the call for comments, De Grandy argued that should the board decide to suspend its vote count, it must wipe the slate clean, because to count only those precincts from heavily Democratic areas would not only distort the Miami-Dade results, but could also violate the 1965 Voting Rights Act in that it would discriminate against Cuban-Americans, a protected group. De Grandy further argued that counting under-votes alone runs contrary to statutory law.

Jack Scott, one of the Democratic lawyers, replied that the real problem in the Votomatic™ machine districts involved undervotes and that counting them alone was the best available solution at this point in time.

With the issue still under discussion, a breathless Marc Racicot raced into the room, found Burchfield and asked, “Bobby, are they going to shut this thing down?”

“I’m not sure, wait and see,” replied Burchfield.

At 2:15 P.M. the board announced its decision. By a 3–0 vote it had decided to cease counting. There was no way to meet the deadline and still count all the votes. And counting just the undervotes would not be worth the effort because it was probably illegal.

The predominantly Republican audience roared its approval. Democratic representatives announced that they would seek a writ of mandamus from the courts. Baker was at the other end of Burchfield’s cell phone. “Respond to whatever they do in court,” he barked. “This is the whole ball game.”

Gore filed a writ of mandamus in the Third District Court of Appeals at 8 P.M. The Bush response, largely prepared by Joel Kaplan, a former law clerk to Justice Antonin Scalia, was in by 8:15 P.M.

At 9:30 P.M. the Gore motion was denied. Although the court found the canvassing board had a “mandatory duty to recount all of the ballots in the county,” it found no way it could do so in the allotted time and thus declined to order a futile act. “Twenty-four hours earlier we had just been hammered

by the Florida Supreme Court,” Burchfield later recalled. “Twenty-four hours later we were virtually euphoric about our position.”

On Thanksgiving Day, Gore attorneys filed a writ of mandamus with the Florida Supreme Court asking that it order the Miami-Dade Canvassing Board to resume the count. Burchfield, Kaplan, and Rodriguez went to work on a response, hoping to have it in by 3:30 P.M. At 3:15, the state Supreme Court denied the writ without waiting for the response but “without prejudice” for Gore to raise the issue at a future point.

Democrats would try to exploit the circumstances surrounding the board’s decision to suspend the count. Board members assured one and all they had not been intimidated by the demonstrations of those locked out on the nineteenth floor. Yet the notion that a small band of protesting vote-count observers and congressional staff troubadours could hijack the American democracy was peddled with a vengeance. Representative Jerrold Nadler from New York proclaimed that “the whiff of fascism is in the air.”<sup>14</sup> And Senator Joseph Lieberman, who probably knew better, gravely warned against the tactics of pressure and intimidation.

On February 26, 2001, the *Miami Herald* reported on the results of its reexamination of the 10,644 ballots that the Miami-Dade election office had identified as undervotes. Using the most liberal counting rules—pregnant and dimpled chads counting as votes—Gore would have picked up a net forty-nine votes, not enough when combined with Broward and Palm Beach counties to reverse Bush’s victory in the state and, hence, the Electoral College. Using more conservative standards, Bush’s lead would actually have increased.

## PALM BEACH

John Bolton, an American Enterprise Institute scholar and former law partner at Covington and Burling, was at a conference in Korea when he began getting word of the prob-

lems in Florida. He called Baker and asked if he could help. A week later, he was in Palm Beach County leading the Bush effort at damage control. The great court battles were being fought at another level, but here in the trenches, Bolton thought, was where the outcome in Florida could well be decided.

