Supreme Court Advocacy

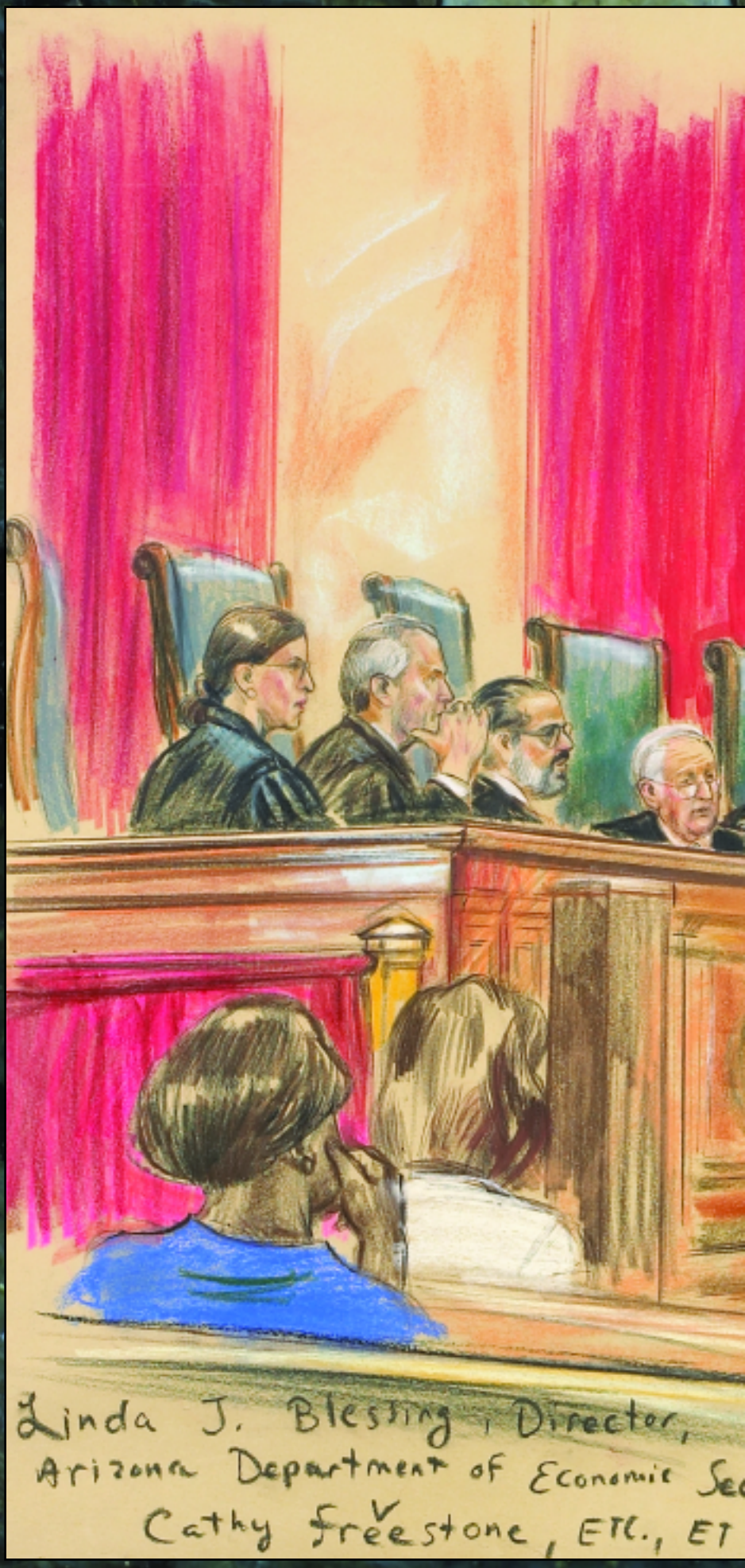
the Highest Bar

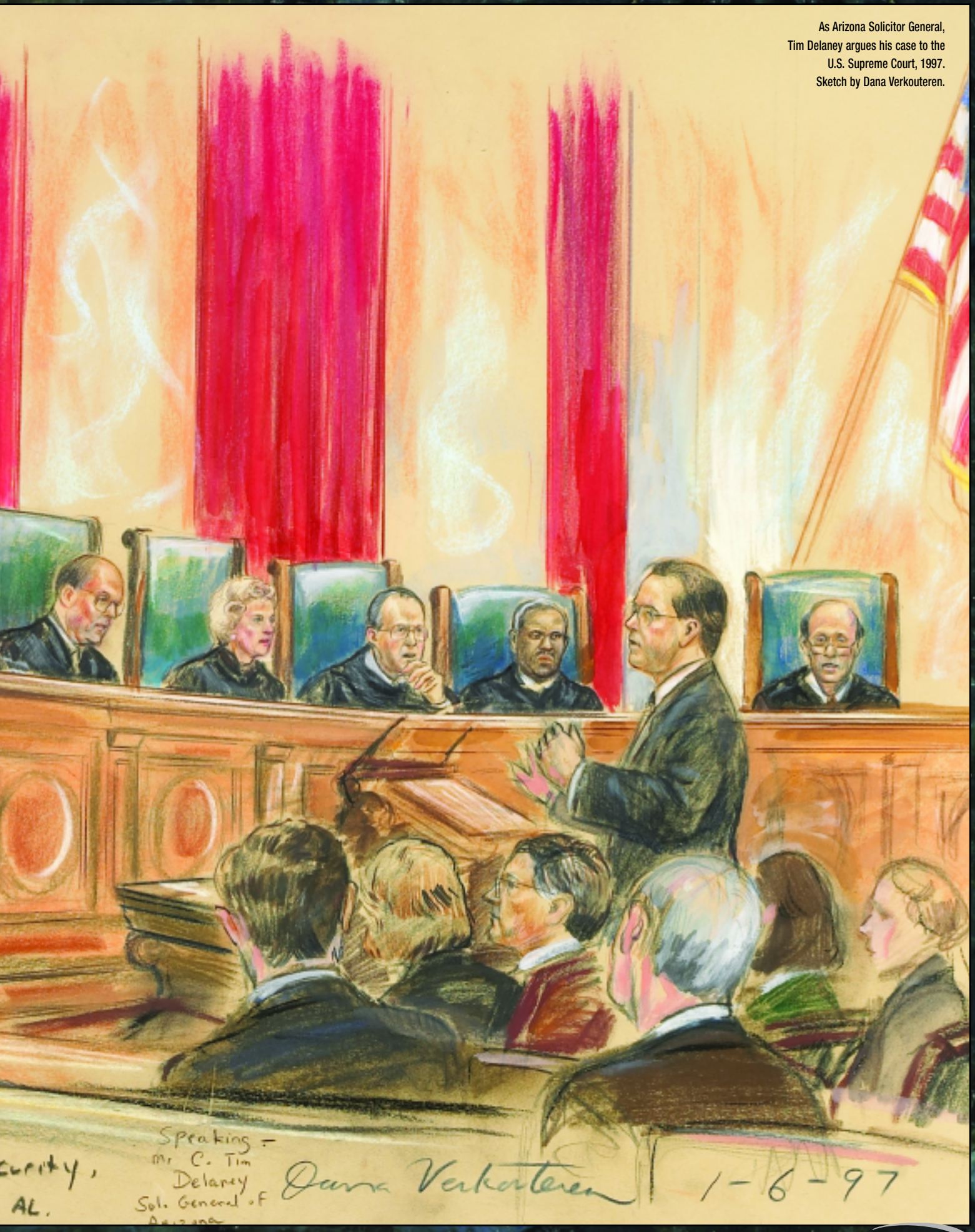
The First of Two Parts

To find out what it is like to argue a case before the U.S. Supreme Court, we went to the source. We asked those who had advocated before the highest panel to explain what brought them there, how they prepared, and what they learned.

