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A FIRST ARGUMENT IN THE TRADITION OF MANY

Beth S. Brinkmann*

INTRODUCTION

I first argued before the Supreme Court of the United States on March 23, 1994. I knew when I was hired as an Assistant to the Solicitor General that my job would be to brief and to argue cases before the Supreme Court on behalf of the United States. So when the time came for my first argument, I was ready—ready, that is, for the legal argument and for the difficult questions. I was not prepared, however, for the tremendous sense of honor that I felt when I entered the courtroom that day.

I had experienced a similar feeling when I served as a law clerk to Justice Blackmun several years earlier. The majesty of the Supreme Court building is awe-inspiring even to a casual visitor, and actually working in the building and participating in the business of the Court is the opportunity of a lifetime. The same is true of appearing as an oral advocate before the Supreme Court. I have had the good fortune of arguing eighteen more cases there over the past nine years, and I have felt the same sense of honor each time, including the day last year when I argued before the Court for the first time as a lawyer in private practice.

Regardless of the number of times that an attorney appears before the Court, the responsibility to the client is always tremendous and the broader significance of the case is inescapable. That responsibility and significance are the driving forces behind an attorney who engages in the rigorous preparation that a Supreme Court argument demands.

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THE PREPARATION

When I began work as an Assistant to the Solicitor General in December 1993, it was unclear when I would be given my first oral-argument assignment. The Court had just completed its third of seven argument sessions for the Term. The Justices would hear argument again for six days during each of the remaining four argument sessions. There was not enough time for me to brief a case that would be argued during the January or February argument sessions, so I hoped that I would get an assignment for March or April, but that depended on which cases the Court decided to hear and which were not already being handled by one of the other attorneys in the office. I knew that I might have to wait until the next Term, which would begin the following October. The precise date of my first argument did not preoccupy me for long, however, because my workload would not permit such a distraction. I immersed myself in drafting briefs for the Supreme Court and writing recommendations for the Solicitor General. At the same time, I tried to take advantage of the opportunities available to watch oral arguments before the Court, especially arguments by other attorneys in the office.

Because the Office of the Solicitor General handles all of the work for the United States in the Supreme Court, attorneys who have worked in the office are the most experienced advocates before the Court. That is particularly true of the Deputy Solicitors General, three of whom are career attorneys who have argued cases for decades. So I made sure to attend oral arguments by several of the Deputies, as well as those of Solicitor General Drew S. Days, III, who was an experienced Supreme Court advocate from his time as an Assistant Attorney General in the late 1970s. I also went up to the Court to watch other well-known advocates and other Assistants argue when I could take an hour out of my workday. Of course, I had watched many arguments during the 1986-1987 Term when I served as a law clerk, but now that I was preparing to stand at the podium myself, that seemed a very long time ago and my memory of the details was vague. Moreover, watching arguments with the knowledge that I would be the one having to answer the Justices' questions in the near future significantly altered my

perspective. I now found myself not only analyzing the legal arguments of the advocates, but also their argument strategies and styles, as I waited for my turn.

It came on March 2, 1994, when the Solicitor General assigned *New York Department of Taxation v. Milhem Attea & Brothers* to me for oral argument. In *Attea*, cigarette wholesalers challenged the system that the State of New York had set up to collect taxes on sales of cigarettes to people who bought cigarettes at stores on an Indian reservation but were not members of the Tribe. Under federal law, the State could not tax on-reservation sales of cigarettes to members of the Tribe, but could tax on-reservation sales of cigarettes to non-members. The problem for the State was how to collect the tax within the confines of the Indian Trader Statutes¹ and federal law doctrines that prohibited the State from unduly burdening commerce with the Tribe.

I had been assigned the *Attea* case soon after my arrival as my first case to brief. That assignment did not, however, mean that I would be assigned the case to argue as well. Argument assignments could not be made until closer in time to the date of oral argument. The Solicitor General first had to see which cases were scheduled on which dates during the particular two-week argument session in order to identify the cases that would be argued by the Assistants, the cases that would be argued by the Deputy Solicitors General, and indeed, the cases that he would handle himself. As it turned out, it fell to me to argue *Attea*, and I was pleased to get the assignment.

The United States had an interest in *Attea* because it was expected that the Court's opinion could set forth broad principles that would determine what regulations States generally would be authorized to impose incident to collecting taxes from non-Tribal members who purchase goods on tribal reservations. It was the job of the Solicitor General's office to consult with the various components of the federal government that could be affected by the case and to consider all of those interests to determine if the federal government had a particular perspective that should be presented to the Court.

1. 26 U.S.C. §§ 261 *et seq.*

The attorneys in the Appellate Section of the Environment and Natural Resources Division at the Department of Justice prepared a draft brief, as was typical, and continued to work closely with our office as the brief and arguments were developed further. We also worked with attorneys in the Department of the Interior to determine what position the United States should take in the case. And we spoke with attorneys representing both parties, as well as amici curiae, to hear what position they thought the United States should take and why.