The Palm Beach County Canvassing Board agreed promptly to Gore's request for a sample recount. As the home of Theresa LePore's 1990 guidance for judging chads as votes, the Bush team had every reason to expect that standard to be enforced. Instead, the board periodically resorted to "sunshine" tests—counting any punctured chad through which light could be seen as a vote. Then it would switch back to the 1990 standard, and possibly switch again to where at least one counter, Democrat Carol Roberts, appeared to be viewing dimpled chads as countable votes. When the board completed its sample, Gore had picked up nineteen votes. Even allowing for the overwhelmingly Democratic sympathies of the selected counties, Bolton, Baker, and others working for Bush feared that Gore could use Palm Beach to finally elbow his way into the lead. Their concerns were heightened on November 12 when the board decided on a second automated recount. Bolton later claimed that hundreds of chads were separated from ballots by the counting devices.

Clearly the Gore camp sensed that something significant could happen in Palm Beach. Just as in their amended Florida Supreme Court brief they had asked the court to order the counting of dimpled chads, here they made the same request on November 15 before a circuit court judge, Jorge Labarga. That same day Judge Labarga held that "the present policy utilized by the local election officials restricts the canvassing board's ability to determine the intent of the voter. . . . To that end, the present policy of a per se exclusion of any ballot that does not have a partially punched or hanging chad, is not in compliance with the law."<sup>15</sup> He stopped short of requiring the board to consider dimpled or

pregnant chads, leaving it to Judge Charles E. Burton and his colleagues to work things out.

Bolton understood that the substantive changes in procedure could well become an issue in the federal litigation. But he recognized that his mission was more to achieve the most favorable outcome on the ground than to build a record for future lawsuits. The overall optimal strategy was to kill the recounts. The local strategy was to get the best standard possible. To that end, on November 16, Bolton met with Burton, LePore, Roberts, and county attorney Denise Dietrich, urging that Palm Beach resist the temptation to speculate regarding voter intent and instead stay as close as possible to the original LePore standards. "These ex parte contacts with the voting officials were important," Bolton later recalled. He was a partisan. Everyone knew that. But if he could also be viewed as a problem solver, his opinions with the board would carry some weight.

Counting in Palm Beach County began on the night of Wednesday, November 16. On some days as many as thirty counting stations were set up at the Emergency Operation Center. Metal boxes containing the results of between one and five precincts were divided up among the counting teams. No single standard applied, but at the initial stage Bolton did not regard this with too much concern because Republican observers were on hand to protest any decision they found unreasonable. By agreement, these challenged or questionable ballots were set aside for later consideration by the canvassing board itself.

On Saturday, when the board started to examine the questionable ballots, Burton called his fellow members together along with representatives of the two camps. After some back and forth, Burton said he thought he had come up with a reasonable standard. On the Palm Beach County ballots, voters were called upon to make twenty-five decisions. Clearly, a single dimple was probative of nothing. Any effort to place it in one column or another would be more speculation than interpretation. But suppose a voter had ten dim-



ples on his ballot, or even five? Most likely that voter thought he was casting a ballot when he simply manipulated his stylus through the hole, or he perhaps lacked the physical strength to vote correctly by punching the stylus through the hole until the chad was dislodged. Burton proposed that in a race where the voter had left dimples on at least 20 percent of his ballots, an effort should be made to interpret his preference. Where the dimples appeared on fewer than 20 percent, the dimple should be ignored.

Burton got his way, although Bolton came to believe that LePore in her counting was applying a somewhat stricter standard than Burton, and Roberts continued to find votes when she saw light at the end of the chad. But if Bolton was not 100 percent certain what standards were being applied, he knew they were anathema to the Democrats who were failing to gain anything like the votes they had expected after the sample precinct recount.

On November 21, the Democrats filed a “Motion for Clarification” before Judge Labarga asking him to issue an injunction against the counting board, requiring them to consider the “totality of circumstances” as regards voter intent with respect to each ballot, and to “count indentations as votes, absent other evidence on the face of the ballot that clearly indicates a voter’s intention to abstain or vote for another candidate.” To the Baker team this was shaping up as the potentially decisive struggle. The state Supreme Court that day had swept Katherine Harris aside and extended the recount deadline until November 26. The Miami-Dade recount was in full swing. Broward had clearly gone “haywire” and was manufacturing votes for Gore about as fast as they came out of the box. “If we can’t stop the hemorrhage in Palm Beach, we can lose this recount,” Baker told Bolton.

