



2003

A Chilly Reception at the Court

David J. Bederman

Follow this and additional works at: <https://lawrepository.ualr.edu/appellatepracticeprocess>



Part of the Courts Commons, Supreme Court of the United States Commons, and the Torts Commons

Recommended Citation

David J. Bederman, *A Chilly Reception at the Court*, 5 J. APP. PRAC. & PROCESS 51 (2003).

Available at: <https://lawrepository.ualr.edu/appellatepracticeprocess/vol5/iss1/5>

This document is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in The Journal of Appellate Practice and Process by an authorized administrator of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

A CHILLY RECEPTION AT THE COURT

David J. Bederman*

My first Supreme Court argument was a humbling, but ultimately valuable, experience. I represented the Petitioner in *Sandra Jean Smith v. United States*.¹ Haven't heard of the case? Well, don't feel bad. Even in this era of reduced Supreme Court dockets, every term there tends to be at least one case that makes Supreme Court watchers scratch their heads and wonder what could possibly have motivated the Court to grant review. My case—as reduced to its essence in the question I presented to the Court in my petition for writ of certiorari—was deceptively simple and (at the same time) fairly inconsequential: “Is Antarctica a ‘foreign country’ for the purposes of the Federal Tort Claims Act?”

Yes, you did read that correctly. My case was the first before the Supreme Court to raise the question of the legal consequences of acts done in Antarctica, in this case, whether it was permissible to sue the United States for its negligent acts there. The Federal Tort Claims Act (FTCA), on its own terms, excludes jurisdiction over claims “arising in a foreign country.”² My client's husband was killed when he fell to his death into an unmarked crevasse outside the major United States base on the frozen continent, so the question was fairly raised whether Antarctica qualified as a “foreign country,” and thus whether claims arising there were excluded under the FTCA.

I had no delusions that *Smith* would be a landmark decision for American jurisprudence. I had previous experience with such a blockbuster case, having served as one of Petitioner's lawyers (although not arguing counsel) in *Lucas v. South Carolina*

* Professor of Law, Emory University.

1. 507 U.S. 197 (1993).

2. 28 U.S.C. § 2680(k).

Coastal Council,³ a regulatory takings decision that had been a highlight of the 1991 term. But I was not entirely prepared for much of the derision that would greet the Court's ruling in *Smith*. No less an authority than Kenneth Starr observed in the *Wall Street Journal* that

[l]ast term's embarrassingly skimpy docket . . . included such distinctly trivial issues as whether Antarctica is a "foreign country" for purposes of the federal statute that allows individuals to sue the federal government for torts. That issue arises every 20 years or so in litigation somewhere in the U.S., and two courts of appeals were indeed in conflict on the subject. But the issue is of singular unimportance to the nation and its ever-growing body of federal law.⁴

The *ABA Journal*, in an article appearing after the *Smith* decision came down, wondered

why the justices chose to hear this particular case [since] the number of FTCA claims arising in Antarctica (or outer space) is presumably modest. Perhaps the answer is that the justices have adopted the "Star Trek" creed, resolving "to boldly go where no man has gone before."⁵

Despite the unfavorable attention the case received, in taking it to the Supreme Court I derived some satisfaction from knowing that I was literally representing widows and orphans. John Emmett Smith had been a good provider for his family. His death had placed them in difficult financial straits. A negligence suit against the United States was their only recourse. It seemed an abuse of sovereign immunity for the federal government to exploit a hyper-technical reading of the FTCA to ward off this suit on jurisdictional grounds. I was pleased to take the case, and declined a fee.

I got the brief from a very talented set of lawyers in Oregon who had handled the matter in the trial court and the Ninth Circuit. One of the local counsel could not continue with the case because he had just been appointed to the Oregon state trial bench. I agreed to handle the Supreme Court case because I had

3. 505 U.S. 1003 (1992).

