

2002

Post-Election Legal Strategy in Florida: The Anatomy of Defeat and Victory

Steve Bickerstaff

University of Texas at Austin

Follow this and additional works at: <http://lawcommons.luc.edu/lucj>



Part of the [Law Commons](#)

Recommended Citation

Steve Bickerstaff, *Post-Election Legal Strategy in Florida: The Anatomy of Defeat and Victory*, 34 Loy. U. Chi. L. J. 149 (2002).
Available at: <http://lawcommons.luc.edu/lucj/vol34/iss1/8>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in Loyola University Chicago Law Journal by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

Post-Election Legal Strategy in Florida: The Anatomy of Defeat and Victory

Steve Bickerstaff*

I. INTRODUCTION

With the passage of time since the abrupt end of the 2000 post-election legal battle in the Florida presidential election, several research groups¹ have examined categories of uncounted or disputed ballots and reported their findings.² These findings show that the post-election battle was Al Gore's battle to win. The final certified totals on November 26, 2000, gave George W. Bush a winning margin of 537 votes out of approximately six million.³ This miniscule lead could have been eclipsed by Gore, either during the recount or the election contest stage of the post-election period, if the Gore legal team's strategies had been successful.

* Visiting Professor of Law, University of Texas at Austin. The author founded the firm of Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P., in Austin, Texas. He has practiced election law for more than twenty years and has represented clients in statewide recounts in Texas.

1. The Florida Ballots Project was conceived and sponsored by the *New York Times*, the *Wall Street Journal*, the *Washington Post*, Tribune Publishing (which includes the *Chicago Tribune*, *Los Angeles Times*, and a number of other newspapers), CNN, the Associated Press, the *St. Petersburg Times*, and the *Palm Beach Post*. This consortium engaged the National Opinion Research Center at the University of Chicago ("NORC") to review and characterize uncertified ballots from the presidential election in Florida. The results were released in early November 2001. Another consortium, including some of these same newspapers, earlier had released results of a review of only undervote ballots.

2. NORC reviewed and characterized 175,010 uncertified ballots, including 113,820 overvote ballots and 61,190 undervote ballots. *Frequently Asked Questions*, at NORC Florida Ballots Project, available at <http://www.norc.org/fl> (last visited Nov. 19, 2002) [hereinafter NORC Website]. The final product of the project is embodied in two primary data sets available at the Center's website. *Id.* The project makes no conclusions about the outcome of the election and allows newsgroups and other persons to utilize the databases to project results under different recount scenarios.

3. The final certified results from Florida show Bush with 2,912,790 votes (48.80% of the votes counted) and Gore with 2,912,253 votes (also 48.80% of the votes counted). Florida Department of State, Elections Division, Official Results, at <http://election.dos.state.fl.us/elections/resultsarchive> (last visited Nov. 19, 2002) [hereinafter Official Results]. The official results also are available by county on the NORC Website, *supra* note 2.

Gore could have prevailed under any of several different scenarios that might have been achieved during the post-election legal battle. In November 2001, The National Opinion Research Center ("NORC") released the results of its review and characterization of 175,010 ballots still officially classified as nonvotes in the presidential election in Florida when Al Gore's election contest ended. The NORC results show that Al Gore could have prevailed if all nonvote ballots (both undervotes⁴ and overvotes⁵) statewide had been manually reviewed to ascertain voter intent. Under a second scenario, Gore could have prevailed if the punch card ballots treated as nonvotes by the canvassing board of Palm Beach County during its manual recount had been counted using the same inclusive standard that was used for the manual review and hand-counting of ballots in neighboring Broward and Palm Beach Counties.⁶ Finally, Bush's victory depended on his margin in the late-received overseas absentee ballots that were counted. Bush garnered 1575 (out of a total of 2411 cast for him and Gore) for a net margin of 739 votes.⁷ Some writers, however, have suggested that significant illegal votes were part of Bush's overseas absentee vote total.⁸ Nonetheless, Gore could have prevailed if more late-received absentee ballots had been counted in heavily Democratic counties or if the Gore legal team had successfully opposed the counting of ballots in Florida's heavily Republican counties.

Significantly, the NORC review shows that, in the absence of a change in results from either the manual recount in Palm Beach County or the count of overseas absentee ballots in Gore's favor, Gore was unlikely to have prevailed⁹ in the election with either the manual review

4. An undervote ballot is one on which the voter did not select a candidate for president or the electronic counting machine failed to register a vote for any candidate in the presidential election. *Frequently Asked Questions*, at NORC Website, *supra* note 2.

5. An overvote ballot is one on which an electronic counting machine registers two or more votes in the presidential election. *Id.*

6. The canvassing board of Broward County (and the canvassing board of Miami-Dade County for its partially completed recount) reviewed undervote punch card ballots using the so-called "dimpled ballot" standard. Under this standard, the canvassing board could conclude that a voter intended to cast a vote for a particular candidate even if the proper chad on the ballot for that candidate was only indented rather than fully detached. By contrast, the canvassing board of Palm Beach County agreed not to count any ballot unless the appropriate chad for a candidate was actually detached (i.e., the "hanging chad" standard).

7. Official Results, *supra* note 3.

8. See David Barstow & Dan Van Natta, Jr., *How Bush Took Florida: Mining the Overseas Absentee Vote*, N.Y. TIMES, July 15, 2001, § 1, at 1, available at LEXIS, News Library, The New York Times File (describing how Republican lawyers were successful in adding possibly illegal overseas absentee votes to the county election returns).

9. See, e.g., Richard L. Berke, *Who Won Florida? The Answer Emerges, but Surely Not the Final Word*, N.Y. TIMES, Nov. 12, 2001, at A16, available at LEXIS, News Library, The New

and counting of undervote ballots in Miami-Dade County, as sought in Gore's election contest,¹⁰ or with the manual review and counting of undervote ballots statewide as mandated by the Florida Supreme Court on December 8, 2000, in *Gore v. Harris*.¹¹ According to the NORC review, a potential margin of victory for Gore lay in the statewide counting of the thousands of ballots rejected by electronic counting machines as overvotes, which, on manual review, were found to contain votes in fact lawful under Florida law.¹² Gore's legal team not only never sought to have these overvotes manually reviewed and counted statewide but, instead, vigorously opposed any statewide hand-counting of overvotes, even as the legal battle ended on December 12.¹³

York Times File; Joel Engelhardt & Elliot Jaspin, *Under the Two Most Likely Scenarios, Bush Won Recounts*, PALM BEACH POST, Nov. 12, 2001, at 1AA, available at 2001 WL 29213042; Ford Fessenden & John M. Broder, *Study of Disputed Florida Ballots Finds Justices Did Not Cast the Deciding Vote*, N.Y. TIMES, Nov. 12, 2001, at A1, available at LEXIS, News Library, The New York Times File; John F. Harris, *A Symbolic, but Muddled, Victory*, WASH. POST, Nov. 12, 2001, at A11, available at 2001 WL 29761941; *If the U.S. Supreme Court Hadn't Said Stop . . . George Bush Would Still Be President* Ballot Review Indicates Over-Votes Cost Gore the Election, PALM BEACH POST, Nov. 12, 2001, § A, at 1, available at 2001 WL 29214001; Gary Kane, *But More Marked Ballots For Gore*, PALM BEACH POST, Nov. 12, 2001, at 1AA, available at 2001 WL 29213043; Dan Keating & Dan Balz, *Florida Recounts Would Have Favored Bush*, WASH. POST, Nov. 12, 2001, at A1, available at 2001 WL 29762038.

10. Compl. to Contest Election, *Gore v. Harris*, No. CV-00-2808 (Fla. Cir. Ct. 2000), available at http://199.44.225.4/courtDockets/pdf/election_cases/CV-00-2808a.pdf (last visited Nov. 26, 2002) [hereinafter Compl. to Contest Election]. As discussed more fully below, Gore's election contest petition also complained that the Palm Beach County Canvassing Board had applied an incorrect standard during its manual review of ballots and that, as a result, the board had left approximately 4000 ballots (e.g., ones with dimpled chads) with votes uncounted. The petition predicted that the uncounted ballots represented approximately 800 additional net votes for Gore. *Id.* However, the Florida Supreme Court found on December 8 that Gore had not presented any evidence that these ballots (now counted as 3300 ballots) were valid votes and upheld the circuit court's rejection of this claim. *Gore v. Harris*, 772 So. 2d 1243, 1247 (Fla.) (per curiam), *rev'd per curiam sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000).

11. *Gore v. Harris*, 772 So. 2d 1243 (Fla.) (per curiam), *rev'd per curiam sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000). This opinion actually is ambiguous as to whether the majority of the Florida Supreme Court anticipated that the recount of votes by the circuit court would include overvotes as well as undervotes. At various places, the Court majority opinion focuses on only uncounted undervotes (e.g., "[T]he circuit court has jurisdiction . . . in all counties that have not conducted a manual recount or tabulation of undervotes in this election to do so forthwith." *Id.* at 1262 (per curiam)). At others the opinion suggests the possibility of a broader recount (e.g., "The circuit court is directed to enter such orders as are necessary to add any legal votes to the total statewide." *Id.* (per curiam)). However, the Gore legal team apparently never officially adopted this broader view of the opinion and continued, even on appeal to the United States Supreme Court and afterward, to oppose counting overvote ballots. See *infra* note 13 (discussing the contents of Gore's brief).

12. NORC Website, *supra* note 2.

13. See JAKE TAPPER, *DOWN AND DIRTY, THE PLOT TO STEAL THE PRESIDENCY* app. at 496-97 (2001) (proposed, but unfiled, Gore brief from December 13, 2000). A proposed, but unfiled, brief for Gore argued that overvote ballots did not need to be included in a recount even after the Supreme Court ruling in *Bush v. Gore* because the Supreme Court did not clearly mandate the

The outcome in Florida is a reminder that legal conflicts sometimes are like military engagements, with the strategies, tactics and leadership of the two combating forces ultimately determining a winner and a loser. For shortly over a month, the legal teams representing George W. Bush and Al Gore were arrayed against one another in Florida like two armies fighting an unplanned, but violent, war. Each team had its own hurriedly organized command structure and order of battle, with both combat and supporting forces. For a time, engagements were fought simultaneously on many different fronts, in different forums, and in different geographical locales.¹⁴ This Article examines the legal strategies, tactics, and leadership that ultimately determined the outcome of that post-election legal fight.¹⁵

In order to better appreciate the legal dilemmas faced by the two legal teams in Florida, it is first important to understand the basic legal rules of election recounts and contests. Many misconceptions about those rules arose from the flood of media coverage that served to distort many of the events in Florida. Some of these misconceptions have found their

recounting of such ballots and there is no legal obligation to include them. *Id.* The brief urged that few overvote ballots would yield valid votes and that “[o]nly in the rarest instances could these ballots be read as reflecting a single intent.” *Id.* The NORC review of the uncounted ballots statewide discovered that there were a significant number of overvote ballots on which the voter’s intent to select one candidate could be readily ascertained. See NORC Website, *supra* note 2.

14. Such hurried, multi-forum legal battles are rare, but not unprecedented. The most comparable experience of this attorney was in 1981–1982 when the State of Texas was defending its congressional and state legislative plans simultaneously in approximately ten different state and federal lawsuits and before the United States Department of Justice. See *Upham v. Seamon*, 456 U.S. 37 (1982) (consolidated cases challenging Texas congressional election districts); *Terrazas v. Clements*, 537 F. Supp. 514 (N.D. Tex.) (three judge court) (consolidated cases challenging Texas senate and representative election districts), *stay denied*, 456 U.S. 902 (1982); *Upham v. White*, 639 S.W.2d 301 (Tex. 1982) (Republican challenge to Texas state senate election districts under state constitution); *Clements v. Valles*, 620 S.W.2d 112 (Tex. 1981) (challenge to Texas state representative election districts under state constitution).

15. The factual descriptions utilized herein are taken either from one of the many books that have been written about the presidential battle, the articles cited elsewhere in this article, or from interviews conducted by this author with attorneys who participated on the Bush or Gore legal teams in Florida. The books include: CORRESPONDENTS OF THE NEW YORK TIMES, 36 DAYS: THE COMPLETE CHRONICLE OF THE 2000 PRESIDENTIAL ELECTION CRISIS (2001); E.J. DIONNE & WILLIAM KRISTOL, *BUSH V. GORE: THE COURT CASES AND THE COMMENTARY* (2001); ABNER GREENE, *UNDERSTANDING THE 2000 ELECTION* (2001); MARTIN METZER, *DEMOCRACY HELD HOSTAGE* (2001); JOHN NICHOLS, *JEWS FOR BUCHANAN: DID YOU HEAR ABOUT THE THEFT OF THE PRESIDENCY* (2001); TAPPER, *supra* note 13; JEFFREY TOOBIN, *TOO CLOSE TO CALL: THE THIRTY-SIX DAY BATTLE TO DECIDE THE 2000 ELECTION* (2001); POLITICAL STAFF OF THE WASHINGTON POST, *DEADLOCK: THE INSIDE STORY OF AMERICA’S CLOSEST ELECTION* (2001). The sources generally agree on most accounts of the events, therefore, I have not attempted to provide a citation for each factual statement. I have tried to avoid any depictions from these books that seem to reflect a bias or opinion by the author. In those instances in which I have relied upon an obviously opinionated account of an event I have cited to the source.

way into the literature about the post-election battle in Florida and have been perpetuated from one article or book to another. Therefore, Part II of this Article attempts to clarify several of the most significant of these misconceptions.¹⁶ Part III of this Article examines various aspects of the organization, leadership, and decision-making of the two warring legal camps in an effort to better understand why, in a circumstance in which either Bush or Gore could have been certified the winner of the Florida presidential election and the Presidency of the United States, Bush prevailed.¹⁷

II. CLARIFYING MISCONCEPTIONS ABOUT THE LAW OF ELECTION RECOUNTS AND CONTESTS

A. *Recounts Versus Election Contests*

As the media reported events in Florida, it appeared that the manual recounting of undervote ballots (with county canvassing board officials photographed squinting at punch card ballots in an effort to discover voter intent) in certain counties continued uninterrupted into an election contest in which Gore asked Florida courts to allow the counties to finish the incomplete recounts. In reality, however, a recount and an election contest are two distinct processes with different purposes and rules.¹⁸ These differences were critical to the outcome in Florida.

16. See *infra* Part II (clarifying misconceptions about the law of election recounts and contests).

17. See *infra* Part III (discussing the anatomy of a defeat).

18. For a summary of state election laws, see NAT'L ASS'N OF STATE ELECTION DIRS., 2001 ELECTION ADMINISTRATION SURVEY (2001) [hereinafter ELECTION ADMINISTRATION SURVEY] (compiled by the Association after the 2000 election in response to events in the Florida election), and individual state responses on which the survey is based. For an overview of the categories of changes in election voting methods and laws and a description of a few of the election problems nationwide since 2000, see Katherine Q. Seelye & David E. Rosenbaum, *Election Officials Are Braced For Big Problems at the Polls*, N.Y. TIMES, Oct. 27, 2002, at A1, available at LEXIS, News Library, The New York Times File. In October 2002, Congress enacted the Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (2002) (to be codified at 42 U.S.C. §§ 15301–15545), in response to some of the election difficulties encountered in Florida. The Act includes requirements for: voter education and voting system changes to better enable voters to correct their ballots; manual audit capability for all voting systems; the establishment by law of an acceptable error rate for voting systems; greater accessibility for individuals with disabilities; additional multilingual voting functionality in voting systems; computerized statewide voter registration; voting absentee by military and overseas citizens; grants to states and localities to implement the other requirements of the Act and to improve administration of elections; the creation of an Election Assistance Commission as a national clearing house and resource for information and procedures and as a source of voluntary guidelines; and the creation of additional federal boards for developing standards and technical guidelines.

A recount, generally, is an administrative process in which local election officials attempt to identify and correct human and machine errors that occur during the original tabulation of votes.¹⁹ Under the law of most states, a recount must be completed within a few days of the election so that the recount total, if different from the original tabulation, can be substituted for the original tabulation before the outcome of the election is certified.²⁰ The certification of the winner of the election is based on the will of the voters as expressed in the number of votes reported by local election officials to the entity responsible by law for finally certifying the winner of the election. The certification is a critical event, and once it occurs, the election as a practical and legal matter is over—a winner has been determined.

An election contest is a separate proceeding in which a losing candidate, or in some states a voter, challenges the certified outcome of the election.²¹ State laws vary nationwide regarding who has jurisdiction in particular elections to consider an election contest. In many circumstances, as in Florida for the presidential election, contests are heard in state court.²² Courts historically, however, have not wanted the task of overseeing election results or substituting their judgment for the certified outcome of an election.²³ Therefore, in virtually every state, the certified election result is presumed to be valid,²⁴ and the courts have erected significant barriers for anyone attempting to challenge that result. Often, these barriers exist as threshold requirements that must be overcome even before a court will assume

19. See *Siegel v. LePore*, 120 F. Supp. 2d 1041, 1050 (S.D. Fla. 2000) (describing the purpose of a manual recount as “detecting and correcting clerical or electronic tabulating errors”); *Miller v. County Comm’n*, 539 S.E.2d 770 (W. Va. 2000) (indicating that a recount gives candidates the opportunity (1) to observe the manner in which the recount is conducted, (2) to notify the canvassing board of their intentions regarding requesting a recount in precincts not requested by the candidate originally requesting the recount, and (3) to identify ballots that may be challenged as irregular or illegal in an election contest).

20. See, e.g., FLA. STAT. ch. 102.166 (2000 & West Supp. 2003).

21. There is no common law right to challenge an election outcome. See *Harless v. Lockwood*, 332 P.2d 887, 888 (Ariz. 1958); *McPherson v. Flynn*, 397 So. 2d 665, 668 (Fla. 1981); *Henderson v. Maley*, 806 P.2d 626, 634 (Okla. 1991). The right exists only by virtue of, and is strictly limited by, statute.

22. See FLA. STAT. ch. 102.168 (2000); ELECTION ADMINISTRATION SURVEY, *supra* note 18.

23. These concerns of the state judiciaries are similar to the concerns underlying the basic political question doctrine of justiciability as explained in *Baker v. Carr*, 369 U.S. 186 (1962). See *McIntyre v. Fallahay*, 766 F.2d 1078, 1087–88 (7th Cir. 1985) (Swygert, J., dissenting).

24. See, e.g., *Gooch v. Hendrix*, 851 P.2d 1321, 1327 (Cal. 1993) (quoting *Wilks v. Mouton*, 722 P.2d 187, 189 (Cal. 1986)) (“[A] primary principle of law as applied to election contests is that it is the duty of the court to validate the election if possible. That is to say, the election must be held valid unless plainly illegal.”); *Swift v. Registrars of Voters*, 183 N.E. 727, 728 (Mass. 1932).

jurisdiction of the contest. Chief among such barriers are requirements for specificity in pleading and for showing that substantial irregularities or violations of state law have affected the outcome in the election. Fishing expeditions, or lawsuits based on a hope that an outcome may change, have historically been disallowed.²⁵ By thus limiting access to the judicial process, state courts historically have attempted to severely limit the frequency with which courts will decide elections and to forestall protracted legal proceedings that, merely by their pendency, could affect the ability of the certified winner of an election to effectively carry out her duties in office.²⁶

Applicable election contest law in Florida is generally consistent with other state laws nationwide.²⁷ The nearness of the two presidential

25. See, e.g., *Christenson v. Allen*, 119 N.W.2d 35, 40 (Minn. 1963) (refusing to allow election contest as a "fishing expedition"); *Jackson v. Maley*, 806 P.2d 610, 615 (Okla. 1991) ("[C]ourts indulge every presumption in favor of the validity of an election and, where possible, the validity will be sustained. . . . Mere possibilities will not suffice to carry this initial burden."); *In re Opening of Ballot Boxes*, 718 A.2d 774, 777 (Pa. 1998) (recount invalidated because of lack of verification of signatures on recount petition); *Pfuhl v. Coopersmith*, 253 A.2d 271, 275 (Pa. 1969) (indicating that a showing that a partial recount of precincts discloses possible errors in other precincts is insufficient to obtain a recount of the other precincts in a state senate election).

