

# Supreme Court Advocacy

# the Highest Bar

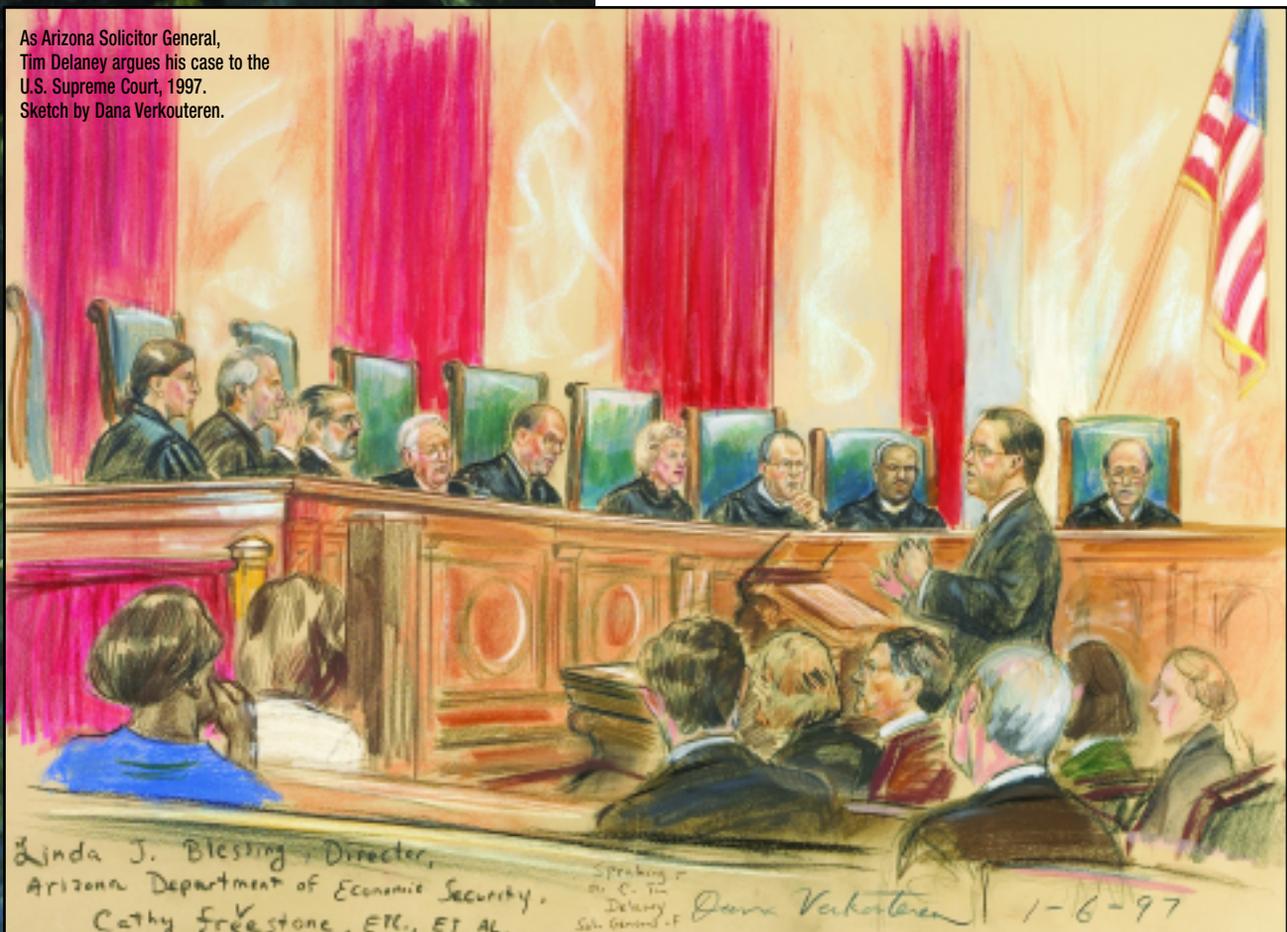
## PART II

Last month, we brought you the memories of a group of lawyers who have argued a case before the United States Supreme Court. In this issue, we are pleased to be able to share the second of this very special two-part series.

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



# Expect the Unexpected

If it wasn't my worst nightmare, it came very close. Thirty seconds into my first appearance before the U.S. Supreme Court, I got the question every lawyer dreads: the one where you have absolutely no clue.

