BUSH V. GORE

A ONE YEAR RETROSPECTIVE

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Mr. Ronald Klain, *O'Melveny and Myers and Gore Legal Team*
Mr. Joseph Smith, *Bartlit Beck (moderator)*

DEAN REUTER: Good afternoon, ladies and gentlemen. Thank you. Good afternoon and welcome. It is great to see so many of you here for this program.

Almost a year ago to this day, those of you who were not in Florida may well have been sitting in this very room listening to Governor Frank Keating offer some observations about the many events that were unfolding in Tallahassee and Miami Dade County at that time. He had just returned from the center of legal and political activity which was attracting unprecedented, but I think, well-deserved national attention.

This afternoon, we have the benefit of being able to sit back and take in a retrospective of those events some twelve months ago. Such a retrospective is worth having, in our view, because *Bush v. Gore* and its surrounding events were a historic moment in the life of American law, and a fitting testimony to the vitality of the rule of law in this country which, in my view, has rightly made us the envy of the world.

Few nation states in human history have survived such deep disputes over the succession of power. We did it. Not without a ripple or without a bruise, but always without a doubt that the values of this great country would endure and see us into and through the 21st Century; that we would not just survive, but continue to thrive.

To introduce our speaker and preside over the exchange, I would like to call upon Joseph Smith, who offered us the idea of sponsoring this afternoon's program. He serves as a partner in the Denver office of the law firm of Bartlit Beck, where he maintains a general and complex litigation practice.

Thanks, Joe, for being with us this afternoon.

MR. SMITH: Thank you, Dean. It is a pleasure to be here, a pleasure to introduce our panel today and to moderate this panel, and especially to do so before basically the same group that Senator Lieberman described as the ugly angry Republican mob. It is good to see everyone once again in full riot gear. You look nice.

Today's panel should be interesting, not just because our participants were on the front lines for Bush versus Gore, not just because they were involved from different sides, but also because they have different personal perspectives. Phil Beck is a trial lawyer and Ron Klain has had a distinguished career in government and is more of an appellate lawyer. By way of more detailed introductions, Phil Beck, after law school at Boston University, clerked for the D.C. Circuit. He then became a trial lawyer at Kirkland & Ellis, where he was for 15 years before founding our firm, Bartlit Beck, in 1993. In 2000, of course, he served as trial counsel for George W. Bush, and more recently, as all of you know, he has been chosen by the Department of Justice to replace David Boise as trial counsel in the Microsoft case. Funny how those things happen.

Ron Klain, after law school, clerked two terms for Justice Byron White. He then served in a series of positions for Democrats in Congress, and then in the Clinton Administration he was chief of staff and counselor to Attorney General Janet Reno, chief of staff and counselor to Vice President Gore, and assistant to President Clinton. He was general counsel of the Gore-Lieberman Recount Committee, and now he is a partner at O'Melveny & Myers here in Washington, D.C.

So thank you very much, all of you, for being here, and I will first ask Phil to make some remarks.

MR. BECK: Thank you.

Most of the discussion of the 2000 election litigation has focused, of course, on the Florida Supreme Court and the United States Supreme Court decisions. I thought for a couple reasons I would focus on something else, and that is what happened at the trial.

One is because that is where I was involved, and the other is because as I thought about this group, I thought there are probably 2- or 300 people who are better equipped than I am to discuss the Supreme Court issues.

But I did have a worm's eye view of what happened in Florida during the campaign and the litigation over the campaign, and it did have very important consequences for how the case eventually got litigated in the Florida and United States Supreme Court. So I thought I would talk about one main issue that had interesting fallout as we went forward, and that is the role of expert testimony in the litigation in Tallahassee.

I think almost everybody in this room probably shares my view that a principal constituency of the Democratic party is now the plaintiff's trial bar, and probably also you share my view that one of the plagues on the legal system over the last ten or 15 years has been the increasing use of junk science in litigation.

What I found down in Florida was a fascinating irony that I thought generally went unremarked upon, and that was that the death rattle of the Gore campaign was a piece of litigation in which their case in chief consisted entirely of junk science, and it was my happy duty to cross-examine the experts that they called.

The case morphed over time as it got to the appellate level, but as it started out in the courtroom in Tallahassee, the Democrats had made a technical choice that they were going to ask for a recount only of four counties, all four heavily Democratic, and not ask for a state-wide recount.

So they had to come up with a rationale. Ron can correct me if I am wrong, but their real rationale, I assume, was that they thought that those four counties, if they could get a recount going there because they were heavily Democratic, would put them ahead, and then momentum would be on their side and there would be tremendous political pressure on the Bush team to concede.

But they needed a legal and factual rationale for selecting those four counties to limit the recount, and the rationale that they came up with was that in these four counties, there was in use these punch-card voting machines, charmingly called the Vote-a-Matics, and they said there is something wrong with these machines. What they said was wrong with the machines is that somehow or another, even though people consistently were able to record votes for every other race on the ballot, they were not able to record their votes for president.

