

1 IN THE CIRCUIT COURT OF THE 15TH JUDICIAL
2 CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA
3 CIVIL DIVISION

3 CASE NUMBERS CL 00-10965 AB
4 CL 00-10970 AB
5 CL 00-10988 AB
6 CL 00-10992 AB
7 CL 00-11000 AB

6 ANDRE FLADELL and ALBERTA McCARTHY,
7 LILLIAN GAINES, and all other similarly
8 situated electors in Palm Beach County,
9 Florida,

9 Plaintiffs,

10 vs.

11 THE ELECTIONS CANVASSING COMMISSION OF
12 THE STATE OF FLORIDA; THERESA LaPORE,
13 Supervisor of Elections for Palm Beach
14 County; THE PALM BEACH COUNTY ELECTIONS
15 CANVASSING COMMISSION, AL GORE; and
16 GEORGE W. BUSH,

14 Defendants.

15 -----x

17 West Palm Beach, Florida

18 November 17th, 2000

19 9:35 o'clock A.M.

21 -----
22 HEARING ON PLAINTIFF'S COMPLAINT FOR DECLARATORY
23 INJUNCTIVE AND OTHER RELIEF ARISING FROM
24 PLAINTIFF'S CLAIMS OF MASSIVE VOTER CONFUSION
25 RESULTING FROM THE USE OF A "BUTTERFLY" TYPE
BALLOT DURING THE ELECTION HELD OF NOVEMBER 7,
2000 HEARD BEFORE THE HONORABLE JORGE LABARGA

1 APPEARANCES:

2 THE LAW OFFICES OF DAVID KRATHEN
3 BY: DAVID KRATHEN, ESQ., and
4 MICHAEL FREEDLAND, ESQ.,
888 East Las Olas Boulevard, Suite 200
Fort Lauderdale, Florida 33301

- and -

5 GILLESPIE, GOLDMAN, KRONENGOLD & FARMER
6 BY: GARY M. FARMER, JR., ESQ.,
6550 North Federal Highway, Suite 511
Fort Lauderdale, Florida 33308
7 appearing on behalf of the Rogers Plaintiffs.

8 GREENBERG TRAUERIG, P.A.
9 BY: BARRY RICHARD, ESQ., (Telephonically) and
MARK F. BIDEAU, ESQ., and
777 South Flagler Drive
10 West Palm Beach, Florida 33401
11 appearing on behalf of Defendant Governor
George W. Bush.

12 STEEL, HECTOR & DAVIS, LLP
13 BY: DAVID I. SPECTOR, ESQ., and
GERRY S. GIBSON, ESQ.,
1900 Phillips Point West
14 777 South Flagler Drive
West Palm Beach, Florida 33401
15 appearing on behalf of Katherine Harris,
Secretary of State; Clay Roberts, Director of the
16 Division of Elections for the State of Florida;
and the Elections Canvassing Commission of the
17 State of Florida.

18 MONTGOMERY & LARMOYEUX, P.A.
19 BY: ROBERT MONTGOMERY, ESQ., and
JOHN T. McGOVERN, ESQ.,
1016 Clearwater Place
20 West Palm Beach, Florida 33401
21 appearing on behalf of Defendant Supervisor
of Elections Theresa LePore.

22 SALE & KUEHNE
23 BY: BENEDICT P. KEUHNE, ESQ.,
100 Southeast 2nd Street
Suite 3500
24 Miami, Florida 33131
appearing on behalf of Defendant Vice-President

25 Albert Gore.

Klein, Bury & Associates
Matthew P. Spoutz

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

ALSO PRESENT:

- BRUCE ROGOW, ESQ.,
- HENRY B. HANDLER, ESQ.,
- DONALD FELDMAN, ESQ.,
- BARRY HOFFMAN, ESQ.,
- BARRY SILVER, ESQ.,
- F. GREGORY BARNHART, ESQ.,
- PATRICK LAWLOR, ESQ.,
- MARK A. CULLEN, ESQ.,
- MARK CRANE, ESQ.,
- KEVIN H. THERIOT, ESQ.,
- DAVID A. CORTMAN, ESQ.,
- PETER ADRIANE
- DAVID ROLAND
- LAWRENCE A. GOTTFRIED

1 THE COURT: Since I got here this morning
2 around 7:00 I have been hit with eight tons of papers.
3 You lawyers neat to put a lid on it. Enough. You got
4 your issues before me. No more paperwork. I got your
5 memos. I understand that, but enough.

6 Let's hear this one issue.

7 MR. GIBSON: My name is Gerry Gibson, Steel,
8 Hector and Davis, representing the Florida Secretary of
9 State, the State Canvassing Commission, and Clay
10 Roberts as a member of the commission.

11 Your Honor, we are not precisely sure which
12 of these cases that have been transferred to you in
13 which this hearing is being held. We wish to make it
14 clear for the record so there is no issue of waiver
15 that we have filed on behalf of our clients motions to
16 dismiss for improper venue in the actions in which our
17 clients have been named as parties.

18 We wish to state for the record that to the
19 extent our clients are either parties or indispensable
20 parties to any of these cases, that we are taking the
21 position that venue in this court is improper, that
22 venue where a state agency is sued is in the county
23 where its principally headquartered. That is Leon
24 County here. And also we are dealing here with a
25 challenge under 102.168 (2) (a), statewide election,

1 and that venue is also required to be in Leon County.

2 We just want to make sure that is on the
3 record and that we are not waiving that issue since it
4 has not been heard in other cases in which we have
5 filed motions. And also we will be arguing
6 indispensable party.

7 THE COURT: That motion was heard the first
8 day, a few days ago. Seems like a year ago.

9 I believe Mr. Richard, Barry Richard, is he
10 on the phone today?

11 MR. BIDEAU: He is supposed to be on the
12 phone today.

13 THE COURT: Am I supposed to call him?

14 MR. BIDEAU: There is an 800 number. I gave
15 to the clerk earlier.

16 THE COURT: Will you take care of that,
17 please?

18 Before we say anything, let's make sure Mr.
19 Richard is on the phone. Should have been on the phone
20 by now.

21 Mr. Richard?

22 MR. RICHARD: Yes, Your Honor.

23 THE COURT: Can you hear me okay?

24 MR. RICHARD: I can hear you fine. Thank you

25 for including me.

Klein, Bury & Associates
Matthew P. Spoutz

1 THE COURT: Let me put the speakerphone up on
2 the bench next to the microphone. I think we have
3 everybody here.

4 Mr. Farmer, what is it you want to say?

5 MR. FARMER: Just a few things, Your Honor.

6 May it please the court, Gary Farmer on
7 behalf of Beverly Rogers and Ray Kaplan.

8 When we were last before Your Honor, we
9 attempted to introduce evidence as to the statistical
10 aberration of the votes in Palm Beach County through
11 Mr. Buchanan and other evidence relating to the
12 legality of the ballot.

13 Your Honor asked us to first brief you and
14 now present oral argument on assuming that the ballot
15 were declared illegal whether or not there is a remedy
16 in the form of a new election. We have submitted our
17 papers. I would now like to present argument on that
18 issue.

19 THE COURT: Hang on a minute.

20 I believe when we recessed the last time I
21 think Mr. Handler or I think it was Mr. Feldman --

22 MR. FARMER: Mr. Feldman.

23 THE COURT: I believe they were up.

24 Have you lawyers agreed on an order in which
25 to present this argument? I take it after about four

1 or five of you I would have heard just about any
2 argument there is. Maybe the rest of you can just
3 adopt the arguments or maybe present something
4 different.

5 MR. FELDMAN: Yes, Your Honor.

6 We have agreed at the request of Mr. Farmer
7 and the Democratic Party to allow them to proceed
8 first. But we really would like to have the
9 opportunity, as Your Honor has said, to perhaps add new
10 matters and perhaps a different approach.

11 THE COURT: Absolutely. I got all day today
12 and -- Well, I got all day today.

13 MR. RICHARD: Your Honor.

14 THE COURT: Yes, Mr. Richard.

15 MR. RICHARD: If I may, my recollection is
16 that you instructed the lawyers to provide each other
17 in accordance with the rule with whatever papers they
18 filed with you. I provided copies of the case that I
19 gave to opposing counsel.

20 I have never received, and as of yesterday
21 evening I was advised by the lawyers in my Palm Beach
22 office they never received copies of any cases or
23 citations or papers from opposing counsel. I do have
24 an associate or partner from my office there in

25 courtroom who can confirm whether or not they have

Klein, Bury & Associates
Matthew P. Spoutz

8

1 received it. But I have received nothing from opposing
2 counsel at this point.

3 THE COURT: I received the bulk of it
4 yesterday late afternoon and this morning. In fact,
5 I'm probably still getting some up there.

6 Did you mention that you had a case you
7 found?

8 MR. RICHARD: Yes, sir. And I believe it was
9 submitted to your office. It was Foster versus Logan,
10 a United States Supreme Court case in 1997. We
11 provided copies to opposing counsel.

12 THE COURT: Do you have a cite for that?

13 MR. RICHARD: I am going to quote it.

14 The cite for the case is 522 U.S. 67, 118
15 Supreme Court 464.

16 THE COURT: Okay.

17 MR. BIDEAU: This is Mark Bideau, Mr.
18 Richard's partner.

19 I will confirm until this morning when I
20 walked in here we did not receive any memorandum
21 although you instructed everybody to fax it to my
22 partner, Mr. Dunkel, before 5:00.

23 THE COURT: I think all of us need to

24 understand, first of all, that the last time we were
25 here was the day before yesterday, and obviously these

Klein, Bury & Associates
Matthew P. Spoutz

9

1 are not normal times. I don't know if we can expect
2 the proper service. I'm sure everybody sent everything
3 to each other. It is just a question of when you get
4 it.

5 It isn't my intention to rule from the bench
6 today on this issue. This, in my opinion, is the most
7 emotional issue in this entire case, and it is not one
8 I intend to rule from the bench on. I'm going to enter
9 a written order which will probably go out next week,
10 so I will have time to have read everything by then.
11 Hopefully by tomorrow everybody would have gotten
12 whatever you need.

13 MR. RICHARD: Your Honor, I didn't mean to
14 suggest that I think anybody intentionally did anything
15 inappropriate, nor did I mean to delay the hearing, but
16 I did want that to be understood. It may not prove to
17 be a problem. But should counsel cite some cases that
18 I feel the need to research, I wanted the opportunity
19 be able to file some supplemental memo.

20 THE COURT: Okay. All right, Mr. Farmer.

21 Mr. Richard, by the way, do you intend to be
22 with us today throughout this hearing?

23 MR. RICHARD: Depends on how long it takes.

24 But I certainly want to be with you until I have the

25 opportunity to argue. Obviously we have some things

Klein, Bury & Associates
Matthew P. Spoutz

10

1 taking place up here. But at some point I may turn it

2 over to another lawyer in my office if Your Honor would

3 permit.

4 THE COURT: Let me do it this way if I may.

5 Let me take a few minutes to set the procedure.

6 Perhaps that will shorten things.

7 I have a feeling, Mr. Richard, and the rest

8 of you attorneys, after I hear from about three of you,

9 the rest of you are going to run out of things to say.

10 And perhaps after I hear from about three or four of

11 you, maybe I can permit Mr. Richard to say his piece

12 and his side, and then if he has to go someplace else

13 he may go and have somebody else on the phone. Then I

14 can hear from the rest of you.

15 MR. RICHARD: Your Honor, I really appreciate

16 your efforts to accommodate me up here. Thank you.

17 THE COURT: Sure thing.

18 Mr. Farmer, go ahead, sir.

19 MR. FARMER: Thank you very much, Your Honor.

20 The right to vote is perhaps the most

21 fundamental right of all the rights we enjoy as

22 American citizens. The Supreme Court has repeatedly
23 stated that without the right to vote, all other
24 rights, even the most basic, are illusory. People have
25 fought in wars and died for that right. Women and

Klein, Bury & Associates
Matthew P. Spoutz

11

1 minorities have fought vigorously for a free and
2 unimpeded right to vote. This is a sacred right we
3 speak about, and we don't take this matter very
4 lightly. And I'm sure the court doesn't either. You
5 already indicated so. It is with that perspective the
6 trial court must consider any election contest.

7 I would like to begin my focus on Florida
8 State law since this is an election contest filed under
9 a Florida statute challenging a ballot under Florida
10 Statute. I feel we must focus then on state law first.

11 102.168, the very statute under which we
12 filed our suit, gives the judge great discretion and
13 provides in any election contest the court can order
14 any relief deemed appropriate under the circumstances.
15 This is consistent with a longstanding constitutional
16 principle that for every wrong there must be a remedy.

17 Another statute, Section 101.111, speaks of
18 the need for flexibility in setting special elections
19 to resolve or deal with unforeseen or unpredictable
20 circumstances. I don't think anyone in this courtroom

21 would disagree we are now facing an unforeseen or
22 unpredictable circumstance in Palm Beach County.

23 The Florida cases which have dealt with
24 election challenges now provide us with a wealth of
25 information in guidance. I think we need to focus

Klein, Bury & Associates
Matthew P. Spoutz

12

1 primarily on the Beckstrom decision, Beckstrom versus
2 Volusia County, 707 So.2d 720.

3 First of all, the Beckstrom case is factually
4 analogous to this case in that Beckstrom did not
5 involve a fraud issue, for example, tampering with
6 absentee ballots or something of that nature. Rather,
7 the issue in Beckstrom was a dispute regarding the
8 method of counting absentee ballots. Again, we have a
9 counting issue in Beckstrom similar to the counting
10 issue we have in this case.

11 Perhaps, more importantly, Beckstrom teaches
12 us it is not necessary for a court to find that fraud
13 had been committed in the course of an election.
14 Rather, a substantial and even unintentional failure to
15 comply with statutory procedure will be enough to void
16 an election. The standard the court must focus on is
17 whether or not there has been that substantial
18 noncompliance with the statutory election procedure
19 which we believe includes whether this ballot is legal

20 under the statutes which govern the form and design of
21 the ballot, and whether the results of an election are
22 in reasonable doubt as to whether the election
23 expresses the will of the people.

24 We believe there is a reasonable doubt in
25 this case as to whether the final tabulation or the

Klein, Bury & Associates
Matthew P. Spoutz

13

1 to-date final tabulation in Palm Beach County
2 accurately reflects the will of the citizens of Palm
3 Beach County.

4 Now, if the court finds there is substantial
5 noncompliance and that the will of the people has not
6 been represented, Beckstrom said that the court must
7 void the election.

8 The substantial noncompliance includes
9 incompetence, a lack of care by election officials, or
10 even a misunderstanding over a statute. We believe
11 that is what has occurred in this case in that the
12 approval of the butterfly ballot represents a
13 misunderstanding over the statutes, and that that is
14 enough under Beckstrom to bring in an election contest
15 and potentially void the election.

16 The Supreme Court has also held in a case
17 called Bolden versus Potter, 452 So.2d 564, that courts
18 must not be reluctant to invalidate elections to insure

19 public credibility in the electoral process.

20 I cited some other cases in my brief, Judge.

21 I won't belabor them. But the principle and guiding

22 focus here is that where there is a question as to the

23 expression of the will of the people due to a statutory

24 violation or fraud, the court must void an election.

25 If an election is to be voided, one of the

Klein, Bury & Associates
Matthew P. Spoutz

14

1 possible remedies must be a new election. In the case

2 of fraud, for example, if it were otherwise, if the

3 election is not set aside and the result stands, for

4 example, an incumbent who benefits from the fraud, not

5 even committed by the incumbent but who nonetheless

6 benefits from it, if there were no remedy in the form

7 of a revote such that the court will just throw out the

8 results of the most recent election, the incumbent

9 would automatically retain his or her seat and they

10 would thereby benefit from the fraud. So a revote or

11 reelection must be a possible remedy where the Supreme

12 Court has repeatedly said the court has the power and

13 indeed must void an election if certain things have

14 occurred or been shown.