I thought I had done everything right in getting ready to defend Arizona's private school tax credits in the case of *Hibbs v. Winn*. I prepared intensively for the oral argument on January 20, 2004. I had gone over all the relevant cases and every conceivable question—I thought. I had memorized my opening statement. I even had my best blue suit pressed and cleaned.

Five sentences into my carefully rehearsed opening, Justice Ginsburg interrupted with a question about "assessment," one of the key terms in the statute we were interpreting. It quickly became clear that, in a case argued the week before, the U.S. Solicitor General had taken the position that "assessment" was merely a "bookkeeping" term and had little importance in the tax system.

In an instant, the good Justice upended my weeks of preparation and sent me scrambling. I had no clue in what context the case she referred to had used the term "assessment." I managed to hide most of my astonishment, but at the time I felt like a prizefighter who had just been knocked over the ropes.

For me, that experience reinforced some essential aspects of Supreme Court argument.

First, you can't be overprepared for this intellectual hurdle of incredible proportions.

Second, you are not so much debating the other lawyer as you are conversing with the Justices. Lawyers are there to answer serious questions and help the Court consider the issues from every conceivable viewpoint. Prepared speeches are not productive. Neither are rhetorical flourishes or a big debating "finish." Advocates must know the issues thoroughly, try to anticipate the hard questions and do their best to respond clearly.

And, expect the unexpected!

I began my preparation by attending a seminar sponsored by the National Association of Attorneys General to learn from some of the country's most experienced Supreme Court advocates. I tried to learn everything I could about the federal Tax Injunction Act and principles of comity. I worked with a terrific team of lawyers from our AG's Office, reviewing and editing our briefs.

For two months, the argument consumed *all* my time. Thanksgiving, Christmas and New Year's observances were cut to the bone. I did four moot courts with people from the Attorney General's Office and lawyers from the community and one with the National Association of Attorneys General in Washington. Each was different and gave me fresh ideas about how to approach the argument. Each moot seemed to build on the previous one.

On the plane to Washington, I read an excellent book called *Supreme Court Advocacy* by David Frederick, which includes examples of virtually everything about a Court presentation. I spent the three days before my appearance reviewing relevant cases, honing my argument and getting very little sleep. I was sure I was as prepared as I could be for my 20 minutes before the Court (the Solicitor, who failed to warn me about the previous assessment case, got 10 minutes of my time).

That confidence evaporated under Justice Ginsberg's questioning. I managed to get back in the ring, make some good points and respond to more questions. When our hour before the Court ended at noon, it tolled one of the longest and most intense 60 minutes of my life!

Terry Goddard is the Arizona Attorney General.

BY ROBERT J. POHLMAN

## A Wager in Law

An oral argument before the United States Supreme Court: the most daunting challenge a trial lawyer will ever face. In December of 1996 I was privileged to argue before the nation's highest court. It was a memorable experience.

Because no real trial lawyer takes herself or himself too seriously, my family and I decided to add some spice to the experience. My wife, our children and their significant others (with the exception of my daughter who was slaving away in Florence, Italy, in a semester of overseas study) were each to provide me with a non-profane English-language word. I then wagered \$20 with each of them that I could weave that word into my oral argument at the Supreme Court. If successful, they would owe me \$20. If unsuccessful, I would owe them a Thomas Jefferson.

In Washington, like most appellate advocates, I engaged in several moot court arguments of my case. In each case I successfully employed all of the words selected by my family. Thus, I had every confidence that in the actual court appearance, I would run the table.

In addition to the practice efforts, my colleagues and I attended several Supreme Court sessions to observe other arguments. These visits allowed me to gauge how very active the justices were during Court proceedings. Using these observations as a measure, I then retreated to my hotel room to assemble my prepared remarks.

I also rehearsed the argument using my wife, Ann, as an audience. When I finished, she simply stared at me. My prepared argument lasted less than two minutes and 30 seconds. Given the brevity of the argument, Ann asked what my strategy was if I was not interrupted with questions. My response was that I would simply indicate that I had completed my prepared remarks and would happily answer any questions that Justice Thomas had.

True to form at the actual hearing, less than 30 seconds into my argument, questions began that consumed all 30 minutes of my allotted time.

Unfortunately, the Supreme Court never confronted the constitutional issues raised by my case, instead focusing only on procedural issues. This wholly eviscerated my ability to utilize my family's word selections and win my wager.