We heard from many lawyers who generously shared their stories. In fact, because the talent in the Arizona Bar runs so deep, we will publish more memories in next month's issue.

We hope you enjoy these memories—sometimes poignant, sometimes funny—of advocacy at the highest level.





As Arizona Solicitor General, Tim Delaney argues his case to the U.S. Supreme Court, 1997. Sketch by Dana Verkouteren.

In This Special Section:

BY PETER D. BAIRD

Loyal to the First Amendment

The first time I appeared before the United Supreme Court was on December 8, 1969, when I was only 28 years old. Because I had not practiced long enough to be admitted to the Supreme Court Bar, I filed a petition to appear *pro hac vice,* which Chief Justice Burger denied. In a move that wasn't going to please him, we appealed his order to the entire Court, which reversed the denial and permitted me to appear before the Court.

My client was my wife, Sara. She had graduated from Stanford Law School and was number one on the Arizona Bar Examination. Without evidence of bad moral character or any connection to a "subversive organization," the State Bar would not admit her because she had refused to sign the Loyalty Oath and, in particular, she had refused to tell the Bar Examiners what her "political beliefs" were. Representing the State Bar was Mark Wilmer, the most accomplished trial lawyer in Arizona.

Because John Frank and Paul Ulrich had worked on the briefs, they sat next to me as I tried to unstick my tongue from the roof of my mouth. Nerves were to be expected of any lawyer, but we faced an unusually difficult situation: Nixon was President, the Vietnam War was raging, McCarthyism still existed, "disloyalty" was a hot issue, Earl Warren had retired, Abe Fortas had resigned under fire, his replacement had not yet been named, and the Court had recently ruled against a California bar applicant in a similar case.

Our position was simple: The First Amendment protected one's political beliefs from any inquisition. Even if a bar applicant's beliefs did not please the State Bar, those beliefs would be irrelevant because competence and character were all that mattered. Moreover, there were lawyers in those days who believed in segregation, and their noxious beliefs hadn't disqualified them from practicing law.

As soon as I introduced myself, Chief Justice Burger jumped me: "Why should a Communist practice law?" Before I could even respond, several other Justices starting shooting questions at me like hot bullets. "Wouldn't a Communist undermine our justice system?" "Aren't beliefs the first step toward action?" And on and on.

Finally, I had had it with these black-robed aggressors. Out of control and out of my mind, I blurted out, "If you won't let my client be a lawyer because of her possible beliefs, then you ought to disbar President Nixon because of his actual belief in an unconstitutional war."

There was a stunned silence, John Frank buried his face in his hands, and the marble floor trembled beneath my feet. Pissing off the Supreme Court is not a good idea.

As it turned out, the Court could not make up its mind and scheduled another oral argument for the next Term when, with the appointment of Justice Blackmun, there would be a full panel of nine Justices.

The second argument was totally different: I behaved myself, nobody asked me much of anything, and it was Mark Wilmer's turn to take heat, especially

Peter Baird is a lawyer with Lewis and Roca LLP in Phoenix. He is also a Senior Editor of the ABA magazine *Litigation* and an Editor of the ABA magazine *Experience*.

from Justice Black. In the end, the Court ruled in our favor, 5–4, with Justice Blackmun being the surprise dissenter.

In her book *Becoming Justice Blackmun,* Linda Greenhouse quotes a memo from Justice Blackmun theorizing that Sara must have refused to take the loyalty oath because she had something sinister or subversive to hide. His suspicions were wrong. She had never belonged to anything more subversive than the Girl Scouts and the Young Republicans.

BY JOHN TODD

Death Penalty Sentencing

In June 2002, the United States Supreme Court, overruling precedent,[1] held that the Sixth Amendment required a jury, rather than a judge, find the aggravating circumstance that made a person convicted of first-degree murder eligible for the death penalty.[2] Did this require a new sentencing for all the convicted murderers on Arizona's death row and in similar judge-sentencing states?

Fortunately, a vehicle existed for answering that question. Warren Summerlin, who had raped and murdered Brenna Bailey in 1981, had a case pending *en banc* review before the Ninth Circuit. After finding two aggravating circumstances, the trial judge had sentenced Summerlin to death.[3] The Federal Public Defender argued these judge findings violated Summerlin's Sixth Amendment jury trial right.[4] We argued even with the changed law, under the Court's 1989 retroactivity analysis, the new decision should not apply retroactively.[5] Justices Scalia and Thomas, however, had been in the majority in both lines of cases. The *en banc* court held that the new rule should apply retroactively.

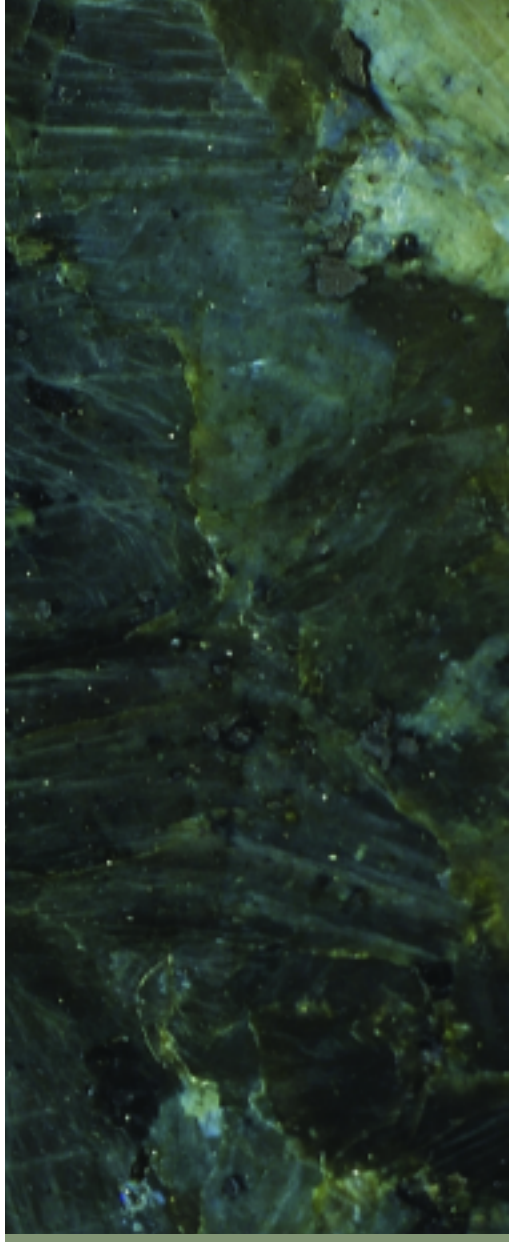
Ninety days later, on December 1, 2003, the Supreme Court granted our 16-page petition for certiorari. Thus, Christmas was spent working on the opening merits brief. Before we even filed the reply brief, the Court set argument for April 19, 2004. There is nothing leisurely about the pace in the United States Supreme Court.