4. Kenneth W. Starr, *Trivial Pursuits at the Supreme Court*, in *Rule of Law*, Wall St. J. A17 (Oct. 6, 1993).

5. David O. Stewart, *Out in the Cold*, 79 ABA J. 44 (June 1993).

previously written some law review literature about this question, and, by virtue of my advocacy work for a number of environmental organizations devoted to the Antarctic environment, was concerned about the resolution of the FTCA question's impact on other matters. In other words, I was an academic babe in Supreme Court practice-land. I knew enough to put together a workmanlike cert petition, and to think through the legal issues raised by the case. But because of my inexperience I had little appreciation for the unique aspects of Supreme Court decisionmaking and the ways in which to make a compelling legal argument, particularly in the face of the most implacable foe that any Supreme Court litigator could ever encounter: the genial attorneys of the Solicitor General's office.

One thing I later learned in my dozen years of Supreme Court practice is that there is a world of difference in being counsel of record for your side and merely being on the brief. While I have also enjoyed the secondary role of a sherpa—taking another lawyer to the summit of Supreme Court advocacy—there is a special thrill in being counsel of record and assuming those extra duties of managing amicus parties, dealing with opposing counsel, and preparing for argument. I was fortunate in *Smith* that we had no amici to manage and corral. (In virtually every one of the other dozen cases I have participated in, there were a couple of amicus briefs, and sometimes that number ballooned to over ten.) I was also lucky that my opposing counsel in *Smith*, Christopher J. Wright, of the SG's office, was gracious and unfailingly polite in our dealings. He taught me that Supreme Court advocates are well and truly officers of the Court, and that we were expected to set a higher standard of professionalism and collegiality. His example has motivated me to be affable in later cases I have handled, whether in freely granting filing extensions, providing reciprocal permissions for amicus briefs, and fully cooperating in the preparation of the joint appendix, or in the simple courtesy of inquiring from opposing counsel how their client wishes to be referred to in Court (including the correct pronunciation of the client's name).

As for the actual argument in *Smith*, I learned valuable lessons from my lackluster performance. The first of these was that it was not enough to go through the motions of preparation.

I was far too cavalier in the weeks leading up to my March 8, 1993, encounter with the Court. Assuming that I knew the law underlying the case better than anyone else, I really failed to focus on the obvious weaknesses of my case and to prepare coherent answers to what would be expected questions from the Court. This was despite the able assistance I received from student research associates and my generous Emory Law School colleagues, who prepared me with two moot court benches. It just did not sink in that the point of these exercises was to anticipate the most dastardly and difficult lines of inquiry from the Court and to be able to deftly answer them and to turn them to my advantage. (That is why I now generate lists of such hard questions and prepare copious notes of how best to handle them.)

As just one example, contemporaneous with the final briefing of my case was the United States' military intervention into Somalia after the breakdown of civil authority there. My colleagues suggested that there might be an analogy to be drawn from an area like Antarctica that is sovereignless to a nation in which the government had ceased to function. I was somewhat dismissive of the analogy because it didn't seem legally precise to me. But that was not the point. I should have expected that a naturally curious Justice might be interested in using just such a connection to explore the limits of my legal submission. And, sure enough, I found myself in this exchange at oral argument:

MR. BEDERMAN: . . . even though Antarctica has no choice of law rules embedded in its law, because it has no law, nonetheless the appropriate choice of law rule to advocate is the notion of personal sovereignty, which obviously has limited relevance today because there are virtually no places in the world aside from Antarctica that have no civil tort law. Otherwise it is—

QUESTION: Well, how about Somalia? Do you suppose they have one right now?

MR. BEDERMAN: Justice O'Connor, I would imagine that despite the conditions in Somalia, no one would doubt that Somalian sovereignty, as one would understand that, is still intact. And Somalia's civil tort law, although we might not recognize it as such, still continues in force and that it would—petitioner's submission would not be that Somalia,

because of its current difficulties, ceases to be a foreign country. Again, the petitioner's position is that the notion of looking for the presence or absence of a foreign tort law only comes into play when there is ambiguity over whether there is a presence of a—of a foreign territorial sovereign.⁶

Looking back at this colloquy a decade later, I now realize that while my answer was coherent, it was not an effective way to address the concern that a Justice was raising: What would be the potential tort exposure of the United States in other situations? It was a perfectly reasonable concern, and the skilled advocate's job is to anticipate and handle judges' reasonable concerns.

