



2003

## Once Is Not Enough, or How about Arguing Your First Two Supreme Court Cases Back to Back . . . and Losing?

Ian A. Macpherson

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



Part of the Courts Commons, Legal Profession Commons, and the Supreme Court of the United States Commons

---

### Recommended Citation

Ian A. Macpherson, *Once Is Not Enough, or How about Arguing Your First Two Supreme Court Cases Back to Back . . . and Losing?*, 5 J. APP. PRAC. & PROCESS 123 (2003).

Available at: <https://lawrepository.ualr.edu/appellatepracticeprocess/vol5/iss1/14>

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](mailto:mmserfass@ualr.edu).

## ONCE IS NOT ENOUGH, OR HOW ABOUT ARGUING YOUR FIRST TWO SUPREME COURT CASES BACK TO BACK . . . AND LOSING?

Ian A. Macpherson\*

I have no idea why I've agreed to do this piece. I'm writing in response to a request for my recollections about the experience (better characterized, perhaps, as the ordeal) of my first, and immediately ensuing second, oral arguments before the Supreme Court. As the title suggests, however, it is either because I've forgotten the stress of it all or, more likely, because having grandchildren has put things into perspective.

I won't bother you with all of the jockeying and wrangling that went on leading up to the arguments. The angling and cajoling regarding the writing of the briefs, who would moot court the arguments, and who would end up making the formal oral presentation were . . . interesting. Suffice it to say that a lot of people who served in the Arizona Attorney General's Office back then were good enough to repose confidence in a mere assistant attorney general, and I thank them, especially then-serving Arizona Attorney General Bob Corbin, for it.

Right off the bat, know this: Mere words cannot adequately convey all of the aspects swirling around the effort to prepare for your first, let alone immediately following second, oral argument before the Supreme Court. This is particularly so if you are a state assistant attorney general dispatched, solo, to the banks of the Potomac in the dead of winter to argue two Indian tax cases where tribal certiorari petitions have been granted and the United States of America, through the Solicitor General, has been invited by the Court to "express its views." And George

---

\* Mr. Macpherson, a board-certified specialist in tax law, is a member of Ryan Woodrow & Rapp P.L.C. of Phoenix, Arizona, where he concentrates his practice on issues involving taxation and Indian law.

Washington thought he had it tough that winter. Hey, at least Washington won.

Since there are far too many facets of the experience to go into anything approaching an in-depth dissertation, and because any attempt to do so would be both boring and contrary to the objective of presenting the highlights, I've decided to share with you a few of the more . . . let's just say . . . memorable events.

First, full disclosure. I still think I was right. You expected something else? The two cases, *Central Machinery Company v. Arizona State Tax Commission*<sup>1</sup> and *White Mountain Apache Tribe v. Bracker*,<sup>2</sup> involved issues of state taxation of non-Indian activities taking place both within and beyond the boundaries of Indian reservations in Arizona. Justice Thurgood Marshall wrote the opinions, with *Central Machinery* decided five to four and *Bracker* decided six to three. My contention, as you might guess, is that the disputes if presented to the Court today could well be decided differently.<sup>3</sup>

That potential aside, I thought in my naivete that the fact that the two cases were scheduled for oral argument in tandem on Monday, January 14, 1980—*Central Machinery* first, *Bracker* second—was more of a challenge than a sentence. Relatively new to the practice of law (I'd been admitted only in 1971), I thought that the opportunity to appear before the Court and actually argue *two* cases was, to understate the matter, exhilarating. With the vast majority of attorneys never having even a remote chance of actually arguing *one* case to the Court, let alone *their first two on the same day*, the enormity of the opportunity relegated other logical concerns to, let us say, a state of secondary importance.

---

1. 448 U.S. 160 (1980).

2. 448 U.S. 136 (1980).