15 Judge, you may find comfort in the fact it

16 has been done before in Florida. We have attached to

17 our brief a decision from ironically Leon County,

18 Florida, Judge Smith in a case called Craig versus
19 Wallace, 2 Florida Law Weekly Sup 517 (a). Again, this
20 is not a fraud case. This is a case where information
21 sheets that were to be handed out with the ballots were
22 missing in some precincts. The court held this caused
23 a deprivation of the voter's rights, and that this
24 error in the election process permeated the entire
25 process to such a degree that an entirely new election

Klein, Bury & Associates
Matthew P. Spoutz

15

1 was necessary. So we have cases in Florida where a new
2 election has been ordered.

3 Your Honor's homework assignment to us the
4 other day, if I remember, the exact quote was you asked
5 us to find a case where a new presidential election was
6 ordered before. I must candidly respond to Your Honor
7 we have been unable to find such a case.

8 THE COURT: Did you find a case where the
9 issue was even before any court?

10 MR. FARMER: No, I have not, Your Honor. I
11 was about to say likewise we have not found a case
12 where it was held that a new election could not be held
13 in a presidential election.

14 THE COURT: I found one.

15 MR. FARMER: Perhaps you have better staff
16 than I do, Judge.

17 THE COURT: I have here a case involving
18 Donahue versus the Board of Elections of the State of
19 New York, 435 Fed Sup 957, 1976 District Court case,
20 New York, Upstate New York, Eastern District of New
21 York. It involved the presidential election between
22 Jimmie Carter and Gerald Ford. It was different than
23 this case in the sense that it was a 1983 action.

24 The District Court has some very strong
25 language keeping in mind in dealing with it a 1983

Klein, Bury & Associates
Matthew P. Spoutz

16

1 context. And it basically says before a federal court
2 can responsively order a new election, the claimants
3 seeking this extraordinary relief must come forward
4 with the most clear and convincing evidence that state
5 officials or persons acting on the color of law, by
6 intentionally depriving qualified voters of their right
7 to vote, altered the outcome of the election. A party
8 contesting a presidential election carries a heavy
9 burden. Not to put too fine a point on it, this
10 standard implies conduct of the most egregious nature
11 approximating criminal activity. In judging whether
12 the complaint before us states a claim upon which
13 relief can be granted, the plaintiff must allege and be
14 prepared to prove the following: One, a specific act
15 of fraud or other unlawful behavior was committed in

16 the conduct of the election; two, the fraud or other
17 unlawful behavior was committed with the intent or
18 purpose of depriving qualified voters of their
19 constitutionally protected right to vote; three, the
20 fraud or other unlawful behavior was committed by
21 persons acting under the color of law, and; four, the
22 fraud or other unlawful behavior changed the outcome of
23 the election.

24 I don't believe fraud is an issue in this
25 case. However, you may be arguing unlawful behavior.

Klein, Bury & Associates
Matthew P. Spoutz

17

1 Again, this case involving a 1983 action may be
2 different from what you are seeking here pursuant to
3 state statute.

4 However, there is a case where the question
5 of presidential election was considered. They
6 basically rejected the argument in that case. So I
7 tell you that is a case we found in doing our research.

8 MR. FARMER: Judge, thank you very much.

9 If I may comment on that case, I think Your
10 Honor has picked up on a very important distinguishing
11 feature of that case in that it is a civil rights
12 violation case. That is why we gave the least amount
13 of emphasis in our brief to federal election challenge
14 cases under civil rights statutes because the standard

15 there is so drastically different from the standard we
16 have here in Florida dealing with election contests
17 under this specific statute.

18 Now that you have read that case to me, I
19 think I may have read it in the myriad of papers I
20 received over the last 24 hours, E mails and faxes.

21 THE COURT: Now you know how I feel.

22 MR. FARMER: They do comment on unlawful
23 behavior, Judge, and you did mention that. Certainly
24 we feel the act of approving the ballot utilized in
25 Palm Beach, Florida, was unlawful in the sense it

Klein, Bury & Associates
Matthew P. Spoutz

18

1 violates a number of Florida statutes.

2 The thing with civil rights cases, Judge, is
3 they only affect a certain portion or percentage of the
4 voters, and that distinguishes the civil rights cases
5 from this case in that we have here an unlawful
6 activity in the form of the violation of the voting
7 statutes which permeated the entire election in Palm
8 Beach County. It is not as though only certain
9 citizens of Palm Beach County were presented this
10 ballot. Everyone in Palm Beach County was presented
11 this ballot.

12 The cases of Beckstrom and Bolden and some of
13 the others I cited focus especially on situations where

14 the wrong complained of permeates the entire election
15 practice. I believe Bolden talked about to the extent
16 that the credibility of the entire election must be
17 called into question.

18 Certainly we believe we have that situation
19 here, Judge, where a ballot utilized in Palm Beach
20 County has caused by people to either vote for a
21 candidate for whom they did not intend to vote,
22 unintentionally poke the wrong hole, vote for perhaps
23 two candidates, realizing they made a mistake with the
24 first punch and trying to correct that mistake.

25 And, in addition, in reading that case to us,

Klein, Bury & Associates
Matthew P. Spoutz

19

1 you talked about substantial evidence must be
2 presented. I'm not going to belabor the evidentiary
3 point because we won't have enough time here today if
4 we go through all the evidence. But we have attached
5 to our brief the statistical analysis performed by some
6 of the world class experts we have retained, the finest
7 statisticians across the country who are convinced to a
8 reasonable scientific certainty that the ballot in this
9 case caused confusion which resulted in a vote which
10 does not reflect the true intent of the voters in this
11 county.

12 THE COURT: By the way, you may want to read

13 that opinion because the last part of it deals with
14 statistical survey techniques and how they were used in
15 this particular case to show that fraud may have been
16 committed in the case. So the case deals with that.

17 MR. FARMER: Thank you, Your Honor.

18 There are some other cases we cited also
19 where statistical analysis was performed to show the
20 effect of the unlawful activity complained of, be it
21 fraud or some other violation of election laws.

22 So in addition to the statistical analysis,
23 Judge, if given the opportunity, we will present
24 evidence either in the form of live testimony or
25 affidavits, depending on how Your Honor wishes to

Klein, Bury & Associates
Matthew P. Spoutz

20

1 conduct such a hearing, of people who were confused by
2 the ballot and are convinced they punched the wrong
3 hole. In addition, people who asked for instruction at
4 the polling places but were denied instruction. We
5 have people who spoiled the ballot and asked for
6 another ballot and were not given another ballot. We
7 have people who were told they could not receive any
8 instruction and could only have five minutes in the
9 voting booth. There is very real and substantial
10 evidence we will supply should the court determine it
11 will hear that evidence.

12 Indeed, Judge, I think when you read the
13 Florida cases, they focus so much on the level of
14 proof. Given the level of proof that we have in the
15 case, should we void this election, or did the trial
16 court err in voiding or not voiding an election.

17 I was going to mention this in my closing.
18 But we feel it would perhaps be premature for Your
19 Honor to enter an order which would absolutely
20 foreclose the possibility of a new election or revote
21 without hearing the evidence because the evidence is so
22 compelling, Judge, of the nature of this error and how
23 it permeated the entire election process. It is not as
24 some commentators have said, a few dumb or
25 unintelligent voters who couldn't read a simple ballot.

Klein, Bury & Associates
Matthew P. Spoutz

21

1 I hear press releases about the ballot was
2 presented to a fourth grade class and 95 percent of
3 them could figure it out.

4 We got so much more here than that, Judge. I
5 truly believe before Your Honor can rule out the
6 potential of a revote or reelection that you may need
7 to hear the evidence in some format. If you want to
8 hear a proffer or affidavits before you hear written
9 testimony, something. But it may be that given the
10 standard in Florida law you need to hear that evidence

11 before you rule out a remedy which we understand is an
12 extraordinary remedy but which may ultimately prove to
13 be the remedy of choice.

14 THE COURT: Going back to my original
15 question I raised the other day -- And I understand,
16 believe me, I think I have as deep an appreciation for
17 the right to vote in this country as anyone else. My
18 parents brought me here so I could have that right. So
19 it is a very precious right to me. But we have a
20 document called a United States Constitution. Actually
21 this is a book I had in law school. Article 2, Section
22 1, Clause 4, the Congress may determine the time of
23 choosing the electors and the day in which they shall
24 give their votes, which day shall be the same
25 throughout the United States.

Klein, Bury & Associates
Matthew P. Spoutz

22

1 Now, keeping in mind I read just about every
2 case you good lawyers have given me, all of them deal
3 with congressional seats, mayor seats, state
4 representatives, a lot of the voters violations in
5 districts and things like that. I read the cases. I
6 know what you are talking about. But the president and
7 vice-president is different. It is the only national
8 election we have. It is the only time that the entire
9 nation goes out to vote for one person to be their

10 executive chief. It is a much different election. And
11 the framers of our Constitution who were far brighter
12 than I think most of us in here decided that election
13 should be held on one day. Florida followed suit in
14 adopting 103.011 where the Florida legislature said in
15 the statute that electors of the president, meaning
16 electoral college, and vice-president, known as
17 presidential electors, shall be elected on the first
18 Tuesday after the first Monday in November of each
19 year, the number of which is multiples of four. And
20 that seems to be quite in line and consistent with
21 Article 2, Section 1, Clause 4. We want the
22 presidential election to take place one day throughout
23 the United States.

24 Now, again, as I said earlier, the voting
25 right is a precious right that I appreciate as deeply

Klein, Bury & Associates
Matthew P. Spoutz

23

1 as anyone else in the country. But given our
2 constitutional mandate, what authority do I or any
3 other judge have to order a new election for president
4 in one county in the entire nation?

5 MR. FARMER: Your Honor, I understand what
6 you are asking me.

7 The constitutional provisions regarding the
8 election for president and vice-president certainly

9 call for everyone voting on one day. But they also
10 call for -- And, by the way, the constitutional
11 provision has been codified in 3 United States Code
12 Section 1. Likewise, Congress has codified the
13 election for senators and congressmen shall take place
14 on the same day throughout the country.

15 THE COURT: But a senator or congressmen, if
16 there is some type of fraud or some ballot
17 irregularities, I can order a new election for
18 congress, I can order a new election for senate, and
19 the rest of the country can go along about its
20 business. I mean the senate is not going to stop
21 functioning because Florida is doing a reelection for a
22 senate seat, or the congress, they are going to keep
23 going. But the presidency, there is no one there to
24 take their place until we have -- What about a little
25 county in Wisconsin? A little county in Maine. Orange

Klein, Bury & Associates
Matthew P. Spoutz

24

1 County in California? Broward County? Macon County in
2 Georgia? All these counties decided we didn't like the
3 election, we think there were problems with the
4 ballots, let's all of us have a new election. When is
5 it going to stop? We would still be deciding the 1960
6 election today, wouldn't we?

7 MR. FARMER: I think whatever remedy the

8 court would order, there may be some time constraints
9 involved. But keep in mind, Judge, Bill Clinton is
10 still our president. He will be our president until
11 January when a new president takes the oath of office.
12 The electoral college will not meet for some time. The
13 country will continue to function. Bill Clinton will
14 be our president if we order a new election down here
15 in Florida and we complete that election and assign our
16 electoral votes within the time prescribed by law.

17 Congress has also, however, provided that
18 electoral college dates may be amended. In 1960, for
19 example, in the 1960 presidential election, the state
20 of Hawaii sent two electoral representative groups to
21 the electoral college, one democratic and one
22 republican, until Hawaii could figure out where, in
23 fact, its vote was going to go. They sent two sets of
24 electoral representatives to the electoral college. So
25 there is precedent for some flexibility in a

Klein, Bury & Associates
Matthew P. Spoutz

25

1 presidential election.

2 Congress has also enacted a statute, 3 United
3 States Code Section 2, which is entitled failure to
4 make choice on prescribed day. That statute provides
5 whenever any state is held --

6 MR. RICHARD: Can I have that section again?

7 THE COURT: Can you repeat the section for

8 Mr. Richard?

9 MR. FARMER: 3 United States Code Section 2.

10 THE COURT: I don't have it. I can't seem to

11 find it here.

12 MR. FELDMAN: May we give you a copy, Your

13 Honor? Would you give this up, please? Thank you.

14 THE COURT: Thank you, Mr. Feldman.

15 Appreciate it.

16 MR. FELDMAN: You are welcome, Your Honor.

17 THE COURT: Let me take a look at it.

18 Section 2 you said?

19 MR. FARMER: Yes, 3 U.S.C. Section 2.

20 THE COURT: It says but the electors may be

21 appointed on a subsequent day in such a manner as the

22 legislature of such state may direct.

23 MR. FARMER: Yes, sir.

24 THE COURT: What provisions do we have in the

25 statute for that?

Klein, Bury & Associates
Matthew P. Spoutz

26

1 MR. FARMER: In this case the legislature has

2 said specifically in 102.168 that the trial judge will

3 be vested with the authority to determine what remedy

4 is appropriate given all the facts and circumstances of

5 the case. So the United States congress has delegated

6 the states with the power to determine what do we do if
7 our voters fail to make a choice on the required
8 election day. And the statute says electors may be
9 appointed on a subsequent day in such manner as the
10 legislature of the state has directed. Our state
11 legislature has not determined, has not set in stone a
12 date where a second or special election should occur.
13 Rather, they have vested that authority with the trial
14 court. Not only Section 102.168 is applicable, but in
15 addition we have Section 101.111 which speaks
16 specifically to the need of flexibility to order
17 special elections to resolve or deal with any
18 unforeseen or unpredictable circumstance. So
19 respectfully, Judge, the buck stops here.

20 You have been given the authority to
21 determine if due to the unforeseen or unpredictable
22 circumstances in this case that the electors of Palm
23 Beach County failed to make a selection on the day
24 prescribed by our federal constitution and federal
25 statutes, that you can order the relief that you deem

Klein, Bury & Associates
Matthew P. Spoutz

27

1 necessary and appropriate.

2 And, in fact, the case cited by George W.
3 Bush, the only case provided to me in preparation for
4 this hearing, Foster versus Love, in fact, speaks to

5 the need to have special elections after election day.
6 In this case it was a runoff election. The court said
7 that actions affecting the final selection of
8 officeholders, including another election, could
9 permissibly take place after the federal election day
10 such as where a runoff is required by a state law
11 mandate that the winner must receive a majority of all
12 votes cast.

13 In Foster versus Love you had a situation
14 where the state had a statute where a plurality
15 majority vote was not sufficient, a majority vote must
16 be obtained. Neither candidate received 50 percent of
17 the vote, so a special election was held on the Tuesday
18 after the first Monday in November.

19 Here we have a situation where, in fact, a
20 federal election, under the provisions of the federal
21 Constitution and federal statutes, was in fact allowed
22 to be held. This is the United States Supreme Court
23 saying elections can be held after election day.

24 Chapter 1, Section 5 of the United States
25 Code also talks about the determination of

Klein, Bury & Associates
Matthew P. Spoutz

28

1 controversies to appoint electors. Certainly we have
2 controversy right now as to where Florida electoral
3 votes are going to go.

4 So you do have the discretion, Judge, to
5 order an election which will take place after the
6 Tuesday after the first Monday of November.

7 Again, we are not asking you to rule today or
8 on Monday or Tuesday that there in fact will be an
9 election held, a new election held in Palm Beach County
10 to resolve this dispute. But we certainly ask that
11 Your Honor not foreclose that possibility at this
12 juncture.

13 Again, I go back to the need to understand
14 and hear and appreciate the evidence that will be
15 presented to Your Honor and how it meets the criteria
16 that has been laid out by our Supreme Court for
17 election statutes under the state statutes.

18 Again, this is a particular and peculiar
19 state issue. The federal government has said states
20 can regulate elections so long as their regulations do
21 not conflict with federal mandate or constitutional
22 provisions. Nothing about the Florida challenge
23 statute or election contest statute deviates from or
24 conflicts with the federal mandates by which we must
25 govern elections. In fact, as I said, and as Your

Klein, Bury & Associates
Matthew P. Spoutz

1 Honor pointed out, there are cases generally speaking
2 of senators and United States congressmen, but

3 nevertheless the cases exist in those situations where
4 the election is to be held on the Tuesday after the
5 first Monday, yet for some circumstance a new election
6 was required or needed.