Fortunately, I had borrowed a copy of David Frederick's *Supreme Court Advocacy,* so I could explain to my family, with some authority, my behavior. He includes a section that could be entitled "The Family's Care and Feeding of an Attorney Who Will Argue Before the Supreme Court."

In some ways, arguing before the Supreme Court is easier than in many appellate courts because there are rarely more than one or two issues. And those issues are narrow and essentially law-bound. The focus is on the depth of legal analysis and research.

In writing the briefs and preparing for the oral argument, I was extremely fortunate to work with Kent Cattani and Rob Ellman and have the assistance of a paralegal, Myles Braccio. We were able to argue late into the night about an argument, a paragraph, a sentence or a word, yet remain friends, and still be able to distinguish the forest from the trees. It is a great way to practice law.

We had at least five separate moot courts, most videotaped. The first moot courts were with in-house attorneys acting as judges. The latter moot courts involved attorneys from outside the office with appellate advocacy experience.



endnotes

1. *Walton v. Arizona*, 497 U.S. 639 (1990).
2. *Ring v. Arizona*, 536 U.S. 584, 589, 609 (2002).
3. *State v. Summerlin*, 675 P.2d 686 (Ariz. 1983).
4. *See Apprendi v New Jersey*, 530 U.S. 466 (2000); *Jones v. United States*, 526 U.S.227 (1999).
5. *Teague v. Lane*, 489 U.S. 288 (1989).

John Todd works in the Arizona Attorney General's office.

> "There is nothing leisurely about the pace in the United States Supreme Court."

The most stress was the wait for the 10 o'clock case to conclude so we could move from the second row of tables to the front tables in front of the Supreme Court bench. Once I stood at the podium and Justice Ginsburg asked her first, of many, questions within seconds of my opening sentence, the time flew.

Perhaps the greatest thrill is being able to answer the Justices' questions, particularly those questions never raised in the moot courts that a person unfamiliar with the case or Arizona criminal law probably would be unable to answer.

David Frederick cautions against calling one of the Justices by the wrong name. However, he does not specifically address the question of what to do when a Justice calls you "Mr. Wood" instead of "Mr. Todd." My advice is simply answer the question, which I did.

P.S. We won, 5–4: *Schriro v. Summerlin*, 542 U.S. 348 (2004) (Scalia, J., writing for the majority).

BY HON. ANDREW D. HURWITZ

Ring Cycle

I have had the "once in a lifetime" experience of arguing to the Supreme Court of the United States twice. In the first case, *Bowen v. Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986) ("*P.O.S.S.E.*"), the Court ruled unanimously against my position. Sixteen years later, in *Ring v. Arizona*, 536 U.S. 584 (2002), the result was markedly better; we won 7–2. Each experience was, in the words of the credit card commercial, priceless. In fact, because each case was made possible by the generous pro bono policies of my firm, the compensation was entirely non-monetary.

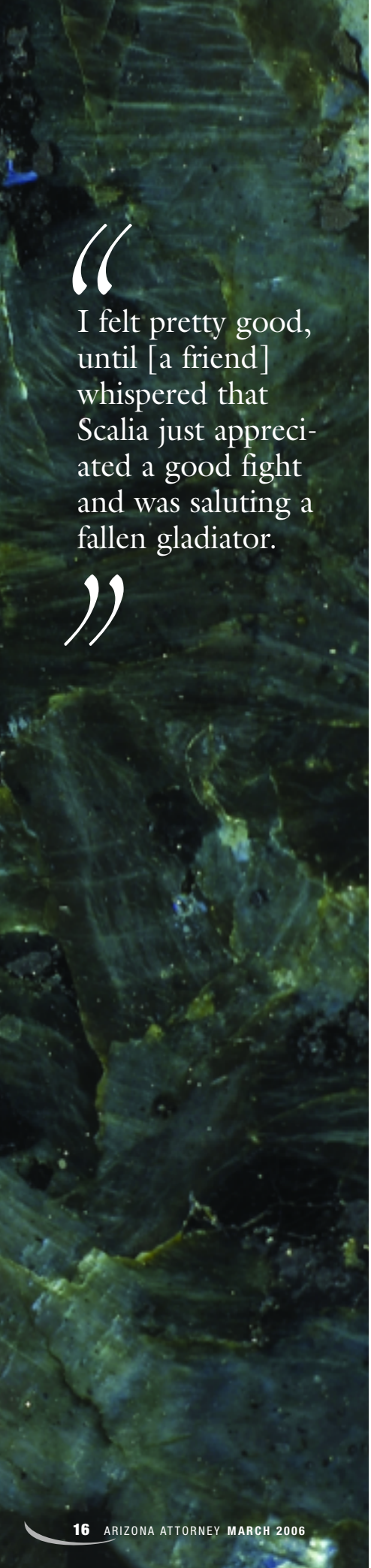
I came to *P.O.S.S.E.* in an unusual fashion. The case concerned the ability of California and its political subdivisions to withdraw from the Social Security system. These entities joined the system at a time when federal law permitted withdrawal on proper notice and signed contracts allowing withdrawal. Federal law was later changed to prohibit withdrawal. A California district court struck down the law, and a direct appeal was taken by the Government to the Supreme Court.

I wrote an amicus brief supporting the California appellees on behalf of the State and Local Legal Center. The State and the local subdivisions each were separately represented, and neither lawyer could agree on who would do the oral argument. They compromised on me, and I accepted the assignment only several weeks before the scheduled date.

I prepared with intensive moot courts in Phoenix and in D.C., the latter presided over by my friend Bartow Farr, with whom I had clerked at the Court and practiced in Phoenix. On the appointed morning, I waited in an anteroom for our case to be called; I was so nervous that I forgot everything I planned to say and decided to watch several preceding arguments to calm down. This did the trick; the arguments were so poorly done that I was sure that I would not be the worst advocate the Court saw that day.

In those days, the Court recessed for lunch in the middle of arguments, so I had more than an hour after my opponent sat down to mull over my opening words. After I got them out, the Court asked questions for the rest of the 30 minutes, and it was

Hon. Andrew D. Hurwitz is an Associate Justice on the Supreme Court of Arizona.



> "I felt pretty good, until [a friend] whispered that Scalia just appreciated a good fight and was saluting a fallen gladiator."

pretty clear from the questioning that we were not going to prevail. I was thrilled nonetheless, particularly because my parents were there (my father died only a few months later).