Following the argument, the press interviewed my client and me on the steps of the Court. Later that day, the local newscast carried that footage. Enjoying my 15 seconds of fame, I waited an hour to view the newscast again. To my chagrin (and the great credit of the station's editors), the story of my case was preempted. A much more enriching feature aired instead: 45 seconds devoted to "Heidi" the talking cat, a loquacious feline that repeatedly and clearly enunciated the word "Hello."

Although trumped by a domestic cat and shut out in my own internal gaming, I nevertheless returned to the relative comfort of Phoenix with fond memories.

BY GRANT WOODS

## An Opponent's Gaffe

I argued *Lewis v. Casey* in 1995, a case where we successfully (8-1) argued that the states should be required to give prisoners access to the courts, but *not* required to have state-of-the-art law libraries at each prison facility. Since then, most have been removed around the country. The decision overturned the Ninth Circuit and an Arizona district court judge.

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I moot courted the case five times. The first four were in Arizona, with experts primarily from within the office (led by Rebecca Berch) and once in D.C. a few days before my argument. The one in D.C. actually shook my confidence a little because one of the panelists asked a very good question that we had never considered. We had a good answer, but it made me wonder if one of the justices might come up with something new as well. Fortunately, that didn't happen.

I don't think you can be overprepared, just prepared. It is a lot of work, but it is better to make your mistakes early rather than later.

As the appellant, I went first. Chief Justice Rehnquist was very cordial and introduced me as General. I had watched arguments before and seen advocates interrupted almost before they got their name out. I began my argument and they let me go for quite awhile. In the back of my mind I was thinking I might run out of material if somebody didn't say something pretty soon. Fortunately, Justice O'Connor broke the ice and it was pretty much nonstop thereafter. The Clerk of the Court came over later and said that he couldn't remember more questions in recent years and that he thought it went well. I felt pretty confident that based upon the questioning we had a good chance to prevail, but I had argued enough cases in Arizona to understand that you never know.

One unusual moment came shortly after my opponent began to argue. Her first question came from Justice Ginsberg. Her answer began: "I believe, Justice O'Connor, that the reason for this is ... ." Justice O'Connor leaned over the bench and stated loudly, "I'm Justice O'Connor!" There was an uneasy silence in the courtroom as my opponent apologized and moved on, but it was hard for her to regain her footing after that gaffe.

It seems impossible that you would make that mistake—there were only two women, and they had their nameplates in front of them only a few feet away from us—but all of us were nervous and trying to think of a million things at once, so it is just something that can happen. I felt bad

**Grant Woods** is a Phoenix trial lawyer. He was Arizona Attorney General from from 1991-1999.

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Yikes! I thought we were talking public documents here, not national security secrets.  
”

for her, but she did fine with the rest of her argument and hopefully will focus on that as she looks back on the experience.

As a trial lawyer and sometime-appellate advocate, I had always wondered whether arguing in front of the United States Supreme Court would live up to the high expectations. Without question it did, as the majesty and history of the place combine with the high standards of the justices themselves to create something truly great for our country.

The trouble with Congress is that it is filled with Congressmen, many of whom can pierce in a minute a lifetime of idealism about the creation of the founding fathers. But the Supreme Court and its members, for me anyway, met those lofty ideals, and left me all the more energized to be part of a judicial system that, for all its flaws, can still achieve greatness.

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BY IAN A. MACPHERSON

## History on Audiotape

Most lawyers never get a chance to argue even one case before the United States Supreme Court, let alone two back-to-back on the same day. And you can probably count on one hand the number of lawyers whose two such arguments were their first before the Supreme Court. That would include ... me.

The two cases, *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980), and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), concerned questions of state taxation on Indian reservations and involved, as do most Indian law cases, some convoluted issues. And that was even before the Indian Gaming Regulatory Act was passed—don't get me started.

One such issue involved whether an obscure federal law (the “Buck Act”) applied to Indian reservations. A prior decision of the Court (*Arizona State Tax Comm'n v. Warren Trading Post*, 380 U.S. 685 (1965)) had suggested, in dictum, that it did not. My opposition claimed that the issue was thus determined.

In order to fortify my position that the issue was not decided, and prior to my oral argument, I tried to obtain the transcript of the oral argument in *Warren* from the Supreme Court law library. The librarians informed me that, for some reason, it could not be located and therefore was unavailable, but that the National Archives might be of assistance.