So the theory underlying the case for why there should be recounts in these four counties was that, yes, people were able to vote for congressmen and dog-catchers and all kinds of other races without apparent difficulty, they were able to punch through those chads, but when it came to that first column, Column A on the far left-hand side, where Al Gore's name and George Bush's name were, they were somehow unable to punch through, and that there were large numbers who were only able to leave dimples or to dislodge one of the four corners of the chad.

So this was the theory, and their theory was sponsored at trial by two expert witnesses. One was named Kimbel Brace. He was a demographer by trade who had done a lot of work over the years for the Democratic party in reapportionment disputes. And because he had been around the country involved in a lot of different elections, he was willing to hold himself out as an expert in the mechanics of the punch-card voting machine.

They really had a two-part approach to their theory. One was the mechanics of what goes wrong with these machines; and the second part was a statistical analysis to back up the theory that there must be something going wrong.

So Mr. Brace said, here's what's wrong with the machines. First of all, these machines are used for a lot of different kinds of elections, school board, union elections, that sort of thing, and there is always somebody in that first column that you're voting for, where as there might not be as many races in the subsequent columns. So over many years, when people push the stylus in the first column, the rubber gets hard from the stylus impacting it over and over and over again, and so therefore it's understandable, so said Mr. Brace, that people would be able to punch through in Rows B, C, D, E, F and G, but not be able to punch through in Row A because the rubber got hard, and that was his theory.

We actually called a polymer chemist, and I met with this polymer chemist for a day or so before the trial started, and he said this was an utter fabrication, complete nonsense.

So really the cross-examination of Mr. Brace on this score was directed toward establishing that he did not know things such as whether there are different kinds of rubber, whether the rubber used in the voting machine was natural or synthetic rubber, whether the kind of rubber used in the voting machine gets harder or softer with age, gets harder or softer with heat, gets harder or softer with being impacted by a stylus. So this theory was something somebody cooked up, not Mr. Brace, but he was willing to sign onto it, and it had no substance at all. His fallback theory was my personal favorite, and that was the chad build-up theory, and this theory was that as people voted for Al Gore in particular, the chads would fall down and start forming a little pile, and eventually the pile would get all the way up to where the ballot rested and people would be unable to push through the chads and they could only leave a dimple.

I asked him how many chads it would take to make such a pile, and he didn't have any idea. The answer is thousands, and these machines are only used by hundreds of people per election.

But then also, remember his theory was that this phenomenon occurs in Column A but not in Columns B, C, D, E, F and G. And so I said, well, have you ever actually looked at the ballot? And he said, I'm not sure that I have. And so we looked at it and there was one race in Column A, and that was for president. So you're only going to be dislodging one chad in Column A unless you're from Palm Beach and are confused.

In which case some number of people are going to dislodge two. But it was very funny because -- and I thought it proved that God is a Republican because as you went down the ballot, sure enough, in Column 2, there were two races, and people did not vote any more frequently for president than they did any other races, so that in Column 2, you would have two chads, so I said, well, then you would expect more chad build-up in Column 2 than Column 1, and he said maybe so.

Then we moved to Column 3, and sure enough, there were three races in Column 3, so there would be three chads; and there were four races in Column 4. And so I said, well, then this chad build-up, you would expect it to work the opposite of what your theory is, that people would have a harder time voting in the middle of the ballot than on the end. And

he said, "Well, what you're overlooking, Mr. Beck, is that, as I said before, these machines are used in many elections and in school board and union elections, there are always somebody in the first column and they don't clean these machines out all that often, so over many years and many different elections, there is going to be more chad build-up under Column A."

That's when I had a lot of fun because I asked him whether, when they picked up these machines at the end of the elections, they carefully walk them to the warehouse so as not to allow the little piles of chad to fall down or whether, in fact, they picked them up and they put them in the suitcase and they bounced along and they put them on the truck and all the chads would fall to the bottom. And he reluctantly agreed that that, in fact, is how they did it. So there was no basis on the mechanical side for their theory of chad build-up or hard rubber.

But then they called Professor Hingardner, who is a professor at Yale, and he was a statistician, and he came to give a statistical analysis where his basic story was, I don't know how or why this happens, but there's something wrong with Column A where we are not recording the votes in Column A. His theory was, he looked at an off-year election from 1998 and what he found is that in Palm Beach County where they used the Vote-a-Matic machines, more people voted for governor than for senate, whereas in the rest of the state, more people voted for senator than for governor. So he said this is a statistical anomaly and there is no reason why the people in Palm Beach County should be any more interested in the governor race than the senate race, and so what could account for this?

Then in his sworn affidavit, he said a closer examination of the ballot reveals the explanation, and that is the senate race is in Column 1 and the governor race is in Column 2, so there must be something wrong with Column 1; that's what's revealed by a closer examination of the ballot.

In fact, he never looked at the ballot. We sent somebody down to get the ballot and what we found out, to Professor Hingardner's surprise, was that both the senate and the governor's race were in Column 1.

So the statistical case evaporated as well.