In contrast to *P.O.S.S.E.*, *Ring* was all-consuming for an extended time period. We filed the certiorari petition in the fall of 2001, cert was granted in January 2002 and the case was argued in April of that year. I did virtually nothing else but work on the case for months, but with the able assistance of Bartow Farr, John Stookey, Larry Hammond and Dan Kaplan, I was better prepared for this argument than any other I have ever made. We did moot courts in Phoenix and in D.C., the former graced by Paul Bender and Anthony Amsterdam, the latter by a group of experienced Supreme Court practitioners assembled by Bartow.

It seemed that all of Arizona was there for the argument—Justice Ruth McGregor, Dean Patricia White, several of my ASU Civ Pro students, a host of assistant attorneys general, and a number of friends.

Our moot courts had focused on the need to persuade Justice Scalia, and I spent much of my argument in what seemed like a personal dialogue with him. When I sat down, he nodded at me smilingly. I felt pretty good, until Bartow (who has done more than 25 Supreme Court arguments) whispered that Scalia just appreciated a good fight and was saluting a fallen gladiator.

My opponent was, of course, Attorney General Janet Napolitano, who performed splendidly. After the argument, our common mentor John P. Frank took us all to dinner. JPF passed on within the year, and I recall fondly his pride at his two friends' arguments. I was also gratified to learn later that Justice O'Connor (who voted against me in both my cases) told others that she was especially proud of Arizona's advocates on that day.

The *Ring* oral argument was the best episode in a wonderful career in private practice. After every other prior oral argument, no matter how well things went, I had awakened during the night thinking of the things I *should* have said. After *Ring,* however, I slept like a baby.

BY TIM DELANEY

Perspective From the Podium

Until standing at the podium saying, "Mr. Chief Justice and may it please the Court," I had never grasped how incredibly close the bench is. My survival instincts immediately calculated the Chief Justice's gavel, extended in his long arm, could almost reach my head if I didn't please the Court.

Nor had I appreciated before how curved the bench is. Turning left to respond to Justice Ginsburg's questions, I could see her, Justices Souter, Scalia and Stevens, and part of the Chief Justice, but no one right of him (Justices O'Connor, Kennedy, Thomas, Breyer). Similarly, when turning right to answer Justice Breyer's questions, I lost sight of four questioners.

With the Justices launching 50 questions in my 30 minutes, part of me felt like a

Tim Delaney leads the nonprofit Center for Leadership, Ethics & Public Service. During his four years as Solicitor General, Arizona won all four cases the Court took. Besides heading up the Center, he also maintains a selective government and non-profit law practice. Tim can be reached at C4LEAPS@aol.com.

lone gladiator in the pit of the Coliseum, fending off aggressive tigers while others circled to pounce from my blind side. Another part of me felt like a bobble-head doll due to my head jumping around to look at the questioners. (My opponents received 65 questions. Yes, it's a *very* active Court.)

In one extended exchange, Justice Souter focused on Congress' rewrite a few months earlier of non-substantial (we contended) aspects of the statutory scheme in dispute. Because our opponents had filed a motion to vacate certiorari or remand the case in light of the intervening substantial (they contended) legislative changes, I knew a slip on my part would lead the Court to revisit that motion. Justice Souter's questions kept pushing me toward that precarious position. I stood my ground, but he kept pressing. As he pushed and I resisted, the pressure mounted. Finally, he said he didn't know the previous funding formula for a related rewritten federal program but then asked a hypothetical about it anyway. Sensing a trap door, I started my answer by noting I didn't know the old statutory formula either. He interrupted and observed coyly, "We're evenly matched."

I knew that using humor, even self-deprecating humor, could backfire. But sliding off the cliff into the abyss of an order vacating cert after argument seemed like a worse fate. Feeling the need to defuse the tension and escape that dangerous line of questions, I seized the opportunity, echoed with quizzical wonderment, "We're evenly matched," and then added longingly, "I *wish* that were the case."

All sound fled the courtroom. Everyone held their breath awaiting Justice Souter's reaction. Even other Justices looked at him for guidance. He studied me carefully, sized me up, and an eternity later—seeing someone who sincerely wished he was as smart as the Justice—smiled and let out a warm laugh. The pent-up tension burst, with supportive laughter filling the courtroom. I then completed my answer and another Justice soon jumped in with a new line of questions. With that, I avoided the precarious position I dreaded and thereafter sensed that the tigers respected the bobble-headed gladiator.

Indeed, from that moment on, it became relaxed and fun, which was the most shocking part of the entire experience, even more than winning 9–0.

"I knew that using humor, even self-deprecating humor, could backfire."

BY HON. PATRICK IRVINE

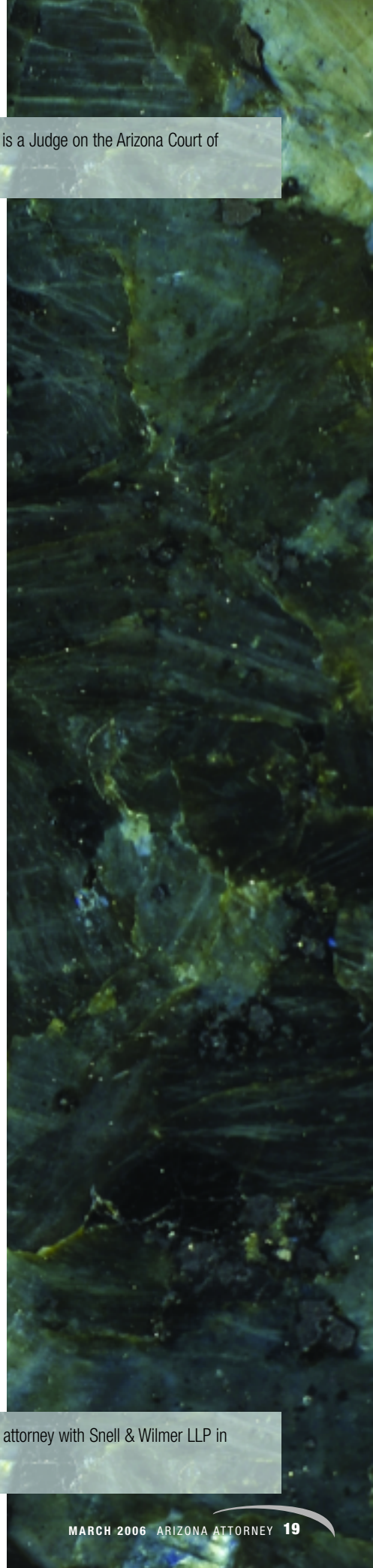
Hard on Fame's Heels

My journey to the U.S. Supreme Court involved *Arizona Dep't of Revenue v. Blaze Construction Co., Inc.* (1999).

That case involved a dispute over the state's authority to tax federal contractors doing work on Indian reservations. This issue was important in certain circles, but it was not considered one of the key cases of the Supreme Court's term.

The case argued just before mine was different; a combination of asbestos litigation and class-action certification for settlements packed the courtroom with attorneys and press. Professor Laurence Tribe of Harvard argued on one side. At the podium he used a small poster board covered with notes so that he could see everything at once.