So I taxied over to the National Archives building to listen to the original audiotapes. After hearing them, I was more convinced than ever that the Buck Act issue had not been substantively determined by the Court in *Warren*. Thus armed, and during my oral presentation in *Central Machinery*, I pointed out that the oral argument in *Warren* supported my position, not that of my opponent. Thus began the following exchange, paraphrased:

“Counsel, how do you know that?” Chief Justice Berger interrupted.

“Mr. Chief Justice, because I listened to the recording of the oral arguments in *Warren Trading Post*,” I replied.

“How did you do that?” he pressed.

“I went to the National Archives last week and listened to it there,” I responded.

The Chief Justice paused, frowned, and then assured me, ominously: “Well, that's the last time *that's* going to happen.”

Yikes! I thought we were talking public documents here, not national security secrets. Trust me, you've not lived until, during your first oral argument to the Court, the Chief Justice chides you for trying to be too thorough.

As it turns out, of course, my efforts were to no avail. The Court ultimately declined my invitation to again address the applicability of the Buck Act and—no surprise here—ruled against me in a 5–4 decision authored by Justice Thurgood Marshall. And, yes, I still

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think the dissenters were correct.

So, to those of you out there with upcoming arguments, my advice is to just be careful what you read and listen to beforehand. Or at least be selective with whom you share the results.

BY RODNEY B. LEWIS

## The Justices' Conversation

After my graduation from UCLA Law School in 1972, I returned home to work for my tribe as staff attorney.

Five years later, after I had been appointed General Counsel to the tribe, we brought suit to challenge Arizona's imposition of a state sales tax on purchases made by our tribal government. Future Associate Justice Sandra Day O'Connor, then a trial court judge on the Arizona Superior Court, ruled in the Community's favor, and the state appealed.

The U.S. Supreme decided to hear our appeal after the Supreme Court of Arizona reversed Judge O'Connor's decision. The case was *Central Machinery Co. v. Arizona State Tax Comm'n*, 448 U.S. 160 (1980).

Because I was scheduled to appear before the Court on January 14, 1980, I had to spend the holiday season preparing for oral argument, a sacrifice imposed on my wife and our children, and an inconvenience to members of our large extended family.

Without question, my appearance before the Supreme Court surpasses all other experiences I've encountered in my years of practice. I endured stressful months of research, preparatory meetings, practice sessions and consultations with other attorneys. All of this preparation was performed under severe time constraints and under pressure-packed conditions.

I was fully aware that my appearance bore something of an historic edge, in that I was appearing on behalf of my own tribe as our legal counsel. I worried about the additional personal weight this added to the task at hand: How would I feel if an adverse decision was eventually handed down? Would a decision against us affect the confidence my fellow tribal members had in me?

In addition, as a participant in the establishment of the developing field of federal Indian law, I knew that my performance before the Court, if not executed to the full extent of my training and ability, might well establish a foothold from which states could pierce the jurisdictional boundaries of tribes nationwide.

*Central Machinery* was first on the Court's docket that day, and I was the first called for argument. I stood and was immediately fortified by Chief Justice Warren Burger's warmth. My nervousness abated, thanks to the gracious manner in which he welcomed me.

I became aware that the arrangement of the Supreme Court chambers was not what I had expected. The Justices were not seated on a raised dais; I gained still more self-confidence in realizing my appearance before the Court was not that different from making a presentation at home to the Community Council in our own legislative chambers.

I began to present the Community's position and, thankfully, did not falter in my initial presentation.

Then the questions began. As they were raised, a split between the Justices became apparent. The questions asked really were comments and queries that, while directed at me, were intended to elicit from me a response that would effectively offset remarks

**Rodney B. Lewis**, who retired as General Counsel of the Gila River Indian Community in December, 2005, having served as tribal attorney for 33 years, recounts his experience of appearing before the U.S. Supreme Court at a remarkably early point in his career. He is now associated with Akin, Gump, Strauss, Hauer and Feld, Washington, D.C.

“Justice O’Connor has been notorious during her tenure on the Court for almost always asking the first question in an argument.”

**Paul Bender** is a Professor of Law & Dean Emeritus at the ASU College of Law. He served as a law clerk to Judge Learned Hand of the United States Court of Appeals for the Second Circuit and to U.S. Supreme Court Justice Felix Frankfurter. He has argued more than 20 cases before the United States Supreme Court.

made by other members of the Court.

Justice Byron White asked whether a state tax imposed on the Community would have an adverse impact on the Community’s Treasury. This, obviously, was an opportunity for me to make a slam dunk: “Of course, the Community’s Treasury would be depleted if the additional tax had to be paid, ultimately resulting in a detrimental impact on services the Community provides its members . . . .”