7 So, in summary, Judge -- and I will yield
8 because I know a lot of people would like to speak to
9 you and I know you don't have much time -- but we have
10 again a very unforeseen and unpredicted circumstance
11 here. It has drastic and far-reaching potential
12 consequences. It would essentially amount to a
13 disenfranchisement of voters in Palm Beach County if,
14 for example, Secretary of State Harris were to certify
15 without consideration of the votes down here, or if the
16 votes were actually certified with a count in Palm
17 Beach County which does not reflect the true will and
18 intent of the voters in Palm Beach County. We can talk
19 about mechanics of how we do this later. It has been
20 done before.

21 In Judge Smith's order in Leon County, again,
22 that was a countywide election, and we are not seeking
23 a new election statewide, but on a county level he
24 ordered the new election take place within a month.

25 I'm not suggesting we do that now. I'm

Klein, Bury & Associates
Matthew P. Spoutz

1 saying time should not foreclose the remedy,

2 constitutional provisions do not foreclose the remedy,
3 and certain binding state precedents do not foreclose
4 that remedy.

5 I very much appreciate Your Honor's time.

6 Judge, I'm sorry. If the court would indulge
7 us, since you brought up some constitutional
8 provisions, I think it would be extremely helpful for
9 the court, we have with us today a professor from the
10 University of Southern California, one of the most
11 renown constitutional scholars in our country, if the
12 court could indulge us for just about five minutes, I
13 think he could especially speak to the case you just
14 brought up and provide some guidance to the court.

15 MR. RICHARD: Your Honor, I would like to
16 object to their putting witnesses on at this point.

17 MR. FARMER: He is not a witness. He is a
18 friend of the court. He is assisting us.

19 MR. RICHARD: He is not admitted to practice.
20 He is not representing one of the parties. Your Honor
21 said we are going to have oral argument on this. Once
22 again, counsel is trying to turn this into an
23 evidentiary hearing.

24 THE COURT: What is the name of the expert?

25 MR. FARMER: Erwin --

Klein, Bury & Associates
Matthew P. Spoutz

1 MR. CHEMBRINSKY: I am an attorney. I would
2 ask for pro hoc vici status as counsel for the
3 plaintiff to speak for five minutes on the
4 constitutional issue. I am a professor of law at the
5 University of Southern California.

6 THE COURT: Mr. Richard, he appears to be a
7 lawyer.

8 MR. RICHARD: Your Honor, that is okay. I
9 would appreciate it, as you had noted earlier, we are
10 not going to have dozens of lawyers making
11 presentations before I have an opportunity to speak.

12 If they want to substitute him for somebody
13 else who was going to speak and let him make a
14 presentation as a lawyer, I think that would be fair.

15 THE COURT: What I'll do, I'll let him speak
16 for about five minutes. Then I think Mr. Handler wants
17 to go. And I think Mr. Barnhart wants to go.

18 MR. BARNHART: Yes, Your Honor.

19 THE COURT: I think after Mr. Barnhart goes
20 we will let Mr. Richard state his side of the case. It
21 will keep me in line as well. It will help me.

22 MR. FARMER: Thank you very much, Your Honor.

23 THE COURT: Why don't you tell me your full
24 name, please?

25 MR. CHEMBRINSKY: Erwin Chembrinsky,

Klein, Bury & Associates
Matthew P. Spoutz

1 C-H-E-M-B-R-I-N-S-K-Y. I thank the court for
2 permission to address this issue. I will be very
3 brief.

4 The central point I want to emphasize is that
5 this court has broad remedial authority so as to remedy
6 any violation of Florida law that it finds. And
7 clearly I believe under Florida law the authority
8 includes ordering a new election. I just want to make
9 two points. First, ordering a new election as a remedy
10 under Florida law would not violate federal law or the
11 United States Constitution.

12 Federal law is clear that it is the state law
13 that is to determine any disputes regarding selection
14 of electors. I direct the court here to 3 United
15 States Code Section 5 that says state law is to be
16 used. I direct this court to Williams versus Rhodes,
17 393 U.S. 23. It makes very clear in the United States
18 Constitution it is state law that is to be used.

19 Indeed, Judge Middlebrooks court on Monday of
20 this week said the states have the exclusive authority
21 to resolve controversies for electing electors. That
22 is why, Your Honor, the Beckstrom case is controlling
23 for you and the Donahue case is not. I am familiar
24 with Donahue. As you rightly pointed out, it is a 1983
25 action under federal law. That has a very different

1 standard. What is to govern federal statutes is the
2 Florida state law.

3 THE COURT: I understand. But there is some
4 language in there about the high burden that would have
5 to be met to touch a presidential election if it is
6 possible.

7 MR. CHEMBRINSKY: If the claim was under
8 Section 1983, then that high burden would have to be
9 met. But since federal law, the United States
10 Constitution and federal statutes are clear that
11 Florida law is to govern the selection of electors,
12 then you look to Florida law, not to Donahue, not to
13 1983.

14 THE COURT: Going back to my original point
15 of Article 2, Section 1, Clause 4, how is it you can
16 justify your position with the United States
17 Constitution's position that the election for president
18 and vice-president should be on the same day throughout
19 the entire United States?

20 MR. CHEMBRINSKY: And it was, Your Honor.
21 The Constitution requires that election be held that
22 Tuesday with the intent of selecting the president and
23 vice-president. It also requires the election be held
24 with the intent of selecting senators and members of

25 congress. But that doesn't speak to what remedies are

Klein, Bury & Associates
Matthew P. Spoutz

34

1 permissible under the Constitution when there have been
2 violations of law.

3 Here I agree very much with Mr. Farmer, that
4 3 United States Code Section 2 is directly on point
5 because it does say the states can provide such further
6 remedies after the elections are necessary for the
7 selection of the electors.

8 You asked Mr. Farmer what is the stopping
9 point. The stopping point is set by federal statute.
10 Florida, like all states, must designate its electors
11 by December the 12th. But Florida law gets to decide
12 between election day and December 12th what procedures
13 are necessary and what are permissible.

14 Here, Your Honor, Foster versus Love cited by
15 the defendants, is directly on point for the
16 plaintiffs, is helpful in answering your question.
17 Foster versus Love involved a state that attempted to
18 hold an election for members of congress where
19 effectively they were choosing them in October before
20 the November election.

21 The Supreme Court said in Foster versus Love
22 the election must be held on the national election day
23 with the intent of choosing members of congress. But

24 Foster versus Love makes it clear if further remedies

25 are appropriate after election day such as runoff

Klein, Bury & Associates
Matthew P. Spoutz

35

1 election, that is permissible. That is exactly how you

2 should interpret the United States constitutional

3 provision you read this morning. It requires an

4 election be held on that Tuesday with the intent of

5 selecting electors. But there is nothing in that

6 provision whatsoever that precludes this court from

7 fashioning what other remedies there are. Federal

8 statutes say it is to be under state law.

9 The second and final point I wanted to make

10 for you is there is authority through jurisdictions

11 throughout the country that give you the power to hold

12 a new election. The brief cites over a dozen cases.

13 They include a New Jersey case from the year 2000.

14 They include cases from the Supreme Court, cases from

15 the federal circuits.

16 You raised the question this morning, and I

17 know on Wednesday, is there authority with regard to

18 holding a new election with regard to presidential

19 electors. But the problem with that question is it

20 assumes there are different election laws with regard

21 to fairness in presidential elections. There is not

22 any different standards with regard to fairness and

23 with regard to what the law requires when constructing
24 ballots for presidential elections. If anything, Your
25 Honor, I would think the most important election in the

Klein, Bury & Associates
Matthew P. Spoutz

36

1 country, we should be especially sure there is a fair
2 election in accordance with state law.

3 To the extent you conclude there is not, you
4 do have broad remedial authority under Beckstrom, under
5 decisions in the United States Supreme Court, to
6 fashion a remedy, and that includes ordering a new
7 election.

8 THE COURT: Let me ask you this. Perhaps I
9 may be picking on you.

10 MR. CHEMBRINSKY: Please.

11 THE COURT: You are talking to me about the
12 Constitution. I'm going to ask you a question about
13 state statute.

14 If the Federal Code Section 2 provides that
15 the electors were not elected on the day chosen by
16 statute, that the choice may be made on the day
17 prescribed by law, then why didn't the Florida
18 legislature, when they enacted 103.011, tell me right
19 there and it will solve this whole case, if you fail to
20 elect a president, the electors, on the first Tuesday
21 after the first Monday, then follow this procedure.

22 See what I'm saying?

23 MR. CHEMBRINSKY: I do. I think Beckstrom

24 answers that for you. Beckstrom talks about unforeseen

25 circumstances. The reality is no legislature could

Klein, Bury & Associates
Matthew P. Spoutz

37

1 have ever imagined the circumstance we are dealing with

2 here.

3 THE COURT: Wait a minute.

4 Hurricane season, for example, in Florida,

5 extends all the way to the end of November, November

6 30. What if we had a Hurricane Andrew during the first

7 Tuesday after the first Monday? Although maybe not

8 likely to happen on that day, it could happen. That is

9 something that the legislature and the state would do

10 especially here in Florida.

11 MR. CHEMBRINSKY: I think you would clearly

12 have the authority to order necessary remedies.

13 Let's start again with Section 5 of the

14 United States Code that says it is state law that to is

15 to be used in determining the selection of electors,

16 and state law provides you the authority to fashion

17 necessary remedies.

18 Beckstrom specifically speaks of the ability

19 to fashion remedies for unforeseen circumstances. I

20 think a hurricane, with the events that have occurred

21 here in Florida the last two weeks, fit the definition
22 of unforeseen circumstances. That is where I think
23 Section 2 of 3 United States Code helps you because it
24 says you can order remedies even after the day of the
25 election.

Klein, Bury & Associates
Matthew P. Spoutz

38

1 I think your hurricane example is a powerful
2 one. Surely if there was a hurricane and there was no
3 way otherwise for people to vote in Florida, you would
4 have the authority under Florida law to be able to
5 provide the necessary remedy to protect the right to
6 vote.

7 What we really had here is an unforeseen
8 circumstance in a sense like a political hurricane.

9 THE COURT: That was one of my questions I
10 was pondering as I'm thinking about this. Everywhere I
11 go and I'm driving, whatever. Suppose we had a
12 earthquake for example in San Francisco and we have
13 elections on the same day. Does it mean that the
14 people of San Francisco do not get to vote for
15 president? Obviously these are questions I'm directing
16 to Mr. Richard later on in this case to answer them.
17 That type of thing. That is my concern, that we could
18 have an act of God that could technically
19 disenfranchise a great number of voters. And the way

20 I'm reading the Constitution, at least a strict reading
21 and the Florida statute, those people would not have
22 any recourse.

23 MR. CHEMBRINSKY: I don't think that is right
24 because the Constitution mandates there be an election
25 on that Tuesday with the intent of selecting a

Klein, Bury & Associates
Matthew P. Spoutz

39

1 president. But there is nothing in the Constitution
2 that forecloses fashioning other remedies to protect
3 the right to vote. In fact, the Supreme Court has long
4 said provisions of statutes and provisions of the
5 Constitution must be read to compliment one another.

6 If you could not order a new election for a
7 hurricane or in my home state of California for an
8 earthquake, you would then be nullifying the right to
9 vote under the United States Constitution. And surely
10 to protect the right to vote, it has to be read in
11 harmony with the provision you read in the
12 Constitution. All that says is an election must be
13 held on that date with the intent of selecting the
14 president. There is nothing in it that forecloses
15 other relief necessary. The federal law and certainly
16 federal statutes are clear, state law is to guide you
17 in terms of your ability to determine how electors
18 should be selected in Florida.

19 THE COURT: Thank you.

20 I waited 22 years to be able to cross-examine
21 a constitutional law professor.

22 MR. CHEMBRINSKY: Thank you.

23 THE COURT: Who is next?

24 MR. FELDMAN: We are, Your Honor.

25 Thank you.

Klein, Bury & Associates
Matthew P. Spoutz

40

1 May I approach?

2 THE COURT: Absolutely.

3 MR. FELDMAN: If I can get there.

4 Your Honor, again, I'm Don Feldman from Weiss
5 and Handler.

6 Let me take things a little bit differently.

7 I think I can answer Your Honor's questions perhaps in
8 a way that has not been attempted before. By that I
9 say this. I believe you have a mandate to fashion a
10 remedy. I don't think you can sit back truthfully --
11 And I know when I say sit back I don't mean do nothing
12 because I know darn well where you are and what is
13 going on with you. The fact of the matter that is we
14 have a statutory election scheme, procedure if you
15 will -- scheme is a bad word but we have procedure.
16 That procedure starts at the very beginning of
17 everything and goes right through to the end.

18 The fact of the matter is that we have a
19 statute as Your Honor very clearly pointed out
20 yesterday that says when the election shall take place.

21 The fact of the matter is this. We have
22 other statutes. That is not a constitutional mandate
23 of Florida. That which you read is a statute, not a
24 constitutional amendment or a constitutional provision.
25 But we have other statutes that fit into the election

Klein, Bury & Associates
Matthew P. Spoutz

41

1 procedure and scheme, and by that I mean specifically
2 Chapter 102.

3 Now, does everything stop at one statute? It
4 can't. The fact of the matter is there would be no
5 remedy for anything that took place. And if Your Honor
6 takes a view of the election procedure, you can see
7 that it follows step by step by step in a very logical
8 progression. And at the apex, the end of this, is the
9 judiciary. The procedure for everything basically in
10 many respects is a separation of powers. But I'm not
11 going to dwell on that. What I'm going to say is that
12 102.168 Florida statutes specifically talks about the
13 contest of an election. The contest of an election is
14 an integral part, if the court please, of the entire
15 election procedure.

16 Looking at the statute, there is absolutely

17 no difference mentioned in it that this shall apply
18 except in presidential elections. It is an omnibus
19 statute meant to apply to all elections or the
20 legislature would have taken out, carved out, the
21 presidential election. So we are dealing with the
22 statute that on its face deals with the situation
23 before us. And it specifically says that you shall
24 entertain a contest of the election. And one of the
25 grounds is under (e), any other cause or allegation,

Klein, Bury & Associates
Matthew P. Spoutz

42

1 which, if sustained, would show that a person other
2 than the successful candidate was the person duly
3 nominated or elected. So basically that is what we are
4 here about, for you to determine whether or not someone
5 other than the successful candidate is the person who
6 was elected.

7 THE COURT: May I inquire just a second, Mr.
8 Feldman?

9 MR. FELDMAN: Please. Yes, sir, Your Honor.

10 THE COURT: Going back to Section 2 of the
11 statute, if you look at the statute, it says whenever
12 any state has held an election for the purpose of
13 choosing electors and has failed to make a choice on
14 the date prescribed by law, the electors may be
15 appointed on a subsequent day.

16 Does that not refer to something other than
17 an election when someone is appointed by the main
18 electorate?

19 MR. FELDMAN: No, sir, Your Honor. Because
20 they are talking about the purpose of choosing electors
21 in Section 1. We are now only in Section 2, one
22 section away. And it would seem, I respectfully submit
23 to the court, a real anomaly for Section 2 to appear
24 right after Section 1 and not address the election
25 itself.

Klein, Bury & Associates
Matthew P. Spoutz

43

1 THE COURT: It seems to me what they are
2 saying is look, you need to go and elect these people
3 on that day. If you don't do it, then you come up with
4 a scheme in the statute how to appoint these people.

5 MR. FELDMAN: Your Honor, I'll give you
6 Section 5 of the same statute.

7 THE COURT: I got it.

8 MR. FELDMAN: That basically tells you if by
9 judicial or other methods -- It specifically includes
10 judicial methods of making a determination -- as long
11 as that determination is made six days before the
12 electoral college does whatever it is required to do by
13 law. So we have six days for a judicial determination
14 of who the electors are, and that is specifically

15 provided by federal statute.

16 There is no comfort in this statute for those
17 who would say we have no way of doing anything because
18 we are circumscribed. The fact of the matter is -- I
19 I'll let Your Honor read it. I'm sorry.

20 THE COURT: Go ahead.

21 MR. FELDMAN: The fact of the matter is if
22 what Your Honor is saying is true, we have taken out
23 and carved out of the election process, directly
24 prescribed by the legislature, for you to hear the
25 contest of elections.