That series of discussions and our own legal research led us to conclude that the United States had a unique perspective regarding the permissible scope of state taxation and regulation in the case, and the Solicitor General authorized us to prepare a brief to present that view, which we filed on January 19, 1994. Reconciling the various interests at stake led us to draft a somewhat unique brief. We did not support, in whole, either side of the case. Thus, instead of filing a brief in support of either party, we filed a brief supporting affirmance. The first part of our brief agreed in large part with the State's view that the court of appeals had erred in holding that New York's scheme for pre-collecting taxes and incidental record-keeping was preempted by the Indian Trader Statutes. The second part of our brief, however, argued that, as applied, the complex system of registration, quotas, coupons, and state-designated trade territories on reservations conflicted with the Indian Trader Statutes, exceeded the regulatory authority of the State, and interfered with tribal sovereignty, because it substantially interfered with the distribution and sale of goods to members of the Tribe.

That brief became my initial guide as I prepared for oral argument in early March, outlining what argument to present to the Court and what position to take in response to questions. I tried to take a fresh look at our case from the perspective of the Court. I spent a lot of time during the two weeks before argument re-examining our legal analysis, exploring the underlying policies and what those policies meant for the government's position in related contexts, re-reading the authorities relevant to a somewhat arcane treaty argument we had made, reviewing the Indian Trader Statutes and licenses issued thereunder, analyzing compacts between Tribes and other

States that the Court had referenced in earlier decisions, and re-reading the line of relevant Supreme Court precedent and the lower court rulings. I also again reviewed the briefs filed by the parties and the other amici.

As I prepared, I tried to keep in the forefront of my mind the fact that I was allotted only ten minutes for argument, as is typical for the United States when it participates as *amicus curiae* before the Court. The brevity of the argument obviously meant that I had to focus on making my opening statement and my responses to questions as succinct as possible. That effort to distill legal arguments down to their essentials is, in my view, one of the most intellectually rigorous exercises an attorney can perform. It undoubtedly is one of the best uses of an oral advocate's preparation time.

Then came my moot courts. The first piece of advice that I give to anyone asking for recommendations for oral argument preparation is to participate in two moot courts. Moot courts are part of the rich tradition in the Solicitor General's office which prepares so many advocates for their first arguments. Standing up for an hour or more answering every question that very smart lawyers have concocted after reading the same briefs that the Court will have read ensures that you have done your best to prepare answers to likely questions. The attorneys with whom I had worked on the brief participated, of course. But it was by having other Assistants in the office who had *not* worked on the brief sit in the role of Justices that I got a sense of what impression the briefs in the case had likely left on the Court.

The moot courts also served as a reality check. I really was going to argue before the Supreme Court, and soon.

Finally, as the day approached, I learned that there were still other details to address. I wrote a letter to the Clerk of the Court requesting reserved seats for some officials from the Department of the Interior. My good friends Karen Jackson and John Sandage also came to my argument to give me moral support. Indeed, over the course of my next several years in the Solicitor General's office, many family members and friends, including my parents, my sister, my brother, my husband, my in-laws, old friends, and friends' parents used my arguments as a reason to come watch the Supreme Court in action, which turned out to be a wonderful experience. I most appreciated my niece

and nephew attending a few years later (while they were still in middle school), especially when they provided me their views on the case afterwards and demonstrated a remarkable understanding of a complex employment-contract case. My sister also played a crucial role in my preparation for that first argument—she got up extra early on the morning of my argument to telephone me and make sure that I did not oversleep!

THE DAY OF ARGUMENT

When the morning of argument arrived, I realized that I need not have worried about oversleeping. I had hardly slept at all. I went to my office early to sit calmly for an hour reviewing my notes and playing through in my mind my answers to anticipated questions. I remember also sitting there for a moment or two realizing how amazing that day was. There I was, at the age of 35, about to represent the United States in oral argument before the Supreme Court. It could not get better than that.

I also was keenly aware that Justice Blackmun would be on the Bench that morning. I was so proud that he would see me argue before the Court. After all, his giving me the opportunity to serve as his law clerk years earlier undoubtedly was one of the reasons that I had been hired in the Solicitor General's office in the first place. Yet, I also felt an added pressure because I had to make sure that my argument did not disappoint him. As it turned out, that was the last Term that Justice Blackmun served on the Court. He announced his retirement later that year. I then appreciated all the more the fact that my turn to argue had come while he was still on the Bench to participate.