3. See e.g. *Atkinson Trading Co., Inc. v. Shirley*, 532 U.S. 645 (2001); *Ariz. Dept. of Revenue v. Blaze Constr. Co., Inc.*, 526 U.S. 32 (1999). This is particularly true as to the *Central Machinery* case. In *Blaze*, an amicus curiae brief supporting the taxpayer was prepared by the General Counsel for the Gila River Indian Community, the same attorney who as co-counsel prevailed in *Central Machinery*, and made (this time, unsuccessfully) essentially the same arguments advanced eighteen years earlier. See Br. of Amicus Gila River Indian Community, *Ariz. Dept. of Revenue v. Blaze Constr. Co., Inc.*, 526 U.S. 32 (1999), 1998 WL 541942 (Aug. 20, 1998). But then again, since the trial judge who granted summary judgment to the taxpayer in *Central Machinery*, and whose view ultimately was vindicated in the Court's opinion, was then-Superior Court Judge Sandra Day O'Connor, perhaps the same result would obtain.

This leads me to my second point and Words of Wisdom. There are two Immutable Rules that a first-time Supreme Court oral presenter should observe.

Rule 1: Never voluntarily undertake the briefing and oral argument of two separate, unconsolidated Supreme Court Indian tax cases set to be heard in tandem, in only one of which you were lower court record counsel, unless you are the Solicitor General of the United States.

Rule 2: Always refer to Rule 1.

All kidding aside, I have no idea what I was thinking. In order to adequately prepare for all of the complicated and unanticipated twists and turns—the state of the record aside—that will invariably emerge as the briefing and preparation for oral argument progress, there is simply no time to do everything necessary, let alone do it well. Having capable assistants and staff is absolutely indispensable, but when the rubber hits the road, it all boils down to you, and you alone, standing up there as the nine Justices prepare to test your mettle as well as the strengths . . . and weaknesses . . . of your case.

In *Central Machinery*, at least I had been the lower court trial and appeals record counsel, so I knew the record inside out. Besides, the Arizona Supreme Court had reversed the trial judge—Did I mention that it was Justice O'Connor?—so at least I had persuaded the highest court of Arizona that the taxes could be imposed.

On the other hand, the *Bracker* case had been litigated in the state courts by an attorney who had by then left the Arizona Attorney General's Office. So who do you think had to plough through the record in that case before penning even the first sentence in the brief, let alone the first sentence of the outline for the oral argument? To reiterate: Observe Immutable Rules 1 and 2.

After completing and filing the briefs, going through the moot court arguments, and otherwise psyching myself up in Phoenix, the time came to take the act on the road. I flew to Washington a week before the argument date so that I could watch some other arguments, which gives me the opportunity to articulate another Immutable Rule.

Rule 3: Always attend other oral arguments to get a vicarious feel for your coming ordeal.

Actually, I recall the other oral arguments as being a preview of a great opportunity rather than a harbinger of doom. Observing the Court's decorum and simplicity of questioning (sometimes deceptively simple) was actually a reassuring experience. *Fool*.

I also recall that, after immersing myself in the records, the briefs, the moot court critiques, and the like, I had decided to relax with some light reading on the plane to Washington from Phoenix. As it happened, my wife,<sup>4</sup> knowing of my upcoming experience, had given me a copy of *The Brethren*, which had just been published, for Christmas. *Yikes*. I'm glad I consumed *that* one before the arguments, for no other reason than that it gave me some better insight into minefields and examples of cases better left alone.<sup>5</sup>

Once in Washington, I began the process of acclimating. I'd been there before, but as a tourist, not as a combatant. I stayed at the then-new Washington Sheraton north of Rock Creek Park, near the zoo. Nice hotel, government rates, and a nearby Metro station. Perfect. But when one prepares for one's first oral argument to the highest court in the land, one must work with equal diligence to prepare and to remain calm. And so (you knew this was coming, as it does for all first-timers), I got past the "lost my lunch" event at the hotel restaurant at breakfast on Sunday. Lunch and dinner were, luckily, a breeze.

Monday morning, January 14, 1980. Here we go. Forget the Metro: "Cabbie, we're going to the Supreme Court." Twenty minutes later, out into the c-c-c-c-cold at First and Constitution. . . . Into the building. . . . Check the coats. . . . Freshen up. . . . Tote the document carriers, one for each case, into the courtroom. . . . Set up: *Central Machinery* first (left hand), *Bracker* second (on the right). . . . And then, wait. All of which brings me to yet another Immutable Rule.