26. See, e.g., *In re Contest of the Election for the Offices of Governor and Lieutenant Governor Held at the Gen. Election on Nov. 2, 1982*, 444 N.E.2d 170, 178 (Ill. 1983).

27. In his dissent in *Gore v. Harris*, Chief Justice Wells explained that "[h]istorically, [the Florida Supreme] Court has only been involved in elections when there have been substantial allegations of fraud and then only upon a high threshold because of the chill that a hovering judicial involvement can put on elections." *Gore v. Harris*, 772 So. 2d 1243, 1264 (Fla.) (Wells, C.J., dissenting), *rev'd per curiam sub nom. Bush v. Gore*, 531 U.S. 98 (2000); see, e.g., *Smith v. Tynes*, 412 So. 2d 925, 926–27 (Fla. Dist. Ct. App. 1982) (indicating that it is not enough for a contestant to show a reasonable possibility that election results could be altered by irregularities, rather a *reasonable probability* that the results would have been changed must be shown). This threshold of "reasonable probability" was created by the Florida courts and did not appear explicitly in the election statutes. See *Krivanek v. Take Back Tampa Political Comm.*, 625 So. 2d 840, 844–45 (Fla. 1993) (quoting *Boardman v. Esteve*, 323 So. 2d 259, 268 n.5 (Fla. 1975), for the proposition that "[i]t is certainly the intent of the constitution and the legislature that the results of elections are to be efficiently, honestly and promptly ascertained by election officials to whom some latitude of judgment is accorded, and that courts are to overturn such determinations only for compelling reasons when there are clear, substantial departures from essential requirements of law"); *Boardman*, 323 So. 2d at 268 (indicating that where the record does not show that votes were illegal "the presumption of the correctness of the election officials' returns stands"). In *Gore v. Harris*, the majority of the Florida Supreme Court concluded that the "reasonable probability" standard was no longer applicable under section 102.168 as amended in 1999. *Gore*, 772 So. 2d at 1255 (per curiam). Dissenting Justices Harding and Shaw agreed with the majority that the reasonable probability requirement had not survived the 1999 amendments. *Id.* at 1271 (Harding, J., dissenting). Nevertheless, these two Justices concluded that section 102.168 still required a contestant to show "that the number of legal votes rejected by the canvassing boards is sufficient to change or place in doubt the result of this statewide election" and that Gore had failed to carry this burden. *Id.* (Harding, J., dissenting). Even the majority found that Gore had failed to carry his burden of showing that the 3300 ballots from Palm Beach County were valid votes. *Id.* at 1260 (per curiam). In 2000, this threshold showing for an

candidates (1784 votes separating the candidates out of approximately six million votes cast) on November 8, 2000, triggered an automatic recount of votes statewide in Florida. In most counties, election officials merely recounted using the same counting equipment and procedures as used on election night. Nevertheless, errors were found and the differences between the two candidates unofficially narrowed to a mere 327 votes, with late-received overseas absentee ballots remaining to be counted.

With the election essentially a statistical tie, the Gore team on November 8 or 9 made its first important strategic decision. The decision had two parts. The first part concerned whether Gore should request a further recount of ballots or allow the outcome of the election to become final with Bush the winner.²⁸ The second part of the decision concerned whether, if a further recount was to be requested, it should be requested in each of Florida's sixty-seven counties or only in selected ones. Gore's fateful decision was to request a manual recounting of the ballots only in the four populous south Florida counties (Broward, Miami-Dade, Palm Beach, and Volusia) in which the already counted votes had shown a majority for Gore. As provided for by state law, the four counties initially conducted a partial manual count of 1% of the county's precincts to determine whether a full manual recount was justified.²⁹ Eventually, the canvassing board in each of the four counties voted to conduct a full countywide manual recount.

Local canvassing boards had one week, until November 14, to officially report county voting results to the state canvassing board headed by Secretary of State Katherine Harris.³⁰ In *Palm Beach County Canvassing Board v. Harris*,³¹ the Florida Supreme Court extended this deadline to 5:00 p.m. on November 26.³² Despite this extension, however, neither Palm Beach County nor Miami-Dade County completed a manual recount of undervote ballots in time to report the results to the Secretary of State by the new deadline. On November 26,

election contest in Florida was the basis for dismissing several challenges to the presidential election. See *infra* note 35 (discussing the threshold requirements for an election contest).

28. Florida Attorney General Bob Butterworth journeyed to Tallahassee on November 8 to persuade the leadership of the Gore legal team that a recount could win the election for Gore. Interview with Ben Kuehne, Al Gore attorney, in Miami, Fla. (May 24, 2002).

29. FLA. STAT. ch. 102.166 (2000 & West Supp. 2003).

30. *Id.* ch. 102.112 (2000).

31. *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1220 (Fla.) (per curiam), vacated *per curiam sub nom.* *Bush v. Palm Beach County Canvassing Bd.*, 531 U.S. 70 (2000) [hereinafter *Palm Beach County Canvassing Bd.* 1].

32. *Id.* at 1240 (per curiam).

George W. Bush was certified the winner of the presidential race in Florida with 2,912,790 votes compared to 2,912,253 votes for Al Gore—a difference of 537 votes.³³

Having been unable to overcome Bush's lead through the administrative recounts, Gore contested the certified outcome of the election. Gore's election contest complaint was filed on November 27. It was this election contest litigation that proceeded on an expedited basis through the Florida courts, and it was the order of the Florida Supreme Court in this litigation that became the basis on which the United States Supreme Court brought the post-election battle to a close on December 12 in *Bush v. Gore*.³⁴

The important distinctions between an administrative recount and an election contest under Florida law created dilemmas for the Gore legal team and led it to make several decisions that were critical to the eventual outcome in Florida. First, the Gore legal team faced a crucial choice on November 13, 2000, when it became clear that the manual recounts would not be completed by the statutory deadline of November 14. Gore could have either asked the Florida courts to enjoin certification of the result of the election as planned on November 16 (thereby extending the period for completion of the ongoing manual recounts), or he could have allowed the election results to be certified on November 16 with Bush as the winner and promptly challenge this result in an election contest. The Gore legal team decided to seek an extension of time for the completion of the administrative recounts.

A second dilemma for the Gore legal team arose in regard to whether to challenge the presidential election result in Florida on the basis of the butterfly ballot in Palm Beach County. The Gore legal team opted against directly making such a challenge because the threshold requirements applicable to such a lawsuit, and the difficulty of remedying the harm caused by the butterfly ballot, made it unlikely that such litigation could be successful.³⁵

33. Official Results, *supra* note 3; *see supra* note 3 and accompanying text (noting that the final certified results from Florida showed Bush with 2,912,790 votes and Gore with 2,912,253 votes).

34. *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam).

35. The threshold requirements applicable to an election contest proved too great for several lawsuits filed to challenge perceived irregularities in the Florida presidential election. *See, e.g.*, *Fladell v. Palm Beach County Canvassing Bd.*, 772 So. 2d 1240 (Fla. 2000) (per curiam) (concluding as a matter of law that the Palm Beach County butterfly ballot did not constitute substantial noncompliance with statutory requirements); *Taylor v. Martin County Canvassing Bd.*, No. CV-00-2850, 2000 WL 1793409 (Fla. Cir. Ct.) (rejecting a challenge to absentee balloting in Martin County despite irregularities because the election in Martin County was a full and fair expression of the will of the people), *aff'd*, 773 So. 2d 517 (Fla. 2000); *Jacobs v.*

A third dilemma was faced upon the filing of the election contest itself. Gore's strategy during the recount had been to obtain manual recounts in only four counties. The dilemma in the election contest was whether a request for completion in court of these limited manual recounts would be sufficient to meet the threshold requirements of an election contest.

Election recount and contest law is arcane. It appears that the leadership of the Gore legal team made some of its fateful decisions without sufficient understanding of some aspects of that law.

B. The Hand-Counting of Ballots

As canvassing boards began a manual review and hand-counting of ballots in the four Florida counties, interested onlookers perceived that such hand-counting of ballots allowed partisan bias to prevail over the supposed objectivity of the counting machines. Republicans suggested that hand-counting was a subterfuge by which Gore was stealing the election.

Contrary to the Republicans' post-election public posturing in Florida, hand-counting ballots is the preferred manner nationwide for determining the correct outcome in extremely close elections.³⁶ The events in Florida are unlikely to change that preference for voting systems in which such counts are possible.³⁷

A manual or hand-counting of ballots on election night is neither reliable nor efficient. Hand-counting hundreds or thousands of ballots, each with votes for candidates in many different races, creates an unacceptable margin of error and the possibility of wide scale fraud. In addition, such a hand-counting is likely to take days to complete in this nation's large jurisdictions at a time when the public has come to expect

Seminole County Canvassing Bd., No. CV-00-2816, 2000 WL 1793429 (Fla. Cir. Ct.) (rejecting a challenge to absentee balloting in Seminole County on the basis that plaintiffs' evidence failed to support a finding of fraud, gross negligence, or intentional wrongdoing by election officials), *aff'd*, 773 So. 2d 519 (Fla. 2000); Order of Dismissal at 1–2, *Brown v. Stafford*, CV-00-2878 (Fla. Cir. Ct. Dec. 12, 2001), available at http://199.44.225.4/courtDockets/pdf/election_cases/CV-00-2878h.pdf (last visited Nov. 29, 2002) [hereinafter Order of Dismissal] (dismissing contest of election irregularities in Duval County in the presidential election).

36. See ELECTION ADMINISTRATION SURVEY, *supra* note 18.

37. Most standalone self-tabulating voting machines, such as direct recording equipment ("DRE") and levered machines, do not leave a paper trail by which the results shown on the machine may be manually checked to discern an individual voter's intent. However, under recently enacted federal legislation these voting systems now are required to produce a permanent paper record that will allow at least some audit capacity and record for recounts. See Help America Vote Act of 2002, Pub. L. No. 107-252, § 301(a)(2), 116 Stat. 1666, 1705 (2002) (to be codified at 42 U.S.C. §§ 15301–15545).

election returns being reported within a few hours of the close of the polling stations.

Properly programmed counting machines are quicker and less prone to error than human counters. Therefore, each sizeable community or jurisdiction in this country uses self-tabulating voting equipment, such as direct recording equipment ("DRE") or levered voting machines, or uses punch cards or paper ballots that can be electronically counted. For virtually all elections, the use of electronic counting equipment is satisfactory for determining the winner of an election. Nevertheless, every manner of voting machine or electronic counting system is susceptible to error.³⁸ Some machine-counted ballots clearly indicating a voter's intent to cast a vote for a particular candidate are erroneously left uncounted by the counting equipment. In those rare instances in which these uncounted ballots may be determinative of the winner of an election, the manual review and hand-counting of the uncounted ballots are the best means of accurately determining the outcome of the election.

Manually reviewing and hand-counting ballots in a recount situation is far different than hand-counting ballots on election night. The manual recount occurs under highly controlled circumstances. Unlike on election night, there usually is only one race at stake and, therefore, only one vote to be determined per ballot. Teams of observers manually review each ballot at issue.³⁹ Each such team includes election officials and a representative of each affected candidate.⁴⁰ As a result, each candidate's representative is in a position to observe and to identify any practices that she considers irregular and to object to any ballots that she believes have been improperly included or excluded from the vote count. Through this process, the team of observers identify individual disputed ballots that may be challenged before the canvassing board and, if necessary, subsequently in an election contest.

Additional observations are useful for understanding the fairness of a hand-counting of ballots. First, such hand-counts rarely change the outcome of an election. The uncounted votes can be expected to

38. See ROY G. SALTMAN, U.S. DEP'T OF COMMERCE, NAT'L BUREAU OF STANDARDS, INST. FOR COMPUTER SCI. & TECH., SPECIAL PUBLICATION 500-158: ACCURACY, INTEGRITY AND SECURITY IN COMPUTERIZED VOTE-TALLYING (1988), *available at* <http://www.itl.nist.gov/lab/specpubs/500-158.htm> (last visited Nov. 27, 2002). Under recently enacted federal legislation, an acceptable error rate standard is established by law for voting systems. See Help America Vote Act of 2002 § 301(a)(5).

39. FLA. STAT. ch. 102.166 (2000 & West Supp. 2003). If ballots on which the counting equipment has recorded no vote have been segregated from the counted ballots, the manual review may (if permitted by state law) be limited to these nonvote ballots.

40. *Id.*

usually break in approximately the same percentages as the votes already counted so long as the standard in question is being applied uniformly to all ballots (i.e., similarly appearing ballots must be treated in a similar fashion for both candidates). Despite the Republicans' public claims that canvassing boards in Florida were allocating votes during the manual recount based on partisanship, the results of those manual recounts in Volusia, Broward, Palm Beach and Miami-Dade Counties suggest otherwise.

A second important observation is that any decision by a canvassing board in Florida or most other states in a manual recount to include or to exclude specific ballots is subject to challenge *de novo* in an election contest.⁴¹ The issue before a court or other body hearing the election contest is whether the disputed ballot is a legal vote under state law, not whether the canvassing board acted reasonably in including or excluding the ballot. Therefore, if the outcome of an election is determined by a canvassing board's apparent inclusion of illegal votes or exclusion of legal votes, the outcome may be challenged in an election contest.

C. The Standard of Voter Intent

As the manual recount of ballots proceeded in the four Florida counties, county canvassing board officials often were shown on national television squinting at punch card ballots in what sometimes was portrayed or perceived as a partisan search for votes for one candidate or another based on a subjective and standardless search for "voter intent." Ascertainment of voter intent is the guiding principle throughout virtually the entire country in any manual review of ballots. Neither the events in Florida nor the opinions of the United States Supreme Court in *Bush v. Gore*⁴² are likely to change the acceptance of that principle.

Many states by administrative rule or state law long ago established rules or guidelines that are to be followed in ascertaining the intent of a

41. See *Gore v. Harris*, 772 So. 2d 1243, 1271 (Fla.) (Harding, J., dissenting) (indicating that the issue of whether a canvassing board has rejected a number of legal votes is sufficient to change or to place in doubt the election by virtue of cutting short a manual recount is to be determined *de novo*, not under an abuse of discretion standard), *rev'd per curiam sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000); see also *McIntyre v. Wick*, 558 N.W.2d 347, 358 (S.D. 1996) (describing the scope of review in an election contest as *de novo*). The majority adopted this same position.

42. The Court's *per curiam* opinion observed that the standard of ascertaining the intent of the voter is "unobjectionable as an abstract proposition and a starting principle. The problem inheres in the absence of specific standards to ensure its equal application." *Bush*, 531 U.S. at 105-06 (*per curiam*).

voter on a ballot that, for some reason, cannot be read by the electronic counting equipment.⁴³ Nevertheless, even when such guidelines exist, the ultimate standard often remains a subjective ascertainment of the intent of the voter. For example, the law of Texas was identified during the Florida recount as an example of state law prescribing specific standards for manually counting punch card ballots.⁴⁴ Section 127.130 of the Texas Election Code purports to specifically limit circumstances in which a ballot may be counted, such as when at least two corners of a chad are detached.⁴⁵ This section of the Texas Election Code, however, goes on to override these specific guidelines by expressly providing that nothing in the section supercedes “any clearly ascertainable intent of the voter.”⁴⁶

Even when authorities agree on what specific guidelines are applicable, reasonable persons may disagree about how those guidelines apply to a particular ballot. Judges that agree on the legal standard to be applied may disagree as to the result when that standard is applied to a specific ballot.⁴⁷ In its review of the uncounted ballots in Florida, NORC found that coders often disagreed in good faith about whether particular ballots met the specific guidelines being applied for characterizing a ballot.⁴⁸

Subjective judgments by humans are unavoidable in the manual review and counting of ballots. Just as different umpires in baseball call balls and strikes differently at the extremes of the prescribed strike zone, different judicial and administrative officials in a hand-counting of ballots may include or exclude votes differently, even when such decisions are subject to controlling guidelines. These differences, however, do not necessarily reflect a partisan bias or effort to aid in the election of a preferred candidate.

43. See, e.g., TEX. ELEC. CODE ANN. § 127.130 (Vernon 1986 & Supp. 2003); see generally ELECTION ADMINISTRATION SURVEY, *supra* note 18. Federal law now requires states to adopt a uniform definition of what constitutes a vote and what will be counted as a vote for each certified voting system. See Help America Vote Act of 2002 § 301(a)(6).

44. TEX. ELEC. CODE ANN. § 127.130 (Vernon 1986 & Supp. 2003).

45. *Id.*

46. *Id.*

47. For example, in *Delahunt v. Johnston*, 671 N.E.2d 1241, 1243 n.2 (Mass. 1996), the Supreme Court of Massachusetts found that the judge of the trial court had applied the correct standard for discerning voter intent but that “[o]n balance, we are slightly more willing to find intention expressed on [the] ballots where the trial judge ruled there was none.” See *Duffy v. Mortenson*, 497 N.W.2d 437, 439–40 (S.D. 1993) (concluding that a ballot with an indented chad not counted by the trial court provided evidence of clear voter intent and, when counted, resulted in a tie between the candidates).

48. See NORC Website, *supra* note 2.

D. A Single Impartial Arbiter

If, as suggested above, manual recounts remain an accepted means for resolving close elections and the inevitable goal in such a recount is ascertaining voter intent, how can candidates and voters be assured fairness and uniformity in the ascertainment of that intent? Historically, fundamental fairness in an election has been guarded through the opportunity for fair adjudication of all disputes before a single impartial arbiter.⁴⁹ Depending on the office at stake and the applicable state law, this prescribed arbiter may be the courts, a state legislature, Congress, or a state official. Importantly, this arbiter's review is *de novo*.

The arbiter determines the legality of a disputed vote independent of any determination reached by a canvassing board. This opportunity for fair adjudication before an impartial arbiter is crucial. For example, Florida's General Election Statute contemplates the opportunity for such adjudication when necessary in election disputes through an election contest in state court.⁵⁰ In 2000, however, the reality was that there was never sufficient time for a full and fair adjudication of the myriad of issues and categories of legal or illegal votes possibly determinative of the outcome of the extremely close presidential election.⁵¹

E. A Remedy For Every Injury

Some commentators have expressed outrage at the action of the United States Supreme Court in *Bush v. Gore* at least in part because of a view that the law should provide a remedy for every injury. As discussed below, however, such an absolute view is contrary to state and federal rulings in the area of election law.⁵² Alleged and even

49. In his dissenting opinion in *Bush v. Gore*, Justice Stevens indicated that the traditional safeguard for election contests nationwide existed even under the Florida Court's remedial order —i.e., “a single impartial magistrate [that] will ultimately adjudicate all objections arising from the recount process.” *Bush v. Gore*, 531 U.S. 98, 126 (2000) (Stevens, J., dissenting).

50. FLA. STAT. ch. 102.168 (2000).

51. In its anxious attempt to count as many votes as possible, the majority of the Florida Supreme Court on December 8, 2000, lost sight of the essential need for preserving the fundamental fairness of the election outcome by assuring that an impartial arbiter could uniformly determine the validity of all disputed and uncounted ballots from throughout the state. The court required that the recount totals from Palm Beach and Miami-Dade (and effectively from Broward and Volusia) Counties be included in the final tally of votes even though the recount standards and ballots in both counties were disputed. It also allowed other votes to be included or excluded based on disparate local standards. The majority effected a fundamentally unfair result that appeared to deny any opportunity for adjudication of these disputed issues before an impartial arbiter.

52. See *infra* notes 53–61 and accompanying text (discussing various state and federal rulings on election contests and recounts).

proven injuries sometimes are left without remedy, especially when the court perceives that a search for a specific injury or the remedy for that injury could be more harmful than productive.⁵³

First, no court has found that “every vote must be counted.”⁵⁴ In the reality of elections involving possibly millions of ballots, votes in an election are seldom fully and accurately counted because every method of counting votes has some margin of error. Most elections, however, are not nearly close enough to fall within this margin of error. Even in a close election, the purpose of a recount or election contest is to determine the will of the voters, not an exact total of votes.⁵⁵

Second, even when the outcome of an election is at issue, circumstances such as a shortage of time sometimes prevent prosecution of a complaint. The process and result in Florida was affected by the extreme shortage of time in which to resolve the dispute over the electors in the presidential election. A presidential election, however, is not the only election in which a lack of time affects the ability to determine the winner with certainty. For example, close party primary elections sometimes end with the final results somewhat in doubt because there is not sufficient time to fully litigate the disputed votes or issues in time for the candidate to qualify for a run-off or for the general election. As a result, the certified results are left to stand without litigation, with the losing candidate sometimes left with the feeling that perhaps she really won.

