CHAPTER 6

Surviving a Scare

Daryl Bristow, the white-maned, elegant trial lawyer from the Baker & Botts firm in Houston, was well into preparation for his role in the defense against Gore's contest suit when he received a call from his senior Houston partner. It was Wednesday, November 29.

"Daryl," said Baker, "I'm going to ask you to do something with no upside. If you win, no one will give you credit because it's a case that's too easy to win. If you lose, you'll always be known as the guy who blew the big one."

Bristow knew that Baker was referring to the lawsuits filed by Gore supporters in Seminole and Martin counties. They were asking the courts to throw out more than 15,000 absentee ballots because Republican officials had been permitted to correct voter identification numbers incorrectly printed or left out altogether on request forms for the ballots.[1] Ginsberg's legal team had conducted a cursory review of the claims and determined them to be lacking in merit if not altogether frivolous, so the cases had plunked along off the radar screen in the two counties during the protest phase of the Florida battle. But now that the two sides had moved into the contest period, the cases, like all others, had been transferred to Leon County, where they were generating national media coverage.

Baker explained the concerns that had led him to ask Bristow to handle the matter. First, the absentee ballots in the two counties had provided Bush with a margin of more than 7,000 votes. Should he lose either case, Bush's battle for the presidency would be lost. Second, the cases involved textbook examples of state law, lacking the federal hook, for example, of Equal Protection or Due Process. Were Bush to lose in the Florida courts he would have a much tougher time getting U.S. Supreme Court attention than he might in lawsuits challenging selective manual recounts or changes in the certification deadline. Finally, the Seminole County case had been assigned to Circuit Court Judge Nikki Ann Clark—black, female, Democrat—a one-person demographic nightmare, and a former aide to Governor Lawton Chiles. Moreover, Judge Clark had recently been passed over by Governor Jeb Bush for appointment to the District Court of Appeals, a move which Florida sources said had left her deeply hurt. Should she rule on behalf of the plaintiffs, the best that could happen would be an appeal to the Florida Supreme Court and its outcome-oriented band of judicial ad-libbers. And even that shot at relief was not considered a sure thing because a narrow reading of state contest laws could lead a jurist to conclude that the legislature had vested sole jurisdiction in the circuit courts, permitting no appellate review.

By the time the two men had concluded their discussion, Bristow was making plans to fly to Orlando to begin taking depositions in the case. In doing so, he was stepping into a case from which Gore and his immediate political family had, for purely tactical reasons, chosen to distance themselves, but one in which their behind-the-scenes role was substantial. The importance of the case to Gore would be emphasized when, during the first week of December, the vice president himself sought to summarize it for reporters in a way that distorted the record beyond recognition.

What happened in Seminole and Martin counties was the result of a clerical error by a veteran Dallas direct mail firm, James Foster and Associates, hired by Florida Republicans to

prepare absentee ballot requests for GOP voters residing abroad. A Florida statute that provides that such forms must include the name and address of the voter and the last four digits of the voter's social security number, had been amended in 1998 to require as well the number on the voter's registration card, thereby providing election officials with an additional means of determining that those requesting absentee ballots were in fact eligible to vote. The request forms mailed out by the Democratic Party included either a space where the person making the request could provide his or her voter registration identification number, or in some cases, the proper number itself. In contrast, the forms distributed by the Foster firm did not include a number or space for one, or any indication that such a number need be furnished.

Barely mentioned by the media was the fact that the Republican oversight was not limited to Seminole and Martin counties. Others too had been touched by the GOP negligence, but when the problem surfaced elsewhere, county election officials, recognizing that they had adequate means of identifying the voters without the identification numbers, treated the problem as de minimus and mailed off the requested ballots. Only the supervisor of elections in Seminole County, Sandra Goard, and her counterpart in Martin County, Stewart Hershey, set the imperfect forms aside, refusing to process them.

Republican Party officials contacted Goard requesting permission to send representatives to her office to correct or complete the ballot request forms. She agreed. Michael Leach, the north Florida regional director for the GOP, assisted occasionally by one or two others, corrected the request forms. Commissioner Goard then mailed the absentee ballots overseas, and thousands of voters abroad cast ballots before the November 7 deadline. Interestingly, the Democratic ballot request forms from Seminole County were returned not to Goard directly but to House Victory 2000, the nerve center of the state's Democratic operation, where party workers prepared the envelopes for delivery to the election commissioner's office. In

terms of the opportunity for tampering, there was thus no functional difference between the parties.

An identical process took place in Martin County save the fact that there, county officials permitted Republican workers to remove the ballot application forms from the county office, returning them after they had been corrected.

Striking about the process was its openness. The GOP problem in Seminole County was discussed in local radio news reports and Leach, armed with his personal laptop computer, made the corrections in the county office during regular working hours. Local Democratic Party officials were aware of the activity but offered no protest. Bob Poe, the state Democratic chairman, did complain to Goard in October, but was unable to persuade her that the activity was inappropriate. Only after the election did Harry Jacobs, a flamboyant Seminole County Democrat and lawyer, initiate legal action.