I want to divert and tell a story. I was just talking with Judge Kozinski. One of his former clerks is a younger partner of mine who was down there helping along with another one of our younger partners, and we had an agreement with the Gore team that we would depose one another's experts the night before the trial was to start, but we had some kind of time limit -- I don't remember what it was; like 45 minutes -- for each expert deposition.

So I said to Sean Gallagher and another one of our young partners, Shawn Fagan, "Why don't you guys take the deposition?" So this was exciting because they are going to take the depositions of the experts in the presidential election case. And I said, "there's only one thing: I already know that Professor Hingardner has screwed it all up on this ballot story, and I already know that Kimbel Brace has it all wrong about rubber and chad build-up, and my only fear is that through this questioning, you will alert the other side to what we have on the two experts. So your job is to take the worst depositions ever taken in the history of America."

And these two guys, they are both former Supreme Court clerks and Type A personalities, and so they come back and it's a great competition to see whose deposition was worse.

Sean Gallagher said, "Well, I took Mr. Brace's deposition", and Shawn Fagan's saying, "Yeah, yeah", and Sean Gallagher said, "I spent all 45 minutes asking him about the reapportionment cases from 1990."

And so then the other Shawn says, "I took Professor Hingardner's deposition and I spent all 45 minutes asking him what textbooks he used in teaching his classes at Yale."

So in the spirit of the times, we declared it a dead heat.

It was interesting later, though, I had dinner with David Boise in the midst of the trial. Everybody would go for dinner and drinks at the same place, and David and I were talking and he said, "Gee, you did a nice job." And I said, "Did you know what was coming?" And he did not do the examination himself of the statistician, and he said, "No, but I knew that we were going to have problems." And I said "why?" And he said, "because when I asked the guy who did do the examination what is Beck going to do on cross, he said, 'I'm not sure, I think he's going to ask him about the textbooks that he used at Yale.'"

So David said, "No, he's not going to do that."

In any event, at the end of the day, because of the nature of the case that the Gore team chose to put on, we were able to show that there simply was no scientific basis for their theory that was the initial rationale for selecting those four counties instead of asking for a state-wide recount.

A consequence of that was that when they got to the Florida Supreme Court, which I believe was trying to dictate the outcome of the election, the Florida Supreme Court had to improvise Plan B, because the four-county recount approach just had no substance to it at all. That's when they found themselves ordering a recount that no one had ever asked for, a state-wide recount, but only of the undervotes and not of the overvotes, and putting in a lock box for Al Gore the undervotes that had already been counted in the four Democratic counties and refusing to have a standard to evaluate the ballots that would apply across the state, and even refusing to have a mechanism in place so that there could be time for judicial review of the results from the different canvassing boards.

Because they had to improvise that recount procedure, then I believe the United States Supreme Court not only acted properly, but really had no choice but to put a stop to what was an absolutely crazy procedure that was going on

down there in Florida.

So as I said, others in this room can do a much better job than I describing the doctrinal bases for the Supreme Court decision. I kept thinking, as I was watching what was going on in Florida, there must be someone in Washington looking at this and saying, "We have to stop the madness." I always thought that was the fundamental basis of the decision, and I was pleased, as I'm sure most of you were, that they did come to that result.

Thank you very much.

MR. KLAIN: Well, I recognize I start off with a little lighter support in the room than Phil has.

But I thought I would have a different perspective, not just because I come at it differently, but, as Joe mentioned, because my role in the case was more on the appellate side than on the trial side. But for me, I think that the whole experience in terms of reflecting on it one year later is an amazing experience and a reminder once again of how when you are involved in history, sometimes you don't really appreciate how historic the events are as they are unfolding.

The epitome of that was on the night of December 12th when the Supreme Court decision came down, I'm sure like many of you, obviously we were very anxious to get it and we were having trouble, in Tallahassee getting a hold of the Supreme Court's opinion, and the Court's clerk had called and had described this very divided lineup. It really wasn't clear to us what it meant.

So finally, someone got a hold of the copy of the opinion and started faxing it, putting it over the fax line page by page, and I would get it and I had Vice President Gore on the phone and I would read through each page and summarize what it meant and so on, so forth, and finally got near the end of the opinion and it was pretty clear what it meant and we ended the call. And, as everyone knows, the next day, the Vice President conceded.

So a couple weeks later, I was doing an interview for one of these many books that had come out about the election and the reporter doing this interview asked me about that night and went through the story and he said, "Well, when you hit the moment when you got to that seminal decisive part of the opinion, what did you say to Vice President Gore?"

I was thinking in this interview, well, you know, this is kind of my moment in history here. I said, "Well, I don't remember exactly, but I think what I said was, 'Mr. Vice President, I'm afraid our quest is at an end.'" And the reporter said, "Well, you know, that's funny, Ron, because there was someone in the room with you as you were doing it, and he says your quote was, 'Damn, I think we're hosed.'"

Somehow, I don't think that's going into Bartlett's any time soon. Well, I'm not going to attempt to engage Phil on the question of the trial and the evidence at the trial. As I said, my role was more on the appellate side of the case.