Klein, Bury & Associates
Matthew P. Spoutz

44

1 And I respectfully submit to the court that
2 you are bound to hear this election process. And what
3 it says in 102 which is so critical, that the parties
4 are entitled -- the electoral is entitled to an
5 immediate hearing. That is how strongly the
6 legislature wants this to be taken care of, immediate
7 hearing, not reasonably immediate, immediate.

8 The next thing is the circuit judge to whom
9 the contest is presented -- That is Your Honor -- may
10 fashion such orders as he or she deems necessary to
11 ensure each allegation of the complaint is
12 investigated, examined or checked to prevent or correct
13 any alleged wrong and, most importantly, provide any

14 relief, any relief appropriate under the circumstances.

15 So, Judge, I respectfully submit to you there

16 is a mandate here for you to act under our Florida

17 statutes. There is nothing in the federal law I

18 respectfully submit to the court. The federal

19 government has left it to states to take care of their

20 own elections. The fact of the matter is that is why

21 we are here in Palm Beach County where all the

22 allegations of problems has occurred. We are before a

23 circuit judge in Palm Beach County. That is you of

24 course. Under the statute, there is no course for you

25 to take but to hear the contest. And if Your Honor

Klein, Bury & Associates
Matthew P. Spoutz

45

1 believes the wrong person was elected, then you must

2 fashion a remedy. And it says any remedy.

3 This statute is by far an open-ended statute

4 for Your Honor to do what need be done in Your Honor's

5 opinion if you find the grounds present. That is why I

6 suggested the other day, frankly, and you took my

7 compromise and you changed it which is fine, and that

8 is why we are here, but I said let's take a look at the

9 ballot and determine as a matter of law whether that

10 ballot is legal.

11 It is our contention you are dealing with an

12 illegal ballot. If we go through the plethora of cases

13 throughout this country -- And I know Your Honor has
14 read many -- And I've read more than I ever wanted to
15 read in my life -- the fact of matter is you will find
16 many courts have set aside elections because of
17 problems that have occurred in ballots.

18 We have a ballot that we respectfully submit
19 there is no real excuse for. To take that New York
20 case Your Honor has been dealing with, I would say to
21 you, not being a constitutional scholar, having done
22 some 1983 work, that you have a different standard in
23 order to bring 1983 into play. That standard, of
24 course, there has to be some type of intentional
25 violation of the civil rights. That is why that is in

Klein, Bury & Associates
Matthew P. Spoutz

46

1 there. Our standard is there. It says if there is a
2 reasonable doubt -- reasonable doubt -- that's the
3 words that we have, is there a reasonable doubt here.
4 I certainly suggest there is. But that is not what we
5 are talking about here today. We are talking about
6 Your Honor's power. Again, I reiterate for the third
7 time because I want to be absolutely clear, I don't
8 think you have a choice. I believe under our statutes
9 you, as circuit judge, must hear the contest that we
10 have presented and rule upon it and fashion any relief
11 you deem appropriate.

12 I thank you for the privilege of being able
13 to argue before you.
14 MR. RICHARD: If I may, Your Honor, Judge
15 Lewis has issued his ruling. I have been summonsed by
16 my client. If the court would indulge me, I would
17 appreciate the opportunity to make my argument. Then I
18 will leave everybody.

19 THE COURT: Why don't we do that? You want
20 to do that now, Mr. Richard?

21 MR. RICHARD: If I may, I would appreciate
22 it.

23 THE COURT: Let's go ahead and let Mr.
24 Richard state his case and then he can go.

25 MR. RICHARD: Thank you, Your Honor.

Klein, Bury & Associates
Matthew P. Spoutz

47

1 THE COURT: Thank you, sir.

2 MR. RICHARD: I have heard several of the
3 lawyers now comment upon the fact you are given
4 unfettered discretion to fashion a remedy.

5 I know of no place in the Florida statutes
6 that provides for that. I heard several lawyers
7 reference Section 102.168. I read it several times,
8 and didn't recall seeing anyplace in there where a
9 court was provided with such broad powers. While they
10 have been arguing I read it again. Unless it has been

11 amended since the provision I have in front of me, I
12 find nothing in that section or any other section of
13 the Florida statutes or any case law that I have ever
14 read that says that this or any other court has
15 unlimited power to fashion any remedy it thinks is
16 appropriate in the event of an election problem. And
17 in particular I know of no provision of Florida law
18 that provides that a judge may order a new election in
19 a statewide election, and in particular with regard to
20 Florida electors.

21 Having said that, let me move on, Your Honor,
22 to tell you what I think the law is. And in essence I
23 agree with what you have suggested to counsel several
24 times when you asked for response and in fact have not
25 received a direct response.

Klein, Bury & Associates
Matthew P. Spoutz

48

1 The fact is we are not dealing here in an
2 area in which the law is silent. The law is not only
3 silent, it is very clear, the federal law and the state
4 law lays out precisely what the powers are of the
5 executive branch and the legislative branch, the
6 limited powers of the judicial branch, and what is to
7 happen in any of the contingencies that we talked
8 about.

9 Under Article 2, Section 1, of the United

10 States Constitution which Your Honor has already
11 quoted, the congress, the congress, not this court, may
12 determine the time of choosing the electors and the day
13 on which they shall give their votes, which day shall
14 be the same throughout the United States. Now,
15 congress has done that. It did it in Section 3 United
16 States Code Section 1 when it said the election of the
17 electors of president of the United States shall take
18 place on the first Tuesday after the first Monday in
19 November in every fourth year.

20 The United States Supreme Court in the recent
21 case of Foster versus Love addressed precisely the
22 questions we are dealing with here. And while counsel
23 made some weak efforts to distinguish that case, the
24 court's opinion is very clear. The facts are not
25 precisely the same because I agree they dealt with a

Klein, Bury & Associates
Matthew P. Spoutz

49

1 congressional race. But the court made clear as I will
2 show you that what they were saying applied as well to
3 the election of presidential electors, and what they
4 said is not subject to interpretation. It is quite
5 clear.

6 The court said it is well settled that the
7 election clause grants congress the power to override
8 state regulations by establishing uniform rules for

9 federal elections binding on the state.

10 So the suggestion that has been made that
11 this is all up to the state is true to the extent that
12 congress doesn't supersede it.

13 The Supreme Court went on to say the
14 regulations made by congress are paramount to those
15 made by the state legislature, and if they conflict
16 therewith, the latter, so far as the conflict extends,
17 ceases to be operative.

18 Here is the part we are concerned with here
19 today. One congressional rule adopted under the
20 elections clause and its counterpart for the executive
21 branch sets the date of the body of election for
22 federal officers. And the court goes on to point out
23 it was originally enacted in 1872 and now provides the
24 Tuesday after the first Monday in November in every
25 even numbered year is established as the date for the

Klein, Bury & Associates
Matthew P. Spoutz

50

1 election in each of the states and territories of the
2 United States of representatives and delegates to the
3 congress commencing on the 3rd day of January next
4 thereafter.

5 Then it says this: This provision, along
6 with 3 U.S.C. Section 1, doing the same for selecting
7 presidential electors, mandates holding all elections

8 for congress and the presidency on a single day

9 throughout the Union.

10 Now, what the Supreme Court said in this case

11 is that no state can have any election for any federal

12 officer, including presidential electors, on any other

13 day.

14 Now, counsel has said that this case

15 recognized that there is an exception when there is a

16 necessity for a runoff election for congressmen or

17 senators. That is true. But what they fail to note

18 was that in Footnote 3 where the Supreme Court

19 recognized that exception, the reason they recognized

20 it as they pointed out is that congress has provided in

21 title 2 U.S.C. Section 8 for that exception with

22 respect to congressmen and senators. And the court

23 noted it is only for a runoff election. That has no

24 application to electors for president, and the reason

25 is because we don't vote for electors, we don't select

Klein, Bury & Associates

Matthew P. Spoutz

51

1 electors by majority vote as we do for congressmen and

2 senators.

3 Section 103.011 of the Florida statutes

4 provides that the presidential electors of the state of

5 Florida shall go to the president and vice-president

6 who receives the highest number of votes, not the

7 majority votes. There is no such thing as a runoff.
8 Now, the court went on to point out in the
9 Foster versus Love case that our judgment is
10 buttressed -- They said it doesn't make any difference
11 what congress' intent was -- that our judgment is
12 buttressed by an appreciation of congress' intent to
13 remedy more than one evil arising from the election of
14 members of congress occurring at different times and
15 different states.

16 As the sponsor of the original bill put it,
17 congress was concerned both with the distortion of the
18 voting process threatened when the results of an early
19 federal election in one state can influence later
20 voting in other states. And they also said it was an
21 unreasonable burden on people to vote twice. But that
22 evil that congress was concerned with is, if it has
23 ever been a concern, certainly a concern in this case
24 where the voters would be faced with as much influence
25 as one can imagine from what has already occurred.

Klein, Bury & Associates
Matthew P. Spoutz

52

1 Now, the question a number of people have
2 addressed and what Your Honor has asked about is what
3 is the remedy? What is if there is widespread fraud?
4 What is if there is a hurricane? Then what? Then
5 there is a remedy provided for, Your Honor, and the

6 remedy is not for a court to do anything. The remedy
7 is provided for by congress which again has been
8 authorized by the Constitution to make the decision.
9 Your Honor has already noted it. It is Title 3,
10 Section 2, Failure to Make Choice on Prescribed Day.
11 Whenever any state has held an election for the purpose
12 of choosing electors and has failed to make a choice on
13 the prescribed day by law, the electors may be
14 appointed on a subsequent day in such manner as the
15 legislature of such state may direct, period. There is
16 no provision in federal law. There is no provision in
17 Florida law for any court, not this court, not the
18 District Court of Appeal, not the Supreme Court, to do
19 anything when the state has failed to chose its
20 electors. There is only one body by law of this nation
21 who can make that determination, and that is the
22 Florida legislature.

23 So what happens if we have a hurricane? What
24 happens is the Florida legislature can have a special
25 emergency session and decide what to do. And what they

Klein, Bury & Associates
Matthew P. Spoutz

1 can do is they can select the electors themselves if
2 they want to. Or they can provide for a special
3 election. Or they can provide for the governor to
4 nominate them. Or they can provide for anything they

5 please because that is what the United States
6 Constitution and the federal statutes and the Florida
7 legislature has said.

8 Now, here is what we face if this court were
9 to throw out this election. I suggest to Your Honor
10 what we would very well could end up with is quite the
11 opposite of what these plaintiffs are asking for. We
12 could end up with a complete disenfranchisement of all
13 the voters in Palm Beach County or a complete
14 disenfranchisement of all the voters of the state of
15 Florida, because where it ends up is in the
16 legislature, and the legislature may chose something
17 other than a new election of the voters of Palm Beach
18 County. They may do it on a political basis, or they
19 may do it because there is just no time to have another
20 election, or they may do it because they fear the same
21 thing congressmen did, that it may be unduly influenced
22 by what has already happened. And the reason they may
23 be concerned about no time for another election is
24 because if Florida fails to send its electors to the
25 electoral college on the appointed day what happens is

Klein, Bury & Associates
Matthew P. Spoutz

54

1 the electoral college chooses a president without
2 Florida, period, because there is nothing in the
3 Constitution that says that every state must send its

4 electors.

5 So the bottom line here, Your Honor, is that
6 the law is crystal clear. It is crystal clear. It
7 tells us exactly what day we are to have this election
8 and exactly what happens if we fail to select our
9 electors on that day. And there is not a whisper of
10 suggestion in any of this carefully crafted design that
11 any court, much less a circuit court, has any voice in
12 solving that problem.

13 When Your Honor set this hearing, you said
14 that you did not want to waste the time of the court or
15 the parties in having a trial which effectively would
16 be nothing more than a public showpiece if you did not
17 have the remedy of ordering another election when it
18 was over.

19 I respectfully suggest to Your Honor that I
20 have the highest respect for this court. One of the
21 reasons I respect this court and our whole judicial
22 system and one of the reasons we have had the
23 incredible stability we have had in several hundred
24 years of this country is because of the willingness of
25 our courts to recognize the limits that have been set

Klein, Bury & Associates
Matthew P. Spoutz

1 on their authority, the unwillingness to usurp more
2 authority than the congress and the state legislature

3 and the Florida Constitution and the United States
4 Constitution has provided them. That is one of the
5 reasons we have a stable democracy, is one of the
6 reasons our elections work, and I would urge Your Honor
7 that you were right smack on point. If there is no
8 remedy that this court has been provided for, there is
9 no reason for us to continue to have this unnecessary
10 proceeding. And I would urge Your Honor to take that
11 into serious consideration.

12 I want to reiterate how much I deeply
13 appreciate the extent to which Your Honor has gone to
14 accommodate me under what is a very difficult
15 circumstance for all of us. And with the court's
16 permission, unless Your Honor has questions, I will
17 depart, and my partner Mr. Bideau and Mr. Dunkel are in
18 the courtroom.

19 THE COURT: Okay. Thank you very much, Mr.
20 Richard.

21 MR. RICHARD: Thank you, Your Honor.

22 THE COURT: Take care now.

23 Who was next?

24 MR. FELDMAN: I was still going.

25 THE COURT: Still going. Good. Because now

Klein, Bury & Associates
Matthew P. Spoutz

2 MR. FELDMAN: I hope I have some answers for
3 Your Honor that are acceptable.

4 THE COURT: You heard Mr. Richard.

5 MR. FELDMAN: Yes, I did, Your Honor.

6 THE COURT: Eloquent argument. He relies
7 pretty much on the language of the United States
8 Supreme Court in the case of Foster versus Love which
9 was decided in 1997, three years ago.

10 MR. FELDMAN: Yes, sir.

11 There is one thing that Mr. Richard did not
12 point out, and that is the savings proviso which the
13 federal laws give to the federal court.

14 May I quote, Your Honor?

15 THE COURT: Absolutely.

16 MR. FELDMAN: Thank you.

17 This is Title 2 U.S.C. Section 8. It
18 provides that a state may hold a congressional
19 election. This is in the case that he cited because it
20 is a congressional election. On page five, the state
21 may hold a congressional election on the day other than
22 the uniform federal election day when such an election
23 is necessitated by a failure to elect at the time
24 prescribed by law. Now, that is the same savings
25 provision that we basically have for federal elections.

Klein, Bury & Associates
Matthew P. Spoutz

1 Let us address if we can.

2 You say the framers of the election

3 procedures in congress did not intend to put handcuffs

4 on everyone so that everything stopped dead in its

5 tracks and nobody could do anything except stand around

6 and say, well, that is terrible. The fact of the

7 matter is that it is specifically provided for, that

8 being what happens when there is a failure to elect.

9 We have a failure to elect basically here.

10 Now, if we go to 2, he is saying in such

11 manner as the legislature of such state may direct.

12 Our legislature has spoken. He is implying the

13 legislature has to meet right now and set an election

14 date. No, it does not. It has put into place how that

15 election will take place if at all. That is through

16 Section 102, the challenge to the election. And Your

17 Honor may set that date. And if we take in para

18 materia Section 5 of the Constitution, it basically

19 states and leaves to the state the power to do it

20 either judicially or any other way. But definitely the

21 power is reserved to the states to do it judicially.

22 Your Honor has seen Section 5 of the United States

23 Constitution. So Your Honor is there with authority to

24 do exactly what you have to do.

25 I haven't said this before. This is the

1 court of general jurisdiction of this state. We are
2 akin to the great court of the king's bench under
3 common law where the power is almost unbridled. We
4 have the ^ set 8 decision (feldman) in this state which
5 basically says that which is not given to the circuit
6 court is there. This is the residuum of power,
7 judicial power this state, unless circumscribed by the
8 legislature. It is not.

9 What happens here and what is being asked to
10 be done is Your Honor stop, do not follow the mandates
11 of the statutes, you are to hold a contest which you
12 are doing but stop. Why stop? What is there that has
13 been said specifically which says our procedure for
14 challenging an election doesn't apply? Nothing.
15 Nobody addressed why it doesn't apply. It does apply.
16 On its face it applies.

17 Your Honor has no discretion but to follow
18 what the statutes have set forth. The legislature has
19 spoken completely. That's why we are here.