The Bush lawyers who perused the case concluded immediately that it was without merit. Two leading Florida Supreme Court decisions seemed dispositive of the issue. In *Boardman v. Esteva*,[2] the court declined to exclude more than 1300 absentee ballots in a race for a court of appeals judgeship despite a showing of minor irregularities, including failure to state the reason for voting absentee and omitting the addresses of attesting witnesses. The court held that because the will of the voters was the primary consideration, substantial compliance with election laws was enough: "It is the policy of the law to prevent the disenfranchisement of electors who have cast their ballots in good faith, and while the technical requirements set for the absentee law are mandatory, yet in meeting these requirements laws are construed so that a substantial compliance therewith is all that is required."

Boardman contained other language that was of central importance to the Seminole and Martin cases. Statutes often contain provisions that serve to guide executive agencies but that, if ignored, do not invalidate their actions. The 1975 court held that unless the statute specifically provides that the

failure to obey a particular provision invalidates the vote, "the statute should be treated as directory, not mandatory, provided such irregularity is not calculated to affect the integrity of the ballot or election." Thus, for example, an election board cannot under Florida law count the ballot of an absentee voter who fails to include on his ballot the date he voted. That requirement is *mandatory*. But an application may be sent to a voter who leaves his voter identification number off the request form because that provision is *directory*.

The disinclination of the courts to disturb the expressed will of voters in the absence of fraud was underlined in the more recent case, *Beckstrom v. Volusia County*. The case involved an election for sheriff in which absentee ballots that did not register a vote on their first feed through an optical scanner were manually marked by election officials with a felt tip pen and rescreened. Had the officials followed previously instituted guidelines they would have made copies of the undercounted ballots and marked the copy for scanning while preserving the original ballot in a designated envelope. Here the action of election officials was both grossly negligent and rife with opportunities for fraud. However, no fraud was evident. Indeed, the affected ballots included a higher percentage of undervotes and a lower percentage of overvotes than ballots not subject to manual intervention. Had the canvassing board been filling in blank ballots, there would have been fewer undervotes. Had it been defiling ballots by adding names, there would have been more overvotes.

"We simply conclude that the court should not frustrate the will of the voters if the failure to perform official duties is unintentional wrongdoing and the will of the voters can be determined," held the court.[3]

Both *Boardman* and *Beckstrom* were right on point. The difference between a "mandatory" and "directory" provision of the law was critical, and here it favored the Bush absentee voters. The Bush lawyers simply saw nothing to fear in Seminole and Martin counties. The law was on their side, unequivocally.

For Gore, who had adopted the “count every vote” mantra early during the selective recount battle, Seminole and Martin counties provided a delicate political problem. Potentially they represented victory in the election in one luscious gobble. But embracing the effort by adding it to the contest lawsuit would be viewed by the press and blasted by Republicans as a cynical desperation move, particularly coming on the heels of the much-criticized effort to block the counting of military absentee ballots.

So the Gore team decided to play it both ways, publicly distancing the vice president from the case but effectively taking over the litigation by providing counsel to the Seminole plaintiff and orchestrating a public relations campaign, on one occasion involving Gore himself, that would present an egregiously false picture of what had actually transpired. One of Gore’s closest allies in the labor movement, Jack Dempsey, the general counsel of the American Federation of State, County, and Municipal Employees, helped coordinate the efforts in both Seminole and Martin counties. Meanwhile, Joe Sandler, chief counsel to the DNC, recruited Gerald Richman, a leading Palm Beach lawyer, as Jacobs’s attorney.

The Gore involvement didn’t stop there. Jacobs acknowledged in a pretrial deposition that he had met with Gore’s lawyer, Mitchell Berger. The meeting was also attended by Richman. Reporting on the conversation, the *Washington Post* quoted Berger telling Richman, “We’re England, and you’re the United States. We’re beleaguered here, and you’re the one that has the chance to come through.”[4]

Days after that meeting, Richman received a call from Steven Kirsch, a Silicon Valley billionaire and generous Gore contributor, who promptly volunteered $150,000 to finance the Seminole County case and followed that up with a similar donation to the Martin County plaintiffs. The money permitted the Gore surrogates to retain a public relations specialist who began what proved to be a successful effort to interest the national media in the two cases. Suddenly stories began to appear suggesting that the cases not only involved

tampering with absentee ballot applications, but also wildly disparate treatment of similar Republican and Democratic situations in Seminole County, and conduct by election officials that was punishable as a felony under Florida law.

Gore himself got into the act on December 5. Asked by the Washington press about the Seminole and Martin county cases, the vice president replied as follows:

> Well, there were more than enough votes to make the differenc, that were apparently thrown into . . . the applications for ballots were thrown into the trash can by the supervisor of elections there, apparently, even though they were missing the same number that the Republican Party workers were allowed to come in and fix the other applications with. So I don't want to speculate on what the remedy might be; I'm not a party to that case or the Martin County case. But more than enough votes were potentially taken away from Democrats, because they were not given the same access that Republicans were. Remember, according to what's come out in that case; again, I'm not a party to it, but I've read about it.