Third, in close elections unaffected by fraud, the courts in this country historically have placed a greater emphasis on maintaining the continuity of government than on encouraging the protracted litigation

53. An important aspect of our democracy is that power in government can readily transfer in confidence that, at the end of the term of office, it will again transfer if the election outcome is different. No outcome of any single primary or general election is sufficiently important to warrant significant disruption of the governing process, even in the interest of assuring the accuracy of the election outcome. There must be finality. The candidates, but more importantly the government and the people, must move on. See *McIntyre v. Fallahay*, 766 F.2d 1088 (7th Cir. 1985) (Swygert, J., dissenting) (indicating that our government is a representative democracy and that the people cannot be properly represented unless the legitimacy and authority of the elected official to represent them is finally determined).

54. This phrase became the rallying cry for Democrats during the post-election battle in Florida.

55. See, e.g., *In re Election of the United States Representatives*, 653 A.2d 79, 90–91 (Conn. 1994) (“[T]he purpose of the voting process is to ascertain the intent of the voters.”); *Boardman v. Esteva*, 323 So. 2d 259, 265 (Fla. 1975) (indicating that a “fundamental inquiry should be whether or not the irregularity complained of has prevented a full, fair and free expression of the people’s will”); *Pullen v. Mulligan*, 561 N.E.2d 585, 611 (Ill. 1990) (“The purpose of our election laws is to obtain a correct expression of the intent of the voters.”); *Moore v. Hayes*, 744 P.2d 934, 941 (Okla. 1987) (“The primary concern of an election recount, whether conducted by hand or by machine, is to find the will of the voters, as truly and faithfully as possible.”).

of questionable candidate claims over disputed ballots. This balancing in favor of “finality” seems to reflect several principles that go to the strength of our democracy, such as: (1) in the absence of credible allegations of fraud or significant irregularities that can be shown to have denied the will of the people, the certified election outcome should be presumed valid and should remain undisturbed;⁵⁶ (2) greater harm may be done to a democracy by allowing protracted litigation over and court interference with elections than by the possibility that sometimes the declared outcome in an extremely close election may actually be statistically incorrect;⁵⁷ and (3) the power of government can readily be transferred in our democracy in confidence that, at the end of the term of office, it will again transfer if the election outcome is different.

Finally, federal courts have long recognized that a remedy will be withheld in election lawsuits even under an unlawful election system when justified by “exigent circumstances.” In its landmark decision, *Reynolds v. Sims*,⁵⁸ the United States Supreme Court explained that federal courts may be bound to award or to withhold relief based on the mechanics and complexities of state election laws.⁵⁹ This principle has been applied many times since 1964,⁶⁰ even though the unavoidable effect is to allow persons to serve in office who otherwise probably would not have been elected.

Regardless whether an observer agrees with the United States Supreme Court decision in *Bush v. Gore*, the decision is not the first in an election case to deny the opportunity for a judicial remedy for an alleged wrong.⁶¹

56. See *supra* note 25 (discussing the Court's preference for a presumption of validity).

57. See *In re Contest of the Election for the Offices of Governor and Lieutenant Governor Held at the Gen. Election on Nov. 2, 1982*, 444 N.E.2d 170, 178 (Ill. 1983) (concluding that the political turmoil surrounding an unresolved election contest effectively could “prevent the legislative and executive branches of government from dealing with the urgent problems facing [a] State. [A] State . . . should not be forced to endure these consequences on the mere suspicion of defeated candidates or on their belief or hope that an election contest would change the results.”).

58. *Reynolds v. Sims*, 377 U.S. 533 (1964).

59. *Id.* at 585–87.

60. See, e.g., *Upham v. Seamon*, 456 U.S. 37, 44 (1982); *Ely v. Klahr*, 403 U.S. 108, 114 (1971); *Kilgarlin v. Hill*, 386 U.S. 120, 121 (1967); *Terrazas v. Clements*, 537 F. Supp. 514, 537 (N.D. Tex.) (three judge panel), *stay denied*, 456 U.S. 902 (1982).

61. For example, on the same day as the Supreme Court decision in *Bush v. Gore*, Leon County Circuit Judge Terry Lewis dismissed another contest of the November 2000 election on the basis that “[t]he problem here is simply one of time and the resultant lack of due process that could be afforded in resolving the issues raised by the Complaint in a meaningful way.” Order of Dismissal, *supra* note 35, at 1.

III. ANATOMY OF A DEFEAT

Many different factors affected the outcome in Florida. This portion of this article examines a few examples of the strategies, tactics, and leadership that helped determine the outcome.

A. *The Organization of the Bush and Gore Legal Teams*

As opposing forces began to assemble in Florida after November 8, the Democratic team of lawyers seemed to hold an advantage. As time passed, however, the Bush legal team proved itself to be better organized and more effective.

By four o'clock in the morning on November 8, the Gore team was convened at the direction of campaign chairman William Daley⁶² in the campaign's headquarters in Nashville, Tennessee. The team had the benefit of some of the best political operatives available and some important legal talent, including Ron Klain⁶³ and the experienced recount law specialists Jack Young⁶⁴ and Chris Sautter.⁶⁵ Former

62. William Daley spent much of his early legal career with the Chicago law firm of Mayer, Brown & Platt. TOOBIN, *supra* note 15, at 37. He served as Secretary of Commerce under President Clinton. *Id.* In 2000, he became Gore's campaign manager, replacing Tony Coelho. *Id.* From the beginning of the post-election battle, Daley thought that Gore's recount effort had little chance of success. *Id.*

63. Ron Klain has extensive experience in advising candidates and elected officials on political and legal issues. *See id.* at 10–11. Following a clerkship with Justice Byron White of the United States Supreme Court, he worked as chief counsel for the Senate Judiciary Committee. *Id.* at 10. With Clinton's presidential victory in 1992, Ron Klain became an associate White House counsel and later served as Chief of Staff to Attorney General Janet Reno and Democratic Senate leader Tom Daschle. *Id.* In 1995, he became Chief of Staff to Vice-President Al Gore. *Id.* He left the White House in September 1999 to join the Washington law firm of O'Melveny & Myers. *Id.* at 11. During 2000, he went to Nashville to help run the Gore campaign's communications center. *Id.* He was thrust into the lead role in the post-election legal battle despite knowing little about the actual casting and counting of votes or about election recounts or contests. *See id.* Ron Klain worked exhaustively for his client and his dedication was absolute.

64. John Hardin Young has an office in Washington with the Democratic National Committee's chief lawyer, Joe Sandler. *See id.* at 27–29, 38–39. He, Chris Sautter, and Timothy Downs are co-authors of the book, *The Recount Primer*. *Id.* One of only a handful of attorneys nationwide with significant recount experience, he was part of the Gore legal team from the beginning and urged that Gore seek a statewide recount of ballots. *Id.* Young ended up spending the post-election period primarily engaged first in the recount in Volusia County and then in Broward and Miami-Dade Counties even though he continued to suggest that the search for voters expand into other counties. *See* TAPPER, *supra* note 13, at 184–85; TOOBIN, *supra* note 15, at 154.

65. Chris Sautter has an office in Washington, D.C., and provides consulting services to Democratic candidates nationwide. *See* TAPPER, *supra* note 13, at 68; TOOBIN, *supra* note 15, at 38. His recount experience dates back to 1984. TOOBIN, *supra* note 15, at 38. Sautter co-authored *The Recount Primer* with Jack Young and Timothy Downs. *Id.* He was persistent but unsuccessful in his effort to persuade the Gore legal team to initiate a recount statewide. *Id.*

Secretary of State Warren Christopher⁶⁶ was awakened by a call from Daley and agreed to fly to Nashville. Shortly after sunrise on November 8, a group of those who earlier had been meeting in Nashville and other supporters left by private plane for Florida where, at Klain's direction, they were spread among the sixty-seven Florida counties. On arriving in Tallahassee, Klain and Democratic Party General Counsel Joe Sadler immediately set out to find lawyers in Florida.⁶⁷ By evening, both Daley and Christopher were in Tallahassee and a core legal team was convened.

Therefore, within approximately twenty-four hours of the closing of the polls in Florida, key members of the Gore legal team were already assembled in Florida to plot their client's legal strategy.⁶⁸ By the morning of November 9, the consensus of the Gore leadership was to forego a legal challenge to the butterfly ballot in Palm Beach County and, instead, to file protests in Volusia, Broward, Palm Beach and Miami-Dade Counties designed to obtain a manual review and hand-counting of ballots on which the counting machines had failed to record a vote for president (i.e., "undervotes").⁶⁹ The team's recount experts dispersed to their assigned counties to file the necessary "protests"⁷⁰ and to prosecute the requested manual recounts before the county canvassing boards and, as necessary, before the Florida courts. This strategy of achieving a manual recount in these four counties remained essentially unchanged during the next eventful few weeks.

The Republican legal team was slower to assemble and to organize. On the morning of November 8, the Bush campaign contacted former

Sautter ended up spending the post-election period primarily engaged in the recount in Broward County. See TAPPER, *supra* note 13, at 208.

66. Warren Christopher has spent most of his legal career as a corporate litigator with the law firm of O'Melveny & Myers. TOOBIN, *supra* note 15, at 45-46. He has been an advisor to many presidents and has served as Secretary of State. *Id.* He is characterized as cautious and judicious. *Id.* at 45. Burdened by personal and professional obligations outside of Florida, Christopher left Tallahassee on November 20. See TAPPER, *supra* note 13, at 327; TOOBIN, *supra* note 15, at 97.

67. TOOBIN, *supra* note 15, at 33. Initially promising efforts by Klain to recruit Democratic attorneys from the prestigious Florida firm of Holland & Knight were unsuccessful when the firm partnership decided to sit out the conflict. *Id.*

68. See *id.* at 44. In anticipation of possible post-election recounts, Democrats had prepared a notebook with the recount procedures of twenty states beforehand. *Id.*

69. See *infra* notes 97-118 and accompanying text (discussing the likelihood of successfully challenging the butterfly ballot in light of recent unfavorable litigation).

70. See FLA. STAT. ch. 102.166 (2000) (amended 2001). In Florida, a request for a manual recount of ballots comes in the form of a written "protest" filed with the county canvassing board. *Id.*

Secretary of State Jim Baker⁷¹ as he returned home from the airport in Houston, Texas. The Gore team had Warren Christopher; would Baker represent Bush in Florida? Baker agreed to the task. The chief lawyer on the Bush campaign with election recount experience was Ben Ginsberg.⁷² When the leaders of the Bush team convened at five o'clock in the evening on November 8 in Tallahassee, Florida, Baker was appalled at the "meager team that had been assembled" to fight what he already sensed would be a demanding legal and public relations fight.⁷³ The Bush team, however, enjoyed many advantages, including having both their client and his brother (Jeb Bush) in governors' mansions. Within days the legal team grew with the addition of attorneys from premier law firms in Florida, Texas, and elsewhere in the United States.⁷⁴ Baker's announced objective from the beginning was to get the best attorneys.

As this throng of willing Republican attorneys gathered in Florida and in offices elsewhere in the country at Jim Baker's request, they were divided into teams with specific assignments and areas of responsibility.⁷⁵ The critical federal court team was organized under Theodore Olsen and had the responsibility of developing and executing a winning strategy for activity in the federal courts. A second group was assigned state court litigation. At the personal initiative of Governor Jeb Bush's general counsel on the day after the election, Democratic Tallahassee attorney Barry Richard had been recruited to help the Bush team. Distrusted by some Republicans for his Democratic past, Richard did not become the clear leader of Bush's

71. See TOOBIN, *supra* note 15, at 40. James A. Baker III has spent most of his legal career with the Houston firm of Baker & Botts, which was founded by his great-grandfather. *Id.* Characterized by one writer as "the leading political operative of his generation," Baker is described as a close friend to former President Bush and intensely loyal to candidate George W. Bush. *Id.* at 45-46. He is characterized as relentless and partisan. *Id.* One writer indicates that Baker is a "ruthless CEO type," once labeled as "the velvet hammer." See TAPPER, *supra* note 13, at 50-54. Baker remained engaged in Florida as the nucleus of the Bush legal effort for essentially all of the post-election legal battle. *Id.* at 238.

72. See TOOBIN, *supra* note 15, at 44-45. Ben Ginsberg is now with the Washington law firm of Patton Boggs LLP. *Id.* He has served as counsel for various campaign committees and for the Republican National Committee. *Id.* His experience extends to numerous election recounts. *Id.* He was quick to lay out a Republican recount strategy for Florida. See TAPPER, *supra* note 13, at 46-47. Ginsberg remained in Florida for essentially the entire post-election legal battle. *Id.* George Terwillinger later joined the Bush legal team as "a kind of chief operating officer of the legal effort in Tallahassee." *Id.* at 50. Ginsberg is credited with telling Terwillinger to find a way to get to federal court. *Id.* at 86.

73. See TOOBIN, *supra* note 15, at 46.

74. *Id.* at 49. For example, there were at least seventy-five participants in the Republicans' legal-strategy conference call on November 9, 2000. *Id.*

75. *Id.* at 48-51.

state litigation team until after Washington attorney, Michael Carvin, received harsh treatment in oral argument before the Florida Supreme Court.⁷⁶ A third team was assigned on November 9 to pursue the still outstanding late-received, overseas absentee ballots. A fourth team was assigned to oppose Gore's manual recount efforts. Most of the attorneys in this fourth group headed to the four heavily Democratic counties on which the Gore team had focused. Eager volunteers, who flocked to Florida to help Bush win, augmented these teams of attorneys. As time passed, Baker persuaded other skilled trial lawyers, such as Irv Terrell of Houston, Phil Beck of Chicago, and Fred Bartlit of Chicago to come to Florida to join the Bush legal team.⁷⁷

Aside from the many attorneys engaged in the higher profile recounts and lawsuits, another group of attorneys played a major role in Florida. The Bush legal team enjoyed a significant operational advantage because of a statewide network of primarily young, "true believer" attorneys⁷⁸ from across Florida who were organized to communicate almost daily with the legal team's Tallahassee headquarters about developments in each of Florida's sixty-seven counties. This network of local attorneys furnished the Bush legal team with timely, generally reliable information about matters statewide, such as the number and origin of late-received overseas absentee ballots and whether individual county canvassing boards were applying a rigid or flexible standard for counting late-received ballots attributable to overseas military personnel.⁷⁹ This network proved particularly useful in the Bush team's ongoing effort through December 12 to garner the maximum number of late-received absentee votes.

Although one of Ron Klain's first instincts on reaching Florida was to dispatch Gore volunteers across the state to determine the situation within each county, the Gore team's statewide network proved over time to be less effective than the Bush network. For example, Gore's representatives were asked to provide Gore's command center with information about the number and nature of overseas and absentee

76. *See id.* at 95-96, 135, 231-32.

77. *See* TAPPER, *supra* note 13, at 293; *see also* KATY TERRELL, THE BATTLE OF THE BALLOTS (May 3, 2002) (describing the background of Irv Terrell and his friendship and professional confrontations with David Boies).

78. Interview with Jason Unger, George W. Bush attorney, in Tallahassee, Fla. (Feb. 1, 2002). These attorneys largely came from the ranks of the pre-existing political organization "Lawyers for Bush." *Id.*

79. *Id.*; *see* Barstow & Van Natta, *supra* note 8 (describing how Republican attorneys in each county obtained a list of overseas voters who had requested an absentee ballot, determined the political affiliation of each voter, and determined whether or not that voter's absentee ballot had been received and counted by the county canvassing board).

ballots in the various counties. This information, however, was received from only ten of the state's sixty-seven counties by November 17. The Republicans had received information much earlier on all of the counties. Similarly, the Gore team apparently failed to timely recognize that approximately 26,000 ballots (including approximately 9000 in primarily African-American precincts that had voted 90% for Gore) had gone uncoun­ted as invalid undervotes and overvotes in Duval County⁸⁰ and that in Lake County there were over 3000 overvotes representing a potential net gain for Gore of approximately 130 votes.⁸¹

The Gore team's initial organizational advantage of having quickly assembled an experienced team of lawyers in Florida and having implemented a strategy of manually recounting votes in the four large heavily Democratic counties became a disadvantage over time because the team's focus remained fixed primarily on successfully fulfilling this strategy. Other additional or alternative strategies or potential sources of net votes for Gore or for Bush went largely ignored.

Further, it appears to have been a mistake to disperse the members of the Gore team with election law experience among the individual counties in which a manual recount had been requested. The Gore command center in Tallahassee suffered from a lack of recount expertise with which to advise the attorneys around the state or to assess the significance of new information or changing circumstances statewide.⁸² The Gore team had been warned early on November 8 that "[r]ecounts only succeed if you find out what happened."⁸³ The Gore team did not follow this maxim, at least insofar as it implies that success required understanding what had happened and was happening statewide in Florida.⁸⁴

80. See Compl. to Contest Election at 7–9, *Brown v. Stafford*, No. 00-2878 (Fla. Cir. Ct. Dec. 12, 2000), available at http://199.44.225.4/courtDockets/pdf/election_cases/CV-00-2878-1.pdf (last visited Nov. 28, 2002). The plaintiffs, including Congresswoman Corrine Brown, indicated in their complaint that the supervisor of elections in Duval County was asked on November 9 about the number of "invalidated votes" but told the Gore campaign representative that "he did not have those numbers available but that there were not many" when, in reality, "they numbered in the tens of thousands . . . and were larger by far than in previous elections." *Id.* Even once the Gore legal team was aware of the number of overvotes in Duval County, it still chose not to attempt to obtain a recount of votes in the county. See TAPPER, *supra* note 13, at 184.

81. See TAPPER, *supra* note 13, at 184–85 (describing the votes in Lake County and Jack Young's futile effort to convince the Gore headquarters in Tallahassee to build on Gore's success in Volusia County by expanding the search for votes to other optical scan counties).

82. The Democratic attorneys with recount experience had been dispatched to the four counties where recounts were in progress.

83. See TOOBIN, *supra* note 15, at 29 (attributing this statement to attorney Jack Young).

84. The Gore team's lack of an effective statewide network left it without sufficient information: (1) to timely predict by precinct and county the likely number of uncoun­ted votes

B. Leadership of the Legal Teams

The leadership of the two legal teams proved to have very different styles. These differences began with the clients themselves. George W. Bush essentially delegated onsite decision-making authority to Jim Baker as the leader of his legal team in Florida.⁸⁵ By contrast, Al Gore remained actively involved throughout the post-election period in the determination of legal strategy and interested in the minutia of what was happening in Florida.⁸⁶

Jim Baker and Ben Ginsberg have been characterized as relentless, partisan, and farsighted. They apparently were perceived by the members of the Bush legal team as loyally committed to achieving a Bush victory at virtually any cost. These perceived characteristics of this leadership team (including its essentially de facto decision-making authority) appear to have allowed the leadership team to achieve better discipline within the Bush legal team.

The Gore leadership team of Warren Christopher and Bill Daley has been characterized as judicious, cautious, and generally passive.⁸⁷ Many Democrats are likely to disagree with writers who describe this leadership team as having “hunkered down” at the Governor’s Inn in Tallahassee as the first stages of the legal battles erupted around them.⁸⁸ Nevertheless, it is clear that after November 11, when they ostensibly made “a case for surrender” to Gore, Christopher⁸⁹ and Daley⁹⁰ became less integral to the operation and decision-making of the Gore legal team. Thereafter, much of the responsibility for ultimately leading the Gore legal team in Florida rested with Ron Klain. While experienced as an attorney and in elections, Klain had neither the political experience

statewide for Gore (particularly overvotes in counties in which a majority of counted votes were for Bush); (2) to timely recognize and react to the growing significance statewide of Bush’s effort to obtain a counting of late-received absentee ballots (particularly from military personnel); or (3) to assess the hostility of individual canvassing boards statewide.