His opponent covered counsel's table with every important document in the case, failing to understand that at the Supreme Court there is no time to look anything up



Hon. Patrick Irvine is a Judge on the Arizona Court of Appeals, Div. I.

or refer to anything except your own memory and, perhaps, a note or two.

At the end of the argument all this paper had to be quickly thrown into boxes, because the Court does not leave the bench between arguments. They were still shoveling documents into cases when I stepped to the podium to begin.

Because of the noise of people moving within the courtroom, Chief Justice Rehnquist gestured to me to wait and quietly said, "We'll let the room quiet down." People in the audience later told me that as soon as I stepped to the podium all the reporters and most of the attorneys in attendance left the room!

I didn't notice. For the next few minutes it was just me and the nine justices.

My preparation included observing three days of arguments the month before and participating in several moot courts. I had handled the case through two administrative hearings and three lower courts, so I knew the facts and issues. I was as ready as I could be, so I concentrated on presenting a clear argument, fairly answering the questions—and enjoying the moment.

Win or lose, big or little case, arguing before the Supreme Court makes a lawyer a part of our nation's history. It was fun, too!

BY DAN MCAULIFFE

Argument By Surprise

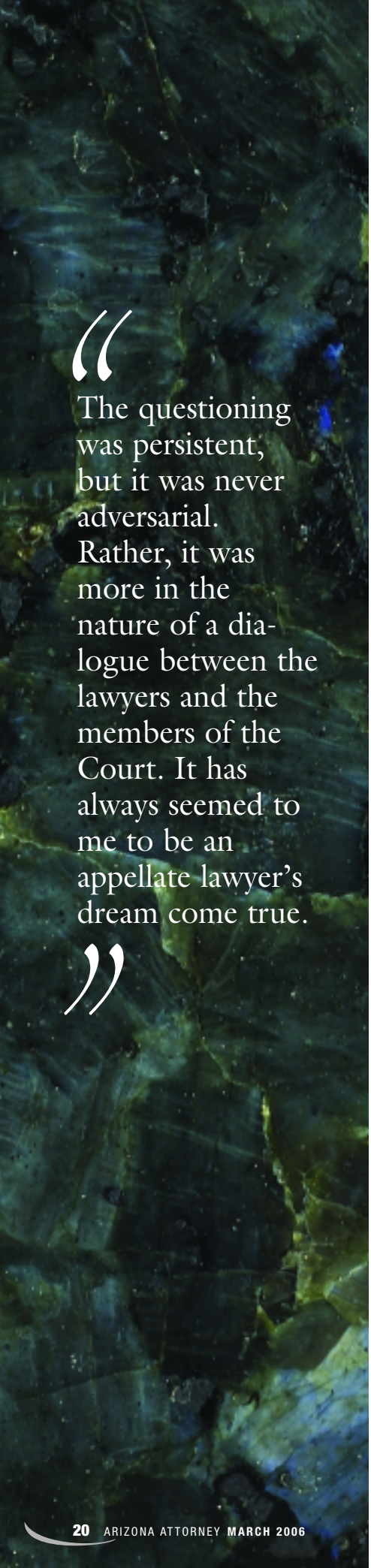
Although the specifics become less and less distinct with each passing year, the memory of conducting the argument before the United States Supreme Court in *Arizona Public Service Co. v. Snead,* 441 U.S. 141 (1979), remains one of the fondest of my professional career. One aspect of it I recall quite clearly, however: I did not experience any nervousness about the argument beforehand. That's because I had very little advance notice that I was going to argue. That needs to be explained.

In the 30+ years that I have been associated with Snell & Wilmer LLP, there have always been in the office one or more cases that, because of their legal or monetary significance, became known throughout the firm by some shorthand designation peculiar to the case. The New Mexico Generation Tax case clearly fit into that category.

Shortly after I joined the firm, New Mexico enacted a tax on the generation of electricity, clearly aimed at the production of the Four Corners Generation Station near Farmington. The statute, however, permitted the generator to take a credit for any generation tax paid against its gross receipts tax liability to New Mexico. If the electricity generated in New Mexico was sold outside the State, there was no gross receipts tax liability against which to take the credit. Any increased revenue from the tax, accordingly, came almost entirely from generated electricity that was sold outside New Mexico. Because the major participants in Four Corners were Arizona Public Service, Salt River Project, Tucson Gas & Electric and Southern California Edison, the primary incidence of the tax was on Arizona and California consumers, or at least on the electric utilities who served them.

The participants determined to challenge the tax on both constitutional and statutory grounds and retained our firm, and specifically Mark Wilmer, to pursue that challenge, because the firm's largest client was also the largest of the participants in Four Corners. Suit

Dan McAuliffe is an attorney with Snell & Wilmer LLP in Phoenix.



was filed in the state courts of New Mexico, and Mark asked another associate—not me—to work with him in conducting the discovery necessary to show that the tax discriminated against interstate commerce.

Shortly after the trial court ruled in favor of New Mexico, the associate involved left the firm, and Mark offered me the opportunity to work with him in prosecuting an appeal to the New Mexico Supreme Court and, if necessary, beyond. This really was an offer you couldn't refuse.

I was stunned by the request, having been with the firm less than five years, but the opportunity to work with Arizona's most respected litigator, on a case presenting challenging constitutional issues, was simply one no rational lawyer would pass up.

And so I worked on the brief, and then, at Mark's insistence, argued the case to the New Mexico Supreme Court. Not surprisingly, we lost there as well and appealed that ruling to the United States Supreme Court. Although it was hardly a foregone conclusion, nobody at our firm or with the affected utilities was particularly surprised when the Supreme Court noted probable jurisdiction and established a briefing schedule.

I can't recall whether Mark and I talked about who was actually going to argue the case at this point, but we did discuss every other aspect of it—frequently and extensively. From the point that our brief on the merits was submitted, up until the eve of the argument, we had lunch once, sometimes twice, a week. The unarticulated premise for all these lunches was that every segment of the conversation would start with a question a member of the Court was likely to ask. We would then discuss the answer until we were mutually satisfied with it, and move on.

The landscape changed, however, shortly after New Mexico filed its brief and we learned that it had hired that pre-eminent appellate advocate, John P. Frank. Our utility clients also had an arrangement under which they were paying the tax into an escrow account pending the outcome of the case. That fund had grown into the tens of millions of dollars, and regulatory authorities were making noises about perhaps not permitting all of it to be passed along to the ratepayers.

The clients were concerned and advised Mark that they expected him to argue the case. When this was passed along to me, it struck me as a pretty rational decision. After all, if you have millions on the line in a Supreme Court argument, and a noted constitutional scholar as your new adversary, who would you pick to argue for you? A lawyer in his early 30s who had been with the firm not quite five years, or the state's most seasoned and respected advocate who just happened to have Supreme Court arguments in the double digits under his belt? That's not really a close call.

As the February argument date rolled around, off we headed to Washington D.C., accompanied by our clients, early because we had arranged to do moot courts of the argument the afternoon and evening before. (Mark wanted to do two—one with him arguing, and the other with me conducting the argument, so he could listen. This should have made me suspicious, but it didn't.)