20 And I thank you.

21 You have some other questions for me?

22 MR. FELDMAN: Actually, as usual, you
23 answered them for me.

24 MR. FELDMAN: Thank you, sir.

25 THE COURT: As usually.

1 MR. FELDMAN: Thank you.

2 MR. HANDLER: Your Honor, Henry Handler of
3 Weiss and Handler. Along with Mr. Feldman, we
4 represent the Fladell plaintiffs before this court.

5 Let me just put a little procedural
6 perspective on what Mr. Feldman has addressed to the
7 court. He has made clear to the court we are not
8 addressing the election of electors. We are addressing
9 the postelection contest, the result of it, and we have
10 challenged that because of the noncompliance of the
11 ballot with the statute, that there is a reasonable
12 doubt as to whether the will of the people was
13 expressed.

14 Mr. Feldman did address Section 3 United
15 States Code Section 5 which is entitled Determination
16 of Controversy as to the Appointment of the
17 Presidential Electors.

18 One question you posed, Your Honor, that I
19 want to specifically answer, you were concerned about
20 endless debates all over the country with regard to
21 presidential electors. That section gives us a finite
22 time period in which this state or any state can
23 resolve postelection controversies. That provision
24 clearly states that the determination of any

25 controversy or contest concerning the appointment or

Klein, Bury & Associates
Matthew P. Spoutz

60

1 all or any of the electors of such state by judicial or
2 other methods -- Remember Mr. Feldman emphasized that
3 point -- the determination shall have been made at
4 least six days before the time fixed for the meeting of
5 the electors.

6 Remember, Judge, when we last met, we talked
7 about December 18 and then December 12.

8 When you look at our own state statute
9 regarding contest, contest of elections, it addresses
10 the need to move forward expeditiously. Mr. Feldman
11 emphasized to you the immediate hearing that the
12 statute prescribes.

13 What we are here to present to you today is
14 that the federal standards have challenged the courts
15 in Florida, have allowed all the states, but in Florida
16 we have a specifically postelection contest procedure,
17 to act immediately, as expeditiously as this court can
18 allow us to do, in order to resolve it by a finite time
19 period.

20 We are here today, Judge, to tell you that if
21 you believe as we argued that you have the authority
22 with which to consider and to implement a revote as a
23 remedy for the wrong which we will establish before

24 you, we have a proposed calendar for you by which we
25 think you can hold a trial on this matter and fashion

Klein, Bury & Associates
Matthew P. Spoutz

61

1 the remedy that the Florida statute permits you to do
2 in order for us to be able to meet the time prescribed
3 by 3 U.S.C. Section 5. So we are here to handle that
4 specific procedural aspect once we have answered your
5 questions specifically and pointed out where you have
6 the authority with which to authorize and to order a
7 revote as part of the remedies under the Florida
8 Statute.

9 Thank you.

10 THE COURT: Thank you, Mr. Handler.

11 MR. BARNHART: Thank you, Your Honor.

12 MR. HANDLER: Your Honor, excuse me. Excuse
13 me, Greg. Just for a second.

14 I know that you asked us with regard to stop
15 with the paper. But when we received Mr. Richard's
16 case at the end of the day, we took the time to address
17 it in a very brief memorandum.

18 THE COURT: You have it?

19 MR. HANDLER: Yes. If I can approach and
20 just give you a copy of our memorandum.

21 THE COURT: Great.

22 MR. HANDLER: Thank you, Judge.

23 THE COURT: This is in response to the Foster

24 case.

25 Go ahead.

Klein, Bury & Associates
Matthew P. Spoutz

62

1 MR. BARNHART: Thank you, Your Honor.

2 If it please the court, my name is Greg

3 Barnhart. Along with Kuehne, we represent the Florida

4 Democratic Party in this action.

5 I will abbreviate what I was going to say and

6 try to respond directly to Mr. Richard because I think

7 that is the most important thing.

8 The question you asked us to respond to was

9 does a state court have the right under the appropriate

10 set of circumstances to revoke a vote, that is, to ask

11 for another specific election, this time in Palm Beach

12 County. I think the better way to do that is to

13 rephrase it if it please the court. Does a state court

14 have the right, have the power to right a wrong even if

15 the stakes are high? And I submit to the court that in

16 fact it does.

17 Here is the reason for that. Your Honor

18 spoke quite eloquently about the meaningfulness of the

19 right to vote, and that being the bedrock of a

20 democracy, and how your family had come over so that

21 you would have that right. Everyone in this room's

22 family came over to this country so that they would

23 have that right.

24 But as we discussed last Wednesday, the right

25 to vote means nothing, it is meaningless, if the right

Klein, Bury & Associates
Matthew P. Spoutz

63

1 to vote is not tallied. But I think we can draw the

2 same line of reasoning because the right to vote is

3 meaningless if that right is exercised in an illegal

4 election or unlawful election. Either way, the right

5 to vote is meaningless, and the bedrock of our nation,

6 the democracy upon which we govern ourselves is

7 threatened.

8 So the question then, is there a way through

9 which you, sitting as a trial court in Florida, can set

10 aside an election in Palm Beach County even if it deals

11 with the highest office in the land.

12 Well, as has been discussed by my

13 predecessors here, courts throughout the country, in

14 this state, in other states, in federal courts, have

15 thrown out election after election if they find there

16 was fraud or unlawful activity. The standards vary,

17 the elections vary, the cases vary, the facts vary.

18 But the one unifying fine line we have seen through the

19 cases all the way through our country, not just now but

20 for years and even centuries before this, if an

21 election is tainted, if it is illegal, if it is
22 unlawfully conducted for whatever reason, then the
23 court of whatever jurisdiction will not hesitate to
24 throw that election out.

25 That doesn't mean that you would sit here as

Klein, Bury & Associates
Matthew P. Spoutz

64

1 someone else has argued that we would throw out an
2 election in Kansas or California or even some other
3 county in Florida. We speak only of Palm Beach County
4 here. So the question then is can you do it and how do
5 you do it. I suggest to the court we start with the
6 Constitution which you spoke about.

7 The Constitution, as Mr. Richard and Your
8 Honor has discussed, the provision which is in effect
9 here is Article 2, Section 1, which we have been
10 talking about. That says very simply the congress may
11 determine the time of choosing the electors, the day on
12 which they shall give their votes, and the day shall be
13 the same throughout the United States. And that's it.

14 In 1948 the congress promulgated legislation
15 according to that section, and the statutes which we
16 discussed today deal with that particular time. Under
17 United States Code Title 3, Section 2, what they say is
18 whenever -- This is the statute we have been dealing
19 with -- congress taking its power from the Constitution

20 of the United States. Whenever any state has held an
21 election for the purpose of choosing electors -- They
22 don't even have to be elected according to the
23 Constitution. They can be appointed. Congress said
24 when they elect -- and they have failed to make a
25 choice on the day prescribed by law, the electors may

Klein, Bury & Associates
Matthew P. Spoutz

65

1 be appointed on a subsequent day, some other day,
2 whatever day that may be, in such a manner as the
3 legislature of such state may direct.

4 So what congress is telling us as Americans,
5 if the electors are not appointed on the day prescribed
6 by the Constitution and by congress, then the
7 legislature of the state, on a subsequent day, may in
8 another manner prescribed by the legislature chose
9 their electors. So what happens?

10 Under Section 5, if the state shall have
11 provided by laws enacted prior to the day of the
12 election for an appointment of the electors for its
13 final determination of any controversy or contests --
14 So they anticipated controversies or contests --
15 concerning the appointment of all or any of the
16 electors in the state, by judicial or other method or
17 procedures.

18 So what the congress of the United States is

19 telling us is if after that day we have a controversy
20 or we have a contest concerning the appointment of
21 electors, and the state, by the judiciary or by some
22 other means, appoints new electors, then they have to
23 do it in a timely fashion. What is the timely fashion
24 according to congress? Six days before the electors
25 meet. It doesn't mean they have to be all chosen on

Klein, Bury & Associates
Matthew P. Spoutz

66

1 that one particular day, election day. If there is a
2 controversy according to congress, states, you figure
3 it out, we leave it to the state legislature. And if
4 it is up to the judiciary which this state says it is,
5 then it gives us a guideline. What is the guideline?
6 If you are not finished six days before the electoral
7 college meets, then you are out. Mr. Richard is right
8 about that. Mr. Richard is wrong respectfully by the
9 way in which we deal with this situation. Congress has
10 expressly spoken. If there was any question as to
11 whether or not the judiciary was involved, we look
12 directly to the words of congress. By judicial or
13 other methods or procedures.

14 Now, what has the legislature of Florida
15 done? Mr. Richard, on behalf of Governor Bush, says
16 well, we would simply hold a special session of the
17 Florida legislature. Where does he get that authority?

18 Where do we find any authority for that, a special
19 session of the legislature? We don't. And, in fact,
20 that would be illegal because the procedures have to be
21 done before the election according to congress. But we
22 do have a procedure.

23 The Florida legislature, well before this
24 election, acted, and they acted by passing Florida
25 Statute 100.101 which is captioned Special Elections

Klein, Bury & Associates
Matthew P. Spoutz

67

1 and Special Primary Elections. And they simply say a
2 special election or special primary election may be had
3 in various circumstances if no person has been elected
4 to a general election to fill the office, or if it is
5 necessary to elect a president or vice-president. We
6 have the procedure in hand.

7 Now, Your Honor raised important points about
8 other cases, particularly about the Donahue case. The
9 Donahue case, as counsel before has discussed, dealt
10 with a federal statute. It was a 1983 action. And it
11 was an allegation that the rights of the people, the
12 rights of the citizens, have been deprived according to
13 federal law, not state law.

14 But then the court goes on to say that the
15 point, however, is not that ordering a new presidential
16 election in New York State is beyond the equity

17 jurisdiction of the federal courts, protecting the
18 integrity of elections, particularly presidential
19 contests, is essential to a free and democratic
20 society. They recognize that inherent power in the
21 courts. They simply said here there was no statute in
22 New York, and the plaintiffs in that case were
23 traveling under federal law, not state law.

24 But as Your Honor also noted, the four
25 parameters through which one can set aside a

Klein, Bury & Associates
Matthew P. Spoutz

68

1 presidential election, at least according to the
2 District Court of New York, included specifically acts
3 of fraud or other unlawful behavior. Fraud or other
4 unlawful behavior was committed. Other unlawful
5 behavior. In Florida, well, we are not reaching that
6 point right now, the allegations in the complaints
7 brought by the citizens were that the elections in Palm
8 Beach County were unlawfully conducted, that is, they
9 failed to follow the election statutes. So I submit to
10 you under either standard that would apply.

11 THE COURT: Let me ask a question, Mr.
12 Barnhart.

13 MR. BARNHART: Yes, sir.

14 THE COURT: Going back to Section 5,
15 Determination of Controversy as to Appointment of

16 Electors, it says if any state shall have provided by
17 laws enacted prior to the date fixed for the
18 appointment of electors, that is the cite, that one
19 line I'm stuck on.

20 You and Mr. Feldman and I believe Mr. Farmer,
21 you are asking me in a way to imply that the
22 legislature intended 101.168, 102.168, to be the remedy
23 that Section 3 is talking about.

24 Now, if that was the case, why didn't the
25 legislature, when they enacted 103.111, say in there if

Klein, Bury & Associates
Matthew P. Spoutz

69

1 there is a problem with electing these people on this
2 day, then you go to follow the procedure set forth in
3 102.168? I know what your answer is going to be. That
4 would be too easy.

5 MR. BARNHART: We wouldn't be here right now
6 if they had done that.

7 THE COURT: Or why isn't there some mention
8 in these statutes as to the six-day limitation?
9 Because if you look at the time limitation in 102.168,
10 they don't coincide with the six-day limitation you are
11 talking about.

12 MR. BARNHART: They don't.

13 The easiest way -- Really the only fair way
14 to read that is to take them together. Florida has

15 spoken as to how special elections are to be conducted.
16 They have spoken generally. They have not spoken
17 directly to presidential elections. They have
18 certainly not conformed to the acts of congress. But
19 we have to read them to make sure.

20 I think a good analogy is this: The state of
21 Oregon has a statute. Oregon is part of the country.
22 They elect electors. Oregon allows the voters of that
23 state to vote by mail starting seven days before
24 national election day.

25 To use Governor Bush's argument, we would

Klein, Bury & Associates
Matthew P. Spoutz

70

1 throw out all the votes of Oregon because it doesn't
2 precisely conform to the language. And the language
3 which we talked about congress has acted upon. And
4 what congress has said is that if for whatever reason,
5 if there is a controversy, if there is a judicial
6 determination to be made, you have to have your
7 electors in and their ballots done six days before the
8 electoral college votes, and that is all they said.

9 Let me use an example if I could. In the
10 last week, Judge Middlebrooks dealt with in some sense
11 issues like this. And Judge Middlebrooks in his
12 opinion, the Seigel opinion, said this: The
13 constitutional provision which we have been discussing

14 grants extensive power to the states to pass laws
15 regulating the selection of electors. What he does is
16 he speaks about other cases. The Constitution
17 recognizes that people act through their
18 representatives in the legislature and leaves it to the
19 legislature exclusively to define the method of
20 affecting the object of selecting electors.

21 What the most recent federal decision has
22 said is we basically leave the election of electors to
23 states which is exactly what congress has done and
24 exactly what the Constitution has done.

25 I would ask the court to consider this. What

Klein, Bury & Associates
Matthew P. Spoutz

71

1 if, in fact, the court found there was an illegal,
2 unlawful election conducted in Palm Beach County? The
3 court would have no trouble throwing out an election.
4 Let's assume that Elaine Bloom, the person who ran for
5 congress against Clay Shaw, had won the election. You
6 make the determination that the election of Palm Beach
7 County was unlawful. There would really be no question
8 you could order a new election in Palm Beach County to
9 take care of that particular congressional seat.

10 It makes no sense, if it please the court, to
11 say that if we find the same unlawful activities that
12 we wouldn't extend that to a far more powerful position

13 in this country, that of president. So the relief,
14 really the only answer I think to please the court is
15 this. You have the power. Under the Constitution of
16 the United States, you have the power as it has been
17 interpreted by the congress of the United States which
18 delegated the power to conduct the election of electors
19 to the state. Our state has ruled. Our legislature
20 has acted. And they have given you provision to
21 fashion new elections if you find there are unlawful
22 activities. They have given guidance in the form of
23 setting special elections. That is where we sit.

24 Clearly no one ever anticipated this could
25 occur. So what we do is we come in, given a fine

Klein, Bury & Associates
Matthew P. Spoutz

72

1 parameter, existing statutes, and under that framework
2 you as the trial court judge act, and you have the
3 ability to do so if you find from the evidence it would
4 be justified.

5 Thank you, Your Honor.

6 THE COURT: Thank you.

7 Since all have you I'm sure are pretty
8 interested in what is happening in Tallahassee, I have
9 just received a fax copy of Judge Lewis' order. Since
10 it is only a page and a half long, I am going to read
11 it to you.

12 Order denying emergency motion to compel
13 compliance with and enforcement of injunction. The
14 limited issue before me on this motion is whether the
15 Secretary of State has violated my order of November
16 14th in the year 2000.

17 The plaintiffs assert that she has acted
18 arbitrarily in deciding to ignore amended returns from
19 counties conducting manual recounts.

20 I disagree.

21 As noted in my previous order, Florida law
22 grants to the secretary as the chief elections officer
23 broad discretionary authority to accept or reject
24 late-filed returns.

25 The purpose and intent of my order was to

Klein, Bury & Associates
Matthew P. Spoutz

73

1 ensure that she in fact properly exercised her
2 discretion rather than automatically reject returns
3 that came in after the statutory deadline.

4 On the limited evidence presented, it appears
5 the secretary has exercised her reasoned judgment to
6 determine what relevant factors and criteria should be
7 considered, applied them to the facts and circumstances
8 pertinent to the individual counties involved, and made
9 her decision. My order requires nothing more.

10 Done and ordered in chambers in Tallahassee

11 on November 17 in the year 2000.

12 MR. LAWLOR: May I suggest an order we go in?

13 I'm Patrick Lawlor. I represent Sharon Elkin and Alex

14 Zoltkowsky.

15 THE COURT: What did you say at first?

16 MR. LAWLOR: An order which people proceed in

17 this case.