---

4. Now of thirty-eight years. And, did I mention, the grandma of the four best grandkids west of the Mississippi?

5. I remember particularly *Antoine v. Washington*, 420 U.S. 194 (1975), an Indian-treaty hunting-rights and jurisdiction case, and the exchanges between the Chief Justice and Justice Brennan on the draft opinion. Those of you who have read the book know what I'm talking about. Glad I didn't cite that one.

Rule 4: Much as if you were securing the first moon landing's soil-contingency sample, grab the two ceremonial quills sitting on the table and hide them in your pocket. In case you pass out, they will be proof to your spouse and offspring that you actually appeared for the arguments.

The wait wasn't long.

Understand that there are no mere English words sufficient to capture the atmosphere when the Clerk bangs the gavel and drones out his "Oyez, oyez, oyez." And then the nine Justices appear from behind the—*gotta be* a hundred feet tall—deep burgundy velvet curtains flanking their chairs. I'm not making this up: Some of the Justices, surveying the courtroom, seemed almost to be selecting and sizing up targets. I felt like I was wearing a bull's-eye. And I was wondering: How did I get myself into this?

Too late. Number 78-1604 called, I had to start listening to the Appellant's opening argument. Same old same old. Nothing new. Lame answers to the Court's questions. Good.

Then, suddenly, showtime. First thing: Remember to stand up. "Mr. Chief Justice and may it please the Court," and off we go.

No questions yet. Good. On a roll. Or so I thought.

The most memorable event of the entire experience occurred in the *Central Machinery* argument. It related to a question asked of me, maybe ten minutes into my presentation, by the Chief Justice. Remember, now, this is the Chief Justice of the United States, I'm an assistant attorney general from Arizona ten minutes into my first-ever argument, and anecdotes from *The Brethren* are still rattling around in the back of my mind. To get the full flavor of the event, however, a little background is necessary.

Recall that I had arrived in Washington the week before the scheduled arguments, both to watch some other oral presentations and to do some final fine tuning of the oral outline and checking out of minor points in the Supreme Court law library.<sup>6</sup> I remember in particular that opposing counsel in *Central Machinery* had made an argument in the reply brief that

---

6. Admission to that library, restricted to members of the Supreme Court bar, is alone worth application for membership by any attorney in good standing.

didn't ring true. In fact, the irregularity hadn't fully struck me until I was on the plane heading for Washington . . . somewhere over Missouri, I think. Right about the time I was reading about *Antoine v. Washington* in my Christmas book.

To avoid boring you with the details, I'll just say that the opposition contended that an issue had been treated by the Court in a particular way in one of its prior decisions, *Warren Trading Post Company v. Arizona State Tax Commission*,<sup>7</sup> the leading case up to that time on state-taxation jurisdiction in Indian country. The issue involved the operation of the Buck Act,<sup>8</sup> which addresses the application of state taxes and fees on federal reservations, including Indian reservations.

Opposing counsel had argued that application of the Buck Act had been rejected by the *Warren Trading Post* Court for a particular reason. That proffered reason, however, was not apparent from either the text of the *Warren Trading Post* decision or the briefs in that case. And in the process of drafting my answering brief, I had confirmed that neither attorney in the *Warren Trading Post* case (both from Phoenix) had the transcripts of the oral argument any longer. And, for some reason, I was unable to get the transcripts at the Supreme Court law library while researching the point.

So, ever the innovative dude, I figured: Why not try to track down the audio recording of the oral argument? A little quick calling around disclosed that—*eureka!*—audio tapes of old Supreme Court arguments were stored at the National Archives rather than at the Supreme Court. Easy. So I trundled over there, checked out the tapes and listened to them. No big deal, right?

Read on.

I was correct: The tapes directly contradicted my opposition's contention. At best, the *Warren Trading Post* Court had addressed the issue only by way of dictum in a footnote. And the tapes of the oral argument, including the comments and questions of the Justices, merely confirmed that the representations being made by my opposition as to the Buck Act were . . . I'll be polite here . . . incomplete.

---

7. 380 U.S. 685 (1965).

8. 4 U.S.C. §§ 105-110.