“We saw this as the battle for Stalingrad,” Bolton later recalled. “If we lost here they would just roll over us.”

To Bolton’s consternation, Baker and Ginsberg dispatched Barry Richard to Palm Beach to argue the case. In descending order of magnitude, Bolton was contemptuous of Democrats,

trial lawyers, and media hogs, and he saw Richard as having hit the trifecta. Plus, he knew the case and the personalities well by now and felt with typical lawyer's pride that he was best situated to argue to the court. But when he heard definitively from Tallahassee that it was not to be, he played the good soldier and urged Richard to do what he would have done: put Burton on the stand and let him relate "judge to judge" to Labarga over what the business of counting was all about.

Richard did precisely that the following day. On November 22, Burton, questioned by county attorney Dietrich, patiently explained that he was trying to apply the standard Labarga had established the previous week and that his method was as fair as any could be, but it was not rigid. No one on the board would be impervious to clear evidence of voter intent.

As a way of emphasizing the fact that many dimples could not be correctly interpreted as votes, Burton brought to court one of the Votomatic machines used in the county and tried to create dimples by lightly touching the chads. As he would later testify at the contest trial, "It was very difficult for me to make an indentation like that, because it was quite easy for me to pop out the chad."<sup>16</sup>

Once again, Judge Labarga, in his order, reminded the board that "each ballot must be considered in light of the totality of the circumstances," and reminded Burton and his colleagues that they "cannot have a policy in place of per se exclusion of any ballot." But he failed to issue the injunction sought by the Gore team and, if anything, paid greater deference than in his earlier order to the discretion vested in the canvassing boards by the state legislature.<sup>17</sup> Burton and his colleagues treated the Labarga order as vindicating their approach and urging them to continue with no change in their ground rules.

Unable to impose their counting rules in Palm Beach County, the Gore team faced the even bleaker prospect that the canvassing board there might miss the November 26 deadline im-

posed by the Supreme Court. “At the nitty gritty level the new date was bad for the Democrats,” Bolton later recalled. “When Miami-Dade stopped, the world began to see that the recount strategy would produce no big victory for Al Gore.”

Despite the time crunch, Burton and his colleagues decided to take Thanksgiving Day off, a bewildering decision to many participants in the battle and members of the media, but not to the county workers who had been working sixteen to eighteen hour days and could only look forward to worse as the deadline approached. Gore himself announced on the holiday that he would be contesting the official tally, the kind of challenge never before launched in a presidential campaign and a sure sign that he had given up the belief that his selective recount strategy would block Bush’s certification. Still the Gore lawyers pressed on. On November 24, they tried again to make the case, this time before the canvassing board itself, that the wrong standards were being applied, but they got nowhere. With the deadline just hours away, the Gore pickup in Palm Beach County barely exceeded 150 votes, far from the giddy numbers projected after the one-percent sample.

Still, the Bush team had to remain alert. In the rush to have the job done by 5 P.M., corners were cut. Suddenly Palm Beach counters stopped segregating objected-to ballots for final decision by the three-person board; some seventy precincts escaped such scrutiny.

At 3 P.M. on November 26, Burton placed a call to Clay Roberts in Tallahassee seeking an extension to complete the count. A half-hour later, the request was turned down. An angry Burton then took a short break while LePore faxed to the capital a series of worksheets that supposedly had up-to-the-minute results. The board had decided to present the final tally the following morning, but did not in fact do so until the first week in December, at which time the net Gore pickup stood at 176 votes. For reasons not entirely clear, in both his brief and oral argument in the Florida Supreme Court contest case, Boies placed the Gore pickup in Palm

Beach County at 215 votes, a number the Justices tentatively adopted, but one having no basis in fact.