At the appointed hour, I went downstairs to the van that takes the attorneys from the Solicitor General's office up to the Court. I sat there quietly, unable to participate in the regular banter that day, taking a deep breath when I saw the Supreme Court building come into view at the top of the hill. When we arrived at the Court, I spoke briefly with the Deputy Solicitor General on the case, Edwin S. Kneedler, with whom I had worked both in drafting the brief and in preparing for argument. I could not have asked for a more experienced or helpful guide.

It was when Ed and I entered the courtroom and sat down next to respondents' counsel that I felt an overwhelming sense of honor at having the privilege to appear before the Court. Then, when the Marshal of the Court announced the entrance of "the Chief Justice and the Associate Justices of the Supreme Court of the United States," and the Members of the Court walked through the heavy red curtains, a sense of patriotism welled up inside me as I felt that I truly was participating in American history being made. Once the Justices seated themselves, however, and the argument in the first case began, my attention was focused again, in its entirety, on the substance of my case and my responsibility to my client. I do not remember having another stray thought until after the Court adjourned at the end of arguments.

When the argument in my case finally began, I listened intently to the attorney for petitioner, the Attorney General of New York. It was clear from the Court's questioning that the Justices had read our brief carefully. They repeatedly asked how they could decide the case without addressing the burdens that we had suggested the scheme would place on tribal retailers. Throughout the arguments by petitioner and respondents, the Court continued to focus on the narrowness of the issues before them. Thus, I was prepared for the Court's questions about the details of the government's position and our focus on the tribal retailers instead of the non-member wholesalers who had challenged the tax scheme. Sensing that the Court might leave for another day some of the issues that we found most troubling regarding the burdens on Indian sovereignty, I attempted to clarify as precisely as I could where we agreed with the parties and where we disagreed. We could hope that the Court would not reach those troubling issues if they were inclined to rule against us. When my ten minutes were over, I could hardly believe it. The time had passed so quickly.

One of my most lasting impressions of that argument was the attention that every Member of the Court gave to the case during the entire hour of argument. Every Justice appeared genuinely interested in hearing the attorneys' answers to each question. Although I had participated in more than a dozen felony jury trials, as well as a few civil trials, and had argued several cases in the federal courts of appeals before very

esteemed judges, I had never before seen judges give the attorneys such a full opportunity to persuade them of their view.

When I returned to my office, I felt the exhaustion of a person whose adrenaline was finally slowing down after a long run. The last thing I wanted to do was sit at my desk, let alone read anything related to one of my other cases in some other area of law. I tried to fight the inevitable inclination to reargue the case in my mind and think of better answers that I could have given. So, I spent the afternoon discussing with other attorneys in the office all the questions that we could recall and debating their significance.

The Supreme Court gave us the answer on June 13, 1994, when it issued an opinion holding that the State's tax regulations, on their face, did not violate the Indian Trader Statutes.² Of particular interest to us was the fact that the Court declined to assess whether features of the tax scheme would affect tribal self-government or federal authority over Indian affairs, and that it limited its ruling to the Indian Trader Statutes. The Court acknowledged that the provisions regarding quotas and trade territories, about which we had voiced particular concern with regard to the rights of tribal retailers, may present significant problems depending on how they were applied, but left those questions to be addressed in future proceedings. Thus, although the Court did not affirm the judgment as we had urged, we felt some measure of victory in avoiding a broader proclamation by the Court that would have curtailed tribal self-government or federal authority over Indian affairs.

FURTHER REFLECTIONS

In the years since my first argument, I have spoken numerous times to groups of attorneys and law students about one or another of my arguments or, more generally, about oral advocacy before the Supreme Court. Nearly every time, I have been asked about how it is different to argue as a woman before the Court.

The short answer is that it is not at all different. In my experience both arguing before the Court and observing

2. *N.Y. Dept. of Taxn. v. Milhem Attea & Bros.*, 512 U.S. 61 (1994).

countless others do so, it has always been clear to me that what the Court cares about is an attorney's ability to present the case effectively and to respond directly to questions from the Court. It certainly did not make any difference in my preparation for my first argument. I was focused solely on my case—the law, the facts, the likely questions that would be asked, Indian law doctrines, the New York State tax scheme, and countless other matters of significance, not my gender. Frankly, there was no room in my mind for me to be concerned about anything else.³

In addition, when I prepared for my first argument, I did not expect it to be any different as a woman attorney because I knew that it was not at all unusual for women to appear as advocates before the Supreme Court. I had seen that to be true during my clerkship year—October Term 1986, during which more than three dozen women argued before the Court. In at least two cases, attorneys on both sides of the case were women.⁴ The women advocates that Term included prominent attorneys such as Elizabeth Holtzman, then Kings County District Attorney, who argued *New York v. Burger*,⁵ and Judith Resnick, now a professor at Yale Law School, who argued for appellees in the *Rotary Club* case.⁶ Moreover, there were a significant number of women serving as law clerks to Members of the Court that Term. If my memory serves me correctly, I was one of eleven women out of approximately thirty-four law clerks. Also, at the reunion of Justice Blackmun's law clerks that year, I met countless women whom he had hired as law clerks in years past (not surprising for the father of three successful daughters), including two who later were appointed judges on