On the morning of February 26, we all met for breakfast and headed for the Court, where our case was second on the day's docket. We passed through the bar and listened patiently to the final minutes of the preceding argument. It was then time to take our seats, and Mark advanced and pointedly sat in the "second chair," pointing me to the chair to be occupied by the lawyer conducting the argument. To my protests, and inquiry as to how the clients would react, he replied: "They're getting the best lawyer in the room to argue their case, and there's nothing they can do about it now." (In fact, Mark had cleared his decision with the clients beforehand, and they had agreed.) And so, I faced my fate with very little notice, but also virtually no time to fret about it.

We had collaborated on an outline of what the argument should cover, but that was of little use. I don't think I even managed to get "May it please the Court" out before the first question came, and they continued to come. Amazingly, Mark and I had anticipated what most of them would be, and the answers came readily.

Justices White and Rehnquist, who eventually filed a separate concurring opinion, were particularly persistent. I have always suspected that Justice Rehnquist was so active because it had been only a matter of a few years since he and I had worked together on

some projects at the Department of Justice. That occasional prior collaboration had produced some animated exchanges, and I now had to resist the urge to simply say, "Look, Bill, it's like this." Fortunately, no such embarrassing lapse occurred.

In fact, the only awkward moment happened during my opponent's argument. (New Mexico had decided, for reasons that escaped all of us, not to have John Frank conduct the argument, and was represented by an Assistant Attorney General.) During that argument, Justice Marshall spoke up to inquire, "Why does Texas think it has the right to tax this gas?" My opponent handled it exactly as I would like to think I would have: He simply proceeded to answer the question as if it had named the correct state and product, and the argument moved on.

I now occasionally read accounts of arguments before the Court and wonder if it is still the same. The questioning was persistent, but it was never adversarial. Rather, it was more in the nature of a dialogue between the lawyers and the members of the Court on the issues the case presented and how they should be resolved. Due to this, and the truly magnificent physical setting in which you conduct the argument, it has always seemed to me to be an appellate lawyer's dream come true.

One of my goals ever since, still unsatisfied, has been to conduct another one. There's still time, and I still have my fingers crossed.

BY HON. WILLIAM J. SCHAFER III

Not So Cert-ain

The first time I appeared in the United States Supreme Court I represented the State on an argument over the viability of an esoteric Arizona criminal statute. The petitioner claimed it was unconstitutional and I claimed that it was constitutional but, more importantly, the case didn't deserve to be in the Supreme Court because the statute was so esoteric (my brief showed that no other state had one) that any decision by the Court would have no effect in the rest of the country.

I knew from experience with the Court while I was a Trial Attorney with the Department of Justice that going outside the record in argument was not to be done. On occasion, however, I had seen the Court ask a question that required counsel to go outside the record.

I also knew that very few, if any, of the prosecutors in Arizona had used this statute. So, even though I realized it would not be part of the record, I called each county attorney a week or so before the argument and asked if they had ever used the statute. They had not.

Now, the only thing that remained was to see if the Court would ask the question.

And they did. In the middle of my argument one of the Justices asked if Arizona had ever filed a case under the statute. I said, "Mr. Justice … , I am glad you asked that question (and at that point a little titter could be heard from the bench) because last week I took a survey of the state prosecutors and found that the statute has never been used."

There was no follow-up on the question.

Two months later the Court dismissed the petition for certiorari as improvidently granted.

Hon. William J. Schafer III is retired from his position as a Superior Court Judge for Maricopa County, but he still sits as a Pro Tem Judge and does trials, motions and hearings; he also does mediation and arbitration. He also served as Presiding Judge of the Arizona Tax Court. Before that, he worked as a trial attorney for the U.S. Department of Justice in Washington, DC, as an Assistant U.S. Attorney in Alaska, as a Pima County Attorney, and as the Chief Counsel of the Criminal Division of the Arizona Attorney General's Office.

Judge Schafer can be reached at Boppananny@aol.com and Bill.Schafer@azbar.org.

Although I had worked as a trial attorney at the Department of Justice and spent a great deal of time at the Supreme Court, when I got notice years later that I would be arguing my first case in the Court, I got so frightened I thought perhaps I would have to get sick and bail out, but I didn't.

I thought it would be good if I went a day or two early and reacquainted myself with the feel of the Court and the building itself to put me at ease. I did, but it didn't. I didn't get much sleep the night before the argument, and when I checked in at the Clerk's office that morning, I was all thumbs.

My argument was the second one that morning. The first argument was from Oregon and an Assistant Attorney General made the argument. It was obvious that he was new to the Court; in fact, it was obvious that he was new to appellate arguments, and besides that he was wearing a dark green suit, which in those days was *verboten* in the Court (I'm still at a loss to figure out how he made it past the Clerk's office).

He did, however, provide one of the most lighthearted moments I've had in the Court. During his argument he stated a constitutional point that was so outrageously wrong it was embarrassing, and I had to slouch down in my chair hoping that no one would notice I was even in

> "I deluded myself into thinking I could draw some conclusions about the justices' opinions on the case based on their reactions to my opponent's argument."

the room.

When he finished that point, Justice Brennan—who in my experience was one of the kindest, gentlest justices on the bench—said in an avuncular manner, "Well, perhaps, Mr. Smith, this is what you meant to say" and then stated the point correctly to save the Assistant from utter embarrassment.

But the correction was lost. The Assistant replied, "No, Mr. Justice Brennan, that is not it at all." Justice Brennan sat back and was quiet for rest of the argument.

Now can't you just see that guy when he got back to Oregon telling his friends how he set the Court straight on a few points they didn't understand?

BY GERALD GRANT

Rather Not Lose

I have had the opportunity to argue three cases before the United States Supreme Court: *Poland v. Arizona*, 476 U.S. 147 (1986), *Lewis v. Jeffers*, 497 U.S. 764 (1990), and *Arizona v. Evans*, 514 U.S. 1 (1995). *Poland* and *Jeffers* were death penalty cases, but *Evans* was a simple possession of marijuana case.

My memories of the *Poland* case are a little more vivid because it was my first argument before the Supreme Court. I arrived in Washington, D.C., two days before the argument so I could attend a moot court the next day, arranged by the National Association of Attorneys General. Several attorneys who had previously clerked for Supreme Court justices served as my panel. The moot court was fairly intense (as it turned out, it was more difficult than the actual argument) and it helped me to focus and organize my argument.

After the moot court, I was more nervous about the argument than before. I spent the rest of the day reviewing the record, re-reading case law, and drafting and re-drafting my outline of my argument. I finally went to bed sometime after midnight, but I just lay awake thinking about the case for the next couple of hours. Just about the time I was starting to drift off to sleep, the fire alarm in the hotel went off. Everyone in the hotel had to evacuate, so my wife and I got dressed, walked down several flights of stairs, and then waited outside in the cold until we could return to our rooms.

The morning of the argument was cloudy and gray. It had snowed during the night, and a few flakes were falling as I walked to the Court. Having been born and raised in Phoenix, the weather didn't make me feel any more at ease.