From time to time, I would walk into this large room where our trial team was meeting and going over how we were going to handle the case. I would take a break from writing briefs and whatnot, and I would walk into the room and listen to this incredible cacophony of witnesses being deposed and experts and this and that and the other, and finally, at the end of one of these things, I pulled David Boise aside, who was running our trial team, and said, "David, What is our trial strategy?" And he looked at me and he said, "Lose fast."

Okay. And as Phil noted, they frustrated us in even doing that, unfortunately. It took us a whole damn week to lose in Judge Saul's courtroom, try as we might.

I do want to talk a little bit about the appellate issues, legal issues raised by *Bush v. Gore.* Like Phil, I am humbled by the fact that there are probably 200 or 300 people in the room who could do a more articulate job than I, but unlike Phil, there would probably only be one or two who would share my point of view.

So I will take a stab at it.

On the main issues in *Bush v. Gore*, I think partisans on both sides have done the case an injustice because the main issues in the case were actually extremely, extremely close, and by that I mean the Article 2 issue and the equal protection issue. I think they were very close, very close calls, and I think it is no accident that of the 16 appellate judges who heard the case, eight sided with us and eight sided with Governor Bush. Unfortunately, Phil got the better alignment of the judges. But nonetheless, I think those issues were very, very close issues.

What from my perspective still is rankling about the case and still difficult about the case and the Supreme Court's handling of the case is not their ruling on the Equal Protection Clause, in my opinion, but was three aspects of the way the Court handled the case that I think were unfortunate.

The first, from my perspective, was the decision by the Court to stay the counting of votes in Florida. I understand, obviously, I am in a distinct minority on this in this room. But I think what you have to keep in mind is that at the time the Court acted on that Saturday to stay the vote count, the Eleventh Circuit had already stayed Kathy Harris from changing the certified vote total in Florida. So there could be no readjustment of the parties' legal rights without any further judicial proceeding to consider the legality of the vote count. So the only thing at stake in the counting of votes at that moment was the perception of which candidate was ahead or behind. I found it then and still find it hard to believe that that possible shift in perception could have created the kind of irreparable harm that would justify a stay here.

Secondly was the Court's decision in the case itself to determine that December 12th was the deadline under Florida law to stop the tabulation of votes. I always found that troubling because that was classically a question of

Florida law, and let's be fair here, I thought both sides, frankly, were full of a lot of hot air on the federalism issues being flung back and forth.

I found it ironic that a lot of progressives were running around arguing that the selection of the president of the United States was essentially a matter of state law and a lot of conservatives were extolling the virtues of the Federal courts to resolve civil rights disputes.

But I think one thing that is unquestionably a matter of federalism is that Florida law is for the Florida courts to say and the decision by the U.S. Supreme Court that December 12th was the deadline here I found ironic. It was especially ironic because when the case actually came back from the U.S. Supreme Court on the 13th of December in a little noticed action, the Florida Supreme Court issued a remand decision on the 23rd of December, and in that opinion, Justice Shaw, one of the three justices who actually voted with Governor Bush when the case came through the Florida Supreme Court, wrote a concurring opinion saying it was his view that December 12th was not the deadline under Florida law. So what the Florida Supreme Court would have done with the deadline question if the Court had remanded it will always be an unknown.

I think that the Court's opinion, on equal protection grounds was justifiable. But the Court did itself a disservice by limiting its opinion to these facts and these cases.

Clearly one of the most important elements of judicial restraint and of our system of judging is that the validity and the wisdom of judicial decisions are tested by their application and precedent and in different circumstances, and to limit *Bush v. Gore* to the case itself, I think the Court did itself no favor at all.

As for the equal protection ruling, as I said before, I think it was a very, very close call, and maybe in the questions and answers, we can get into that. I think that there was no question of inequity in the kind of recount that was going in Florida that Saturday. It was not a fair kind of count, it wasn't a count that either side had asked for in the litigation, and I think the only way it could be justified was as a remedy of other inequities that had happened on election night.

You know, Phil made fun of our punch-card rubber theory, which I will concede certainly had some problems with it, but the flipside was that, in fact, voters in Palm Beach County and Broward County were four times less likely to have recorded a preference for president than voters in adjacent counties, and I don't really believe that there is anything about those counties that suggests those voters were four times less likely to have had a preference for president, be that Vice President Gore or Governor Bush.

In the end, let me just close by saying obviously it was disappointing as a political partisan and as a lawyer to lose a case of that significance and to see my candidate lose and to see my client lose. People often ask me, what was the greatest lesson I learned in Florida? I learned many fantastic lessons. I practiced with an amazing group of lawyers and we were opposed by an incredibly, incredibly talented team. I think both sides acted professionally and responsibly and represented their clients extremely well. But the greatest lesson I learned actually came from a collateral piece of litigation that I am pleased to say that we beat the vaunted Bartlit Beck team on, and that came the Saturday that the vote counting was stopped, and Phil knows where this story is headed. The Saturday the vote counting was stopped and David Boise and I did a press conference afterwards and we talked about some aspects of the vote counting, and I relayed my view that based on the data we had, we had gained 58 votes in the vote count.