### THE MILITARY VOTE

In the early 1980s, the federal government sued the state of Florida, claiming that the state's cumbersome procedures for filing absentee ballots effectively denied many overseas U.S. servicemen the right to vote. One problem was that a Florida election law requiring overseas absentee ballots to carry an APO, FPO, or foreign post mark invalidated the ballots of many servicemen who were victims of sloppy overseas posting services or who may have gotten their ballots back to the United States via a personal friend or courier or some other means of unofficial transportation.

In a consent decree entered in 1982, Florida pledged to address many of the problems in the U.S. complaint. Pursuant to that decree, the state adopted Rule IS-207 of the Florida Administrative Code which requires only that the ballot "be postmarked *or* (emphasis added) signed and dated no later than the date of the Federal election." The change was approved by the federal district court as part of the remedial action required by the consent decree.

Another problem—common to many states—involved a Florida requirement that requests for overseas absentee ballots be received by the state at least 30 days prior to the election. Mailed requests were frequently lost in transit or by state election officials, thus disenfranchising overseas voters. Congress addressed this situation in 1986 with the Uniformed and Overseas Citizens Absentee Voting Act (OCAVA). This permits overseas voters who have not received state ballots to cast a generic federal ballot. To protect against fraud, the overseas voter must sign an oath stating "that my application for a regular state absentee ballot was mailed intime to be received 30 days prior to this election." Clearly the oath is a substitute for physical proof of the effort to obtain the state ballot. Both the consent decree

and the OCAVA had the force of law and, as anyone even reasonably schooled in the law would know, took precedence over any inconsistent Florida statutes or practices.

The Gore campaign, however, viewed the absentee military ballots received between Election Day and November 17 as a lethal threat. Bob Dole, the 1996 Republican candidate, who had lost Florida, nonetheless had received a hefty majority of the military absentee vote. Bush would likely top 60 percent at a time when he already enjoyed a 300-vote margin, which Gore was seeking to erase with selective recounts.

On November 15, Mark Herron, an attorney with the Gore campaign, circulated a five-page memorandum to Democratic lawyers across the state entitled “Overseas Absentee Ballot Review and Protest.” The document described the grounds upon which absentee ballots could be challenged and included a “Protest of Overseas Absentee Ballot” form to make it easier for a challenger to file his protest.

Herron listed five particular areas in which Gore lawyers attending the county ballot counting should focus their attention. Item #1 instructed the lawyers to “determine that the voter affirmatively requested an overseas ballot,” an instruction that resulted in challenges to federal write-in ballots supported only by the oath but with no receipt record in the county office.

Item #4 on Herron’s list stated in part “with respect to those absentee ballots mailed by absolute qualified electors overseas, only those ballots mailed with an APO, FPO, or foreign postmark shall be considered valid.” In the same paragraph, Herron acknowledged that his instructions were inconsistent with the Florida Administrative Code “which provides overseas absentee ballots may be accepted if ‘post-marked or signed and dated no later than the date of the federal election.’”<sup>19</sup> In other words, from the face of his own memorandum, it would appear that Herron willfully instructed the Gore legal team to challenge overseas military absentee ballots on grounds he knew to be legally spurious.

Gore lawyers or observers were present in every county office in the state on November 17, seeking to keep as many military votes as possible from being counted. They were highly successful, particularly in counties controlled by Democrats. Overall, 356 overseas military ballots were disallowed because of postmark challenges and another 157 because there was no independent record of requests for absentee ballots having been received. Combined with other causes, a total of 788 military absentee ballots were rejected. Bush lawyers were also present in force. In counties carried by Bush, 29 percent of the overseas ballots were disallowed, but the figure was 60 percent in counties carried by Gore. In Duval County, the state's largest, which was carried by Bush, the canvassing board rejected 64 of 512 overseas absentee ballots. In Broward County, Gore's territory, the board rejected 304 of 396 ballots for a kill rate of 77 percent.<sup>20</sup>