Another element of oral argument I was unprepared for was gauging the temperament of the Court and responding to a cold bench. I somehow assumed that my case was the most intellectually scintillating matter to come before the Court that term. I expected that I would be literally bombarded with questions, even though I may not have been particularly confident about the answers I would offer. I was also assuming that I would be closely questioned by Justice Scalia. The reason for this anticipation was that the one other case in which the applicability of the FTCA to Antarctica had arisen was the D.C. Circuit's 1984 decision in *Beattie v. United States*.⁷ In that case, the court of appeals had held that Antarctica was not a foreign country under the Act, and that, therefore, cases against the government could proceed. Writing a spirited dissent to that decision was then-Judge Scalia. So I believed that I would be engaged in a animated debate with the one Justice who was on judicial record about the issue presented.

The dynamics of my actual oral argument were different indeed. For starters, mine was the third case scheduled for the day. (It's hard now to believe there was a time with the Court's docket that more than two cases were argued daily!) The other two cases wound up early, my case was called, and I was summoned to the podium at about 11:40. The courtroom emptied out, so I guess the public hardly regarded the case to be as interesting as I supposed. I launched into my opening,

6. Tr. of Oral Argument at 7-8, *Smith v. United States*, 507 U.S. 197 (1993) (available at 1992 U.S. Trans LEXIS 155).

7. 768 F.2d 91 (D.C. Cir. 1984).

meticulously planned for a mere three paragraphs. I was expecting the barrage of questions to come. But they did not. And because I really had not planned a second or third wave of points to use after the invocation of my mantra and my opening, I was at a bit of a loss. Aside from Justice O'Connor's inquiry with the Somalia analogy and a pointed set of questions from Justice Souter on choice-of-law issues, I got no other questions. And not a peep from Justice Scalia. After about ten minutes it finally dawned on me that I had a really chilly bench (as perhaps befitted the topic), and I concluded my argument in chief by asking for questions. Getting none, I reserved the balance of my time and sat down.

That put my opposing counsel in the hot seat, but after ten minutes he was interrupted by the Chief Justice calling for lunch. So Mr. Wright and I trudged downstairs to the Court cafeteria for a light snack. He was gracious enough to say some encouraging words, and to comment on the oddness of breaking for lunch so deep into the argument. In any event, we resumed at one o'clock, and he was able to finish the rest of his submissions with virtually no interruptions, except for a flurry at the end.

I got up for rebuttal, realizing how little traction I had gained with my arguments. It is not a nice feeling, but it's one I suppose every experienced appellate advocate eventually experiences: the sense that you are not persuading the Court, and that your arguments are falling short of the mark. I made a game attempt to shore up my position, and then Chief Justice Rehnquist moved in for the kill. It was an exchange I will not soon forget:

QUESTION: Mr. Bederman, how do you respond to the Government's argument about 1346(b), that the United States would be liable to the claimant in accordance with the law of the place where the act or omission occurred?

MR. BEDERMAN: Chief Justice, my construction of 1346(b) is that if a private party would be liable as a tortfeasor in Antarctica—to Mrs. Smith, say, as plaintiff—then it follows that the Government would likewise be liable. And as the Government has conceded, Antarctica—pardon my colloquialism—is not a legal black hole, that law does apply there by virtue of these choice of law principles.

QUESTION: Well, but the Government's argument, as I understand it, is that there is no tort law governing in—in Antarctica, and therefore without regard to the foreign nation exception, you are not brought within 1346.

MR. BEDERMAN: That would be so, Chief Justice, if, under prevailing choice of law rules a private tortfeasor would not—there would be no law applicable in a private action—

QUESTION: But the statute says the law of the place where the act or omission occurred, which—and here the act or omission occurred in Antarctica, it's conceded, didn't it?

MR. BEDERMAN: Yes, sir.

QUESTION: And if there—if there is no law there, I—how do you get to choice of law?

MR. BEDERMAN: Well, I read the—the Government's reading of 1346(b) is, frankly, disjunctive. They would prefer to eliminate the languages under circumstances where the United States, if a private person. They would prefer to read out that clause and simply look at the last provision in isolation.