I arrived several minutes before the building's doors opened, so I had to stand outside for awhile. Once inside, I was taken to meet the Clerk of the Supreme Court for some last-minute practical instructions (which table to sit at, how to address the justices, stop talking when the red light on the attorneys' podium flashes, etc.). I had been told by another attorney from my office that the Clerk also used this meeting to make sure the attorneys were properly dressed, and that the Clerk's Office kept a wardrobe of suits available if an attorney's attire wasn't up to snuff.

When I went into the courtroom and took my seat at the first table, I was a little overwhelmed by the enormous size of the courtroom, the large number of people in the audience, and the realization that I was about to become a part of centuries of tradition. I was glad I represented the respondent because I didn't have to go first and could watch my opponent argue. I also deluded myself into thinking I could draw some conclusions about the justices' opinions on the case based on their reactions to my opponent's argument.

When I finally stood at the podium, I found it surprisingly easy to block out every-

Gerald Grant works in the Office of the Maricopa County Attorney.

> "The case involved the hijacking of an armored car on Interstate 17 near Bumblebee, and at one point it appeared that Chief Justice Rehnquist was looking at a road atlas trying to pinpoint where the incident had occurred."

thing except the justices in front of me. The argument went by very quickly. I do remember that the justices were courteous in their questioning and I was able to answer their questions directly without sounding like a complete fool. The case involved the hijacking of an armored car on Interstate 17 near Bumblebee, and at one point it appeared that Chief Justice Rehnquist was looking at a road atlas trying to pinpoint where the incident had occurred. After I said my piece and determined that the justices had no more questions, I sat down before the red light on the podium flashed.

Two months later the Court issued its opinion in my favor and a reporter called to ask me how I felt about the decision. I responded, "It's a lot better than losing." When that statement appeared in the newspaper the next day, the attorneys in my office had a T-shirt made for me with my brilliant comment printed across the front of the shirt.

BY ROBERT C. BRAUCHLI

Runaway Train

I had actually hoped it wouldn't happen. When the Supreme Court announced it would hear the United States' petition for certiorari in my case, *United States v. White Mountain Apache Tribe*, the first breach of trust damage case the Court had heard since 1983, I felt as if I were on a runaway train. While I was excited about the opportunity to argue a case before the U.S. Supreme Court, I was apprehensive about the prospects of winning, considering the Court had ruled against Tribes 80 percent of the time in the past 25 years.

I got to work. During the next few months, I reviewed hundreds of cases, revised the Tribe's brief 27 times, studied the bios on the Supreme Court Justices, and sought advice from scores of colleagues.

On November 15, 2002, two weeks before the day of reckoning, I participated in a moot court generously hosted by Georgetown University. I attended Supreme Court arguments to watch the Justices interact with the attorneys and to familiarize myself with the mechanics: where to sit, when and where to move up, where the lectern was and how to crank it up to the appropriate height.

The big day finally arrived for my case and one involving the Navajo Nation. Even though it was freezing outside, hundreds of people were lined up on the courthouse steps to get in, and Tribes from all over the country were having prayer meetings. I slipped in through the side door for attorneys and proceeded to the lawyer's lounge, where we were seated to receive a lecture from Court staff on the do's and don'ts when addressing the Court.

When I entered the courtroom, it was full of spectators. The Secretary of the Interior, Gale Norton, and the lawyers from the Solicitor's office came in and sat near the front of the room. Next, the Justices quietly entered, and the White Mountain case was called. The United States went first, and then it was my turn. As I approached the podium, a feeling of calm came over me, probably for the first time in months.

At the lectern, the Justices were a lot closer than I imagined. It is an intimate setting, and you hardly notice the 300 spectators surrounding you on three sides.

I began my argument and had spoken for only 15, maybe 20, seconds before the first of a burst of questions came at me from the Justices. I was actually pleased to have the questions, because they helped me to identify the Court's concerns. Justice Scalia differed with me on the purpose of Fort Apache, and the sequence of damages, and our exchanges ended up being a couple of the lighter moments in the courtroom.

Robert C. Brauchli practices at Brauchli & Brauchli PC in Tucson.

Four months later, the Court rendered a decision in my client's favor (5–4). Exhilarating? Definitely!

BY HON. NEIL V. WAKE

Friend of the Court

The chance of ever having a case in the Supreme Court of the United States is not good. More than a million lawyers in the country. Eighty cases a year. Do the math.

Here's my advice on how to get a case in the Supreme Court: When you get your first case on your first day on the job out of law school, tell yourself that case is going to the Supreme Court of the United States. It happened to me.

LAW SCHOOL THIRD-YEAR PAPER

My law school required of all graduates a paper of publishable length and quality, and I wrote one about State jurisdiction on Indian lands. I started work at Jennings, Strouss & Salmon in Phoenix on June 4, 1974. A young partner in the firm, Leo R. Beus, had a case with pending cross-motions for summary judgment before Superior Court Judge Roger G. Strand. The case challenged State gross receipts and motor fuel taxes on, and Corporation Commission regulation of, a non-Indian logger cutting and hauling timber for a tribal enterprise on the reservation. Our clients were Pinetop Logging Company and the White Mountain Apache Tribe.

Knowing of my interest, Leo invited me to update case research for a possible supplemental memorandum in support of the motion for summary judgment. I did, and we later lost the motion. Leo then invited me to do the appeal.

The Corporation Commission, represented by Assistant Attorney General Michael M. Grant, abandoned its claim of regulatory authority rather than defend its summary judgment on appeal. The Court of Appeals found in our client's favor on a state-law issue, which reduced the tax liability, but rejected entirely my argument of federal law preemption. *White Mountain Apache Tribe v. Bracker*, 585 P.2d 891 (Ariz. Ct. App. 1978), *rev'd*, 448 U.S. 136 (1980).

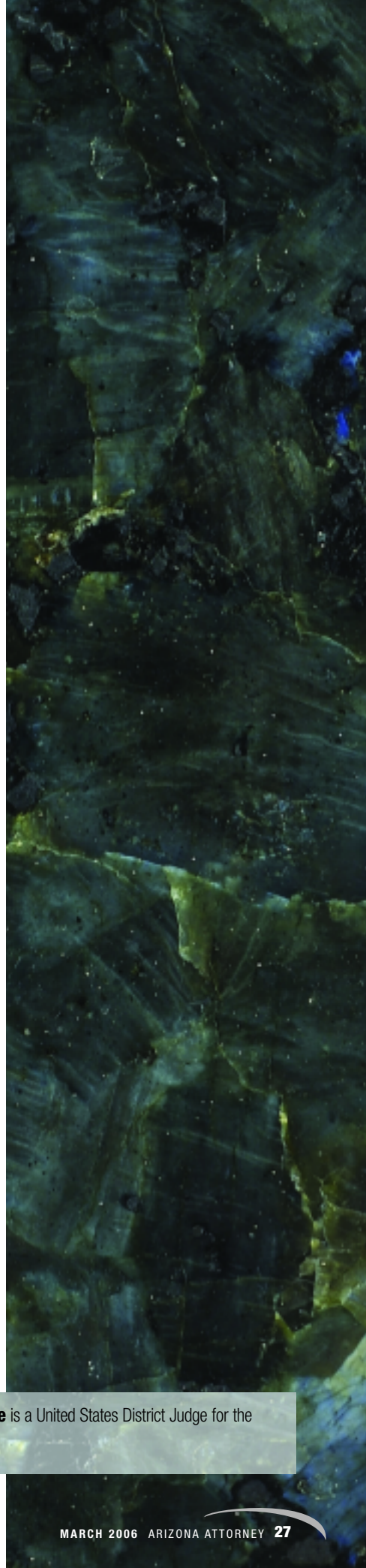
The Arizona Supreme Court unanimously denied review. Score three wins in a row for my adversary, Assistant Attorney General Donald O. Loeb.