Near the end of this press conference, a reporter stood up and said, "Well, Mr. Klain, haven't you just violated the section of Judge Lewis' order that said there shall be no release of partial vote counts during this tallying." The truth is, having spent the night working on appellate briefs, I hadn't been in Judge Lewis' court when the trial team had been there and this order had been formulated and I was unaware of it, and so I hurumph'd some answer and walked out of the room and went back to work on all the briefs we had to file the next day. The briefs and the brief in the Eleventh Circuit all had to be done in twelve hours.

About an hour later, the phone rang and it was Judge Lewis' clerk saying, "You know, there is going to be a contempt of court proceeding involving you in Judge Lewis' courtroom in 15 minutes." Well, this is kind of bad, you know.

Well, get me this order, I've got to see this order. So I read the order. I thought that the fair reading of the order was that the limitation went to the county canvassing boards not to release the partial totals, not to the lawyers, the parties, so I thought I was in no legal jeopardy. But still, this is kind of embarrassing.

So I sent off some folks to go deal with Judge Lewis' courtroom and thought to myself, well, the one good thing about this is, as embarrassing as this is, this is the Saturday that vote counting has been stopped in the presidential election, no one who I know is ever going to hear about this. I had the TV on and the local news in Florida came on and the local news said, you know, one of Gore's lawyers goes on trial this afternoon.

I thought, well, okay, you know, it's local news in Florida. Who is going to hear about that? And two minutes later, my phone rang and it was my mother, and she says, "Your cousin Andrea who lives down in Jacksonville says you're going to jail. And what am I going to do?" I said, "Mom, don't worry, don't worry."

Okay. Well, all right, my mom knows, but at least none of my friends and colleagues in Washington know. And five minutes later, John King was covering the story for CNN, starts to say, "The courthouse in Leon County is the site of a proceeding involving one of Gore's lawyers this afternoon."

Ten minutes later, the phone rings and it's Al Gore and he says, "Well, you know, Ron, Tipper is in the kitchen baking a cake with a file in it; we'll take care of you." I thought, okay, all right, well so now my client knows and my mother knows. But the one thing I knew for sure was it was a Saturday afternoon and my mentor, my senior partner, Warren Christopher, the chairman of my firm, O'Melveny & Myers, he doesn't watch CNN on Saturday, the only thing he watches is the network news. I was confident that, of course, with all that had gone on in the world that day, the network news wouldn't cover it.

I turned on the TV, and sure enough, network news, Nora Campbell: I'm standing outside the Leon County courthouse where the Ron Klain contempt trial has just concluded.

The phone rings and it's, of course, Secretary Christopher. This is great. We're on the verge of losing this case, I'm going to have lost this huge case, and I'm going to get fired, because I was pretty convinced that in the distinguished 135-year history of O'Melveny & Myers, no O'Melveny partner had ever been sent to the clink in Leon County.

It's not the kind of thing that a distinguished lawyer like Warren Christopher would think that highly of.

So Chris said, "I hear you've had a little trouble down there, Ron."

I said, "Well, that's right, sir." He said, "You didn't learn the first lesson of law practice?" I said, "Zealous advocacy of your client, is that it?" He said, "No, it's if someone is going to go to jail, make sure it's the client, not the lawyer."

Thank you very much.

MR. SMITH: There are two microphones if anyone wants to stand up and ask a question. I will ask the first. I was a little surprised no one made any remarks about the media recount that has just recently concluded with, of course, the shocking news that George W. Bush won in Florida.

MR. KLAIN: Or could have lost.

MR. SMITH: Or could have lost. I was going to ask Ron if there was, from Gore partisans, any second-guessing or Monday quarterbacking about having not requested a recount of the overvotes, which I guess would have been the one avenue for Gore. Then if either anyone wants to comment on what the Wall Street Journal has described as the missing ballots issue. I think that's an interesting one as well.

MR. KLAIN: Well, let's be clear. We never asked for an undervote-only count. That was a construct created by the Florida Supreme Court and, as Phil said, not at the suggestion of either party. In the counties where we asked for recounts, we asked for both undervotes and overvotes to be counted, and I was always troubled by the fact that an undervote-only count was going to be inherently inaccurate and limited.

We ended up defending the Florida Supreme Court's decision to order that kind of count before the U.S. Supreme Court because at the time we were up on appeal. And that was really the only place we could be; but it certainly wasn't our sense of the best way to do this.

Vice President Gore proposedon the first Wednesday, the first full week after the election,on national television that both sides drop all their lawsuits and there be a complete state-wide recount of every single ballot in the state. I still believe that would have been the best way to resolve this dispute and, I think that would have put to rest a lot of the controversy over which ballots got counted and why they got counted and how they got counted.

But absent that, we did the best we could with the very limited legal rights we had under Florida law. Florida law at the time was a Swiss cheese on these issues and we got the counts we could.

