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AN ELECTION NIGHT MEMO TO CANDIDATES IN RACES INVOLVING A RECOUNT

*John Hardin Young**

It looks like the results in your race show you dead even with your opponent.

You have several choices in the next few days that will make a great deal of difference to you. How you handle these choices will determine your political future.

First, you need to be respectful of the process. Remember you are talking to, and about, people who took the time to go to the polls. Fortunately, half of them like you and voted for you. Unfortunately, the other half does not like you and did not vote for you. You need to appeal to all of them about wanting to do the right thing. Judges and election officials are also listening. Follow the process. The process has the power to put you in office if you let it. Do not try to “game” the system.¹ If you have any doubts, think about the mistake Al Gore made in 2000 when he listened to those advisors who wanted a recount only in the four Florida counties in which he won big, and who then selected the slogan “Count Every Vote.”² Sore losers in recounts rarely make a comeback in subsequent elections. Remember—Nixon accepted defeat in 1960, although the Chicago results might have made him question the outcome, and then came back to win in 1968.

Second, your campaign needs to gather all the data it can. Start with the official canvas that usually commences within days of the election. Do not trust the election-night results. Look at the election-night results, however, to identify precincts that need immediate, on-the-ground investigation, and then immediately get field people in those precincts to gather every piece of election information they can—how many people are registered, how many voted, what the vote totals for all races were (i.e., is there a trend you can decant), what the projections were, what the individual machine totals were, whether there were any incidents during the election day voting, whether all

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1. For an explanation of the importance of a “principled approach to a recount,” see Steve Brickstaff, *Post Election Legal Strategy in Florida: The Anatomy of Defeat and Victory*, 34 LOY. U. CHI. L.J. 149 (2002).

2. See JEFFREY TOOBIN, *TOO CLOSE TO CALL* (2001); JAKE TAPPER, *DOWN & DIRTY* (2000).

the totaling devices have been accounted for and counted, and whether all the ballots have been counted (because you will be surprised to learn that results and total tapes get left in schools, cars, and just about anywhere except in the counting room).

Third, choose your most trusted campaign staff member to run your recount. Pick the person you would want to handle your personal checkbook. This person will be key in making sure that all the information is gathered and that you stay on message. Get the most solid *in state* trial lawyer you can to represent you and to work with the court and election officials. Choose solid over flash. Let your chief trial attorney assemble his or her trial team, and hire a recount expert to work with your lawyer. Have your team develop all the options and likely outcomes and then create your strategic plan that everyone will follow. When you are in a tight race, as you are, there will be lawyers and political advisors jetting and dropping in by the dozens. Listen to them, and then send them home to work on discrete legal issues and raise money. The brilliance of the Bush 2000 Florida Recount was to assign tasks to the likes of Ted Olson and his team to be performed from their Washington offices. For those people who truly want to be in the field, thank them and thank your lucky stars for them, and make sure they are out in the field gathering election data immediately.

Fourth, set up computer spreadsheets to analyze, and reanalyze, each piece of the election results. Get hard numbers. Do not put any trust in those political advisors who project great vote changes unless they can prove each number in their projection. One of the most bizarre parts of the one-day trial in the Florida recount was when Al Gore's expert projected unobtainable leads for Al Gore in Miami-Dade when in fact his lead was very small. In other recounts, expert mistakes have had more people voting in the jurisdiction than live there. When this happens, you lose all credibility.³ (Watch out, however, for those precincts in which these anomalies truly exist because they will be areas in which the vote will change.)

Fifth, organize a field staff that will cover the complete jurisdiction. Do not miss any precincts. Remember your votes can be anywhere. Another mistake—a very big mistake in Al Gore's recount—was to ignore votes in DuVal County and in the north central optical scan counties where he could have picked up votes even though Bush had carried the counties.

Sixth, when the actual recount occurs, have a principled approach to the process.⁴ Be, and appear to be, fair. If a ballot looks like a vote for your opponent, recognize it as such. Demand the same when the vote looks like it

3. See TIMOTHY DOWNS, CHRIS SAUTTER & JOHN HARDIN YOUNG, *THE RECOUNT PRIMER* (1994).

4. See *supra* note 1; see also Symposium, *Evolving International Standards Pertaining to the Resolution of Election Disputes*, 57 ADMIN. L. REV. 829 (2005).

is for you. If the members of your staff have done their homework, they will be able to instantly tell you where you are in the count and all the likely outcomes. You will be surprised how far this approach will take you in the proceedings and in the eyes of the voters.

Last, use common sense. Thank everyone for putting up with the recount when they should have been with their families for Thanksgiving and doing their holiday shopping. And finally, thank the voters.