Justices William Brennan and Thurgood Marshall asked no questions, but they voted with the majority, which included the Chief Justice, in a 5–4 decision establishing that a state is without power to impose its tax on a sale by a non-Indian corporation to an Indian tribe where the sale took place on the tribe’s lands.

The opinion was written by Justice Marshall.

BY PAUL BENDER

## Arguments and Results

All of my arguments in the U.S. Supreme Court have taken place while I was serving in the office of the Solicitor General of the United States—the office that represents the United States government before the Supreme Court. I’ve worked in that office twice—once in the mid-1960s as an Assistant under Solicitors General Archibald Cox and Thurgood Marshall, and again in the first term of the Clinton Administration, when I was the Principal Deputy S.G.

The mid-1960s Court and the mid-1990s Court were quite different courts to argue before.

The 1960s Warren Court did not ask many questions, and argument time then was typically one hour per side. The combination made for some seriously dull argument sessions, especially after lunch. I remember Attorney General Robert Kennedy, for example, reading an entire hour’s argument without interruption. I once argued a very complex federal income tax case in which the Justices showed no interest whatsoever. During the course of the hour, they each became glassy-eyed, one by one, their minds obviously elsewhere. Luckily, I happened to mention that the government’s theory was that all taxpayers should be treated equally. Chief Justice Warren suddenly awoke: “What’s that about equal protection?” he asked, his face alive with interest. We won, 9–0.

Justice Douglas was notorious for not seeming to pay attention at argument, working instead on his correspondence or a draft of one of his many travel books. I was arguing a patent case in which the government’s position was that a patent for a process to produce a product was invalid because there was no known use for the product. I hit upon the bright idea of saying that it was as though the inventor sought a patent for a machine that produced “piles of garbage.” Justice Douglas, a pioneering environmentalist, had apparently not been completely absorbed in his extra-judicial pursuits. “But I hear they’re doing marvelous things with garbage these days, Mr. Bender,” he interjected, and returned to whatever he was doing. “Well, just imagine a big pile of something useless,” I offered. I think we won. Justice Douglas did not write the opinion.

Today’s Court is at the opposite extreme. Arguments now are typically a half an hour per side, almost all are scheduled before lunch, and it is sometimes difficult for an advocate to get a work in edgewise. Even in a 10-minute *amicus curiae* argument, every Justice but Justice Thomas will typically ask at least one question—sometimes several.

Justice O’Connor has been notorious during her tenure on the Court for almost always asking the first question in an argument. In a generous mood, she might give you 30 seconds before launching her attack.

I once was asked a question by Justice Ginsburg when I was on my way up to the podi-

um before I even got to say “May it please the Court.” I think she wanted to make sure she had her chance before the really heavy talkers (*i.e.*, Scalia and Breyer) got going.

In the argument in *United States v. Virginia*, where the issue was whether the state could run the Virginia Military Institute as a male-only military academy, I represented the United States as petitioner, taking the position that they could not. I thought the argument went well (Ted Olsen, later President Bush’s lawyer in *Bush v. Gore*, was my opponent and seemed to lose rather than gain votes during his presentation), but I wanted to make one point on rebuttal. My goal was to try to convince Justice O’Connor, whom I thought would be assigned the opinion in our favor, not to act on her comment during argument that letting women in, but having totally segregated dormitory arrangements, might be an appropriate resolution.

When Olsen finished his argument, Chief Justice Rehnquist told me I had a minute and a half left for rebuttal. As I got up to puncture the segregated dormitories idea, Justice Breyer couldn’t restrain himself: “I know you probably have a point to make, but there is one question I’d like to ask you, if you don’t mind,” he said. Halfway through Breyer’s question, Justice Scalia interrupted him to ask me a question about Breyer’s question. They wanted to argue about the constitutionality of separate-sex elementary school education, as I remember, something quite irrelevant to the case at hand.

The red light went on before they were finished rebutting each other. I’m not sure where I got the courage, but I looked pleadingly at Chief Justice Rehnquist and asked whether I might perhaps be permitted to make the one rebuttal point I had risen to make. Obviously taken aback by my chutzpah, he said I could, if I did so quickly. I did.

The 7–1 opinion in our favor was assigned, however, not to Justice O’Connor, but to Justice Ginsburg, who didn’t need any help from me in how to secure equal treatment for women VMI cadets.

Supreme Court arguments are great fun, but rarely have much to do with the ultimate result. 