The last point I will make is I think the media recount proves very, very little in this sense. Much to Phil's chagrin and somewhat to ours, too, the way those counts were going on Saturday was very haphazard. Some counties were, in fact, counting overvotes, arguably contrary to the decision of the Florida Supreme Court but perhaps not. I think you could actually read that opinion as being somewhat ambiguous on what they were supposed to count.

So to go back and to suggest that now you can know what would have happened had that count proceeded, you just can not. In my view, it's like stopping a football game in the third quarter and then coming back three months later and saying, okay, now we'll put the same two teams on the field and see what would have happened if the game had played the fourth quarter. You just don't know that it's going to be the same.

The bottom line was the media sorted through 170,000 ballots, and on one count Gore won by 200, and on one count Bush won by 400, and that is well within the margin of error of any of these tabulations.

MR. BECK: I agree with that last point emphatically. The case was always, in my mind, too close to call and no one could know with absolute certainty who had more votes. All you could do was apply the law that provided for mechanisms for resolving this. Our problem down there was that the law as had been enacted by the Florida legislature had mechanisms that, when they were applied, led to a victory for then-Governor Bush and the Florida Supreme Court kept trying to rewrite those provisions.

But I do think that when it comes to the actual counting of the ballots, I was remarking over lunch that the first day I got down there, I met with our statistician and I asked him, who really won. And he said, "That's a silly question. All you can do is say at what point do we accept the count and what basis, because the margin for error under any mechanism for counting exceeded the margin of victory, and that's just a fact of life and people have to accept that." And I think that's what was confirmed by the media recount.

It was interesting to me that having invested a million dollars and eleven months on this project, the media felt like they had to give tallies that showed Bush winning under certain scenarios and Gore winning under other scenarios, and it was never until you got off the first page and got halfway through the reporting on the inside page that they would finally have a quote from the fellow from the organization that actually conducted the counting where he said none of these numbers mean anything.

MR. BECK: And that's what I think the teaching of it was.

PANELIST: You say that no one could say with actual certainty who won the election. Of course, the news media did three times within 24 hours.

MR. BECK: Yes.

PANELIST: And each time was reversing the earlier call. And now with the recount, we can say each prediction was correct.

MR. SMITH: Yes, sir. Could you identify yourself?

AUDIENCE PARTICIPANT: Yes. My name is Frank Shepherd.

I would like to follow up on something that Mr. Klain said. My understanding, Mr. Klain, is that you were most disappointed that the December 12th deadline was established and held in place. I have a recollection during the first Supreme Court argument of Charlie Wells, Chief Justice Wells, trying to figure out how fast he had to get an opinion out, asked what is the deadline for counting votes and Mr. Boise said, December 12th, if I recall correctly.

I guess what I'm wondering is doesn't that kind of bind the client and the appellate lawyer and were you disappointed in Mr. Boise?

MR. KLAIN: Your recollection is correct and to go back to that time, that first argument was on the 20th of November, I think, which was twelve days after election day, and David was asked if this proceeding, went on until December 12th, was that enough time, which at that point in time was 22 more days. After having been done there for twelve days with the country kind of on the edge of its seat, it seemed inconceivable even that it would go on 22 more days.

You know, I thought the answer was a good answer given at oral argument in that proceeding, and I thought it was the right answer under the circumstances, and, indeed, maybe, it very well would have been the decision of the Florida Supreme Court to hold us to that on remand.

My point was that the Court, with the institutional competence to decide what the deadline under Florida law was in that state, whether or not the deadline was set by the statute, by prior precedent, by us waiving our rights to extend it by virtue of the answer he gave in oral argument, whatever basis you want to use, the Court with the institutional competence to reach that conclusion was the Florida Supreme Court, not the U.S. Supreme Court.

MR. SMITH: Yes, sir.

AUDIENCE PARTICIPANT: My name is David Levine, and I would like to not leave unchallenged the claim that the Supreme Court ruled five to four in favor of Bush. At best, they could claim they ruled five, two and two, and if you look at the difficulties if not impossibilities of the Florida court correcting the cited defects, ultimately it was realistically seven-two in favor of Bush.

MR. KLAIN: You know, the only thing I will add to that is, as I said in my remarks, I thought the equal protection in the case was, in fact, very close and, indeed, was a seven to two vote. But certainly on what was the disposition of the case, it was five to four and the two Justices who voted with the majority on equal protection and against the remedy styled their own opinions as dissents, not as concurrences.

MR. SMITH: Professor Volokh.

AUDIENCE PARTICIPANT: So let's say four years from now, three years from now, there will be another election and the

results can be pretty much the same. There is going to be a close poll somewhere. It doesn't seem that likely -- but it certainly could happen. So now what we've got is a precedent that when that happens, we just Sue.

So what, if anything, can be done to try to make sure the next time this happens, it is going to be less agonizing for the country, or does anything need to be done?