18 THE COURT: Let me see by show of hands how

19 many of you want to speak. One, two, three, four,

20 five. Okay.

21 MR. ROGOW: We represent Theresa LaPore.

22 THE COURT: Whoever wants to speak about this

23 issue. Like I said at the beginning, there shouldn't

24 be that much more that you guys can add.

25 Let's do this. Can I do this? I want to

Klein, Bury & Associates
Matthew P. Spoutz

74

1 break at noon. Can I just give everybody five minutes

2 and have you come up and say your piece, and if you

3 need more than that I will come back after lunch if you

4 want me to. I don't want to cut anybody off. Let's

5 see if we can finish by noon. Can we do that?

6 Since you spoke first, why don't you come up?

7 MR. LAWLOR: May it please the court.

8 THE COURT: I'll make sure you speak.

9 MR. LAWLOR: Patrick Lawlor on behalf of

10 Sharon Elkin and the Zoltkowskys.

11 In hearing the arguments this morning, I
12 think what has been lost in all the argument here and
13 what is really at stake here is the persons who have
14 been wronged, the plaintiffs in this case.

15 Essentially, Your Honor, these persons went
16 in and made a vote which they thought counted for a
17 specific candidate and it didn't. The plaintiffs in
18 this case have been caught up in the constitutional
19 arguments and all the arguments. Essentially what
20 happened, I want to bring the court back as to why the
21 court should hear argument on the why this ballot was
22 invalid.

23 Essentially, Your Honor, the arguments we
24 make is these plaintiffs have constitutional rights
25 both under the Florida Constitution and the U.S.

Klein, Bury & Associates
Matthew P. Spoutz

75

1 Constitution. The basic rights under the equal
2 protections and the due process clause of both the
3 state and federal Constitution have been violated.

4 Your Honor, I do want to address the issue of
5 103.011. That is the statute the court asked us to
6 address here today.

7 Essentially, Your Honor, what I see the court
8 doing here is if you were to rule the election could

9 only choose electors on that date regardless of any
10 circumstances, essentially you would be finding a
11 narrow ruling which would indicate no matter what
12 happens on that date, fraud, deception, anything that
13 could happen, natural disasters, there never could be
14 another election afterwards. If you are saying they
15 have to be chosen on that day, nothing could happen
16 afterwards.

17 Clearly in this case there is extraordinary
18 circumstances. That is my understanding.

19 THE COURT: If somebody committed fraud, it
20 would seem to me what would happen after is somebody
21 would go to prison.

22 MR. LAWLOR: Correct.

23 The point is extraordinary circumstances have
24 occurred. Everybody said here the court is given the
25 power to have remedies to deal with those extraordinary

Klein, Bury & Associates
Matthew P. Spoutz

76

1 circumstances. But essentially it is a public policy,
2 Your Honor, that in finding such a ruling and not
3 allowing the evidence to come forward, and I cite to
4 the case Your Honor talked about, the Donahue case,
5 what this court asked us today is whether or not he
6 could go forward and have a remedy of revote.
7 Essentially the court was asking whether he wanted to

8 hear all the evidence in the case by statistical
9 analysis. In the case the court cited, it seemed the
10 federal court there did hear the evidence. It may not
11 reach the conclusion a revote may, but it heard the
12 evidence. That is the standard the court needs to
13 follow.

14 In this case the evidence should be put forth
15 to the court whereby the court can hear the evidence
16 and determine the remedy whether you can or cannot have
17 a revote. The court cannot shut the courthouse doors
18 on the plaintiffs in this case and not allow them to
19 come forward.

20 Lastly, Your Honor, my clients want to have
21 their day in court. Public opinion throughout the
22 nation is that my clients and the other plaintiffs are
23 sitting in this room through these other attorney
24 representatives and have let the world know what they
25 think. They put in the public forum that they voted

Klein, Bury & Associates
Matthew P. Spoutz

77

1 for the wrong candidates or the they choose two persons
2 or they were confused with the ballot.

3 What has this done in public opinion? They
4 have been called idiots, morons.

5 THE COURT: Let me stop you there a second.

6 Like I said in the beginning, the right to

7 vote to me is as precious as life itself. You don't
8 need to preach to me, Counsel, about what your clients
9 have the potential to lose if I rule against them. I
10 don't need to hear that. I understand, believe me. If
11 I rule against your client, it will probably be the
12 most difficult decision I will ever make.

13 Right now I want to hear law which is what I
14 got to abide by, the law. That is what I'm going to
15 follow, the law. So you tell me what the law is which
16 is what I wanted you lawyers to come in today for, to
17 educate me on the law. I don't want to hear about all
18 this stuff. Believe me, you don't need to beat it.

19 MR. LAWLOR: I think the other counsel
20 addressed the law.

21 All I would bring up is our plaintiffs do
22 have constitutional rights of equal protection and due
23 process which have been violated if the court does not
24 allow them to go forward. Therefore, we feel the court
25 would not be allowing them to meet the due process

Klein, Bury & Associates
Matthew P. Spoutz

78

1 rights under the laws in this institution of the United
2 States and Florida.

3 Thank you.

4 MR. PASSIN: Robert Passin. I represent the
5 plaintiffs in this Litman versus Bush case which is

6 Case Number 00-11098, Your Honor. I will try to be
7 brief.

8 I have items which I think Your Honor ought
9 to be aware of that have not been addressed yet. I
10 think a lot of the argument before Your Honor has
11 really missed the point. Everyone assumed you are
12 being asked to rule upon a new election for electors
13 for the purpose of electing the president of the United
14 States. That is not what we are asking you to do.
15 Only the statewide election elects electors. The
16 people of Palm Beach County and the Palm Beach County
17 election does not elect electors. So the question of
18 you do have the authority to order a countywide
19 election is not governed by these provisions.

20 THE COURT: Who elects the electors on
21 November 7th?

22 MR. PASSIN: The people of the state.

23 THE COURT: Who don't live here.

24 MR. PASSIN: The only issue you would be
25 ordering is a countywide election. A countywide

Klein, Bury & Associates
Matthew P. Spoutz

79

1 election by definition does not elect electors.

2 THE COURT: Palm Beach County, last time I
3 checked, was in the state of Florida.

4 MR. PASSIN: It is within the state. Under

5 the statute they would ask Your Honor to conclude that
6 do you have the power to order a new election of
7 electors. Granted, the question of what effect that is
8 going to have is a question that is going to be
9 answered by the Secretary of State or perhaps the
10 Supreme Court of the United States. If the statute
11 requires the election to have taken place on November 7
12 of last -- couple weeks ago, we are already in
13 violation since that date has passed.

14 What is going on today in the counting of
15 votes, and determining what votes will count and what
16 votes won't be count is a continuation of that process.
17 It will be held to be related back to the election that
18 took place on the 7th. Therefore, it will comply with
19 the law.

20 I would ask Your Honor to consider even if
21 you order a new election within Palm Beach County that
22 is simply also a continuation of this process which we
23 are going through right now which is counting votes
24 and, therefore, would be nothing improper as a
25 component of that process. A new election will have

Klein, Bury & Associates
Matthew P. Spoutz

80

1 the purpose of relating back to the date of the
2 original election and, therefore, will be no
3 constitutional violation.

4 Mr. Richard, in his comment to the court,
5 indicated that the voters of Palm Beach County will be
6 disenfranchised perhaps if Your Honor gives the ruling
7 we are asking you for, perhaps a new election. That is
8 not true. Assume that for all of the ambiguities and
9 problems going on within the state of Florida today,
10 and this is a first impression for our country, assume
11 the election for the electors that was conducted in
12 Florida is thrown out, is deemed by the Supreme Court
13 or the Supreme Court of Florida to be null and void.
14 What would be the remedy? It has been pointed out to
15 you within Florida statutes, Florida Statute 103.021
16 (5)says when for any reason a person nominated or
17 elected as a presidential electoral is unable to serve
18 because of death, incapacity or otherwise. So let's
19 assume that or otherwise covers our situation that we
20 don't have electors. What does the statute say is
21 supposed to happen? It says the governor may appoint a
22 person to fill such vacancy who possesses the
23 qualifications required for the elector to have been
24 nominated in the first instance. In other words, if it
25 is a Gore representative who should have been nominated

Klein, Bury & Associates
Matthew P. Spoutz

1 in the first instance and because of the unavailability
2 of a Gore elector, a new Gore elector would be

3 appointed by the governor. That is what that provides.

4 THE COURT: You are mixing apples and

5 oranges.

6 What happens on November 7th is we have two

7 slates of electoral voters, 25 each. The democrats

8 have 25 and the republicans have 25. All you are doing

9 is replacing the tire on the car. If one is sick or

10 can't make it, you appoint somebody to take that

11 person's place. The governor can appoint you or I to

12 go vote in that person's place.

13 MR. PASSIN: The point I was making, Your

14 Honor, is why it is essential if Your Honor believes it

15 would be necessary to have a revote in Palm Beach

16 County, it is necessary under this section of the

17 statute to give guidance to the governor as to which

18 elector should be appointed.

19 Right now within the state of Florida I

20 believe there is a 300-vote difference between the Gore

21 and Bush tabulations, but there is a great controversy

22 in Palm Beach County as to what the true vote was that

23 is going to affect it. Somehow the question is

24 ultimately presented to the governor because of these

25 first-time situations we have never faced before, and

Klein, Bury & Associates
Matthew P. Spoutz

1 an interpretation of all these statutes is Governor

2 Bush, it is up to you to appoint the electors of the
3 state of Florida, then the methodology by which you
4 would appoint those electors would be who won the
5 popular vote of the state of Florida in which case Your
6 Honor's decision would be very crucial and, of course,
7 would give guidance to him because he would now have an
8 accurate vote cast in the state of Florida.

9 Finally, I know you wanted me to wrap up. I
10 was thinking. I know there are laws that require
11 congress to terminate by a certain time of night. I
12 have seen on the news what they do to get around that
13 is they reach up to the clock in the capitol and they
14 stop the clocks from ticking at about one minute to
15 midnight.

16 THE COURT: You are not asking me to cheat,
17 are you?

18 MR. PASSIN: No, sir. Not at all.

19 But what I'm asking you to consider is that
20 the process that we are in right now, the process we
21 are in, the rationale that congress does that is they
22 were in the process of completing the work and,
23 therefore, it is completed within the time prescribed
24 by law. And that is not a minor law. They have to do
25 that with the clocks because they have to bring

1 themselves in compliance with the law.

2 To bring us with the compliance of the law,
3 if Your Honor feels the statutes mandate the election
4 to only have been on November 7th even though we
5 continued through that process, it would be just as
6 relevant and appropriate for Your Honor to conclude
7 that we are simply in a process which began on November
8 7 which is continuing, and even if a new election is
9 held it is a continuation of that process and will not
10 violate any law because the election could be deemed to
11 have been conducted when it began which was on November
12 7th.

13 MR. SILVER: Barry Silver. I represent
14 various plaintiffs including many Haitian American
15 plaintiffs.

16 Your Honor, the Florida law that has been
17 quoted, 102.168 I believe it is, says that someone
18 challenging the election has a right to a hearing.

19 This hearing today, if Your Honor rules that
20 a new election is not possible, would potentially
21 eliminate the voter's right to a hearing and the
22 voter's right to have a remedy. Therefore, I believe
23 that when Your Honor evaluates whether it should
24 consider the possibility of a new election, it should
25 be similar to a summary judgment in which Your Honor is

1 going to assume that everything that the plaintiffs are
2 suggesting is true, and then assuming all of that is
3 true then still the court would automatically preclude
4 a new election. So I hope Your Honor may use that
5 standard in its consideration.

6 Now, what the plaintiffs are alleging is
7 similar to what if there was a machine malfunction in
8 the ballot and we had hard documentation that due to
9 this machine malfunction 100,000 votes let's say from
10 let's say Jews and Haitians mistakenly went to the Nazi
11 party? What would this court do? What could this
12 court do?

13 We respectfully suggest that this court has
14 the inherent right and the responsibility to say that
15 this result will not stand and, therefore, we will have
16 a new vote.

17 And by the way, Your Honor, we are not asking
18 for a new election. That is one possible remedy. You
19 could open it up and say everybody in Palm Beach County
20 vote again. That is not what these plaintiffs are
21 asking. That is one possibility. But a less drastic
22 way would be to say that the plaintiffs who voted
23 should be able to come back and vote again. If you
24 want to have them sign an affidavit saying this is what
25 I intended in a similar way as if we were to recount

1 the ballots and try to check out the mind of the voter
2 through dimples or through pregnant chads or whatever.
3 But what we are saying this is the best way to find the
4 intent, not by guesswork, but allow each person who
5 voted to come back and say this is what I intended.

6 And the plaintiffs are alleging, Your Honor,
7 that there was a mistake. And not only that. The
8 Supervisor of Elections is saying, yes, there was a
9 malfunction. She is saying yes, it is confusing.

10 For the first time perhaps in history a
11 political candidate came forward, Buchanan, and said
12 yes, these votes were mistakenly cast towards me.

13 I have clients who have testified under oath
14 that in my wildest imagination I would never ever cast
15 my votes for this person because he is antithetical to
16 my interests, he is an antisemite, he is against
17 immigrants and I'm an immigrant.

18 What we have here, Your Honor, if there is no
19 remedy, it is worse than the loss of the right to vote.
20 It is worse than disenfranchisement. It is not just
21 saying to people your vote won't be counted. It is
22 saying your vote is going to someone that you detest.
23 And even though that will change the outcome of the
24 election, and even if what the plaintiffs are saying is

25 true which Your Honor perhaps should consider, that

Klein, Bury & Associates
Matthew P. Spoutz

86

1 even if what you are saying is true, and even if your
2 vote went to someone you detest, and even if it was a
3 mistake, and even if it was done not by mistake but by
4 two different illegal acts which is what the plaintiff
5 is saying, even if all that is true, sorry.

6 I don't think the Constitution was meant to
7 say that, and that is why Florida law does give Your
8 Honor the opportunity to enact any relief necessary,
9 and we think this relief should be granted.

10 And by the way, Governor Bush has made an
11 admission against his interests. Your Honor is very
12 concerned about the amount of time this is going to
13 take. I know you are and we all are. But Governor
14 Bush's attorney said time is no problem, don't worry if
15 you set the hearing two weeks, three weeks, four weeks
16 down the line, that doesn't matter, we got plenty of
17 time for a new election. So for them, time is no
18 object.

19 For the statute, why wouldn't the framers say
20 December 12? Or why would the law say December 12 is
21 when the electors are appointed if not for the fact
22 that now we are going to look at their intent. What
23 was the intent when they said December 12? Probably

24 the intent was to allow Your Honor to fashion any
25 relief necessary if there was a mistake in the voting

Klein, Bury & Associates
Matthew P. Spoutz

87

1 machine, if there was a hurricane, if there were
2 illegal actions. That is precisely why they didn't say
3 you appoint the electors the day after election day, so
4 that you would have an opportunity to do that.

5 Moreover, Your Honor, what if we had a
6 contract situation and there was an ambiguity? We
7 would construe it against the draftsman. Right now the
8 draftsman is Theresa LePore who is a defendant in this
9 case. We are not saying she did anything intentionally
10 wrong. In fact, Theresa LePore has the utmost respect
11 I believe from everybody in this county, and everyone
12 who knows her has the utmost respect for her. What we
13 are saying is there was an honest mistake, and in law
14 when there is a mistake you construe it against the
15 draftsperson.

16 Yes, it is difficult to have perhaps a new
17 vote for people who voted, but that is the remedy. And
18 if there was a mistake, it is more proper to require
19 the supervisor to have a new vote or a new election
20 than it is to require people to vote against their
21 interests and for someone they despise.

22 And, by the way, the mistakes are legion.

23 I'm not going into them because that is what should be
24 determined at a hearing. Suffice it to say we can show
25 plenty of mistakes and plenty of reasons why voters

Klein, Bury & Associates
Matthew P. Spoutz

88

1 voted the wrong way through no fault of their own.
2 That is what we are alleging. Through no fault of
3 their own. They had no choice. There were two holes,
4 it said vote for the candidates, plural, they had to
5 vote for two because that is what they thought they
6 were supposed to do. That is why we want a hearing,
7 Your Honor.