85. See TOOBIN, *supra* note 15, at 53, 288.

86. TAPPER, *supra* note 13, at 198–299 (contrasting Gore’s fixation on events in Miami-Dade and Palm Beach Counties with Bush’s “hands-off” attitude); TOOBIN, *supra* note 15, at 53–55, 199–202 (describing how Gore followed events closely and convened his top advisors in Washington or by conference call to assess legal strategy).

87. TOOBIN, *supra* note 15, at 51.

88. *Id.*

89. See *id.* at 97. Warren Christopher’s age (75 years) may have affected his ability to remain actively involved as the pace of the fight accelerated. *Id.*

90. *Id.* Bill Daley is reported to have had reservations about Gore’s post-election efforts almost from the beginning. *Id.* He is pictured as having a “sense of futility” about the effort and as worrying about the “personal cost” to him and Gore from a prolonged or bitter fight. *Id.* Daley left Florida for Washington on November 13 and did not return to Florida during the post-election battle. *Id.*

nor the presence of Jim Baker, nor the election recount experience of Ben Ginsberg.

On November 13, David Boies⁹¹ was asked to join the Gore legal team. Initially, Boies was seen as a high profile attorney who could be Gore's appellate lawyer in Florida as Harvard Professor Laurence Tribe was doing in Washington. Boies eventually became the team's public face and even assumed the role originally occupied by Tribe as Gore's advocate before the United States Supreme Court. Whatever his considerable talents may be as an advocate, Boies too lacked experience in election recounts or contests. Therefore, although there were members of the Gore team with recount experience equivalent to or greater than anyone on the Bush legal team,⁹² this Gore team advantage was largely nullified by the lack of such experience at the highest command levels.

Moreover, this lack of recount experience at the highest levels of the Gore command structure left individual Gore attorneys in the recount counties largely free to follow their own tactics for achieving a satisfactory recount. This freedom led to a variation in tactics and a difference in results among the four counties.⁹³ This lack of experienced direction from above also left Gore attorneys on occasion

91. TAPPER, *supra* note 13, at 168–69. David Boies is generally regarded as one of the foremost trial lawyers in the United States. *Id.* He started his own law firm, Boies, Schiller & Flexner in 1997. *Id.* His major cases have included the federal government's antitrust suit against Microsoft and the litigation between Texas and Pennzoil in which he faced the Bush team lawyer Irv Terrell. *Id.* at 168, 293.

92. The attorneys on the Gore legal team with election recount experience included Jack Young, *see supra* note 64 (explaining his expertise in election recounts), Chris Sautter, *see supra* note 65 (explaining his background and his role on the Gore team), Jack Carrigan, and Dennis Newman. *See* TAPPER, *supra* note 13, at 104. All were dispatched to the four counties where ballots were being recounted. *Id.*

93. *See* TOOBIN, *supra* note 15, at 66, 161–62, 165–66. Attorneys Jack Young and Chris Sautter urged that the Gore team persuade canvassing boards to adopt an inclusive standard for determining voter intent and to apply it uniformly in the manual recount. *Id.* The tactic was anticipated by those attorneys to increase the total number of votes for both candidates while maximizing Gore's net gain of votes from the four majority Democratic counties that were being recounted. *Id.* This tactic was followed in Volusia, Broward, and Miami-Dade Counties. *Id.* This contrasted with the tactic of the Gore attorneys in Palm Beach County trying to maximize the number of votes counted for Gore while objecting to similarly marked ballots for Bush. *Id.* Ultimately, the canvassing boards in Miami-Dade and Broward Counties found that approximately 25% of the undervote ballots contained a valid vote. *Id.* The canvassing board of Palm Beach County found a legal vote on only 5% of the county's undervote ballots (for a net gain of 176–215 for Gore) while leaving an additional 3300 ballots uncounted (a net gain of an additional 800 votes for Gore) that would likely have been considered valid votes under the standard being applied by the other counties. *Id.*

to quarrel among themselves about how to proceed statewide or in a particular county.⁹⁴

Possibly the most important difference in the leadership of the two opposing legal armies was their respective views on how the battle in Florida would proceed or end. The Gore legal team tended to focus on the immediate horizon, apparently expecting the post-election maneuvering to last only a few days after November 7. Even as the county recounts became protracted and the prospect of an election contest became a reality, the team's overall decision-making remained short-term.⁹⁵ On the other hand, Republican Jim Baker is credited with having a longer-term view of how the battle would end. He reportedly predicted as he flew to Tallahassee on November 8 that the United States Supreme Court ultimately would decide the outcome in Florida.⁹⁶ He organized the Bush legal team accordingly. Events proved Jim Baker correct.

C. *Requiring A New Vote*

During the days following the 2000 election, Democrats nationwide watched anxiously as George W. Bush continued to win the tally of legal votes in Florida even though there was a general sense that significantly more voters in Florida had actually cast their ballots with an intention to vote for Al Gore.

Voters in Palm Beach County claimed that the confusing format of the presidential ballot used in that county had caused them, and thousands of other voters in that Democratic stronghold, to mistakenly mark their punch cards for other candidates⁹⁷ or to cast invalid

94. See, e.g., TAPPER, *supra* note 13, at 208 (describing conflict between two sets of Gore attorneys in Broward County). Attorneys for Gore sometimes found themselves offering conflicting guidance to the same canvassing boards. *Id.*

95. For example, David Boies had returned home after the November 21 decision of the Florida Supreme Court, only to be recalled to Florida to prepare for an election contest.

96. See TOOBIN, *supra* note 15, at 42.

97. See NICHOLS, *supra* note 15, at 85–86. Approximately 25% of the residents of Palm Beach County are Jewish and the county historically has voted heavily Democratic in statewide and national elections. *Id.* Therefore, it is considered surprising that Reform Party presidential candidate Pat Buchanan received over three times as many votes (3411) in the county as in any other Florida county on November 7 despite being widely criticized as an anti-Semite. *Id.* Similarly, Socialist Party candidate David McReynolds received 302 of his Florida statewide total of 621 votes on November 7 from Palm Beach County. *Id.* at 93; see also Official Results, *supra* note 3 (providing detailed election results for each county). These apparently anomalous vote totals for Buchanan and McReynolds in Palm Beach County remain explainable to some observers only as the product of voter confusion caused by the “butterfly ballot” where the names of these two candidates appeared on the page opposite to the name of Al Gore. See NICHOLS, *supra* note 15, at 94.

overvotes because they marked their punch cards for multiple presidential candidates instead of Gore.⁹⁸ This ballot became the focus of national media attention and was designated the “butterfly ballot” because of its appearance with presidential candidates aligned on opposing pages and the punch holes arranged vertically in the middle of the ballot between the candidate names.⁹⁹

Receiving less national attention during this initial period was the ballot problem in Duval County. A combination of a multi-page presidential ballot¹⁰⁰ and inaccurate voter instructions had caused as many as 25% of the ballots in the heavily African-American precincts to be disqualified as illegal overvotes because they contained a vote for Gore and at least one other presidential candidate.¹⁰¹ Altogether, there were approximately 16,000 votes in Duval and Palm Beach Counties that arguably had been intended for Gore but that had been miscast due to a combination of confusing ballots, misdirected voting instructions, and voter error.¹⁰²

The “butterfly ballot” in Palm Beach County was the first potential election irregularity to attract the attention of the Gore legal team. Now, at the beginning of the legal battle in Florida, the Gore team was confronted with its first major strategy choice. Several members of the team urged that Gore’s best legal strategy was to sue in Florida state court to correct the effects of the “butterfly ballot.”¹⁰³ Several possible options for remedy were suggested, including: (1) apportioning the miscast votes by using some formula to parcel out some portion of the Buchanan votes to Gore and Bush; (2) obtaining testimony from voters

98. Kane, *supra* note 9. Voters cast approximately 19,000 overvotes in the presidential race in Palm Beach County. *Id.* Over 15,000 of these overvote ballots included a vote for Gore and a vote for one or more other candidates. NICHOLS, *supra* note 15, at 91. Approximately 3750 ballots included a vote for Bush and a vote for one or more other candidates. *Id.*

99. The relevant portions of the ballot are depicted in NICHOLS, *supra* note 15, at 83, and online at the NORC Website, *supra* note 2.

100. See TOOBIN, *supra* note 15, at 173. This ballot became known as the “caterpillar ballot.” *Id.*

101. See U.S. COMM’N ON CIVIL RIGHTS, VOTING IRREGULARITIES IN FLORIDA DURING THE 2000 PRESIDENTIAL ELECTION, ch. I, at 20–32, app. VII, at 10 (2001).

102. See METZER, *supra* note 15, at 179. There were over 9000 overvote ballots disqualified in Palm Beach County because the voter had punched the card for Gore and for at least one other presidential candidate, such as Buchanan (5264), McReynolds (2862), or Browne (1319). *Id.* In Duval County, over 9000 of the county’s disqualified overvote ballots came from predominately African-American precincts where Gore had received 90% of the counted votes. See TOOBIN, *supra* note 15, at 173.

103. Foremost among the attorneys who urged this position was Fort Lauderdale attorney, Mitchell Berger. He remains of the opinion today that such litigation by Gore could have resulted in a new election or an allocation of miscast ballots. Interview with Mitchell Berger, Al Gore attorney, in Fort Lauderdale, Fla. (May 24, 2002.)

who claim to have miscast their votes and reapportioning their votes according to their stated intention; or (3) ordering a new presidential election in Palm Beach County or Florida.

There is some precedent from Florida and other states in local elections for such extraordinary remedies.¹⁰⁴ Nevertheless, the legal obstacles to a challenge to the “butterfly ballot” were considered great, particularly when ultimately a judge’s decision could determine the Presidency of the United States. For example, although some state courts outside of Florida have been willing in a few rare circumstances to statistically apportion or reallocate illegal or miscast votes in local elections,¹⁰⁵ members of the Gore team were dubious as to whether any state judge in Florida would be willing to decide the Presidency of the United States on the basis of an expert witness’s reallocation formula. Similarly, although some state courts outside of Florida have allowed and even required voters to testify about how they had voted in an election and have determined the outcome of the election by adding or deducting votes according to that testimony,¹⁰⁶ there were no means apparent to the Gore legal team for proving which Florida voters had actually miscast their ballots. Therefore, it was easy to imagine that any evidentiary proceeding based on this remedy was likely to digress into a seemingly endless number of Palm Beach County voters being presented as witnesses by each candidate, with each voter swearing that she had miscast her vote while intending to vote for Bush or for Gore; not an attractive sight for determining who will be President of the United States.

The remedy that seemed to hold the most hope was for a court to void the November 7 election and to call a new election. While not a preferred remedy, courts in Florida and elsewhere have on occasion mandated new elections.¹⁰⁷ But this 2000 election was not a usual one;

104. See, e.g., *infra* notes 105–07 and accompanying text.

105. See, e.g., *Canales v. City of Alviso*, 474 P.2d 417, 422 (Cal. 1970) (explaining how the court subtracted illegal votes from the vote totals in a municipal consolidation election based on circumstantial evidence that illegal voters most likely voted for the proposition); *In re Purported Election of Bill Durkin*, 700 N.E.2d 1089, 1095 (Ill. App. Ct. 1998) (explaining how the court subtracted illegal votes from candidates by precinct according to the proportion of votes received by the candidate in the precinct).

106. See, e.g., *Green v. Reyes*, 836 S.W.2d 203, 207 (Tex. App. 1992).

107. See, e.g., *Marks v. Stinson*, 19 F.3d 873, 887 (3d Cir. 1994) (arguing that if the alleged irregularity makes it impossible to determine the will of the voters, a court may call a new election); *In re Protest of Election Returns and Absentee Ballots in the Nov. 4, 1997, Election*, 707 So. 2d 1170, 1174 (Fla. Dist. Ct. App. 1998) (refusing to approve a new election for extensive absentee voting fraud in the Miami mayoral election because such a ruling “would be sending out the message that the worst that would happen in the face of voter fraud would be another election”); *Becker v. Pfeifer*, 588 N.W.2d 913, 918 (S.D. 1999) (explaining that under

it was a nationwide vote for the Presidency of the United States. Essentially, every voter in every state would have an interest in the outcome and an argument for being allowed to participate in any new election. Therefore, if a new election were an appropriate remedy, would the election occur only in Palm Beach County, or in all of Florida, or in all of the United States? Moreover, would a Florida court have authority to require a new election in the face of the requirements of the United States Constitution and federal law regarding the date for the election of the President? Perhaps most importantly, however, the possible remedy of a new election appeared almost inevitably to raise questions of federal law that would allow the federal courts a basis for intervening in the Florida election.

Significant problems also could be foreseen for overcoming the threshold requirements of an election contest. Some of these problems were similar to those that affected the availability of a remedy (e.g., how to actually prove that the “butterfly ballot” changed the outcome of the election). Another problem existed in the apparently benign reasons for the use of the “butterfly ballot.” The miscast votes in Palm Beach County might well have cost Gore the election, but no one was asserting fraud as a cause. Therefore, even if the “butterfly ballot” could be shown to be violative of state law, contestants would be forced to concede that the violation apparently occurred as a result of official misjudgment or mistake, not purposeful misconduct. Courts have been reluctant to overturn elections because of unintentional errors.¹⁰⁸ Meeting the threshold requirement for an election contest, ultimately, would prove even more difficult than expected.

The Gore legal team met on November 8 and 9 in Tallahassee to consider its options.¹⁰⁹ The team’s recommendations were then

South Dakota law, the court can only uphold the election as the free and fair expression of the will of the voters or declare the election void); *Green*, 836 S.W.2d at 207 (indicating that in Texas “[w]hen the court, with some degree of certainty, can determine the outcome of the election based upon the evidence presented by the parties, [state law] requires it do so”). At least one state has allowed a new election applicable only to one precinct or to certain specific voters previously denied the opportunity to cast a qualified ballot. See *State ex rel. Olson v. Bakken*, 329 N.W.2d 575, 579–82 (N.D. 1983).

108. See, e.g., *Boardman v. Esteva*, 323 So. 2d 259, 269 (Fla. 1975) (listing the factors that would justify voiding votes); *Jacobs v. Seminole County Canvassing Bd.*, No. CV-00-2816, 2000 WL 1793429 (Fla. Cir. Ct.) (rejecting a challenge to the misconduct of election officials when the plaintiffs’ evidence failed to support a finding of fraud, gross negligence, or intentional wrongdoing by election officials), *aff’d*, 773 So. 2d 519 (Fla. 2000).

109. See TOOBIN, *supra* note 15, at 34–36 (describing the Gore legal team’s consideration of a possible challenge to the election result based on the use of a “butterfly ballot”).

presented on November 11 to Gore.¹¹⁰ The team decided against directly pursuing litigation challenging the “butterfly ballot” on the basis that such litigation would be virtually impossible (10% to 20% chance of success) to win.¹¹¹

A legal challenge to the “butterfly ballot” was pursued without Gore’s direct participation, however.¹¹² Circuit Court Judge Jorge LaBarga rejected this challenge on the basis that, under Article II, Section I, Clause 4 of the United States Constitution, he lacked authority to call for a new vote in one county in the nation to decide the Presidency of the United States.¹¹³ This ruling was appealed. In *Fladell v. Palm Beach County Canvassing Board*,¹¹⁴ the Florida Supreme Court avoided the federal law basis for the circuit court’s decision and instead rejected the challenge on the basis that, as a matter of law, the “butterfly ballot” did not constitute substantial noncompliance with Florida law.¹¹⁵ Therefore, the election contest threshold had not been met.

An election contest challenging the “butterfly ballot” stood very little chance of success. Gore’s direct participation in such a challenge might have given any such litigation greater validity in the eyes of a majority of the Florida Supreme Court and possibly could have avoided a dismissal such as occurred in *Fladell*. Any subsequent evidentiary hearing, however, was likely to have consisted primarily of dubious, self-serving testimony from expert and lay witnesses who clearly favored one candidate or the other. The spectacle of the Presidency of the United States being decided in such a proceeding is mind-boggling.

110. *Id.* at 52, 57. The Florida Supreme Court treated this case akin to an election contest despite the fact that the case was timely filed before certification of the election results, when an election contest would have been barred by state law as premature. *Id.* The court presumably could have dismissed the suit as untimely, but instead ruled on the state law merits of the challenge to the “butterfly ballot,” thereby effectively preventing any subsequent timely election contest. *Id.*

111. *Id.* at 55; see TAPPER, *supra* note 13, at 106 (indicating that Washington election law attorney Bob Bauer quickly came “to the conclusion that the butterfly ballot lacks legal merit” and that by November 15, Klain had discarded the “butterfly ballot” as a basis for a possible legal challenge).

112. See TAPPER, *supra* note 13, at 86; TOOBIN, *supra* note 15, at 80–82.

113. *Fladell v. Palm Beach County Canvassing Bd.*, No. 00-10965AB, at 5 (Fla. Cir. Ct.), <http://www.pbcountyclerk.com/courtdocuments/revote.pdf>, *aff’d per curiam*, 772 So. 2d 1240 (Fla. 2000).

114. *Fladell v. Palm Beach County Canvassing Bd.*, 772 So. 2d 1240 (Fla. 2000) (*per curiam*).

115. *Id.* at 1242 (*per curiam*). Although generally treated as an election contest, this litigation was filed too early (i.e., prior to the certification of the election) to meet statutory requirements for an election contest.

The legal obstacles identified by the Gore legal team for any challenge to the “butterfly ballot” were legitimate and made success unlikely even within a favorable Florida court system. Although the “butterfly ballot” and related irregularities ostensibly were put aside by the Gore team leadership as a basis for challenging the election, the Gore legal team continued to use valuable time and resources considering and documenting¹¹⁶ the circumstances of the “butterfly ballot” and other alleged election irregularities, such as possible Voting Rights Act violations. None of these alleged irregularities was ever a realistic basis on which Gore could obtain post-election relief.¹¹⁷

D. Statewide Manual Recount

In its meeting on November 9, the Gore legal team not only decided against filing litigation challenging the “butterfly ballot” but also against seeking a recount of ballots statewide. The Gore legal team agreed on a strategy of filing protests¹¹⁸ only in Broward, Volusia, Palm Beach and Miami-Dade Counties asking the canvassing boards in those counties to manually review and hand-count the ballots in their respective counties.

This ultimate strategy of seeking a manual recount in only four of Florida’s sixty-seven counties proved to be a crucial mistake. First, the strategy was a legal mistake because it needlessly gave the Republicans a basis for a federal court challenge under the Fourteenth Amendment. The Gore legal team apparently overlooked the possibility of such a challenge when initially deciding on its strategy. Some Gore election lawyers apparently expected Bush to counter Gore’s recount requests with ones of his own or to agree with Gore to a statewide recount.¹¹⁹ If

116. See METZER, *supra* note 15, at 147. Affidavits were prepared without sufficient attention to what they must contain in order to be of value in an election contest (e.g., the affidavits indicated that the voters had “miscalc” their vote). *Id.* Democratic officials explained that they did not know that the affidavits needed to be worded to meet any particular legal test. *Id.* The Gore legal team also considered possible action under the Voting Rights Act. See TAPPER, *supra* note 13, at 59–60 (describing a Gore team memo suggesting the possibility of challenging alleged Palm Beach County irregularities under the Voting Rights Act).

117. See TAPPER, *supra* note 13, at 85. The Republican legal team apparently concluded very early in the post-election battle that the “butterfly ballot” did not provide Gore with a sufficient legal basis for challenging the election. *Id.* Bush attorney Barry Richard observed that the “butterfly ballot” was a shame, but it wasn’t much more than that: a shame. *Id.*

118. In Florida, a request for a manual recount of ballots comes in the form of a written “protest” filed with the county canvassing board. FLA. STAT. ch. 102.166 (2000) (amended 2001).