Of those absentee ballots that were counted, Bush received 64 percent of the vote, picking up 1,380 votes to Gore's 750. This stretched Bush's lead over Gore to 930 votes pending the outcome of the selective recounts. And, for the moment, Gore had handed Bush a huge public relations victory. Dorrance Smith, a former ABC News executive producer and media director for President George H.W. Bush who had come to Florida at Baker's behest, immediately saw the potency of the issue and urged Austin to play it for all it was worth. Smith was soon talking up the story with the media gathered in Tallahassee. Before the Gore camp could blink, General Norman Schwarzkopf, the Persian Gulf war commander, was in Florida calling it "a very sad day in our country" when servicemen find that "because of some technicality out of their control they are denied the right to vote for the President of the United States, who will be their commander in chief."<sup>21</sup> Other Bush surrogates followed suit.

The Democrats at first tried to fire back publicly. Responding to the Republican onslaught, Bob Poe, Chairman of the state Democratic Party said, "I think that they wanted to get every military vote they could counted, regardless of the law."

In Washington, Senator Lieberman seemed to be more in touch with public opinion, telling NBC's Tim Russert, "If I was there, I would give the benefit of the doubt to ballots coming in from military personnel generally."<sup>22</sup> Florida county officials should "go back and take another look. Because again, Al Gore and I don't want to ever be part of anything that would put an extra burden on the military personnel abroad who want to vote." Lieberman's appeal took a bit of the fight out of Florida's Democrats on the issue. While some in the counties continued trying to block absentee ballots with any imperfection, the heavy hitters knew a lost cause when they saw one.

Attorney General Butterworth, possibly seeing his career aspirations flash before his eyes, publicly disassociated himself from the position of the Gore lawyers. In a letter to all county election supervisors and canvassing boards dated November 20, he wrote:

No man or woman in military service to this nation should have his or her vote rejected solely due to the absence of a postmark, particularly when military officials have publicly stated that the postmarking of military mail is not always possible under sea or field conditions. Thus, canvassing boards should count overseas ballots, which are from qualified military electors and which bear no postmark if the ballot is signed and dated no later than the date of the election.<sup>23</sup>

Strategically, it was not obvious what the Bush team should do. Approaching the canvassing boards to reconsider their actions would generate some revisions, but, considering the recantations of top Democratic figures, the Bush lawyers were surprised to find a tough batch of Florida Democratic locals still fighting them tooth and nail. Further Bush could risk no legal move that would take the military ballots out of play for purposes of certification because, despite Heron's efforts, those ballots remained the margin of victory between the two candidates.

Fred Bartlit, the Bush lawyer handling the matter, next decided on a lawsuit in Leon County, but when that court publicly wondered whether it had jurisdiction, the Bush effort

shifted to thirteen individual county courts. That wasn't much better, in part because Florida was then in its contest period in which only the loser could sue and everything took place in Leon County, home of the capital, Tallahassee. By then, the Bush lawyers in Tallahassee were beginning to ask each other some pointed questions about Bartlit's preparation. But the legal team finally found an appropriate forum for its complaint, the U.S. District Court for the Northern District of Florida in Pensacola. There, the Bush team asked for a declaratory judgment that certain specified grounds for invalidating overseas military ballots were illegal, and an injunction requiring the canvassing boards to reverse their rulings. That ruling would come in the form of a declaratory judgment and temporary restraining order issued by U.S. District Court Judge Lacey A. Collier on December 8 and 9, respectively. Judge Collier would order officials not to reject a federal write-in ballot that has been signed and dated "*solely* because the ballot or envelope does not have an APO, FPO, or foreign postmark;" or "*solely* because there is no record of an application for a state absentee ballot."<sup>24</sup>

Even before Judge Collier's ruling came down, canvassing officials in several counties that had voted for Bush had agreed to reverse enough of their overseas ballot exclusion decisions to beat the certification deadline, thus adding a net of 105 votes to the Bush victory margin. The Bush Tallahassee legal team expected the district court ruling to produce several hundred additional votes. But before Collier's Temporary Restraining Order could be implemented, the U.S. Supreme Court would halt all Florida electoral proceedings, putting Mr. Bush in the White House, but without the additional military votes.