A LITTLE HELP FROM YOUR FRIENDS

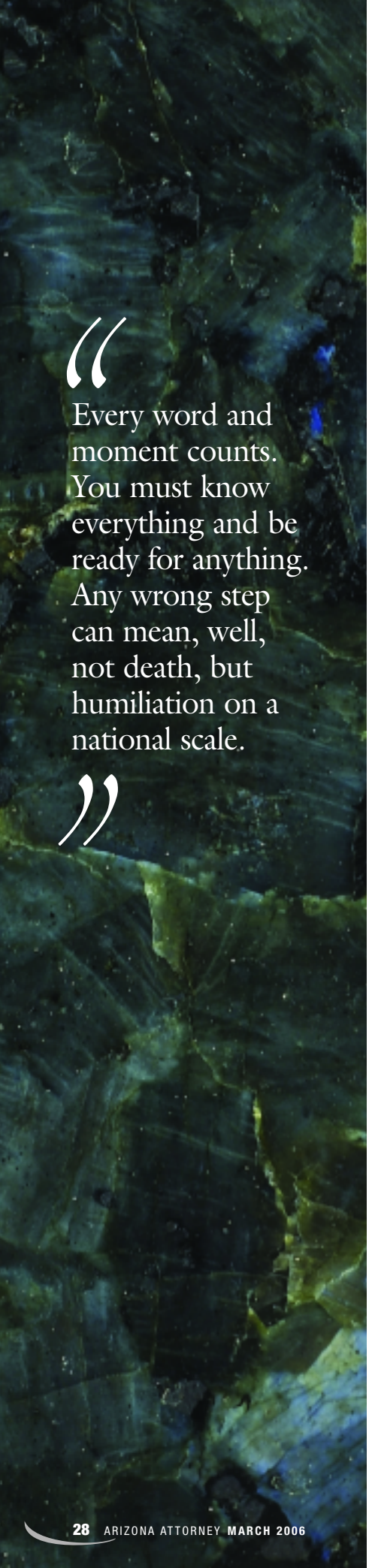
I wrote a petition for writ of certiorari in December 1978, believing the case had doctrinal importance in the field of implied federal preemption of state laws applied to non-Indians and affecting tribal interests on the reservation. But we wanted friends as well as principle on our side. I approached Robert Moeller, Assistant Field Solicitor of the Department of the Interior, who agreed with our assessment of the importance of the case. He tried to persuade the Solicitor of the Department of the Interior to ask the Solicitor General to support our petition. His try failed.

Then the Supreme Court itself called for the views of the Solicitor General. At first the Solicitor General was disposed to urge the Court to deny the petition, but after considerable study by them and persuasion by us, the Solicitor General urged the Court to grant the petition. In the Supreme Court, as in most things, the United States of America is the best friend you can have.

I had further help in the oral argument, divided with the Tribe's regular attorney, Michael J. Brown, later the Presiding Judge of the Pima County Superior Court.



Hon. Neil V. Wake is a United States District Judge for the District of Arizona.



My new opposing counsel, Assistant Attorney General Ian A. Macpherson, who inherited the case when Don Loeb entered private practice, was a model of courtesy and professionalism. If he is subject to a criticism, it is that his zeal showed he didn't really care about the critical importance to me personally of winning in the Supreme Court in my first case from my first day as a lawyer.

THE BATTLE

My one and only oral argument in the Supreme Court was in January 1980, at age 31. I could not sleep a wink the night before. Breakfast was a soft-boiled egg and a glass of milk. My co-counsel Mike Brown, who is the most manly man I know, fared no better the night before than I did.

The argument itself was like what I have read of fighter pilots in aerial combat: Every second is in slow motion. Your senses are heightened, and you are conscious of every random stimulus. Every word and moment counts. You must know everything and be ready for anything. Any wrong step can mean, well, not death, but humiliation on a national scale.

After about three minutes of supreme stress, I began to feel as I did in other appellate arguments. I told myself it was like arguing in the Arizona Court of Appeals. When it was over, I sat down and felt good.

Though the audio recording of my argument has been available in the National Archives for 26 years, I have not yet had the desire to listen to it.

CLIENTS ARE THE BEST PART OF PRACTICING LAW

Solving the problems of people who entrust them to you is the best reward lawyers get. We often become friends, and good friends, with the people whose problems we labor through. My oral argument in the Supreme Court was more than just a professional milestone. Because of that case I met one of the most remarkable people in my life, who became one of my best friends.

Gary Loveness came alone from Oregon to take over management of Pinetop Logging Company, a family business, shortly after I started working on the case. He was a former Air Force fighter pilot, a young business graduate, and the divorced father of 5-year-old Tasha, whom he adored. Gary would fly when the rest of us would drive. He had an infectious humor and wit, and strong opinions. Even if you didn't agree with him, you pretended you did because it was so much fun to be on his side. He had the spirit and aggressiveness to stick with a lawsuit his lawyer of the same age kept telling him was meritorious and kept losing.

On the morning of the oral argument, January 14, 1980, Gary and I met on the steps of the Supreme Court. There for the first time I met his new fiancée Liz, and for the first time he met my new fiancée Shari. Gary and Liz married on February 29. Shari and I married on May 10. Our three sons and their two sons shared the same obstetrician. We vacationed together regularly. Gary gave my sons their first helicopter rides, an experience that would be seared into the consciousness of any little boy. Gary had a magic with our oldest son Aaron, who looked forward to being with Gary more than anything else in life. He was a friend with whom you could always be comfortable, whom you never had to impress, with whom you always felt close even though you were separated by space and time and the intensities of life at the moment.

We lived intertwined lives until Gary was tragically killed in an airplane crash in 2003. When the engine lost power after takeoff, Gary's extraordinary flying skills surely saved his sons, who were with him. We still live intertwined lives with Liz, Ghryn and Collin.

Now I can't think about the best day of my legal career—the day I stood before the Supreme Court—without also thinking about the day I stood in the open air before 400 people at Gary's memorial service. The best moment of my legal career occurred on the day of the Supreme Court argument, but it was not when I stood before the Court. It was late that evening at dinner with Gary and our fiancées. As we were nearing the time to leave, Gary said that when I sat down from my argument, he wanted to stand up in the courtroom and shout, “That was *my* lawyer.” This essay is my way of standing up and shouting, “That was *my* client.” AZ