QUESTION: Whereas you would prefer to read out the last clause?

MR. BEDERMAN: No, Chief Justice. If it were true that under prevailing choice of law theories a—no private action was permissible because the *lex—lex loci delicti* was in Antarctica, we would have no case. But that is not the law and therefore the fair reading of the entirety of 1346(b), in conjunction with the remainder of the statute including the foreign country exception, leads inevitably to a finding that Antarctica is not a foreign country and that this action can proceed.⁸

When I look back on this exchange, I am pleased to see that I stood my ground under this direct questioning. That was a good lesson to learn. Based on what I have observed of Supreme Court arguments, more cases have been lost by counsel seeking to be agreeable and conceding points they should not, than by

8. Tr. of Oral Argument, *supra* n. 6, at 30-32.

their standing firm. The Justices seem to agree. After I finished this last exchange with the Chief Justice, he was smiling, and I had no further desire to take the Court's time:

MR. BEDERMAN: I have no further substantive points.

QUESTION: Do you have any nonsubstantive points?

(Laughter.)

MR. BEDERMAN: I will not rise to that invitation, Chief Justice.

(Laughter.)

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bederman. The case is submitted.⁹

As I took my seat, I knew that I had probably lost. And given the probing nature of his inquiries, I sensed that it would be an opinion produced by the Chief himself, in the spare and laconic style that I had grown to appreciate. I was later vindicated in that prediction, and I lost eight to one. But I did get a spirited dissent from Justice Stevens, substantially longer than the Court's opinion, in which he at least gave some credence to the legal theories I was advancing in the case. I didn't feel like such a dolt.

My experience with *Smith* has conditioned much of my subsequent Supreme Court practice. I have developed a specialty of sorts in representing clients before the Court who are resisting the application of various forms of sovereign immunity (whether it is the states' Eleventh Amendment immunity, foreign sovereign immunity, or even tribal immunities). Given the difficult nature of arguing against sovereign interests, I have learned that oral argument is a distinctive element of appellate practice. I have conditioned myself to take a fresh look at my case, to simplify it, to ruthlessly expose the weaknesses in my argument, to know

9. *Id.* at 32.

when and how to make key concessions, and to focus on what legal ground I will have to defend to the death. My preparations now for oral arguments are more searching—but also more efficient. Over the years, I have also become more conscious of the fact that my skills as a law teacher really do help me as an advocate. My task in the well of the Court is, in an incredibly short period of time and under the most daunting of conditions, to educate a very special and distinctive audience. All the while, I now realize, many (if not all) the Justices will be ready—just as Justices Souter and O'Connor and Chief Justice Rehnquist were ready in *Smith*—to concentrate their considerable intellectual energies on the weakest part of my submissions and to render my case asunder.

My later experiences arguing before the Court have been more pleasant. And that's not just because the outcomes were more positive for my clients. In the unique arena of Supreme Court advocacy, the key ingredient of success can often be the lawyer's level of experience and comfort. This is not to say that it always is so—I have observed plenty of arguments where a first-time counsel bested an old hand, usually because they knew their case better and were more modest in their legal submissions. But I know that I am a better, more effective, counsel having been on the losing end of the *Smith* decision, and having realized the ways in which my performance could have been improved.

I am also a better person. Other Supreme Court cases have brought me more fame and accolades. I argued *Smith* before a virtually empty courtroom. The case received little attention, aside from the derisory hoots already mentioned. In a sense, it was the most intimate kind of case one can argue before the Court. The result only mattered in tidying up a Circuit split and settling a pesky issue. But that's certainly not the way my client saw it, nor is it the way I viewed the case on that day.

After the argument, I flew home, and told my wife of all the day's events and my feeling that my best had not been good enough. She took my hand, and kissed me, and told me that she was proud of me for having fought the good fight. And then she, a more experienced lawyer than I, predicted that I would eventually look back on my first argument and see that part of lawyering is to have the fortitude to responsibly represent your

client's position against all odds, even when logic suggests that you should give up or give in, but also to have the good grace to accept the court's judgment. She was right, of course. I know that now.