119. See TOOBIN, *supra* note 15, at 48 (indicating that for Bush to have requested a recount in his stronghold counties would have been the classic recount strategy). Gore attorney Mitchell Berger indicates now that the Gore strategy was always to pursue a statewide recount but that the Gore legal team expected to achieve this goal by seizing a lead in the vote totals through the

this had happened, the issues of fundamental fairness, equal protection, and due process would have largely disappeared. It is questionable whether the outcome of the election was ever going to be determined by additional net votes gained by Gore through the counting of a statewide category of ballots, such as undervote ballots, in only a few selected counties favorable to the candidate. Fundamental fairness and common sense suggest otherwise.¹²⁰ Even if the selective county strategy had netted Gore sufficient votes to have pulled ahead of Bush by the time of certification, Bush would have had bona fide grounds for an election contest and, possibly, for a challenge in federal court.

Second, the strategy was a mistake as a practical matter because the limited recount never generated sufficient net Gore votes to allow Gore to overtake Bush's narrow lead. The ostensibly friendly canvassing boards in Palm Beach and Miami-Dade Counties balked at giving Gore the relief he sought. Moreover, it was foreseeable on November 9 that Bush would gain additional net votes from late-filed absentee ballots. Therefore, recounting undervote ballots in only these four counties provided Gore with too slim of a margin of possible net votes.

Third, the strategy was a public relations nightmare because it made Gore's post-election effort vulnerable to charges of cherry picking votes from Democratic counties and canvassing boards instead of legitimately attempting to "count all votes."

Finally, the strategy was a mistake because it flew directly in the face of the strategy recommended by recount specialists, including those advising Gore. *The Recount Primer*, written by Gore legal team members Jack Young and Chris Sautter, explained that if a candidate is behind, the scope of the recount should be as broad as possible and the rules for the recount should be different from those used election night. A recount should be an audit of the election to insure the accuracy and

recounts in the four counties and forcing Bush (Jeb or George W.) to agree to a recount elsewhere. Interview with Mitchell Berger, Al Gore attorney, in Fort Lauderdale, Fla. (May 24, 2002).

120. See, e.g., *In re Issue 27 Election of Nov. 4, 1997*, 693 N.E.2d 1190 (Ohio Ct. Common Pleas, Licking County 1998) (disallowing recount where manual counts by board of only the votes "for" a municipal proposition produced an increase in votes sufficient to change the outcome. The court reasoned that if irregularities (i.e., loosened chads) affected votes "for" the proposition, it was incumbent on the canvassing board to inspect the ballots for "no" votes as well). The canvassing authority has the duty to ensure a fair and accurate recount. *Id.* at 1192; *In re Opening of Ballot Box*, 25 A.2d 330 (Pa. 1942) (revoking certification of the recount on finding that erasures had caused invalidation of ballots in one precinct and ordering checks for similar tampering in another fifteen precincts); *McIntyre v. Wick*, 558 N.W.2d 347 (S.D. 1996) (challenging the inconsistent methods by which certain types of ballots (straight party) were counted in different counties within a state legislative district).

honesty of the results.¹²¹ As it turned out, the Gore legal team simply did not know enough on November 9 about what uncounted votes existed in Florida to limit itself to just the four counties.

The greatest objection in my view to a strategy of seeking recounts selectively among supposedly friendly partisans is that the strategy reflects a cynical view of the government institutions responsible for assuring the integrity of state and federal elections. As it turned out, the success of the Gore team in obtaining manual recounts in these four counties was not determined by the partisan make-up of the canvassing boards. For example, the recount effort in Volusia County was relatively smooth and successful for the Gore team even though the chairman of the canvassing board was Republican.¹²² The success of the manual recount in Broward County was in large part due to the willingness of the chief lawyer for the county (a Republican) to approve a more inclusive standard for determining voter intent.¹²³ Indeed, the recount efforts in Palm Beach and Miami-Dade Counties were less successful even though a majority of the canvassing board in each county was Democratic. Nevertheless, despite Gore's relative lack of success based on the partisanship of the board, the choice of those four counties because they were expected to be politically friendly helped initiate a cycle in which all of Florida's institutions, including its courts, ultimately were perceived as acting for partisan reasons.

To the surprise of some of the Gore legal team, Bush did not petition for a manual recount in any of the remaining sixty-three counties.¹²⁴ Initially, this Republican strategy was criticized by some observers as a serious mistake¹²⁵ that could have cost Bush the election if Gore's

121. TOOBIN, *supra* note 15, at 28; see TIMOTHY DOWNS ET AL., *THE RECOUNT PRIMER* 5 (1993).

122. Judge Michael McDermott resisted pressure from Democratic Attorney General Butterworth in regard to the recount only to then support a full recount of Volusia County's ballots on the basis that "[t]oo much is at stake not to do a full recount." See TAPPER, *supra* note 13, at 133.

123. See TOOBIN, *supra* note 15, at 162 (indicating that county lawyer Ed Dion "thought the only fair thing to do was loosen the standard and recognize more votes").

124. Baker would have no part of such a defensive response. See TAPPER, *supra* note 13, at 86 (indicating that Baker's instruction was for the legal team to discredit anything that happens from now on).

125. Some Democrats feel that the Republicans failed to timely file recount protests because they were unprepared for Gore's recount initiative. Interview with Jack Young, Al Gore attorney, in Washington, D.C. (May 27, 2002). Republican attorneys respond that the Bush strategy from the beginning was to fight all recount efforts because the Bush legal and public relations stance was that the election was over and that the manual counting of ballots was a subjective, partisan means of stealing the election. When Gore later offered to join with Bush in asking for a statewide recount, Bush did not accept. By this point, however, the selective nature of the Gore

strategy of manually recounting ballots in only four heavily Democratic counties resulted in enough net votes to put Gore ahead statewide and if Gore's strategy withstood challenge in federal court.

The Republican position publicly was that the election was already over. Some Republican attorneys acknowledge, however, that some members of the Bush legal team believed that Democratic voters, being "generally poorer and less well educated," were more likely to have committed a "voter error" that resulted in their votes going uncounted statewide.¹²⁶ Therefore, some members of the Bush legal team opposed a manual counting of ballots statewide because of the possibility that a net gain in votes might be realized by Gore even in counties in which a majority of the already counted votes had gone for Bush.¹²⁷ The recent reviews of uncounted ballots statewide suggest that these attorneys may have been partly correct.¹²⁸

E. Influencing Government Officials

Both candidates and their respective legal teams tried privately throughout the post-election process to influence how Florida government officials carried out their statutory duties.

Katherine Harris, in particular, has been seen as using her office as Florida Secretary of State to help elect candidate Bush. Several writers have reported how Republican attorney J.M. "Mac" Stipanovich¹²⁹ assisted Secretary Harris throughout the post-election process in the development and adoption of official positions that would aid Bush.¹³⁰ Mr. Stipanovich freely acknowledges his role and is unapologetic for doing what he sees both as legal and necessary to the victory of the candidate he supported.¹³¹

All of the official positions and actions taken by Secretary Harris¹³² as Florida's chief elections officer during the post-election process were

recount had been recognized by the Bush legal team as giving them the issue needed for possibly stating a federal question before the United States Supreme Court.

126. Interview with Mac Stipanovich, attorney, in Tallahassee, Fla. (Feb. 1, 2002).

127. *Id.*

128. See *supra* notes 9–12 and accompanying text (indicating that Gore could have prevailed with a recount statewide of both undervotes and overvotes).

129. Mr. Stipanovich has been called "the state's premier Republican power broker." See TOOBIN, *supra* note 15, at 68–70.

130. See generally *id.* at 69–76, 185–88.

131. Interview with Mac Stipanovich, attorney, in Tallahassee, Fla. (Feb. 1, 2002).

132. Secretary of State Harris was co-chairperson of the Bush election campaign in Florida. She maintained during the post-election process that she was exercising her official duties as Secretary of State without partisan favoritism. She has continued to take this stance since 2000

potentially advantageous for Bush and disadvantageous for Gore. First, on November 13, the Elections Division of the Department of State issued Letter Advisory Opinion DE 00-11 to the chairman of the Republican Party in Florida indicating that a county canvassing board could not conduct a manual recount in the absence of a voting machine malfunction, not for mere voter error.¹³³ Even though wrong,¹³⁴ the Election Division's advisory opinion had the effect of temporarily stopping the manual recounts in Palm Beach and Broward Counties.

Second, when asked by Volusia County to extend the November 14 deadline for accepting county returns, Secretary of State Harris refused on the basis that she had no discretion to accept county returns after November 14 except in the event of natural disaster. Her position, if correct, meant that the results of the recounts in at least three of the four counties could never be accepted.

Third, when told by Circuit Judge Terry Lewis¹³⁵ that she did have discretion to consider county returns filed after November 14, Secretary of State Harris asked the counties to explain why they were conducting the manual recounts and then, upon receiving those reasons, rejected them. Attorneys representing Harris tried but failed to defend her decision before the Florida Supreme Court.¹³⁶ As a result, the Court extended the deadline for the filing of county returns to 5:00 p.m. on November 26.¹³⁷

Fourth, when November 26 arrived, Secretary of State Harris refused to accept the partial recount returns sent by Palm Beach County before 5:00 p.m., or the final returns sent by the County two hours later. The effect was to deny Gore a net gain of 215 votes. Finally, as the Bush effort to garner additional absentee votes from ballots cast by overseas military personnel gained momentum statewide, Secretary of State

while also appearing to revel in her fame within the Republican Party as "the darling of Republicans." See NICHOLS, *supra* note 15, at 110.

133. Definitions of Errors in Vote Tabulation, Op. Dir. Div. of Elections DE 00-11 (Nov. 13, 2000), available at http://election.dos.state.fl.us/opinions/de2000/de00_11.html (last visited Nov. 23, 2002) [hereinafter Definitions of Errors in Vote Tabulation].

134. See *Palm Beach County Canvassing Bd. I*, 772 So. 2d 1220, 1226-27 (Fla.) (per curiam), vacated *per curiam sub nom.* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000).

135. *McDermott v. Harris*, No. CV-00-2700, 2000 WL 1693713, at *1 (Fla. Cir. Ct. Nov. 14, 2000). Judge Lewis concluded that determining ahead of time that returns will be ignored unless excused by some Act of God is not an exercise of discretion, but an abdication of that discretion. *Id.* He reasoned that the exercise of discretion contemplates a decision based upon a weighing and consideration of all attendant facts and circumstances. *Id.*

136. See *Palm Beach County Canvassing Bd. v. Harris*, 772 So. 2d 1273, 1289-92 (Fla. 2000) (per curiam) [hereinafter *Palm Beach County Canvassing Bd. II*].

137. *Palm Beach County Canvassing Bd. I*, 772 So. 2d at 1240 (per curiam).

Harris refrained from explaining or enforcing Florida requirements for such ballots in a way that would interfere with the Bush effort.

If the allegations are true, possibly the most significant assistance provided to Bush by Secretary of State Harris came indirectly through one of her assistants, Ms. Kerey Carpenter. Ms. Carpenter is alleged to have convinced the chairman of the canvassing board in Palm Beach County that the board should use a narrow standard of counting only ballots with a "hanging chad" in its manual review of ballots.¹³⁸ One writer has claimed "it is no exaggeration to say that Kerey Carpenter and Charles Burton [the chairman of the Palm Beach County canvassing board] won the presidency for George W. Bush."¹³⁹ Gore in his election contest petition claimed that the more restrictive standard used in Palm Beach County cost him a net of 800 votes.¹⁴⁰

The Gore legal team also sought the help of its allies in the Florida government. Florida Attorney General Bob Butterworth responded to the Elections Division's November 13 advisory opinion with an official opinion of his own. Attorney General Advisory Legal Opinion 2000-65 was issued on November 14 and expressly concluded that the Elections Division advisory opinion was wrong.¹⁴¹ The Attorney General's opinion had the merit of being legally correct. Nevertheless, there can be little doubt that the rush to draft and to issue the opinion within twenty-four hours of the release of the Secretary of State's opinion was intended to prevent the manual recounts from being halted. Moreover, the Attorney General's Office continued to be aligned with Gore's legal team during appeals to the Florida Supreme Court and the United States Supreme Court.

138. County Judge Burton denies this view of events. Interview with the Honorable Charles Burton, Palm Beach County Judge, in Fort Lauderdale, Fla. (May 24, 2002). Judge Burton indicates that the canvassing board's unanimous (3-0) decision to apply the more stringent standard had its origin in a policy adopted by the canvassing board in 1990 and a mistaken belief that Broward County was continuing to apply the more stringent standard. *Id.* Judge Burton insists that Ms. Carpenter never advocated using one standard or another; but instead insisted that the county had no right under Florida law to conduct a recount at all. *Id.* Subsequent Democratic efforts to convince the canvassing board to change back to a more inclusive standard were rejected unanimously by the members of the board. *Id.*

139. TOOBIN, *supra* note 15, at 86.

140. A later review by the *Palm Beach Post* found that, if the more inclusive (dimpled ballot) standard, as applied in Broward County, had been applied to all of the undervote ballots in Palm Beach County, Gore would have had a net gain of 784 votes. See Engelhardt & Jaspin, *supra* note 9. With these votes, Gore's total net gain from the recount in Palm Beach County would have been at least 950 votes; more than sufficient to have overcome Bush's lead.

141. See Advisory Op. Att'y Gen. of Fla., No. 2000-65 (Nov. 14, 2000) (indicating that "error in voter tabulation . . . encompasses a discrepancy between the number of votes determined by a voter tabulation system and the number of votes determined by a manual count").

Other examples exist of attempts by one or the other candidate or his representative to privately influence other Florida officials, including the members of county canvassing boards and Alex Penelas, then the mayor of Miami.¹⁴²

F. Administrative Recount Versus Election Contest

By November 13, it was apparent to the Gore legal team that at least three of the manual recounts would not be finished in time to be filed with the Secretary of State on November 14. Secretary of State Harris refused to extend the deadline. Therefore, the Gore legal team now faced another major strategic decision. The team had two alternatives.¹⁴³ First, Gore could try to extend the time available for completing the recounts by asking the Florida courts to overturn Secretary Harris's decision and to compel her to accept recount results after November 14. The second alternative was to allow Secretary Harris to certify Bush as the winner based on the county returns filed on November 14 and then to proceed immediately to state circuit court to contest the election outcome.¹⁴⁴

A strong case can be made for why Gore should have foregone any effort to continue the attempted recounts and should have proceeded on November 16 to challenge the election outcome in an election contest. The election contest would have been a *de novo* proceeding unaffected by the partisan maneuvering and chaotic action that marked the continuation of the administrative recount process in Palm Beach and Miami-Dade Counties. More importantly, a timely filed election contest would have allowed Florida courts an opportunity to arrive at a standard for manually counting undervote and overvote ballots statewide in a fundamentally fair and constitutionally uniform manner. Some of Gore's Florida lawyers continue to believe that the failure to

142. See, e.g., TAPPER, *supra* note 13, at 274–77; *id.* at 79 (describing Attorney General Butterworth's call to the chairman of the Volusia County Canvassing Board); TOOBIN, *supra* note 15, at 148–51 (describing attempts by Gore and his supporters to obtain the assistance of Miami Mayor Alex Penelas in convincing the Miami-Dade canvassing board to complete a recount).

143. One writer has suggested that the Gore legal team never timely realized the option of immediately pursuing an election contest. See TOOBIN, *supra* note 15, at 196–97. This suggestion is strongly disputed by several of the Gore attorneys who indicate that early in the post-election process they advised the legal team's leadership that an election contest was available in state court after certification of the election. Telephone Interview with Dexter Douglass, Al Gore attorney (May 2002).

144. Under Florida law an election contest can be filed only following certification of an election result. FLA. STAT. ch. 102.168 (2000); see also TOOBIN, *supra* note 15, at 196–97 (discussing the timeline for contesting election results).

immediately file an election contest after the circuit court's refusal to extend the time for protests was a crucial misjudgment.¹⁴⁵

Extending the certification deadline to allow time for Gore to move ahead of Bush during the administrative recount also was a possibly winning strategy. The argument was that neither Gore nor Bush was likely to prevail in an election contest, given the time constraints and the myriad of legal issues, parties, and attorneys likely to be part of any such proceeding. Therefore, the winner of the certification could very likely remain the winner of the election. Extending the certification deadline to allow Gore to move ahead of Bush in the vote tally prior to certification was a potentially winning strategy, however, only if Gore's legal team used the extra days to gather the votes necessary to be ahead at certification.

Gore's team successfully prevented the State Election Board and Katherine Harris from certifying the election results prior to November 26, 2000. Amended returns submitted by 5:00 p.m. on November 26 were to be accepted and included in the final certification.¹⁴⁶ Gore's strategy might have worked if the intervening period from November 14–26 had been more productive. By the time of certification on November 26, however, Gore faced the worst possible situation. Of the three counties, only Broward County had finished its recount in time to have its amended returns included in the certified returns. Bush was the certified winner with an increased margin of 537 votes, and Gore had ten fewer days in which to successfully prosecute an election contest.

G. Manual Recount Fights in Specific Counties

The manual review and hand-counting of ballots proceeded differently in each of the four counties targeted by the Gore legal team strategy. One county, Volusia, used optical scan counting equipment. The other three counties used punch-card ballots.

Volusia County. The manual review and hand-counting of ballots in Volusia County was successfully achieved in a relatively orderly manner in the time available after November 7. The Republican Chairman of the canvassing board, Judge Michael McDermott, and Gore legal team member Jack Young, generally have been credited with responsibility for the relative ease and business-like manner in which the manual recount was achieved. This process was made substantially easier, however, because the county utilized an optical scan voting

145. See, e.g., Telephone Interview with Dexter Douglass, Al Gore attorney (May 2002).

146. *Palm Beach County Canvassing Bd. II*, 772 So. 2d 1273, 1289–90 (Fla. 2000) (per curiam).

system. Volusia County thereby avoided the most difficult issues of voter intent that dominated the manual review and counting of punch card ballots in the other three counties.¹⁴⁷ Volusia County completed its manual recount on November 14, with a net gain by Gore of ninety-eight votes.

Broward County. The manual review and hand-counting of punch card ballots also was successfully completed in Broward County before the court-ordered November 26 date for certification of final statewide results. On November 13, the canvassing board voted not to conduct a full manual recount. This decision came largely in response to the issuance that day of Elections Division Advisory Opinion DE 00-11.¹⁴⁸ The canvassing board subsequently voted to reconsider its decision and on November 15 voted to manually review and hand-count all ballots in the county. The canvassing board initially applied a very narrow standard for determining when a voter's intent could be ascertained. Many ballots were discarded as invalid undervotes. On November 19, the board voted unanimously to change to a more inclusive standard for ascertaining voter intent. The board subsequently reexamined the ballots that had been reviewed and proceeded to finish its manual review and hand-counting of ballots on November 25 within time to meet the deadline for filing results with the Secretary of State. The manual recount in Broward had been successful for the Gore team, giving Gore a total of 567 additional net votes.¹⁴⁹

Palm Beach County. The manual recount in Palm Beach County may have been one of the Gore legal team's darkest moments and possibly determinative of the outcome of the election. The canvassing board was actually the first to vote in favor of conducting a manual recount, doing so on November 12. On the following day, however, the board

147. Deciding whether a dimple, indentation, or puncture of a chad on a punch-card ballot reflects an intent to cast a vote for a specific candidate proved controversial and contentious in the recount counties using punch-card machines. For example, one participant observed that "[a] dimple to one person can be a shadow to another." METZER, *supra* note 15, at 176. On the other hand, observers readily reached agreement on uncounted optical scan ballots where a failure by a voter to sufficiently darken the selected oval or to use the correct pen, or a decision by a voter to both darken an oval and write-in the name of the same candidate left little doubt of a voter's intent. For example, a manual review of uncounted optical scan ballots in Gadsden County during the automatic recount on November 8 readily resulted in an agreement on the valid votes included among the previously uncounted optical scan ballots. The result was an additional 187 votes, with a net gain for Gore of 170 votes. See TAPPER, *supra* note 13, at 72.