8 Let me sum up. I think I'm about done.

9 Thank you.

10 THE COURT: Okay. Thank you.

11 MR. KORNWELL: Your Honor, if I may, I'm
12 sorry, my name is Bill Kornwell. I'm here. I'm one of
13 the lawyers who have been up to wee in the evenings
14 looking at the case law you directed us to look at. I
15 don't say that to foster any sympathy. I say it only
16 because you asked specifically that we address the law.

17 Two questions you have addressed to us out
18 here I don't think were answered clearly. I want to
19 try to answer them clearly. The first one was you said
20 under 102.168 you didn't think it was consistent or
21 could be read consistently with Title 3 U.S.C. 5

22 because of the six-day issue.

23 THE COURT: What I said was the date, the
24 time limitations do not coincide.

25 MR. KORNWELL: And I believe they do, Your
Klein, Bury & Associates
Matthew P. Spoutz

89

1 Honor.

2 THE COURT: I asked the wrong word.

3 MR. KORNWELL: I'm trying to address that. I
4 think they do coincide. I think you'll find if you
5 look at 102.168 there is a ten-day response time, and
6 there is a right to an immediate hearing. All of this
7 has to be resolved six days before the electoral
8 college meets which in this instance is December 12th.

9 The people drafting 102.168 understood that
10 elections would take place on the first Tuesday after
11 the first Monday in November, and they knew there was a
12 need to expedite any contest after such an election.
13 That is why they shortened the time period from 20 days
14 to ten days and called for the right to an immediate
15 hearing so this could be resolved in time for the
16 electoral college to meet, convene and have the
17 electors cast their vote, in this instance, by December
18 12. I think you do have time. That is the first point
19 I wanted to address. The six-day issue is six days
20 prior to the electors convening and casting their

21 ballots.

22 The second issue is Foster. Foster addresses
23 state action prior to the federal election day. Let me
24 say that again. Foster addresses state action prior to
25 federal election day in terms of ordering federal

Klein, Bury & Associates
Matthew P. Spoutz

90

1 elections.

2 The federal government, the Supreme Court
3 specifically, said that is preemptive, that kind of
4 state action is preempted.

5 Our case and what we are all here about is
6 postelection remedies for wrongs during the federal
7 election day election. In that case, state action is
8 not only not preempted, it is specifically contemplated
9 and authorized under the federal statutes. By that I
10 cite you to 3 U.S.C. 2 and 3 U.S.C. 5. It can be done.
11 There is time.

12 Thank you, Your Honor.

13 THE COURT: Thank you, sir. Appreciate it.

14 MR. CULLEN: Good morning, Your Honor.

15 Mark Cullen on behalf of the Horowitz
16 plaintiffs. I have only two issues to present to you.

17 THE COURT: Got a lot of paper from you.

18 MR. CULLEN: Yes, you have, Your Honor. I
19 only brought one with me to the podium.

20 THE COURT: We lost a rain forest.

21 MR. CULLEN: Your Honor, I direct your
22 attention, you raised an issue with regard to using the
23 analogous situation of an emergency and how the court
24 should deal with that situation. I direct your
25 attention to the Busbee versus Smith case which indeed

Klein, Bury & Associates
Matthew P. Spoutz

91

1 deals with that very same argument for your
2 consideration.

3 The second issue I bring to your attention in
4 light of Judge Lewis' decision, in light of the fact
5 there perhaps is one less remedy available to the
6 voters, your role in fashioning a remedy to the voters
7 because even more critical as there are fewer routes
8 through which the voters can go. Your role then
9 becomes much more critical in terms of fashioning a
10 relief.

11 In that sense then, as was presented in our
12 brief, we presented three different avenues the court
13 could take. It appears one of the avenues is no longer
14 there, so the court's situation becomes more difficult
15 in terms of selecting relief for the voters.

16 Thank you.

17 THE COURT: Okay.

18 MR. ROGOW: May it please the court, Bruce

19 Rogow and Robert Montgomery for Theresa LePore.

20 THE COURT: Good. Another professor.

21 MR. ROGOW: Judge, this case is not ripe.

22 There is no need to reach any of these constitutional
23 questions. Everyone here has talked about 102.168, but
24 they neglected to tell you the language of 102.168 (1)
25 says the certification of an election may be contested.

Klein, Bury & Associates
Matthew P. Spoutz

92

1 The election in Palm Beach County has not yet
2 been certified. There is nothing to challenge in Palm
3 Beach County at this moment. The importance of that is
4 this. What if the results in Palm Beach County turn
5 out to favor Mr. Gore and, indeed, what if that change
6 results in Mr. Gore being certified the winner
7 statewide?

8 The case presently pending in the Supreme
9 Court of Florida brought by the Palm Beach County
10 Canvassing Board poses the question that has been
11 framed by the Secretary of State and by the Attorney
12 General. If the count in Palm Beach County counts and
13 that changes the outcome of the election and Mr. Gore
14 is declared the winner of the election in Florida,
15 there is no need to talk about any kind of remedy. He
16 doesn't want any remedy because he will have prevailed.

17 And if, indeed, it is the other way and the

18 certification is in favor of Mr. Bush, the question
19 then becomes whether or not Mr. Gore wants to continue.
20 And without a statement from Mr. Gore saying he would
21 wish to contest this election that everybody is talking
22 about, there is no election to be had.

23 The electors may want to have an election.
24 But unless there is a candidate who continues to be a
25 candidate, there is no need to have any election.

Klein, Bury & Associates
Matthew P. Spoutz

93

1 THE COURT: I'm not all that sure the
2 vice-president can speak for the clients these lawyers
3 are representing here today. He can say stop his
4 lawsuits and they can keep -- It is their rights that
5 have been allegedly violated, not the vice-president's.

6 MR. ROGOW: That is true. But if they have
7 no one to vote for, if he takes a position I do not
8 want to pursue this any longer, then there would be no
9 need to have any election. That is why the wisdom of
10 102.168 is all important here. It says the
11 certification of an election. And by allowing the
12 election to be certifying and then seeing what happens
13 as a result of that certification either ultimately in
14 favor of Mr. Gore which then there is no need for his
15 electors to make this challenge, it is irrelevant, or
16 if it is against Mr. Gore, Mr. Gore then has to make a

17 decision about whether or not he wants to pursue it.
18 If he doesn't, whatever these electors want is
19 irrelevant then too. You can't vote for a person who
20 doesn't want the office and who has already conceded
21 the office.

22 I don't know what will happen. The only
23 point I'm making it is certainly a fundamental
24 principal of law that one avoids hard questions,
25 especially constitutional questions, if one can. This

Klein, Bury & Associates
Matthew P. Spoutz

94

1 case is premature. It is not ripe.

2 I come back to 102.168. The beginning
3 paragraph is the certification of an election. This
4 election has not yet been certified in Palm Beach
5 County. There is nothing before this court to act
6 upon.

7 THE COURT: Thank you.

8 MR. GREEN: Good morning, Judge.

9 James Green, West Palm Beach, for the
10 American Civil Liberties Union.

11 The ACLU you has routinely represented voters
12 and candidates in election contests throughout the
13 country in order to protect the right to vote and the
14 right to participate in an election process that is
15 fair, and we have done so without regard to the parties

16 at interest or the issues involved. We stand on the
17 papers we filed. I wanted to address one very brief
18 point.

19 Mr. Richard seemed to suggest on behalf of
20 the Bush campaign that the courts have limited remedial
21 powers. It is true under Article 3 of the United
22 States Constitution that federal courts are courts of
23 limited jurisdiction. However, Florida circuit courts
24 are courts of general jurisdiction with broad remedial
25 powers. I think that is an important distinction, both

Klein, Bury & Associates
Matthew P. Spoutz

95

1 with respect to what Mr. Richard said and also with
2 respect to the Donahue case which Your Honor cited.

3 THE COURT: Okay.

4 Anyone else wish to speak?

5 DAVID ROLAND: Peter Adrian and David Roland
6 in proper person.

7 Your Honor, basically I want to address a
8 statement made earlier regarding the Palm Beach voters
9 having some sort of different standard or advantage if
10 they were given a revote. A revote doesn't give them
11 an advantage. I just want the court to understand that
12 basically what it does, it preserves the constitutional
13 right that they have been given to vote, and that is
14 all they are fighting for. Over 19,000 voices,

15 actually 33,000, were not heard. And with an election
16 this close, we believe there will be injustice done if
17 they are not given the opportunity to be heard.

18 Thank you.

19 THE COURT: Thank you, sir. Appreciate it.

20 Anyone else wish to speak?

21 MR. FELDMAN: May I speak again for a moment?

22 THE COURT: Mr. Feldman. Yes, sir.

23 MR. FELDMAN: Thank you, Your Honor.

24 THE COURT: You can stay there if you wish.

25 MR. FELDMAN: Thank you.

Klein, Bury & Associates
Matthew P. Spoutz

96

1 If response to one of the professor's
2 comments, I would remind Your Honor that basically at
3 this moment we are here under the declaratory relief
4 statute, and the fact of the matter is there is no
5 certification necessary in order for Your Honor to do
6 anything. We are traveling that route. An alternate
7 ground is the statute per se.

8 What we are asking Your Honor basically to
9 do, because of the time constraints, it will become
10 impossible for Your Honor to do anything if you wait
11 until certification to get this thing moving if we are
12 going to do anything about it.

13 THE COURT: Given Judge Lewis' order I just

14 read to you, it seems to me that certification, unless
15 the Supreme Court stops it, may be found tomorrow.

16 By the time this order gets out it will be
17 ripe anyway.

18 MR. FARMER: Your Honor, Palm Beach County
19 has in fact certified its county results. That is what
20 happened last Tuesday at 5:00. Secretary of State
21 Harris had a representative at the emergency operation
22 center. I watched it occur on TV. The paper was
23 signed by the commissioners and handed over. The
24 certification at the county level has in fact occurred.

25 Judge, we are not asking you to determine

Klein, Bury & Associates
Matthew P. Spoutz

97

1 right now whether you should order this revote. It is
2 just whether you can order this revote. Even under the
3 Donahue case it says you can. The bar is set high, but
4 you can. We would ask you not foreclose that remedy at
5 this juncture.

6 Thank you very much.

7 THE COURT: Thank you, Mr. Farmer.

8 Anyone else wish to speak? This is
9 important. Anyone else?

10 MR. HANDLER: Thank you, Judge.

11 We also had a more perfunctory motion before
12 the court, a motion to amend. We wanted to add a count

13 to our complaint.

14 THE COURT: Anyone there for Mr. Richard
15 still on the phone?

16 MR. BIDEAU: I'm here from Mr. Richard's
17 office. Mark Bideau.

18 THE COURT: They filed a motion to amend
19 their complaint.

20 MR. HANDLER: We faxed it up to Mr. Richard's
21 office in Tallahassee. We wanted to add the statutory
22 count of the contest to our complaint for declaratory
23 relief. We think that issue is already in play before
24 the court, so we wanted to make sure we had symmetry
25 with our pleading, Judge. Therefore, we filed it more

Klein, Bury & Associates
Matthew P. Spoutz

98

1 perfunctory than anything else.

2 MR. BIDEAU: I can't take a position on it
3 never having seen the motion. Until I have a chance to
4 read the motion I really can't take a position on that.

5 THE COURT: I think they are saying the
6 complaint they had before, the bills having been
7 certified in Palm Beach County, now that they have in
8 Palm Beach County, now is the only time they can really
9 travel under 102.168 because the election has to have
10 been certified. Now they want to travel under on that
11 statute. That is what I'm saying.

12 So I'm going to grant the motion.

13 Do you have an order?

14 MR. HANDLER: We have a proposed order,

15 Judge. What we can do is make copies here and have it

16 conformed here.

17 THE COURT: Let me sign it. Today is the

18 17th.

19 MR. HANDLER: Yes, sir.

20 THE COURT: Mr. Clerk, this is the original.

21 Before we break up here, anybody else wish to

22 speak on this issue?

23 MR. CHEMBRINSKY: You read and I was speaking

24 with others, the language of Article 2 of the

25 Constitution. Two points haven't been made.

Klein, Bury & Associates
Matthew P. Spoutz

99

1 If you look at that language closely, it

2 speaks of the appointment of the electors. Congress

3 set a uniform date for appointing the electors. I

4 think what we are doing here is confusing two different

5 things, the date of the popular election and the date

6 of appointing the electors.

7 Congress said December 12 is the uniform form

8 date by which electors have to be appointed. The

9 popular election is set by statute. The reason that is

10 an important distinction is at the time the

11 Constitution was written the framer's didn't intend
12 popular elections in the way we have them now as
13 president. They let each state choose for itself how
14 to determine it's electors. In fact, the state
15 legislature could determine who the electors are going
16 to be. There is nothing in the United States
17 Constitution that requires there be a popular election.
18 If Florida wanted to let the Florida legislature choose
19 its electors it could do so. So I think the language,
20 I think that is clear as a matter of the Constitution.

21 THE COURT: You think that the people of the
22 state of Florida would elect the house and the senate
23 so they could then elect the electors who are going to
24 elect the president?

25 MR. CHEMBRINSKY: No. That is not what I

Klein, Bury & Associates
Matthew P. Spoutz

100

1 said.

2 I said that every state gets to decide for
3 itself how it is going to choose its electors. We now
4 have a convention where we choose the electors by
5 popular vote. But that is not what the framer's that
6 choose the electoral congress meant.

7 What I just said a moment ago, Your Honor, is
8 if Florida wanted by statute to say it is the Florida
9 legislature that chooses Florida's electors, it could

10 do so constitutionally. There is not a word in the
11 Constitution that requires there be a popular vote for
12 president.

13 So the language, Your Honor, you were
14 focusing on in Article 2 uses the word appoint the
15 electors. Congress set a date for that. That is
16 December 12th by statute. That is different from the
17 separate statute which provides for popular election.

18 There is a second point with regard to this.
19 You asked a question of whether or not the language in
20 Article 2 you read would permit a later election if an
21 election was voided.

22 The Donahue case actually is a case for the
23 plaintiff because Donahue says you have the authority
24 to void an election and hold another election
25 notwithstanding that language in Article 2, but Donahue

Klein, Bury & Associates
Matthew P. Spoutz

101

1 sets a high bar in terms of what would be under federal
2 law. Once you accept what Donahue establishes you can
3 do so, it is then Florida law that determines the
4 standards of whether you should do so, and that is the
5 Beckstrom case. I think those points were made and I
6 wanted to raise them.

7 THE COURT: Mr. Silver, quickly, please.

8 MR. SILVER: Very, very quickly. I just want

9 to clarify, Your Honor.

10 You are asking whether an election can be
11 held on another date other than November 7th. We are
12 asking as one of our remedies not to have another
13 election other than on November 7.

14 We are asking to go back in time to
15 November 7 and allow everyone to indicate how they
16 wanted their vote to be on November 7. Just as right
17 now past November 7 we are still counting ballots
18 trying to determine the intent, we are trying to
19 determine the intent as it was on November 7. We are
20 not asking people how do you feel now. We are asking
21 how did you feel on November 7, and what was your
22 intent on that date.

23 THE COURT: You don't want to call it a
24 revote. You want to call it a clarification?

25 MR. SILVER: If that would help, we could

Klein, Bury & Associates
Matthew P. Spoutz

102

1 call it a clarification.

2 MR. FARMER: One last request, Judge.

3 If we are going to have a hearing, I wonder
4 if we can preliminarily set aside a date so we can plan
5 accordingly, experts can be contacted and lined up, and
6 then if you decide you don't have the authority we can
7 cancel that hearing.

8 THE COURT: That's a good idea.

9 Next week, as you know, we have the holidays.

10 We are closed Thursday and Friday.

11 What I was going to suggest is a week from

12 Monday. Is that cutting it too close?

13 MR. FARMER: I would prefer we do it next

14 Tuesday or Wednesday, Your Honor.

15 MR. MONTGOMERY: What about the answer? What

16 about the complaint?

17 THE COURT: The problem, Mr. Montgomery, the

18 statute provides when you are dealing with election

19 laws --

20 MR. MONTGOMERY: There has got to be some due

21 process.

22 THE COURT: I understand that, Mr.

23 Montgomery. But we can't have interrogatories. We

24 can't have requests for production.