PANELIST: What do we do? The machines are not going to become foolproof. I can assure you that. In fact, just as an aside, I read that there was an election since the presidential election in Palm Beach and the rate of undervoting there was close to zero, and the reason was because if there is one machine in the world that everybody now understands how to use when voting, it's the Vote-a-Matic.

PANELIST: So, of course, the one machine that everybody can operate perfectly because they've been educated to death on, they are now being sold on E-bay as souvenirs -- so that they can switch to another method which has its own problems, as Ron knows.

I don't know that there is any answer at all to that. I think it was unfortunate that this got into litigation, but I just can't imagine that in today's world, that the losing side is going to resist the temptation to invoke whatever judicial remedies they may think they have.

I was hopeful, actually, soon after the litigation ended, that there would be at least a movement in the states to take a look at their election codes and to revise them to provide greater clarity. I think that is one practical step that could be taken, but it hasn't happened at all.

I won't spend a lot of time on it, but those of us who were down there realized that one of the big problems was that the election code in Florida was not written with a presidential election in mind and that none of the remedies made any sense in terms of the presidential elections, and so they had to make it up as they went along. I think that that's true throughout the country, and I think that unfortunately, state legislatures have just failed to reexamine their own election laws to make the rules clearer and give better guidance and to avoid the kind of fiasco we had down in Florida.

PANELIST: I would like to add to that. It was an unpleasant, unfortunate event, but I think good is coming out of it. I think greater care is being taken to see how ballots are drawn up and how they are counted. The media is certainly taking steps to see they don't make the mistakes, the egregious mistakes they made the last time around.

I would also like to point out what an extraordinary election it was. I mean, I think it's unlikely, it's, of course, possible, but it's unlikely we are going to see anything like that again in our lifetime. It wasn't just the presidency; the Senate split 50 to 50; so many races. The country was a 50/50 country, it seemed. It was just very unusual.

MR. SMITH: Yes, sir.

AUDIENCE PARTICIPANT: Nelson Lund from George Mason Law School.

I don't have time to take issue with all three of Ron Klain's criticisms of the Supreme Court's decision, so I will just take the one that has already been touched on, namely the claim that the U.S. Supreme Court mistakenly decided a question of Florida law with respect to the deadline.

The Supreme Court accurately reported that on December 11th, the Florida Supreme Court had said that December 12th was the deadline, and the Court did not remand with instructions to dismiss the case; therefore, it seems to me the Florida Supreme Court was legally permitted to decide afterwards that the U.S. Supreme Court had misinterpreted its December 11th opinion or even overrule its December 11th opinion.

They weren't given the chance to do that because the Gore team didn't ask them to, but is there anything actually in the opinion, in your view, that precluded them from doing that if they had been asked to do it?

MR. KLAIN: Nelson, I agree that the opinion did not preclude the possibility that the Florida Supreme Court could have had a remand proceeding and could have determined that the Supreme Court's conclusion in its opinion that the December 12th deadline was wrong. I absolutely agree with you that that possibility was open, and, in fact, on the night of December 12th, a number of us on the Gore team stayed up all night and wrote just such a brief inviting the Florida Supreme Court to do just that.

I think as a practical matter, though, in this context, our view was that the Florida Supreme Court had gotten, you know, two increasingly intense candygrams from the U.S. Supreme Court and the second one seemed to have the word "stop" written on it in really big letters. It was our view that the Florida Supreme Court, which had divided four-three the past time around, was really not that interested in seeing us there one more time.

So I take your point that as a legal matter, it was open to the Florida Supreme Court to write an opinion that said, "we know the Supreme Court said December 12th was the deadline, we know everyone in America thinks this is over now, but in fact, December 16th is the deadline and we're going to start the counting again." You know, it just seemed like the

Supreme Court was sending a very strong signal not to do that.

PANELIST: I actually thought there was another issue lurking in there. I thought there was an Article 1 issue lurking in there if the Florida Supreme Court had attempted to do that. I think that at some point, it becomes an issue of Federal law on what is it that the Florida legislature decided in terms of specifying the manner in which electors will be appointed, and so we would loop back to that same Article 1 issue that I thought all along doctrinally was the strongest ground in the first place. But if they had interpreted Florida law to say that it was December 12th and then the recount was stayed and the Florida Supreme Court came back and said, "We've changed our minds, the legislature did not adopt December 12th as a drop-dead date and, in fact, it's December 18th," I think that would have put in high relief the Article 1 issue about the extent to which the Florida Supreme Court had the right to keep reinterpreting the statute in ways that were fundamentally inconsistent with what the legislature had in mind.

MR. KLAIN: Could I just say one more thing very quickly? I think there are a number of law professors, Professor Lund and others in the room. What this case always raised to me at a very abstract level was the impossibility of crafting neutral rules once a dispute is underway.

You know, something Phil and I, I think, absolutely agree on was there simply were no rules in Florida for this sort of dispute. The election law was written unquestionably with county elections in mind and a set of procedures designed to resolve at the county level with an indefinite period of time the ability to resolve an election dispute. The last election dispute they had in Florida went on until March. In March, they removed the mayor of Miami, you know, six months after the guy had been in office, and we didn't really see that as a viable option in this case.