148. Definitions of Errors in Vote Tabulation, *supra* note 133.

149. Despite the inclusive standard apparently adopted by Broward County, one report indicates that "dimples" or "indentations" existed in enough additional ballots that Gore could have netted as many as an additional 1000 votes from the county. See METZER, *supra* note 15, at 248.

suspended its recount upon issuance of Division of Elections Letter Advisory Opinion DE 00-11.¹⁵⁰ The manual recount did not begin again until November 16. The canvassing board then suspended counting over the Thanksgiving holiday, resuming its recount on November 24. The board failed to complete the recount by the deadline of 5:00 p.m. on November 26. Secretary of State Harris refused to accept the county's submission of a partial recount total, and then refused to accept the completed results when they were submitted after the 5:00 p.m. deadline.¹⁵¹ As a result, the net gain by Gore of 215 (or 176)¹⁵² votes from the recount was not included in the state's certified election returns.

The much more serious aspect of the outcome in Palm Beach County is the effect of the County canvassing board's use of a very narrow standard (i.e., "hanging chad") for ascertaining the intent of a voter to cast a vote for a particular candidate. Using the narrower standard, the canvassing board found that only approximately 5% of the undervote ballots contained a valid vote. By comparison, the more inclusive standard used for punch card ballots by the canvassing boards in Broward and Miami-Dade Counties had shown an ascertainable intent to vote for a specific candidate in approximately 25% of the undervote ballots.¹⁵³ The effect of using the narrower standard in Palm Beach County was to leave 3300 ballots uncounted, even though the participating Gore or Bush representatives often thought that ballot showed the requisite voter intent. Counting these ballots as votes would have given Gore a net gain of approximately 800 additional votes,¹⁵⁴ for a total net gain of approximately 1000 votes from the recount in Palm Beach County.¹⁵⁵

It has been suggested that the decision to use the narrower standard was the result of behind the scenes maneuvering by Kerey Carpenter of

150. *Id.*

151. See *supra* notes 138-40 and accompanying text (discussing the influence Kerey Carpenter and Charles Burton had on the outcome of the election).

152. The Gore monitors insist the number is 215. The County canvassing board tally shows only 176. The Republicans adopt the canvassing board total. See TOOBIN, *supra* note 15, at 188. The Florida Supreme Court noted this disagreement and left it unresolved. See *Gore v. Harris*, 772 So. 2d 1243, 1248 n.6 (Fla.) (per curiam), *rev'd per curiam sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000).

153. See TOOBIN, *supra* note 15, at 165-66.

154. See TOOBIN, *supra* note 15, at 165; Engelhardt & Jaspin, *supra* note 9. Gore alleged in his election contest petition that application of the appropriate (more inclusive) standard would have resulted in a gain of 800 votes. The *Palm Beach Post* found Gore's net gain from these additional ballots to be 784. See Engelhardt & Jaspin, *supra* note 9.

155. The addition of 744-800 net Gore votes to the 176-215 already counted under the more stringent standard would have given Gore a net gain of approximately 1000 votes.

the Department of State's Division of Elections.¹⁵⁶ Allegedly Ms. Carpenter convinced Charles Burton, the chairman of the canvassing board of Palm Beach County, that the narrower standard was more appropriate. The outcome in Palm Beach County may have been at least partly a result of the tactics followed by Gore legal team members in the County, however.

Gore lawyers were divided about how to succeed in Palm Beach County. Jack Young, in Volusia County, and Chris Sautter, in Broward County, had approached the recount process by encouraging the canvassing boards to uniformly apply an inclusive standard of review to all ballots. The effect in these counties of increasing the total number of valid votes for both candidates was to increase the net gain of votes for Gore. Gore continued in each of these counties to receive a majority of the newly found votes just as he had received a majority of votes in these counties on November 7. A similar tactic might have worked in Palm Beach County, in which Gore had received almost 63% of the votes cast on November 7. Instead, Gore team lawyers in Palm Beach County fought early and hard for every Gore vote by urging the counting of each ballot potentially containing a vote for Gore, while not urging the counting of similarly marked ballots for Bush.¹⁵⁷ This tactic ultimately was counterproductive because it increased the contentiousness within the recount process and slowed the process. Ultimately, such partisan haggling from both sides made it easier for the Palm Beach County Canvassing Board to count only clearly marked ballots and to refuse Democratic entreaties by Dennis Newman and David Boies after November 16 to change to a more inclusive standard.¹⁵⁸

Miami-Dade County. The canvassing board of Miami-Dade County did not decide to conduct a manual recount of ballots countywide until November 17. The County never completed the process. The canvassing board was utilizing an inclusive standard for reviewing and counting ballots, but was only able to finish recounting 20% of the county's precincts. These precincts were the most heavily Democratic in the county and resulted in a net gain for Gore of 168 votes.¹⁵⁹ The canvassing board's efforts to complete the manual recount came to an abrupt end on November 22 when the board voted to cancel the recount.

156. See TOOBIN, *supra* note 15, at 85–86; see also *supra* notes 138–40 and accompanying text (discussing Carpenter's role in choosing what standard to apply).

157. See TOOBIN, *supra* note 15, at 165–66.

158. See TAPPER, *supra* note 13, at 306–08.

159. See *Gore v. Harris*, 772 So. 2d 1243, 1248 (Fla.) (per curiam), *rev'd per curiam sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000); TOOBIN, *supra* note 15, at 197.

On November 22, Miami's Clark Center, where the canvassing board was meeting, erupted with demonstrations against the Board and the recount. Some writers claim that the demonstrators were largely Republican congressional aides and that the demonstrations were part of an organized Republican effort to stop the recount.¹⁶⁰ The county made no effort to submit the results of its partial recount with its election returns. Approximately 9000 undervote ballots were never manually reviewed.

Statewide. The Gore legal team's victory in *Palm Beach County v. Harris*,¹⁶¹ which extended the deadline for submitting county election returns from November 14 to November 26, provided a significant opportunity for success. Even with greater time to complete the recounts, however, the Gore legal team was unable to secure the necessary votes. The Gore strategy remained limited to completing the three county recounts that had not yet been finished. Little if any thought apparently was given at this stage as to how else Gore might gain net votes. Meanwhile, although continuing to vigorously oppose Gore's recount efforts, the Bush legal team also used the time of the extension to persuade county canvassing boards to count a greater number of late-received absentee ballots.¹⁶² The Gore team's efforts to timely complete the recounts in Palm Beach and Miami-Dade Counties ultimately proved unsuccessful. Therefore, as the deadline on November 26 passed, Bush remained ahead in the vote. He was certified the winner. Gore's only remaining option for victory was to successfully contest the outcome of the election.

H. Counting of Late-Received Absentee Ballots

Florida allows absentee ballots for federal offices to be received from absent qualified electors overseas as late as ten days after an election.¹⁶³ Qualified absent overseas electors under Florida law include members of the armed services and other permanent residents of the State of Florida who are temporarily residing outside the United States.¹⁶⁴ The allowance for these late-received absentee ballots to be received after

160. See NICHOLS, *supra* note 15, at 153 (showing a photograph of the "riot" with the participants separately numbered and identified as current and former Republican congressional aides).

161. *Palm Beach County Canvassing Bd. I*, 772 So. 2d 1220, 1239-40 (Fla.) (per curiam), vacated *per curiam sub nom.* Bush v. Palm Beach County Canvassing Bd., 531 U.S. 70 (2000); see also *supra* note 135 and accompanying text (discussing the breadth of the Secretary of State's discretion to extend the deadline for submitting returns).

162. See Barstow & Van Natta, *supra* note 8.

163. FLA. ADMIN. CODE ANN. r. 1S-2.013(7) (2000).

164. FLA. STAT. ch. 101.62 (2000).

the date of the election is coupled with state and federal requirements intended to prevent fraud and to maintain the integrity of the election.¹⁶⁵ The successful efforts of the Bush legal team to contest how some county canvassing boards initially applied these requirements has been scornfully called “unseemly trolling”¹⁶⁶ for votes or “Thanksgiving Stuffing.”¹⁶⁷ Ultimately, however, it was the Bush legal team that won federal court sanction of most of its legal reasoning for counting additional overseas ballots.

During the initial days after the election, neither side was sure whether counting these late-received absentee ballots would help or hurt their candidate. The Republicans feared that civilians¹⁶⁸ overseas might be a source of votes for Gore. The Gore team feared that votes from military personnel overseas might go heavily for Bush. Both sides prepared for the possibility of challenging late-received absentee ballots. Mark Herron of Tallahassee prepared and circulated a legal memorandum for the Democrats indicating possible reasons for invalidating late-received overseas ballots for violating Florida law.¹⁶⁹ David Aufhauser of the Washington firm of Williams & Connolly oversaw the preparation of materials for the Republican effort.¹⁷⁰

Eventually, the very different positions of the two legal teams emerged. Democrats determined that their candidate was best served by limiting the counting of all late-received absentee ballots. Republicans concluded that overseas military personnel were more likely in 2000 to vote for Bush than for Gore. Therefore, the Republicans adopted a strategy designed to maximize the number of net votes for Bush. The objective for the Bush legal team, through its statewide network of attorneys, became to increase the acceptance and counting of late-received ballots in counties that Bush had won on November 7

165. See *Bush v. Hillsborough County Canvassing Bd.*, 123 F. Supp. 2d 1305, 1315 (N.D. Fla. 2000).

166. See TAPPER, *supra* note 15, at 301.

167. See Barstow & Van Natta, *supra* note 8 (discussing the Republican public relations campaign used to persuade “selected Bush counties” to reconsider rejected overseas military ballots).

168. The primary Republican concern was about Jewish civilians temporarily residing in Israel. *Id.*

169. See TOOBIN, *supra* note 15, at 96. Mark Herron is a Tallahassee attorney who prepared a legal memorandum or “playbook” for use by the Gore legal team in opposing the counting of the late-received absentee ballots that did not comply with Florida law. *Id.* at 131, 174. Herron is a campaign law expert who worked previously for former Florida Governor Lawton Chiles. TAPPER, *supra* note 13, at 58, 205–06.

170. See TOOBIN, *supra* note 15, at 96. David Aufhauser is a Washington attorney who has represented clients as diverse as Oliver North and Bill Clinton. *Id.* He is credited with being the architect of the Republicans’ legal strategy in Florida on the overseas absentee ballots. *Id.* at 273.

(especially those with a large military presence), while limiting the acceptance and counting of such ballots in those counties that had voted by majority for Gore.¹⁷¹

When the position of the Gore legal team for disqualifying overseas ballots became known publicly on or about November 18, it was condemned by Republicans and others as an effort to invalidate military ballots because of technicalities. Even the Democratic vice presidential candidate Joe Lieberman agreed on national television that he would be in favor of giving the benefit of the doubt to ballots coming from military personnel.¹⁷²

The late-received absentee ballots were counted by November 18. Bush had gained 1380 votes; Gore had gained 750 votes.¹⁷³ This result showed that these overseas absentee ballots were a potentially important source of net votes for Bush. The result also showed that county canvassing boards had disallowed a significant number of the ballots for failing to comply with the requirements of state or federal law.

Rather than being satisfied with the results on November 18, the Bush legal team moved quickly to use the extension of the certification deadline as an opportunity to persuade many of Florida's counties to reconsider some of the ballots that had been disallowed. When some counties balked, the Bush legal team filed suit in Leon County against fourteen of them.¹⁷⁴ The legal issues raised by the Bush team were far from spurious. Most arose from the potential for conflict between Florida law and the Uniformed and Overseas Citizens Absentee Voting Act.¹⁷⁵

The defendant counties had systematically rejected overseas military ballots that lacked a proper¹⁷⁶ or readable postmark, had arrived in an undated envelope, were undated, or were received from voters who were not shown by county records to have requested an absentee ballot. Bush argued that some of these rejections were clearly wrong under

171. *Id.* at 96.

172. *See* TOOBIN, *supra* note 15, at 131.

173. *See* CORRESPONDENTS OF THE NEW YORK TIMES, *supra* note 15, at 101.

174. Compl. for Declaratory & Inj. Relief at 3–4, *Bush v. Bay County Canvassing Bd.*, No. CV-00-2799 (Fla. Cir. Ct. Nov. 27, 2000), available at http://199.44.225.4/courtDockets/pdf/election_cases/CV-00-2799a.pdf (last visited Nov. 28, 2002).

175. *See id.* at 2–3; *Bush v. Hillsborough County Canvassing Bd.*, 123 F. Supp. 2d 1305, 1315 (N.D. Fla. 2000).

176. For example, under Florida law a postmark is improper if it is domestic. *See, e.g.,* Shailagh Marray et al., *GOP Says Democrats Wrongly Discarded Hundreds of Overseas Absentee Ballots*, WALL ST. J., Nov. 20, 2000, at A28, available at 2000 WL-WSJ 26617399 (reporting that the Democrats argued to throw out overseas ballots that did not bear foreign or military postmarks).

federal law. Although section 101.62 of the Florida Statutes provided that an overseas absentee ballot could be considered only if it bears “an APO, FPO, or foreign postmark,” this requirement had been relaxed pursuant to an agreed federal judgment, and the operative state law was embodied in Florida Administrative Code Section 1S-2.013(7).¹⁷⁷ That provision requires only that an overseas ballot be “postmarked *or* signed and dated no later than the date of the Federal election.”¹⁷⁸ Moreover, the Bush legal team argued that insofar as state law was interpreted by the canvassing boards to require rejecting federal ballots with a domestic postmark or for which no ballot application existed in the county records, the state law conflicted with federal law.

After oral arguments on November 24 before Leon Circuit Judge Ralph “Bubba” Smith, the Bush legal team filed a voluntary dismissal¹⁷⁹ indicating that it appeared that many of the defendant counties were now in substantial agreement with the plaintiffs. Some county canvassing boards had met or had indicated an intention to meet to reconsider rejected late-received absentee ballots.¹⁸⁰ For those counties who remained recalcitrant, the Bush legal team proposed further litigation in a different forum.

The Bush legal team then pursued six of the same counties in federal court. On November 26, a complaint for declaratory and injunctive relief was filed before United States District Judge Lacey A. Collier in the Northern District of Florida.¹⁸¹ The allegations were essentially the same as in the earlier state suit (i.e., the conflict of state law with federal law). Judge Collier noted that although initially there had been inferences that the defendant canvassing boards had acted for political

177. FLA. STAT. ch. 101.62 (2000); FLA. ADMIN. CODE ANN. r. 1S-2.013(7) (2000).

178. FLA. ADMIN. CODE ANN. r. 1S-2.013(7) (2000) (emphasis added).

179. Various reasons have been given for why the Bush legal team moved immediately to voluntarily dismiss its lawsuit. TOOBIN, *supra* note 15, at 170–71. First, it is suggested that the lawsuit was no longer needed because most of the counties had agreed to reconsider previously rejected ballots. *Id.* Second, it is suggested that Judge Smith’s concerns about proper venue prompted the Bush legal team to move its litigation to the separate counties. *Id.* Finally, and by far the most interesting theory, it is suggested that the team was concerned by Judge Smith’s questions regarding a consent decree and resulting administrative rule overriding the specific provisions of Florida statutes. *Id.* According to this theory, the team was concerned that Smith might actually declare that the ten-day extension (which also had its origin in the consent decree) was invalid and, therefore, that none of the late-received ballots should be counted. *Id.*

180. For example, the canvassing board of Clay County was one of the fourteen counties sued in state court. See TAPPER, *supra* note 13, at 297. In return for dismissal from the lawsuit, Clay County agreed to reconsider the seventeen late-received absentee ballots that it had rejected. *Id.* It then accepted fourteen of the ballots, representing twelve votes for Bush. *Id.*

181. See *Bush v. Hillsborough County Canvassing Bd.*, 123 F. Supp. 2d 1305 (N.D. Fla. 2000).

reasons, there was no evidence presented to the court to substantiate such inferences and the canvassing boards apparently had acted with the best of intentions.¹⁸²

Judge Collier upheld most of Bush's claims. He concluded that Florida's law was that a ballot should be counted if postmarked *or* signed and dated on or before the election. Therefore, county canvassing boards could reject ballots without a postmark or the required signature and date, but could not require that ballots have both.¹⁸³ Insofar as ballots with domestic postmarks were concerned, Judge Collier found that to cast a federal write-in ballot, the voter must sign an oath that the ballot has been mailed from outside the United States and that the oath is sufficient to allow the ballot to be counted, even when the postmark is domestic.¹⁸⁴ Finally, Judge Collier found that a canvassing board could not reject federal write-in ballots because the county lacked an absentee ballot application from the voter.¹⁸⁵

Several writers have criticized the Bush team's effort.¹⁸⁶ Some of these criticisms apparently arise from a misunderstanding of the applicable law. Judge Collier's opinion provides a clear guide to applicable state and federal law, and nullifies some of the criticisms of the Bush team's effort. Other criticisms, however, remain. These relate to the Bush team's strategy of focusing on military ballots and on only those counties in which Bush was likely to receive a majority of the counted late-received absentee ballots.

There is little, however, to criticize in this legal strategy. The Bush legal team was able to make a credible factual and legal argument that the federal law was intended to facilitate voting by members of the armed services and government service overseas and that a strict interpretation of state law to reject the absentee ballots of these voters conflicted with the purpose and provisions of that federal law. The Bush strategy of making this argument only in those counties in which the counting of additional votes was likely to add net votes to the Bush total was certainly no more partisan than a Gore strategy of counting

182. *Id.* at 1307.

183. *Id.* at 1314–15.

184. *Id.* at 1316.

185. *Id.* at 1317.

186. See TAPPER, *supra* note 13, at 299–301; TOOBIN, *supra* note 15, at 170–71; Barstow & Van Natta, *supra* note 8. Interestingly, none of these sources mention the decision by Judge Collier. Many of Judge Collier's determinations have since been codified as part of federal law. See, e.g., Help America Vote Act of 2002, Pub. L. No. 107-252, tit. VII, 116 Stat. 1666, 1722 (2002) (to be codified at 42 U.S.C. §§ 15301–15545) (delineating the voting rights of military members and overseas citizens).

undervote ballots in only heavily Democratic counties. The real reason for Democrat complaints about the Bush strategy seems to be that the Bush team's effort to increase the counting of overseas ballots selectively by county escaped criticism at the same time that the Bush team was publicly attacking Gore's recount efforts as partisan "cherry-picking."

The Republican strategy in heavily Democratic counties was to allow the Democrats to inflict significant self-injury. The Gore legal team was urging in these counties that late-received absentee ballots be rejected if they appeared to violate state law. Bush's attorneys acquiesced in this position. The result may have determined the outcome of the election. Approximately 1.8 million votes had been counted on November 7 in the four heavily Democratic counties.¹⁸⁷ Thereafter, only 249 late-received absentee ballots were counted (147 [59%] for Gore).¹⁸⁸ By contrast, nine smaller counties with only 980,000 total votes on November 7 counted an additional 1600 late-received absentee ballots (1150 [71%] for Bush).¹⁸⁹ Although some of this difference may be attributed to a disproportionate number of overseas military personnel in these smaller counties, it appears that a substantially smaller percentage of late-received absentee ballots were accepted in the heavily Democratic counties.¹⁹⁰

Some ballots that were disqualified in Palm Beach, Miami-Dade, Volusia, or Broward Counties may have been valid ballots under a proper reading of the applicable law as explained later by Judge Collier. If the failure to count these absentee ballots cost Gore net votes, responsibility must lie with the Gore legal team. This same reasoning applies to the possibility that potentially illegal ballots¹⁹¹ were counted in the Republican counties. At least fourteen counties initially rejected the Bush team's legal position, to the extent that the Bush team found it necessary to file suit against the counties. The Gore legal team failed to

187. Those counties are Broward, Palm Beach, Miami-Dade, and Volusia.

188. See the official results as shown on the NORC Website, *supra* note 2.

189. The counties are Bay, Brevard, Clay, Duval, Escambia, Manatee, Okaloosa, Santa Rosa, and Seminole. See the official results as shown on the NORC Website, *supra* note 2. Eight of these nine counties had initially resisted the Bush team's demands and had been the target of the Republican lawsuits over late-received absentee ballots. These nine counties provided Bush with 1150 votes from late-received absentee ballots and a net advantage of 700 votes over Gore.