Armed with this information, and at just the right point—timing is everything—I boldly announced to the Court in the *Central Machinery* argument that “opposition counsel’s contention regarding the Buck Act is wrong, and demonstrably so.” Then the fun began. The Chief Justice perked up, looked me right in the eye, and asked (I paraphrase):

“Counsel, how do you know that?”

“Mr. Chief Justice, because the audio recordings of the oral argument in the *Warren Trading Post* case confirm it. The questions from the Court in that case and answers from the lawyers confirm it.”

“But how did you get the recordings?”

“Well, I listened to them last week. At the National Archives.”

“At the National Archives?”

“Yes, here in Washington, preparing for this argument.”

I was beginning to worry. Yeah, the National Archives, I thought. So what? I shortly learned so what. The Chief Justice leaned forward and targeted me again, a slight scowl creasing his brow, and announced for all those gathered (again, I paraphrase):

“Well, that’s the last time *that’s* going to happen.”<sup>9</sup>

*¡Caramba!* It was as if I had breached some national-security ears-only protocol. A quick scan of the courtroom convinced me that no court officers were bearing down on me, so I quickly moved on to the next issue in the case—What else could I do after that?—and ended up finishing the argument just as my time expired.<sup>10</sup>

---

9. Apparently not. In 1993, an enterprising capitalist clandestinely re-recorded many of the more noteworthy oral arguments then still stored at the National Archives—*Brown v. Board of Education*, *Miranda v. Arizona*, *Gideon v. Wainwright*—and packaged them for sale as unique “gifts” for the “lawyer who already has everything.” I think the current Chief Justice finally put the kibosh on this practice.

10. Adding salt to the wound, when the Court’s opinion finally issued, the majority offered, in a footnote, that it had declined to accept my invitation to re-examine its Buck Act conclusions from *Warren Trading Post*. See *C. Mach.*, 448 U.S. at 166 n. 5. And I thought it had been such a tempting and polite invitation.



The *Bracker* argument started immediately thereafter, and I mean immediately. I was still rearranging and moving the piles of briefs from *Central Machinery* out of the way when opposition counsel began speaking. Mercifully, having become a veteran of one Supreme Court argument, I was in a calmer state of mind for the second argument. Make the points, answer the Court's questions, watch the argument timer lights, sit down. And, thank goodness, no more "That's the last time *that's* going to happen" admonitions.

That's basically it. I checked out of the Sheraton, returned to National Airport, downed a chili dog (*big* mistake) and boarded the plane. The flight back to Phoenix was uneventful, but the wait for the decisions was agony. And, frankly, when the news came on the morning of June 27, 1980, that the Court had reversed both decisions—yeah, yeah, five-to-four and six-to-three is not bad, but this isn't horseshoes—I was not exactly great company.

Reading the decisions was even more difficult, particularly *Central Machinery*, since it had been my case from the get-go. Truthfully, I've read the (cogent) dissent *far* more times than the majority opinion. But hey, you know what? Life goes on. I enjoy a good practice, having left the Arizona Attorney General's Office eleven years after making my first two arguments at the Supreme Court. (No, they didn't fire me for losing the cases.)

The experience was a "twice in a lifetime" one for me. I hope that more than a few of you reading this get the chance to appear and argue, since it is, all other things aside, a prime rush. My mentor and sponsor for admission to the Supreme Court bar offered the best observation on the experience, which I will freely share with you as my last Immutable Rule.

Rule 5: Don't get tied up in the "win" and "lose" sweepstakes game, especially in the Supreme Court.

The bottom line is that you have had a chance to actually appear before and argue to—You're a lawyer, aren't you?—the highest court of the United States of America, and you survived. In my case, not once, but twice, right out of the gate.

There are tens of thousands of lawyers in this country making gazillions of dollars—much of it ethically—who will never have the opportunity to actually argue *anything* of consequence to the Court. Some would arm-wrestle for the

chance, some couldn't care less, and all of them can buy anything their whims and checkbooks dictate, including ersatz ceremonial quills at the Supreme Court's basement gift shop. But mine—been there, done that—are the real deal. And that means I'll have a great story for my grandkids as soon as they're old enough to listen. I can't wait.