25 MR. MONTGOMERY: No, sir. But we can have

Klein, Bury & Associates

Matthew P. Spoutz

103

1 some discovery and some effort in order to prepare for

2 this particular hearing that is going to be --

3 THE COURT: What I'm going to do is schedule

4 it for a week from Monday. And next week you guys can

5 do what you want considering I ruled the way you want

6 me to I guess.

7 Now, as far as the ruling is concerned, I
8 intend to obviously be here this weekend and work on
9 this order which obviously, whoever doesn't prevail, is
10 going to appeal. So let's not fool ourselves. I don't
11 have the last word here, and maybe not even the first
12 word. Somebody with far more knowledge than me will
13 decide this. But by the same token, we need to get
14 that order quickly so you can get it up, whoever
15 losses, and take it up to where you need to take it.

16 I don't want to have to gather everybody
17 together again and have them set up the cameras and
18 come in here so I can read the order. I don't need the
19 exposure. I think I have had enough.

20 Why don't I just prepare, and I'll tell my
21 judicial assistant to prepare 50 of them and just have
22 one stack for the attorneys and one stack for the media
23 and one stack for the general public, and maybe set up
24 a place on the 5th floor, court administration, where
25 you can come in the hallway and pick them up.

Klein, Bury & Associates
Matthew P. Spoutz

104

1 MR. FARMER: That would be fine.

2 We would also be willing to accept by

3 facsimile if Your Honor is inclined.

4 THE COURT: If I start getting people my fax

5 number I would be getting faxes --

6 MR. FARMER: No. You could fax it to us. We
7 could provide our numbers to the court. I offer that
8 as a suggestion.

9 THE COURT: Why don't you do this?

10 All those attorneys interested in the order,
11 why don't you get a legal pad and write down your fax
12 numbers and your name next to them? Obviously your fax
13 numbers on the pleadings. I got so many of these
14 coming and going I'm going to miss people. If I get a
15 precise list of people's names and fax numbers I'll get
16 Sally to sit there by the fax machine for a couple
17 hours and get these things out.

18 What I'm going to do, I am going to put them
19 out in court administration, out front there on a
20 table. There is going to be one stack for the lawyers,
21 one stack for the media and one stack for the parties.
22 It will be there for you. We will see what happens.

23 If I rule that a hearing, that a reelection
24 is possible, even permissible, you can assume we are
25 going to have a hearing at Monday at 9:30. We can

Klein, Bury & Associates
Matthew P. Spoutz

105

1 start at 9:00 if you want to. One good thing about
2 having to do this I don't have to do the motion
3 calendar.

4 MR. KUEHNE: Your Honor, there are two brief

5 matters.

6 Ben Kuehne representing the democratic party.

7 With regard to the proceedings in

8 Tallahassee, would Your Honor appreciate receiving

9 copies of any material being submitted to the Supreme

10 Court so you understand what is being done?

11 THE COURT: Absolutely.

12 MR. KUEHNE: We understand that is being done

13 on an emergency basis.

14 THE COURT: Absolutely. I will give you my

15 fax number, but then I'll have to shoot you. If you

16 could have somebody deliver it to my office, I really

17 want to know what is going on up there. Obviously

18 tomorrow is a big day other than the Florida FSU game.

19 MR. FARMER: Thank you.

20 THE COURT: But tomorrow is obviously a big

21 day as to what happens with the Secretary of State and

22 what actions are taken up with the higher courts after

23 that.

24 Let me ask you good lawyers this question.

25 If the Secretary of State certifies the election

Klein, Bury & Associates
Matthew P. Spoutz

106

1 tomorrow, I guess you will first go to the Supreme

2 Court? Would that be the first court you would go to?

3 MR. KUEHNE: Florida Supreme Court does have

4 pending jurisdiction over these matters, so we
5 anticipate relief will be requested of the Supreme
6 Court at that time.

7 But our position is even with state
8 certification, the matters pending before this court
9 are not moot because the statute still allows the time
10 period to make the contest. That is my second item,
11 Judge. We expect that since that time clock for
12 contest is ticking or will be maybe ticking, you may be
13 receiving additional contests. I don't know that you
14 will, but you may be.

15 THE COURT: Additional what?

16 MR. KUEHNE: Additional contest lawsuits.
17 102.168 says since they are required to be filed within
18 a certain period of time. I alert you to that because
19 the procedure probably should be the same, that they be
20 brought together so the matters are handled as one.

21 THE COURT: Let's do them all together.

22 MR. BARNHART: If it please the court, we
23 listened to a number of our colleagues make their
24 arguments. The Democratic Party, most respectfully to
25 our colleagues, do not agree with all the arguments

Klein, Bury & Associates
Matthew P. Spoutz

1 made. If there is to be a hearing, to make it
2 effective in terms of presentation and in terms of

3 fairness to all sides, I agree with Mr. Montgomery,
4 there needs to be a fashion through which we can
5 orderly take whatever discovery may be necessary and
6 present and cross-examine witnesses.

7 THE COURT: What I suggest is you lawyers
8 know who your experts are by now I hope. Did I not
9 order somebody provide copies?

10 MR. FARMER: Yes.

11 THE COURT: Copies of reports and things like
12 that. So you know who they are.

13 What I suggest you do is get busy this week.
14 You good lawyers can agree if you want me to enter an
15 order that all depositions of all experts are to be
16 taken by Friday of next week, I can do that if you
17 want.

18 Under the circumstances, Mr. Montgomery, I
19 don't know what else I can do. These are not normal
20 times here. Again, we have an election. We have the
21 Secretary of State about to certify the election. I
22 don't know what is going to happen.

23 MR. MONTGOMERY: We will abide and comply
24 with anything the court orders. I need some semblance
25 of order to know what we are doing.

Klein, Bury & Associates
Matthew P. Spoutz

1 THE COURT: You know who each other's experts

2 are.

3 MR. FARMER: We have disclosed ours.

4 MR. KRATHEN: Nobody disclosed anybody to us.

5 MR. FARMER: I sent a letter to the

6 Canvassing Commission lawyers last week asking them if

7 they intend to present any expert testimony.

8 THE COURT: How about Governor Bush? Does he

9 have any experts in reference to the question raised?

10 MR. BIDEAU: We just received this morning

11 their expert information. Once we have analyzed it, we

12 will determine if we need the experts. We were

13 supposed to get it two days ago.

14 MR. FARMER: You got it last night.

15 THE COURT: Let's say Governor Bush is to

16 decide whether he is asking to call any experts or not

17 let's say by 5:00 today. Can you review those today

18 and let me know?

19 MR. BIDEAU: I think Mr. Richard is probably

20 over at the Supreme Court now. We can certainly do it

21 by Monday.

22 THE COURT: Say Monday 12:00 noon? Then you

23 good lawyers sit down, get together and decide when you

24 want to depose whoever.

25 Can I trust you to do that? You are not

Klein, Bury & Associates
Matthew P. Spoutz

1 going to be fighting as to I got to be in Atlanta that

2 day or I got to be in Hawaii that day?

3 MR. BARNHART: My point, Judge Labarga, there

4 needs to be lead counsel. There cannot be 20 people.

5 THE COURT: I understand.

6 The question I have, Mr. Barnhart raises an

7 interesting question, we going to have these experts

8 being deposed and are we going to have every person in

9 the world coming in wanting to be on CNN asking a

10 question or two just for the sake of that. And I agree

11 with that. So far, I seen Mr. Farmer, I have seen Mr.

12 Keuhne and Mr. Barnhart, I've seen the Weiss and

13 Handler law firm, I have seen Mr. Montgomery and the

14 county attorney in the back. Obviously Mr. Richard and

15 Gary Dunkel and whoever else in the firm. They seem to

16 be the major players or the major attorneys involved in

17 this litigation from what I have seen so far. Everyone

18 else is obviously assisting me which I deeply

19 appreciate. But they seem to be the ones.

20 What I suggest is you guys be the ones that

21 take the depositions and do the discovery and get this

22 thing ready, and I'll be here for you Monday morning at

23 9:30 need be.

24 MR. GIBSON: Your Honor, Gerry Gibson for the

25 Secretary of State.

1 Again, in the interest to expedite things, do
2 I understand correctly that Your Honor has denied our
3 motions to dismiss this case for improper venue?

4 THE COURT: Right. We had that discussion
5 with Mr. Richard.

6 MR. GIBSON: For clarification of the record,
7 that ruling then applies to all the cases pending
8 before Your Honor? We made that same motion.

9 THE COURT: I believe Ms. Harris has been
10 dropped as a party in most of these lawsuits.

11 MR. GIBSON: That is wrong. That is not
12 true. We are a party in several of these suits.

13 I would like clarification for the record.

14 THE COURT: That raises another can or worms
15 because you heard the argument made.

16 MR. FARMER: Judge, you ruled on
17 indispensable parties when we were here on Monday. You
18 recall the Steel Hector lawyers were arguing
19 indispensable parties because remember I voluntarily
20 dismissed Secretary of State Harris, Governor Jeb Bush
21 and Clay Roberts. We talked about the statute. You
22 said only the candidates are the indispensable parties
23 and you denied the motion for failure to add
24 indispensable parties. I think that is the law of the
25 case.

1 THE COURT: That is the law of the case.

2 But if there are lawsuits with Ms. Harris as
3 a party in it, then the law clearly says they have to
4 be in Tallahassee.

5 MR. FARMER: I have no quarrel with that. My
6 lawsuit does not have Ms. Harris in it.

7 THE COURT: Whatever lawsuit has Ms. Harris
8 in it must be held in Tallahassee. That is by statute.

9 MR. GIBSON: We had two motions, two parts to
10 our venue motion. One was that the action contesting
11 the statewide election like this one under the statute
12 had to be also in Leon County. It was a two-part
13 motion we made in the Rogers case.

14 So I understand correctly, those motions are
15 denied in all of the transferred cases pending now
16 before Your Honor?

17 THE COURT: Your change of venue, is that
18 pursuant to 102.168 (5)?

19 MR. GIBSON: Yes.

20 THE COURT: Mr. Richard and I had a lengthy
21 discussion about that. I denied that motion because I
22 believe that statute encompasses Palm Beach County.
23 The election involved here does not encompass more than
24 one county.

25 MR. GIBSON: Thank you.

Klein, Bury & Associates
Matthew P. Spoutz

112

1 Denied as to both the Secretary of State and
2 Governor Bush I understand.

3 THE COURT: Yes. My ruling was that any
4 lawsuit that has the Secretary of State in it as a
5 party, that lawsuit is transferred to Tallahassee, Leon
6 County. That is by statute. You can only be sued in
7 Tallahassee. If you have a lawsuit that has the
8 Secretary of State in it as a party, then don't come
9 back Monday.

10 MR. PASSIN: Robert Passin.

11 I do have a case in which I named Secretary
12 of State Harris. I do have legal authority under the
13 sword yielding doctrine where it is proper to have
14 venue for that case in this county. Also the venue
15 statute you cite only states to a contestant running
16 for the election, not the taxpayer or the voter of the
17 county. I need to be heard on that issue.

18 THE COURT: Mr. Passin, your case is in
19 Tallahassee. Have a nice day.

20 Next.

21 MR. LAWLOR: You haven't heard about the
22 issue. There is an exception to that statute.

23 THE COURT: I heard from you.

24 LAWRENCE GOTTFRIED: Your Honor, I will be

25 very brief. My name is Lawrence Gottfried. I'm here

Klein, Bury & Associates
Matthew P. Spoutz

113

1 pro se. I'm a voter in Palm Beach County. I have no
2 set of legal team following me.

3 I filed several papers with Your Honor. I
4 will make two quick points. One, even if Your Honor
5 were inclined to want a revote, no one has addressed
6 the practical issue there are voters who are unknown
7 that are somewhere out in this world that will not be
8 able to come back and vote again, will not know of the
9 proceedings. Yes, there are places in the world where
10 people will not hear of Palm Beach County.

11 As a result, my rights and the rights of
12 every other voter in that election will be bridged if
13 there is a revote.

14 Now, since Your Honor has indicated, and I
15 think he is doing so with due judicial diligence, take
16 time over the weekend with the extraordinary amount of
17 paperwork and the extraordinary situation facing him,
18 to offer a written opinion except of one from the
19 bench. I would urge Your Honor to read the paperwork I
20 submitted this morning which is an emergency TRO,
21 particularly in light of the decision handed down and
22 Your Honor saw fit to read into the record today. It

23 is a temporary restraining order stopping the hand
24 count as a waste of assets of the citizens of this
25 county until such time as a decision is made whether or

Klein, Bury & Associates
Matthew P. Spoutz

114

1 not that would be appropriate for the count to go on,
2 the extraordinary expense being incurred as a result of
3 something that may be moot by either Your Honor or
4 another venue. And it looks like the Secretary of
5 State, in its infinite wisdom, and the infinite wisdom
6 of the judge of Leon County saw she took six hours
7 according to her. That is an inordinate amount of time
8 to think over, assess. She sought counsel and came up
9 with a decision. She is an elected official charged
10 with that responsibility. She rendered that. And
11 tomorrow at approximately 12:00 noon it is anticipated
12 she will certify the vote.

13 Everybody is expecting it to be Governor
14 Bush. It may be Vice-President Gore. Nobody really
15 knows for sure. But until that happens, and if it is
16 in fact Governor Bush and there are appeals, what is
17 going on now across town at Military and Southern costs
18 the taxpayers, costs myself, costs the citizens of this
19 county, immeasurable amounts of time and money, and I
20 would urge the court to look at my paperwork, issue the
21 temporary restraining order until such time as it

22 becomes relevant to continue the hand count.

23 Thank you, Your Honor.

24 THE COURT: Thank you, sir. Appreciate it.

25 Gentleman in the back, you wish to come up?

Klein, Bury & Associates
Matthew P. Spoutz

115

1 KENNETH HOROWITZ: Thank you. My name is

2 Kenneth Horowitz. I'm not an attorney. I am a

3 plaintiff in one of the cases being heard here.

4 There are a lot of eloquent comments made by

5 various attorneys today. I need to point out in fact I

6 don't have a lot of knowledge of law. I have a sense

7 of what is right. And I needed to respond right now

8 based upon what the other gentleman just said. That is

9 I voted correctly. I was with my son in the voting

10 booth. We both saw where someone could make a mistake.

11 What brought me to all this, when I walked

12 out of the voting booth, there were three elderly women

13 and a gentleman talking together. The old man was

14 crying. I asked him why. I didn't know what was

15 wrong. He said after speaking with the women that he

16 voted incorrectly and he wanted to go back in to

17 revote. I explained to him that really wasn't possible

18 because there was a card that didn't have his name on

19 it that he deposited into the box. He began to explain

20 to me he was a veteran, he fought for this country.

21 His last words were somebody has to do something. That
22 is what he said to me. And I just felt bad in my
23 heart. That is why I got involved in this.

24 Despite this gentleman talking about the time
25 and money that is needed to right things, there is a

Klein, Bury & Associates
Matthew P. Spoutz

116

1 certain hurt going on I have observed personally. And
2 I know in your good wisdom you will do the right thing.

3 THE COURT: As I said earlier, if I rule that
4 the Constitution does not allow for new election, it
5 will be the hardest decision I will ever make.

6 KENNETH HOROWITZ: I believe that. Thank
7 you.

8 THE COURT: Okay. Who is next?

9 MR. FARMER: Move to adjourn hearing.

10 THE COURT: Thank you.

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

Klein, Bury & Associates
Matthew P. Spoutz

117

1 CERTIFICATE

2 I, MATTHEW P. SPOUTZ, Court Reporter, certify

3 that I was authorized to and did stenographically

4 report the foregoing proceedings had before the

5 HONORABLE JORGE LABARGA, Presiding Judge, at the Palm

6 Beach County Courthouse, West Palm Beach, Florida, on

7 the 17th day of November, 2000, commencing at

8 9:35o'clock A.M.; and that the transcript is a true

9 record.

10 Dated this _____ day of _____, 2000.

11

12

13

MATTHEW P. SPOUTZ, Court Reporter

14

15

16

17

18

19

20

21

22

23

24

25

Klein, Bury & Associates
Matthew P. Spoutz