190. See Barstow & Van Natta, *supra* note 8 (indicating that Gore counties accepted only two of ten ballots lacking evidence of mailing on or before Election Day; with Bush counties accepting six of ten such ballots).

191. One writer has suggested that the Bush legal team discussed the "drumming up of illegal post-election ballots." See TAPPER, *supra* note 13, at 301.

come to the aid of these county canvassing boards.¹⁹² If, as a result, Bush gained an undue advantage that possibly gave him his margin of victory, responsibility lies with the Gore legal team's strategy, not the Bush legal team.

The ultimate benefits for Bush were great. Of the total of 2491 late-received ballots accepted, counted, and included in the results certified on November 26, Bush received 1575 votes—for a net gain over Gore of 739 votes.¹⁹³ This net gain more than offset any additional votes achieved by Gore through the recounts completed prior to certification. Even as the United States Supreme Court was bringing the post-election legal battle to a close on December 12, Bush was poised to potentially pick up a few more net votes from late-received ballots to be accepted and counted in the six counties directly affected by Judge Collier's order.

I. Uncounted Overvotes

The NORC review of uncounted ballots in Florida shows that perhaps Gore's best opportunity to win in the post-election dispute was by obtaining a manual counting of overvotes, particularly in counties using optical scan counting equipment.¹⁹⁴ Altogether there were approximately 114,000 ballots statewide classified in 2000 as invalid overvotes.¹⁹⁵ Upon manual review of these ballots, NORC coders identified 3501 ballots that clearly exhibited a voter preference for a single candidate. The most common scenario in which this occurred was on optical scan ballots on which the voter had blackened the oval for a single candidate, but had also entered the candidate's name as a write-in.¹⁹⁶ Such ballots with clearly ascertainable voter intent are valid votes under Florida law and must be counted. NORC identified Gore as the candidate selected on 2194 of these uncounted overvote ballots statewide, with a net gain for Gore of 887 votes.¹⁹⁷

192. See TAPPER, *supra* note 13, at 297 (indicating that the Gore legal team did not oppose the Bush team on the absentee ballot issue either in court or before the canvassing boards).

193. See Official Results, *supra* note 3.

194. See Kane, *supra* note 9; see also *supra* notes 9, 98 and accompanying text (reviewing the reasons for the rejection of overvotes by the voting device).

195. NORC was able to review 113,820 of these overvote ballots. See NORC Website *supra* note 2; see also *supra* note 2 and accompanying text (discussing the Florida Ballots Project and the process by which uncounted ballots were reviewed).

196. Kane, *supra* note 9. NORC coders also found punch-card ballots with clean punches for a single candidate that apparently had been misinterpreted by the counting machines as overvotes. *Id.*

197. *Id.*; NORC Website, *supra* note 2.

Members of the Gore legal team indicate that they never focused specifically on the possibility of a net gain by Gore from the manual review of overvotes statewide.¹⁹⁸ It was the Bush legal team, in fact, that pointed to the existence of such overvotes and claimed that the manual review of only undervotes would violate the Fourteenth Amendment.

One reason that dissuaded the Gore legal team from seeking a statewide recount of ballots, which in hindsight might have disclosed these valid overvote ballots, was concern that the canvassing boards in the remaining sixty-three counties might be hostile and unwilling to manually review ballots. This concern appears to have been misplaced. The NORC review found that its coders were in “high agreement” on the coding of overvote ballots.¹⁹⁹ In other words, the disputes about voter intent that plagued both the Florida canvassing boards and the NORC coders when considering undervote ballots, particularly in counties using punch cards, were not present with the review of overvote ballots, particularly in optical scan counties. Moreover, when Gore legal team members did seek manual reviews of ballots in optical scan counties, such as Volusia and Gadsden Counties, the county canvassing boards and election officials acquiesced, with the result that the hand-counting in those two counties proceeded relatively smoothly and garnered Gore valuable net votes.

Whether the Gore legal team should have specifically recognized the potential of adding net votes for Gore through the counting of overvote ballots may be problematic. However, the team’s failure to request the manual review and counting of all ballots classified as nonvotes statewide, including overvotes, was a significant mistake. Ironically, the Bush legal team’s strategy of arguing that counting only undervotes is a denial of equal protection could have proven disastrous for Bush if the scope of the recount had been timely expanded to include these ballots.

J. Gore Election Contest

The Gore election contest petition was filed on November 27, 2000.²⁰⁰ Apparently, the petition went through many different versions before being filed, as the Gore legal team determined what allegations

198. Interview with John Newton, Al Gore attorney, in Tallahassee, Fla. (Jan. 30, 2002).

199. NORC Website, *supra* note 2.

200. See *Gore v. Harris*, 772 So. 2d 1243, 1247 (Fla.) (per curiam), *rev’d per curiam sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000).

should be included.²⁰¹ Among the potential allegations that did not find their way into the final complaint were those challenging: (1) the butterfly ballot in Palm Beach County; (2) the voter instructions and caterpillar ballot in Duval County; (3) the inclusion in the final returns of potentially illegal late-received absentee ballots in certain counties; (4) the inclusion in the final returns of potentially illegal absentee ballots in Martin and Seminole Counties; (5) the exclusion from the final returns of approximately 26,000 uncounted ballots in Duval County; (6) the exclusion from the final returns of legal overvotes statewide; and (7) the exclusion from the final returns of legal undervotes statewide. None of these allegations ultimately found their way into the petition.²⁰²

The reality facing the Gore legal team on November 27 was that very little time remained²⁰³ in which to obtain any relief that could change the election. Therefore, Gore's contest complaint essentially followed the team's strategy since November 9—i.e., manually review and hand-count all undervotes²⁰⁴ in Volusia, Broward, Palm Beach and Miami-Dade Counties. The manual recounts had been timely completed in Volusia and Broward Counties, and the recount totals were part of the final returns certified by Secretary of State Harris. Therefore, the complaint under section 102.168 focused on Palm Beach and Miami-Dade Counties.²⁰⁵ Gore, however, had to prevail on essentially all of his claims to overtake Bush's lead using this strategy.²⁰⁶

In regard to Palm Beach County, Gore alleged that the failure of the Secretary of State to include the results of the county's manual recount (a net gain of 215 votes²⁰⁷ for Gore) was an unlawful exclusion of legal

201. See TOOBIN, *supra* note 15, at 196–202; Interview with John Newton, Al Gore attorney, in Tallahassee, Fla. (Jan. 30, 2002) (describing how the draft petition was changed periodically in response to decisions being made by the legal team leadership in conjunction with Gore on a conference call).

202. See TOOBIN, *supra* note 15, at 196–202.

203. Throughout the election contest process, the Gore team took the position in oral arguments and in written pleadings that “December 12, 2000 [is the] deadline for the resolution of contests regarding the selection of electors.” Compl. to Contest Election, *supra* note 10, at 6.

204. At least some overvotes were counted in Volusia, Broward, and Miami-Dade Counties during the administrative recount. Interview with Jack Young, Al Gore attorney, in Washington, D.C. (May 27, 2002).

205. Compl. to Contest Election, *supra* note 10, at 19–20. The complaint also alleged that the canvassing board of Nassau County on November 24 had unlawfully substituted the county's original vote totals for the results of the automatic recount conducted on November 8. *Id.* at 11. The effect was a net loss of fifty-one votes for Gore. *Id.*

206. See TOOBIN, *supra* note 15, at 196–202.

207. The accuracy of this number was disputed in the filings of the Bush legal team, which insisted that the correct number was only 176 net votes for Gore. Defs. George W. Bush & Dick

votes.²⁰⁸ At the same time, the Gore complaint also alleged that the Palm Beach County Canvassing Board had applied an unlawfully restrictive standard of counting only ballots with a “hanging chad” during its manual recount and, therefore, had unlawfully excluded approximately 4000 legal votes,²⁰⁹ with a loss to Gore of approximately 800 net votes. In regard to Miami-Dade County, the Gore complaint alleged that the Secretary of State’s failure to include the results of the county’s partial recount, a net gain for Gore of 168 votes from the manual counting of 20% of the county’s precincts, was an unlawful exclusion of legal votes.²¹⁰ The complaint also alleged that the county canvassing board had acted unlawfully to exclude votes by failing to complete its manual recount, with the result that approximately 9000 undervote ballots remained to be reviewed.²¹¹ Gore asserted that, if he received the same proportion of the legal votes from among these 9000 ballots as from among those already reviewed, he would gain a net of approximately 600 votes.²¹²

The responses of the Bush legal team, the other defendants, and intervenors opposing Gore have received less attention. The Bush team split its briefing efforts among several groups of lawyers, with the result that in last days of November 2000 the team filed multiple motions and memoranda of law calling for rejection of Gore’s claims and dismissal of the election contest complaint. Altogether, Bush raised at least eighteen separate affirmative defenses, including claims that: (1) Gore lacked standing because section 102.168 applied only to qualified electors and losing “candidates” (i.e., the presidential electors); (2) the court lacked jurisdiction because the contest complaint had been filed after the prescribed statutory deadline; (3) the election contest provisions of Florida law were not intended to apply to presidential elections; (4) the canvassing boards of Palm Beach and Miami-Dade Counties did not abuse their discretion; and (5) the recount and contest processes in Florida violated constitutional due process and equal

Cheney’s Offer of Proof Regarding Palm Beach County Manual Recount Results at 1, *Gore v. Harris*, No. CV-00-2808 (Fla. Cir. Ct. Dec. 4, 2000), available at http://199.44.225.4/courtDockets/pdf/election_cases/CV-00-2808-26.pdf (last visited Nov. 28, 2002).

208. Compl. to Contest Election, *supra* note 10, at 19–20.

209. *Id.* On appeal to the Florida Supreme Court, this number was corrected to 3300 ballots. *Gore v. Harris*, 772 So. 2d 1243, 1248 (Fla.) (per curiam), *rev’d per curiam sub nom.* *Bush v. Gore*, 531 U.S. 98 (2000).

210. Compl. to Contest Election, *supra* note 10, at 3.

211. *Id.* at 4.

212. *Id.*

protection and other provisions of federal law.²¹³ Secretary of State Harris's defense pleadings stressed the additional argument that the Gore complaint was inadequate because it did not initiate a recount of all ballots statewide.²¹⁴

Especially interesting, as it relates to the potential outcome of any eventual effort by the court to have actually resolved the election by counting all legal votes and excluding all illegal votes, are the Republican challenges to: (1) the recount results in Broward, Volusia and Pinellas Counties²¹⁵ (which had resulted in a net gain for Gore of 1130 votes)²¹⁶ on the basis that the canvassing boards "included numerous illegal votes for the Democratic Presidential Electors";²¹⁷ and (2) the exclusion in some counties of legal votes from late-received overseas absentee ballots.²¹⁸ Further, the Bush team alleged that the 9000 uncounted ballots from Miami-Dade had been mishandled in violation of state law, with the result that chads had been dislodged and the ballots spoiled.²¹⁹ Bush claimed that, as a result, the integrity of the 9000 ballots had been compromised, with the effect that the ballots could not legally be introduced into evidence.²²⁰ In other words, the Bush team was prepared to fight over each potential net vote and to try to counter any added Gore votes with additional net Bush votes.²²¹

213. Answer & Affirmative Defenses of Defs. George W. Bush & Dick Cheney at 12-13, *Gore v. Harris*, No. CV-00-2808 (Fla. Cir. Ct. Dec. 4, 2000), available at http://199.44.225.4/courtDockets/pdf/election_cases/CV-00-2808ar.pdf (last visited Nov. 23, 2002) [hereinafter Defs' Answer & Affirmative Defenses].

214. Answer & Defenses of Katherine Harris, as Sec'y of State, & Sec'y of Agric. Bob Crawford, Sec'y of State Katherine Harris, & L. Clayton Roberts, Dir., Div. of Elections, Individually & as Members of & as the Fla. Elections Canvassing Comm'n at 28, *Gore v. Harris*, No. CV-00-2808 (Fla. Cir. Ct. Dec. 4, 2000), available at http://199.44.225.4/courtDockets/pdf/election_cases/CV-00-2808am.pdf (last visited Nov. 23, 2002).

215. In the automatic recount conducted by Pinellas County on November 8, the County added 404 votes for Gore and subtracted sixty-one for Bush, giving Gore a net gain of 465 votes. See TAPPER, *supra* note 13, at 85. Bush disputed this change.

216. This total represents the sum of votes netted for Gore in Volusia (98), Broward (567), and Pinellas (465) Counties.

217. Bush filed a third party complaint against these counties. Third Party Compl. of Defs. George W. Bush & Dick Cheney at 18-19, *Gore v. Harris*, No. CV-00-2808 (Fla. Cir. Ct. Dec. 4, 2000), available at http://199.44.225.4/courtDockets/pdf/election_cases/CV-00-2808bs.pdf (last visited Nov. 23, 2002).

218. Defs' Answer & Affirmative Defenses, *supra* note 213, at 13.

219. *Id.* at 19.

220. *Id.* at 19-20.

221. The *Miami Herald* has suggested that Bush also could have challenged thousands of illegal votes cast by felons or unregistered voters, including 473 alleged illegal votes in Miami-Dade County. See METZER, *supra* note 15, at 8, 104 (estimating that as many as 2500 felons statewide were allowed to vote).

The legal and factual issues raised in the election contest pleadings were numerous, significant, and complex. The potential for new legal and factual issues was almost endless. Nevertheless, as pointed out by the Bush legal team, the purpose of an election contest is to declare a winner and “[i]n order to determine a winner, the Court must resolve all contested issues concerning the November 7 election.”²²² Obviously, Republicans were pleased that it appeared very unlikely that sufficient time existed for litigation of the myriad of issues raised in the contest proceeding.

The Election Contest Proceeding. The Gore legal team’s strategy at trial of Gore’s election contest was dictated by the perceived need to meet a “December 12, 2000 deadline for the resolution of contests regarding the selection of electors.”²²³ Time was rapidly running out. Therefore, the legal team decided to focus less on presenting a strong evidentiary case at trial than on accelerating the case through the circuit court²²⁴ to the Florida Supreme Court. David Boies took the lead in implementing this strategy.

Given the acute shortage of time remaining before the perceived December 12 deadline, the decision by the Gore legal team to avoid a lengthy evidentiary trial at the circuit court was a necessary one. Nevertheless, several aspects of the trial would later adversely affect whatever chance still existed for Gore to prevail in the election.

First, the Gore legal team overlooked the threshold burden that separates an administrative recount from an election contest. Section 102.168 of the Florida Statutes appears deceptively simple. This statute, as amended in 1999, expressly acknowledges that the “rejection of a number of legal votes sufficient to change or place in doubt the result of the election”²²⁵ is a ground for an election contest and authorizes the circuit court judge to fashion such orders as he or she deems necessary.²²⁶ There is no express indication of any threshold burden to be met by the plaintiff. It would seem reasonable, based on the face of this statute alone, to expect in a close election that the trial court would simply begin to look for valid votes among those ballots

222. *Id.*

223. Compl. to Contest Election, *supra* note 10, at 6.

224. Some Democratic attorneys urge that virtually any circuit judge in Leon County other than Judge Sanders Saul would have granted Gore his requested relief. Interview with John Newton, Al Gore attorney, in Tallahassee, Fla. (Jan. 30, 2002). These attorneys suggest that the failure to disqualify Judge Sauls from hearing the election contest was a major tactical mistake. *Id.*

225. FLA. STAT. ch. 102.168(3)(c) (2000).

226. *See id.* ch. 102.168(7).

that had remained uncounted or possibly to count de novo those disputed ballots that had been counted or rejected by the canvassing boards. The apparent promise of section 102.168, however, was illusory. The threshold burden was there but unspoken and apparently unseen. The Gore team's failure to meet this threshold burden would doom its contest effort.

Second, the Gore team presented no evidence that the canvassing board of Palm Beach County had excluded legal votes by refusing to count the votes allegedly existing on the 3300 ballots that had "dimples" instead of "detached chad." As the Florida Supreme Court later found, although review by a court in an election contest proceeding is de novo, a court is not required to repeat an otherwise-proper manual count of ballots.²²⁷ Therefore, a plaintiff has the burden of introducing evidence to refute or call into question the canvassing board's determinations. The Gore team relied on the existence in the court record of the ballots themselves and the transcripts of the Palm Beach County Canvassing Board. The Supreme Court of Florida found that Gore "failed to make a threshold showing that 'legal votes' were rejected."²²⁸ The outcome on this issue before the Florida Supreme Court was crucial because the 3300 votes in question represented a net gain for Gore of approximately 800 votes. Without these votes, Gore was doomed to be defeated without a statewide counting of overvotes.

Third, Gore's claim at trial that reviewing the 9000 uncounted ballots in Miami-Dade County would produce an additional 600 net votes for Gore was plainly unsupportable.²²⁹ Gore's net gain of 168 votes from the partial recount in Miami-Dade County had come with reviewing ballots from the most heavily Democratic precincts (voting 75% for Gore) in the county. Gore claimed at trial that he would realize a net gain of an additional 600 votes through a manual review of the remaining 9000 undervote ballots in the county. This claim, however, rested on the assumption that Gore would continue to receive the same proportion of votes in the remaining uncounted precincts even though those precincts had gone 52% for Bush. Republican witness Dr.

227. *Gore v. Harris*, 772 So. 2d 1243, 1260 (Fla.) (per curiam), *rev'd per curiam sub nom. Bush v. Gore*, 531 U.S. 98 (2000).

228. *See id.* (per curiam) (indicating that "[t]he appellants . . . failed to introduce any evidence to refute the Canvassing Board's determination that the 3300 ballots did not constitute 'legal votes'"); *see also* TAPPER, *supra* note 13, at 376 (indicating that Boies decided not to attempt on the cross examination of Palm Beach County Judge Burton to undermine the Palm Beach County standard as too rigid).

229. A legitimate question is why the Gore legal team proceeded with this claim (even making it the focus of the team's efforts) in view of its apparent weakness.

Laurentius Marais persuasively testified that the projection of a gain for Gore from any review of the uncounted 9000 ballots was “unreliable and inaccurate.”²³⁰ Subsequent reviews of these ballots confirm Dr. Marais’s opinion.²³¹

Fourth, Gore’s strategy during the recount phase of manually recounting only in selected counties may have been an available remedy at the recount stage, but it was legally insufficient to sustain an election contest. By adhering to this strategy in the election contest complaint, the Gore legal team was unable to demonstrate how, in fact, a vote change in only those counties (regardless how substantial) would change or place in doubt the outcome of the election statewide. The majority opinion of the Florida Supreme Court tried to save the Gore legal team from its failed legal strategy by finding that Gore had met his burden under section 102.168, but the majority opinion also recognized that uncounted ballots needed to be reviewed statewide, not just in selected counties.²³²

K. *The Republican Foray Into Federal Court*

Although the final outcome before the United States Supreme Court was favorable for Bush, the federal lawsuit filed in Florida on behalf of Bush was unsuccessful. It is important to understand how these two legal actions were different in the issues that they raised.

The Bush legal team filed an omnibus complaint, *Siegel v. LePore*, on behalf of Bush and Cheney in the federal court for the Northern District of Florida.²³³ Republican residents of counties in Florida in

230. Contest Hearing Record at 326–27, *Gore v. Harris*, CV-00-2808 (Fla. Dist. Ct. App. 2000), available at http://199.44.225.4/courtDockets/pdf/election_cases/CV-00-2808-38.pdf (last visited Nov. 23, 2002).

231. See Keating & Balz, *supra* note 9 (indicating that, based on the NORC study, if the undervotes in Miami-Dade County had been counted and added to the votes from the other three recounted counties, as sought in Gore’s election contest complaint, Bush would have prevailed in the election by approximately 225 votes).

232. *Gore*, 772 So. 2d at 1253 (per curiam) (observing “[w]e do agree . . . that it is absolutely essential in this proceeding and to any final decision, that a manual recount be conducted for all legal votes . . . in all Florida counties where there was an undervote and, hence, a concern that not every citizen’s vote was counted”). The three dissenting members of the court concluded that Gore had failed to carry his burden even in regard to Miami-Dade County. *Id.* at 1263 (Wells, C.J., dissenting); see *id.* at 1271 (Harding, J., dissenting).