Gore continued:

> Apparently the Democratic Party chair was denied the opportunity to even look at the list of applications, whereas the Republican Party workers were allowed to roam around unsupervised inside the office and bring their computers in and fix all of the valid applications for one side even as the Democrats were denied an opportunity to come in, denied a chance to even look at the applications and those applications were thrown out. Now, that doesn't seem fair to me.[5]

As the facts acknowledged by both sides would soon show, contrary to Gore's account there had been no Democratic forms thrown away in the wastebasket or anywhere else and no discrimination against the Democratic Party of any kind. The missing voter identification numbers were exclusively a Republican problem. And as such there was no need to permit any special Democratic access because no Democratic ballot applications were in danger of being disallowed.

Bristow saw the core of his case as sound but fretted about the fringes. Barry Richard was telling him he could expect

fair treatment from Judge Clark, but other Florida veterans were warning that she was a judicial time bomb waiting to explode. Bristow felt he could take no chances and moved first to consolidate the two cases under Judge Terry Lewis, who had ruled for Katherine Harris on the recount extension. Then he moved for Judge Clark to recuse herself due to her strong anti-Bush feelings arising from the Florida governor's failure to promote her. Both motions were lost.

"That was a mistake," Bristow later said. "After fifteen minutes in her courtroom, I knew we would get a fair decision. Judge Clark takes control. She inspires confidence."

In Bristow's written pleadings, the Bush lawyers took the further precaution of trying to inject federal issues into the case. The hope was to preserve a hook for the federal courts just in case things went awry in Florida. Citing a civil rights-era provision of the federal code that forbids anyone acting under color of law to "deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under state law to vote in such election."[6]

Powerful stuff, to be sure. But Bristow knew the problem was that if the Florida courts interpreted the violation as *material* to voter qualification, the federal courts would be hard-pressed to overrule that conclusion.

Both Bristow and others were impressed when, early in the trial, Judge Clark went matter-of-factly about her business, ignoring the glaring presence of the Reverend Jesse Jackson in her courtroom. As Jackson lacked a documented intellectual fascination with the arcane vicissitudes of Florida election law, Bristow could only assume that Jackson's presence was intended to fortify, or perhaps intimidate, Judge Clark into delivering a decision favorable to the candidate who had won 93 percent of the votes cast by African-Americans nationwide.

Bristow's other problem involved potential witnesses. Sandra Goard was a career public servant—quiet, fragile, and frightened. The two Republican Party officials who had actually corrected the ballots in each county, Michael Leach and Todd Schnitt, were potential problems. Leach was right-wing even by the standards of conservative Florida Republicans and maintained a political Web site that, if it came into play, could expose the Bush campaign to ridicule. Schnitt, on the other hand, seemed unduly nervous about the proceedings and there was no way to predict how he would act on the stand.

So Bristow decided to take advantage of everyone's desire to save time, particularly with both trials scheduled to take place on a rotating basis in the same Tallahassee courtroom. He had his team draft a lengthy stipulation, admitting to 95 percent of the facts the other side was prepared to place on the record through its own witnesses and cross-examination. To his delight, Richman agreed. Leach never took the stand in either case because few facts were in dispute. Goard too, a potentially nervous witness who had exercised zero supervision over her Republican visitors, was spared from having to testify. And Schnitt's testimony did minimal damage in the Martin County case even though he froze when plaintiff's counsel asked him whether he realized that by tampering with the absentee ballot applications he had committed a "third-degree felony."

Both Judges Clark and Lewis released their decisions just after 2:30 P.M. on December 8 as the nation awaited what many expected to be the definitive resolution of the 2000 election by the Florida Supreme Court. The two judges found for Bush on all material issues. Indeed, Judge Lewis noted that because the provision of a voter identification number was directory rather than mandatory, election officials could have mailed the ballots to the absentee voters without requiring any fix. "The failure to comply with the statutory procedure was not intentional wrongdoing, but rather was the result of an erroneous understanding of the

statutory requirements. There is also no basis in the evidence to conclude that the irregularities affected the vote."

Nor did either jurist find any basis for suggestions that Democrats had been treated differently than Republicans in the two counties. The Democrats had simply never had the voter identification number problem, so there had been no need for them to participate in the cure. As Judge Clark concluded, "For all the foregoing reasons, the court finds that the certified election in Seminole County was the result of the fair expression of the will of the people of Seminole County."[7] Justice Lewis also concluded that despite the minor irregularities, "the sanctity of the ballot and the integrity of the election were not affected."[8]

Four days later, the Florida Supreme Court unanimously affirmed both decisions. By then, of course, Seminole and Martin Counties were again off the radar, about as far off as two counties can get.