On the evening of November 26, Secretary of State Katherine Harris announced at a staged yet somewhat fumbling ceremony that George W. Bush was the certified winner in Florida by 537 votes, the figure representing his 300-vote margin after the machine recounts, buttressed by his gain in the overseas absentee balloting, minus Gore's big gain in



Broward County. The “partial manual recount” submitted by Palm Beach County would not be counted. Having spent weeks at the epicenter of political controversy, Harris had concluded her essential business with a ministerial act. The contest phase of the Florida battle would barely involve her.

At the GOP headquarters in Tallahassee, the feeling was one of relief combined with resentment directed at Gore for continuing the struggle. Baker had some tough trial lawyers coming in from Houston and Chicago to handle the contest phase. He had also sent for Frank Donatelli, a Washington lawyer and veteran of the Reagan and Bush political operations, whose principal task would be to serve as liaison to the Florida legislature. Those familiar with Florida law were telling him that elections are very difficult to contest, but with the Florida Supreme Court certain to have another go at things, nothing was safe.

Baker and Austin agreed that it would be appropriate for the governor to address the country briefly after the certification. Stepping beyond his usual role of managing the Florida defense, Baker decided to have some of his Tallahassee people work on a draft.

The draft prepared by the Baker team reflected the combat attitude developed during nearly three weeks in the trenches. In prose as graceless as any statement from a “president-elect” could be, the Baker draft began with a curt “good evening” and continued:

Tonight, three weeks after the election, the votes of Florida have been counted, confirmed and certified.

This is now the fourth vote count that Secretary Cheney and I have won in that state. We had more votes than our opponents did on election night. We had more votes after the automatic recount. We had more votes in the election returns submitted on November 14. And now, once again, we have more votes—even after selective manual recounts, even under an extended deadline ordered by Florida’s Supreme Court. We have won under the rules and laws passed by the Florida legislature. We have won under rules imposed by Florida’s judges. We have won under procedures in place before the election, and under procedures created after the election.

The vice president has now exhausted every recount provision available to him. The result wasn't exactly a landslide. But by every count, and by any measure, we have carried the state of Florida.<sup>25</sup>

The draft went on to the mandatory call for finality of process: "At some point we must have an end. At some point, the counting must stop, and the votes must count. At some point, the law must prevail, and the lawyers must go home. And we have reached that point."

The draft had a half-life of instants. It quickly came back with brief comments from George W. Bush: "too arrogant, need better, softer way to say it, so pleased that secretary of state has confirmed, thank people of Florida."

Austin prepared a draft Bush liked better. It began: "The election was close, but tonight after a count, a recount, and yet another manual recount, Secretary Cheney and I are honored and humbled to have won the state of Florida, which gives us the needed electoral votes to win the election. We will therefore undertake the responsibility of preparing to serve as America's next president and vice president." Bush did add a modest call for Gore to close up shop. "This has been a hard-fought election, a healthy contest for American democracy. But now that the votes are counted, it is time for the votes to count."<sup>26</sup>

Baker himself addressed reporters on November 26. "Governor Bush and Secretary Cheney had more votes on Election Night," he barked. "They had more votes after the automatic recount. They had more votes in the election returns submitted by all of the counties on November 14."<sup>27</sup>

And so on. The speech may have been "too arrogant" to be delivered by the next president of the United States, but, with a few modifications it seemed just right for a tough old political strategist slugging it out in Florida but wishing he were off somewhere abbreviating the lives of pheasants.