233. *Siegel v. LePore*, 120 F. Supp. 2d 1041 (S.D. Fla.), *aff’d*, 234 F.3d 1163 (11th Cir.), *cert. denied*, 531 U.S. 1005 (2000) [hereinafter *Siegel I*]. The Republicans attempted to use this federal court as a means of dealing with many of the various issues surrounding the November 7 election. For example, the plaintiffs sought to stop the manual recounts, to declare Florida Statutes section 102.166(4) unconstitutional, to declare the form of the ballot in Palm Beach County to have been valid, and to remove and consolidate any other actions filed across the State of Florida purporting to challenge the November 7 election or to delay the certification of the

which the ballots were not being manually recounted joined them in the action. Bush challenged Florida's manual recount system on the basis that it lacked meaningful standards for determining voter intent, thereby allowing similar ballots (particularly those with dimpled chads) to be counted differently in different counties. Bush argued that the effect was a violation of due process (i.e., lack of standards) and equal protection (i.e., that a voter has a right to have her ballot counted in the same manner as other ballots are counted in other counties). The individual voters added the equal protection argument that their votes were less likely to be counted than votes in counties in which ballots were being recounted (i.e., all ballots should be recounted, or none should be recounted)²³⁴ and that, therefore, such recounts should be either prohibited or required to be statewide.

Federal District Judge Donald Middlebrooks rejected the plaintiffs' request for an injunction to stop the ongoing manual recounts.²³⁵ Judge Middlebrooks concluded that there had been no showing of irreparable harm given the preliminary stage of the post-election process and the availability to Bush of an election contest to resolve any voting irregularities.²³⁶ He rejected the equal protection and due process claims on the basis that manual recounts are used across the country and serve a valuable function, along with the decentralized election system to prevent corruption and fraud in elections.²³⁷ Judge Middlebrooks warned that federal courts should tread cautiously in the traditional state province of electoral procedures and tabulations.²³⁸ A separate group of Republican voters also filed suit challenging the manual recounts. This suit also was dismissed based on the reasoning in Judge Middlebrooks's opinion.²³⁹

The Court of Appeals for the Eleventh Circuit denied the request for an emergency motion for injunction pending appeal.²⁴⁰ The United

election. See *Siegel v. LePore*, 234 F.3d 1163, 1169–70 (11th Cir.), *cert. denied*, 531 U.S. 1005 (2000) [hereinafter *Siegel II*].

234. *Siegel II*, 234 F.3d at 1174–75.

235. *Siegel I*, 120 F. Supp. 2d at 1054.

236. *Id.* at 1052–53.

237. *Id.* at 1050–52.

238. *Id.* at 1052–54.

239. *Touchston v. McDermott*, 120 F. Supp. 2d 1055 (M.D. Fla.), *aff'd*, 234 F.3d 1133 (11th Cir. 2000), *cert. denied*, 531 U.S. 1061 (2001) [hereinafter *Touchston I*].

240. *Touchston v. McDermott*, 234 F.3d 1130 (11th Cir. 2000), *cert. denied*, 531 U.S. 1061 (2001) [hereinafter *Touchston II*] (the court noted that Florida laws provided a detailed election dispute process both in the form of administrative actions by state officials and actions in state courts that could address and resolve any necessary federal constitutional issues presented to them). The same conclusion was reached in the emergency appeal in *Siegel v. LePore*. *Siegel II*, 234 F.3d at 1177.

States Supreme Court denied certiorari even before the case was decided by the court of appeals.²⁴¹ On December 6, the Eleventh Circuit en banc upheld Judge Middlebrooks's ruling without reaching the merits of the plaintiffs' challenges.²⁴² Four justices dissented. The foray into federal court by the Bush legal team had been unsuccessful.

A crucial difference exists in the issues raised by the Republican plaintiffs in *Siegel* and those that came before the United States Supreme Court in *Bush v. Gore*. In *Siegel*, the plaintiffs were challenging the Florida statutory structure that provided for manual recounts and the process of administrative actions and state court actions designed to resolve election disputes. The Florida structures and process are very similar to those existing in other states nationwide. Therefore, any ruling that the Florida statutes or the manual recount process were unconstitutional unavoidably would have called into question the validity of the laws and election procedures in many other states and propelled the federal courts headlong into a major intrusion into state management of elections. No federal court, including the United States Supreme Court, is likely to welcome such a global result.

Through its flawed strategy of attempting to continue the limited manual recount in its election contest, however, the Gore legal team created the opportunity needed by Republicans to successfully challenge the outcome in Florida without creating a precedent with broad implications. The Florida Supreme Court attempted to save Gore from his flawed strategy by remanding the election contest for a statewide recount of undervotes.²⁴³ In doing so, however, the Florida Court realized the shortage of time remaining to resolve the recount and, therefore, mandated the inclusion of recount totals in Palm Beach and Miami-Dade Counties that otherwise would have been subject to challenge by Bush in the election contest. Republicans were left without an effective recourse by which to challenge these or other disputed vote totals within the expedited election contest process. The Florida Court went on to prescribe an essentially nonuniform manner of counting the remaining ballots in the time available. The court's majority opinion was a product of extraordinary circumstances and recognized that "practical difficulties may well end up controlling the

241. *Siegel v. LePore*, 531 U.S. 1005 (2000) (denying appellants' writ of certiorari before judgment).

242. *Siegel II*, 234 F.3d at 1178–79 (finding that the district court did not abuse its discretion by finding that plaintiffs had not met their burden of showing at least a substantial likelihood of irreparable injury).

243. *Gore v. Harris*, 772 So. 2d 1243, 1262 (Fla.) (per curiam), *rev'd per curiam sub nom. Bush v. Gore*, 531 U.S. 98 (2000).

outcome of the election.”²⁴⁴ The court’s order demonstrated that there no longer was time for the state courts to provide the fundamental fairness necessary for a credible result in the election contest.

The per curiam opinion in *Bush v. Gore* carefully limits its precedential significance. The opinion explains the scope of its holding as follows:

The recount process, in its features here described, is inconsistent with the minimum procedures necessary to protect the fundamental right of each voter in the special instance of a statewide recount under the authority of a single state judicial officer. Our consideration is limited to the present circumstances, for the problem of equal protection in election processes generally presents many complexities.

The question before the Court is not whether local entities, in the exercise of their expertise, may develop different systems for implementing elections. Instead, we are presented with a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards.²⁴⁵

The Supreme Court’s per curiam opinion limits its scope to a remedial order of a judicial officer having authority to assure uniformity in a statewide recount. By doing so, the opinion expressly limits itself to election contest type proceedings and avoids directly implicating state statutes providing for manual recounts or a process of administrative actions or state court actions designed to resolve election disputes. In other words, the opinion avoids the type of issues posed in *Siegel*.²⁴⁶

Read literally, the per curiam opinion holds only that a remedial order in a judicial election contest proceeding must assure “rudimentary requirements of equal treatment and fundamental fairness”²⁴⁷ for resolving disputes over the counting of votes throughout the election jurisdiction in question. Nothing is novel in this declaration. A function of an election contest before a single judicial officer or court, or other authorized forum,²⁴⁸ is to consider alleged irregularities that might affect the outcome of the election and to fairly resolve disputes. For it to be legally acceptable for such a court to resolve those disputes in an admittedly nonuniform manner with the result favoring one

244. *Id.* at 1261 n.21 (per curiam).

245. *Bush*, 531 U.S. at 109 (per curiam).

246. *See supra* notes 233–42 and accompanying text (discussing the issues posed in *Siegel v. LePore*).

247. *Bush*, 531 U.S. at 109 (per curiam).

248. *See* Steve Bickerstaff, *Counts, Recounts and Election Contests: Lessons From the Florida Presidential Election*, 29 FLA. ST. U. L. REV. 425, 433 (2001) (describing how officials or forums, such as Congress, may be designated to hear election contests).

candidate or the other is a shocking concept. Yet, this is the concept that ultimately was the basis for Gore's election contest strategy.

By pursuing this strategy, the Gore legal team unwittingly gave the Bush team a bona fide argument for federal court intervention to terminate a state process that was unable to provide fundamental fairness for both candidates in the time remaining for adjudication. Gore's flawed strategy gave the Supreme Court of the United States an opportunity to resolve the contest for the Presidency of the United States without establishing a precedent that would necessarily apply to the statutes and election procedures of Florida or any other state.

L. The Effect of Political Considerations on Legal Strategy

The Bush and Gore legal teams conducted their legal maneuvering in a floodlight of media coverage. Both candidates were concerned about the public perception and political ramifications of each possible legal strategy. Candidate Gore was concerned about the perceived need to maintain support among Democratic Party leadership, elected officials in Congress, and the media if he was to prolong the election dispute in Florida through a recount or litigation.²⁴⁹

One effect of the active involvement of Gore and his political advisors in the decision-making in Florida was that it created an opportunity for the legal strategy in Florida to be shaped by political rather than legal concerns. Several specific strategic decisions appear to have been significantly influenced by political considerations, including the following: (1) to seek a manual review of ballots in only four counties instead of statewide (because of the concern that manually counting ballots in only a handful of counties would be more politically acceptable than manually counting ballots in all counties); (2) to seek a delay of the deadline for vote certification rather than proceeding immediately with a judicial election contest (because of the concern that litigation would be less politically acceptable); and (3) to avoid aggressively challenging statewide the counting of late-received absentee ballots attributable to military personnel (because of the concern that such opposition would be perceived as "anti-military" and could have unfavorable political ramifications in the future for Gore and other Democratic candidates). Each of these decisions possibly cost Gore the election.

249. See TOOBIN, *supra* note 15, at 7, 21, 30, 82, 180, 224 (describing how Gore agonized over the views of the "elite opinion makers" and the "Washington establishment," particularly as they might be prompted to call for Gore's withdrawal or concession).

Bush's de facto delegation of responsibility for legal strategy to the Bush legal team in Florida had the apparent effect of reducing the impact of political concerns on the determination of Republican legal strategy. Republican political concerns directly affected how the legal strategy was packaged for the public more than the strategy itself. Clearly, the Republicans actively worked to manage the media and to affect how Americans saw the events and issues in Florida²⁵⁰ by sending "the message" that once the automatic recounts were completed on November 9, the election was over and that any further recounts, especially by hand, were a partisan attempt to steal the election. There is no indication, however, that the Bush legal team actually believed that the uncertified results were legally final,²⁵¹ nor did this public position deter the Bush legal team from continuing its efforts to increase the number of late-received absentee ballots counted by county canvassing boards through December 12.

The Republicans considered both the Florida courts and canvassing boards to be dominated by Democrats.²⁵² Therefore, as the Florida courts became engaged on the election issues, the courts also became targets of the Republican public relations strategy designed to show that the election was being stolen.²⁵³ Accusations by an attorney that a court system or court is biased or partisan are extraordinary, particularly if the attorney is directly or indirectly representing clients before those courts. In hindsight, however, there can be little doubt now that Republican claims of partisan bias, and resulting media coverage of those claims, drew the attention of members of the nation's highest court and served to set the stage for Bush's successful appeal to that Court. Regardless whether the Republican public relations strategy was part of the larger legal strategy to reach the United States Supreme Court, it aided that end strategy. The Republicans' public relations strategy both effectively communicated the Republican legal and policy positions to the United States Supreme Court before any case actually reached the Court and helped prepare the public, nationwide, to accept a decision by that Court bringing the "partisan" proceedings in Florida to a close.

250. One of Jim Baker's first concerns on arriving in Florida was the need to develop a "PR strategy." *See id.* at 46. The strategy of claiming that the election was already over was at least partly a response by Jim Baker to that need that he perceived. *Id.* at 48.

251. For some observers, this meant that the Republicans were guilty of hypocrisy. *See id.* at 48.

252. *See id.* at 47 (noting that Baker counted the canvassing boards and the courts as warriors for the Democrats).

253. *See* TAPPER, *supra* note 13, at 248–49 (describing Baker's news conference on November 21, 2000, accusing "[t]he Florida Supreme Court and some Democratic county electoral boards" of changing the rules in the middle of the game).

IV. CONCLUSION

Litigators are tempted to believe that they win because of their skills and lose only when the facts, law, or courts are against them. The truth, of course, is that sometimes (as we recognize in hindsight) we win because of good fortune and lose because of our unsuccessful legal strategies, inadequately prepared witnesses, or the will and capabilities of the opposing counsel. Legal contests, like wars or battles, sometimes are won or lost when the outcome is in doubt. The outcome was in doubt in Florida on November 8. Bush was not predestined to win; Gore was not predestined to lose. Gore could have won the Presidency. This Article has examined some of the reasons why Gore did not win.

Concluding that Gore could have won the Presidency does not mean that Bush did not rightfully win the election in Florida. Legal rules exist that historically have provided a means for resolving close elections. The presidential election in Florida was a statistical dead heat. Nevertheless, as shown by Bush's presence today in the White House, there usually is a victor and a vanquished even in a statistical dead heat. That victor in Florida was George W. Bush. His victory was won by his legal team.

The NORC review shows that Bush almost certainly would still have won the statewide recount of undervote ballots as initiated by the Leon County Circuit Court on December 9.²⁵⁴ Therefore, even those skeptical of the motivation or legal basis for the stay of that recount in *Bush v. Gore* should acknowledge that Bush is not President today solely because of five justices on the United States Supreme Court.

In a contest of wills between two teams of outstanding, strong-minded attorneys, as occurred post-election in Florida, there is no blame attached to defeat. There are, however, pertinent observations to be made and possible lessons to be learned. The observations and lessons that I have derived from my analysis are as follows:

Tactical Advantage. Bush enjoyed a meaningful advantage because the television networks on the night of November 7–8 had mistakenly projected him as the winner of the vote in Florida and because throughout the post-election period he successfully maintained a lead in the unofficial returns from the Florida counties. Although without official significance, these factors affected the post-election strategies of both candidates. The factors allowed Bush to adopt a strategy of opposing or delaying any move by Gore that might change the returns

254. See *supra* note 9 and accompanying text (concluding that Gore was unlikely to have prevailed, based upon the findings of the NORC review).

before certification and of labeling each such move by Gore as an effort to steal the election. These factors caused the Gore legal team to fashion its strategies cautiously because of a perceived need to minimize anticipated criticism that Gore was needlessly prolonging the uncertainty of the outcome of the election. Ultimately, however, the advantage enjoyed by Bush from these unofficial symbols of victory was not determinative of the outcome. Gore had a chance of prevailing in the official returns and of winning the Presidency.

Leadership. Each legal team included some of the finest lawyers in Florida and the United States. The Republican leadership, however, proved superior. James A. Baker's personal presence, experience, strategic foresight, de facto authority and unflinching commitment to winning maintained an astonishing degree of discipline among the numerous elite lawyers and other professionals that made up the Bush legal team and contributed to the efficiency and effectiveness of that team. There was no equivalent figure to enforce discipline on the Gore legal team or to guide the Gore team effectively in accordance with a winning long-term strategy.

Organization. The Gore election campaign strategy for winning the election in Florida focused primarily on turning out Democratic voters in the six most populous and most heavily Democratic counties in the state. Organization elsewhere in Florida suffered. After the November 7 election, the Gore legal team attempted to establish a statewide network to counter the pre-existing Republican statewide network. The Gore team's effort was unsuccessful. Democratic information gathering statewide was spotty throughout the post-election process. Potential net Gore votes went undiscovered or were ignored. The Republican network of attorneys in each county proved to be a more reliable and timely source of information for the Bush headquarters and a more effective means of carrying out Bush strategy statewide. This statewide network proved particularly important to the outcome in Florida by convincing county canvassing boards to accept and to count late-received absentee ballots that did not strictly comply with state law. Ultimately the Bush legal team was larger, better organized and more disciplined in support of seeing that its candidate would win.

Inflexible Strategy. The Gore legal team's strategy of requesting manual recounts in only four of Florida's sixty-seven counties was a critical error. Perhaps more significant, however, was the team's failure to modify or abandon this strategy in the face of increasingly ominous indications that the strategy had backfired and could not win the election for Gore. Other possible strategies, both offensive and defensive, went unimplemented. The goal of completing these four

recounts continued to dominate the focus and organization of the Gore legal team right up through trial of the election contest. The leadership of the Gore team proved unable to adjust its strategy for winning in the face of new information and changed circumstances statewide. By contrast, the Bush legal team modified its strategies numerous times in response to changed circumstances, particularly as related to the counting of late-received absentee ballots and to challenges in federal court.

Costly Victories. The Gore team succeeded in initiating a manual recount in all four of the target counties, in securing an inclusive standard for voter intent in three of the counties and in timely completing manual recounts in two of the counties for a net gain of 665 votes for Gore. These successes came over vigorous Republican opposition. The members of the Gore team with the greatest experience in election recounts were sent to these individual counties to achieve the recounts. As a result, Gore's recount experts were drawn into almost daily trench warfare within each county over a mere handful of votes. The dispersal of the team's experts among the recount counties meant that they were not present in the Tallahassee headquarters to evaluate information statewide, to monitor Bush's activities in the other sixty-three counties, to implement alternatives to the limited recount that was underway or to help modify Gore's election contest strategy as circumstances changed.

Unfamiliar Law. Election recount and contest law is arcane. Only a few attorneys nationwide can legitimately claim to be expert. It is not wise for attorneys accustomed to practicing in other areas of the law to try to learn election law in the course of a chaotic, break-neck post-election legal battle. Although the Gore legal team had election law expertise at least equivalent to the Bush legal team, the Gore team squandered that expertise. The Gore team leadership too often failed to follow the advice of its election law experts or its experienced Florida lawyers or even to timely seek advice from these lawyers. It is not surprising, therefore, that many of the Gore team's critical legal strategies backfired. Greater attention to and input from the expert members of the legal team, in lieu of the more political members, might have helped the Gore team to better foresee how the recount would develop and to avoid some of the critical strategic mistakes that ultimately doomed the recount and election contest efforts and created the legal justification for the Supreme Court's intervention.

Political Factors. Bush effectively delegated authority to James Baker to do what was necessary to win the post-election legal battle in Florida. Baker pursued this objective relentlessly. As a result,

Republican political concerns more directly affected how a legal strategy was packaged for the public than the strategy itself. By contrast, Gore and his political advisors maintained an intense personal interest in day-to-day events in Florida and in the perceived possibility of criticism from members of Congress, the press, and the public for Gore's legal maneuvers. Gore and his political advisors often participated directly in the formulation of legal strategy. As a result, Democratic political concerns directly affected legal strategies and produced a cautious, shortsighted, and uncertain approach in Gore's post-election battle to win the Presidency.

The Vagaries of Fortune. Despite the circumstances that benefited the Bush legal team in Florida, the post-election legal battle could have gone against it. The unanimous decision of the Palm Beach County Canvassing Board to apply a narrow standard for determining voter intent cost Gore approximately 800 net votes at a time during the recount when that vote increase would have given Gore a lead over Bush at the time the official results were to be certified. Yet, there is nothing in the record to suggest that the Board's decision was a result of superior lawyering by the Bush team. Moreover, the Bush team's foray into federal court to prevent the manual recounts was unsuccessful both at the district court and court of appeals levels. The opportunity for a Republican victory before the United States Supreme Court in *Bush v. Gore* came not as a result of the Bush team's federal court challenge to manual recounts, but as a result of the Gore team's flawed election contest strategy, which led, in the frantic rush of events, to a fundamentally unfair Florida Supreme Court order.

Neither Gore nor Bush was ever likely to prevail in a judicial contest of the certified election results because there was never sufficient time to adjudicate a fair and credible result in the time available after the November 7 election. Whoever was ahead when the election results were certified was almost certain to be the winner of Florida's electors and the Presidency. Gore could have achieved enough net votes to have been leading at the time of certification. The Bush legal team outmaneuvered the Gore team during the recount phase, however, and won enough of the issues in the county-by-county recount fights for its candidate to prevail in the final election returns and to become President of the United States.