There was just no process. So both sides were struggling with the question of how can we draft rules for a dispute that has no preexisting rules? And I talked with Phil at lunch. You know, as much Phil had the experience with his statistician, every day I was in Florida. I would get an e-mail from a political science professor or statistician that would say, "You stupid lawyers think someone won. When will you recognize that statistically, this is a tie and why don't you propose to just split the electoral votes with Governor Bush?" Well, there are 25 electoral votes in Florida; we needed four to win, they needed 21. You know, I was for the split any time.

That's just the kind of rule that you might be able to write *ex ante*, but you certainly aren't going to write, you know, on the 1st of December, and that, I think, was the fundamental conceptual problem here.

MR. SMITH: Yes, sir.

AUDIENCE PARTICIPANT: This is a question primarily for Mr. Klain. This is Todd Zywicki, George Mason Law School.

Even if Gore had won the recount, I don't understand how he could have won the election after Governor Jeb Bush had sent the certificate of ascertainment giving the electoral votes initially to Bush. As far as I could tell, what would have happened is, at best, there would have been a fight over which slate would have been recognized in Congress. In the event of a stalemate between the House and Senate, the state would decide, in which case my sense is that as soon as the certificate of ascertainment was given to George Bush, it was checkmate at that point and that there were a huge number of insurmountable hurdles that Vice President Gore would have had to overcome before he could have actually won the election even if he won the recount.

MR. SMITH: Ron, what was the Gore end game?

MR. KLAIN: I think the Gore end game was fairly simple. I think it was always our view that if there was a recount in Florida that was determined to be lawful, consistent with the Constitution and showed that Al Gore had gotten more votes, that we really couldn't conceive that someone would take office contrary to that.

Whether it was through Governor Bush withdrawing or through a judicial proceeding that ordered a retrieval of the certificates of ascertainments and rival certificates being issued, you know, I just didn't -- I never believed that either candidate, notwithstanding the machinations in the Florida legislature and everything else that was going on there, was prepared to take office contrary to the outcome of a recount that was determined to be legally valid. I just don't think that would have happened.

MR. SMITH: Anyone who doubts that might think of Senator Carnahan's election, which was procedurally unusual. But consistent with what you're saying.

Yes, sir. Last question.

AUDIENCE PARTICIPANT: I think to most of the public at large, the low point in the entire process had to do with the effort to keep military ballots from being counted, you know, from overseas ballots, that had already been held to be valid or a

consent decree.

Do you think -- I mean, how did that play into your strategy

MR. KLAIN: Well, I think the military ballots has been one of the most controversial aspects of this both ways. Let's be clear. We're not talking just about military ballots, but ballots that came in from overseas from people whether they were military or not, and it was our effort to simply apply what we thought Florida election law was. In fact, the principles we armed our folks with were similar to the principles that the Republican member of the Statewide Board of Canvassing, Jim Smith, had articulated the same day until the politics on this shifted.

There certainly was no effort in the Gore campaign to systematically root out military votes. In fact if you look at the counties where there were heavy concentrations of the military, a much higher percentage of overseas absentee ballots were counted in those counties than in counties that had heavily Democratic people overseas, like the southeastern Florida counties.

In the end, after all the controversy about it, the New York Times ran an investigation where they concluded that far from having lots of legal ballots for military people excluded, there were hundreds of arguably illegal ballots that were included. These were supposed to be overseas absentee ballots. Some of the ballots that got counted were ballots where the affidavit was faxed from Maryland, I mean, all sorts of irregularities.

It is a difficult problem when an election is this close to apply rigorous rules and to try to determine which ballots count and which ballots don't count. We tried to do it fairly, and in the final analysis, when we filed our election contest and there was evidence, ample evidence that there had been over Thanksgiving weekend a couple hundred ballots that did not meet even the most generous, legal standard, counted, largely to Governor Bush's benefit, Vice President Gore declined to authorize us to put that claim in our contest and instructed us to make no legal effort to exclude those ballots, and as a result, those ballots were included and could well have been the difference, the margin of difference depending on how a recount had gone forward.

I think the Vice President did the right thing in that regard. It was a very difficult situation all the way around.

PANELIST: One of my favorite stories concerning the election litigation has to do with the military ballots. There was a judge down there who did not get as much attention as the others, but his name is Bubba Smith, and I appeared in front of him concerning the military ballots in one of the counties. The Democratic lawyers and the Republican lawyers and the lawyers for the Secretary of State and all the various intervenors all agreed on one thing, and that was that under the Supremacy Clause of the United States Constitution, a consent decree that had been entered into between the State of Florida and the United States Justice Department had provisions that trumped some of the provisions of Florida law concerning absentee ballots. And to a group of Federalists, you will like this: Bubba Smith, Judge Smith, declared *sua sponte* that that notion was unacceptable and unconstitutional, and that this was a matter for the Florida statute, and that's all he was going to look at. And so we all threw our hands up and walked out of the room.