3. Later, there did come a time when I felt somewhat different arguing as a woman, and that was when I argued two cases while I was pregnant. Even then, I really was not much different from any male attorney who might happen to be sick or nauseous the morning of his argument—a not uncommon phenomenon experienced by Supreme Court advocates preparing to face the barrage of questioning. Also, several women before me had argued while pregnant, and several have since, without its ever becoming an issue. Indeed, I can think of at least ten Supreme Court arguments presented by pregnant attorneys. I did feel, however, that I had a responsibility to ensure that my pregnancy did not, in any way, affect my preparation or argument because I would risk adversely affecting the chances of arguments being assigned to similarly situated women in the future.

4. See *Pa. v. Finley*, 481 U.S. 551 (1987); *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987).

5. 482 U.S. 691 (1987).

6. *Bd. of Dir. of Rotary Intl. v. Rotary Club of Duarte*, 481 U.S. 537 (1987).

the federal courts of appeals. In other words, in the pool of Supreme Court law clerks—the group of attorneys whose members are among those most likely to later practice before the Supreme Court—thirty percent were women my year and many women had come before that as well.

I also was keenly aware of the true pioneers in the generations of legal advocates before mine. I had spent a year serving as a law clerk for an outstanding member of the Eleventh Circuit who happens to be a woman, the Honorable Phyllis A. Kravitch. Like both Justice O'Connor and Justice Ginsburg, Judge Kravitch is one of those women attorneys of an earlier generation to which the women of my generation owe a great debt. Unlike Justice Ginsburg, Judge Kravitch never had the opportunity to argue before the Supreme Court, but she became one of the leading trial and appellate advocates in Georgia, and was the first woman to win election to the Georgia Superior Court (in 1976). In 1979, she became the third woman appointed to a federal court of appeals. Judge Kravitch teaches her law clerks the significance of legal ability, dedication, and hard work to achieving success as an attorney, despite whatever obstacles might arise because of gender or similar factors. Judge Kravitch now recounts stories about instances of unfair treatment based on her gender only because she knows that they would not happen today. She also does not fail to appreciate the irony in many of those stories, and even the humor in some.

The morning of my first argument, I found myself recalling one of Judge Kravitch's experiences at the moment when I caught sight of the Supreme Court building as we drove up the hill. I was thinking of the history of the building and suddenly remembered a story from its early years. After serving on the editorial board of the law review and graduating second in her class at the University of Pennsylvania Law School in 1944, Judge Kravitch was interviewed by a Justice of the Supreme Court for a position as his law clerk. She had been commended to the Justice by a colleague based on a recommendation provided by her law school's dean, and the interview went well. Nonetheless, the Justice candidly informed her that his first offer was going instead to a male applicant who was no better

qualified. The Justice explained that “the Court had never had a female clerk and he hesitated to be the one to break precedent.”⁷

After she also was refused employment by both New York and Philadelphia law firms because of her gender (and, in one instance, because of her religion), Judge Kravitch returned to Savannah, and entered the law practice of her father, Aaron Kravitch. She became a member of the Bar of the Supreme Court of the United States, along with her father, on January 13, 1948, the day on which her father presented argument in *Toomer v. Witsell*.⁸ She appeared on brief in that case and on certiorari petitions in another half dozen cases over the course of the following decade or so. Needless to say, when I approached the Court for my first appearance as an advocate before it, I could not help but feel a sense of satisfaction (as I had when I was hired as a law clerk there) knowing that I was joining the ranks of women who had righted an historical wrong.

Finally, shortly after my arrival at the Solicitor General’s office, I had learned more about the history of government attorneys appearing before the Court, which further confirmed that there is a rich, albeit little known, tradition of women advocates. I met Harriet S. Shapiro, who had been working in the office since being hired by Solicitor General Griswold in 1972 as the office’s first woman attorney. She had presented seventeen arguments before the Court in her first decade there, and eventually continued in a part-time position even after her official retirement. Soon after I started, Harriet told me that I was “Number Ten,” and then explained that I was the tenth female Assistant hired in the office. (Three women also had served as Deputy Solicitors General by then.) Like Judge Kravitch, Harriet downplayed her role as a woman attorney, and she focused, instead, on her role as a government attorney in the best traditions of the Office of the Solicitor General and the Department of Justice. Nonetheless, Harriet Shapiro’s presence in the office paved the way for other women attorneys, and her trailblazing role cannot be discounted.

7. Phyllis A. Kravitch, Bernita Shelton Matthews Meml. Lecture in Law, *Women in the Legal Profession: The Past 100 Years* (U. of Miss. L. Sch., University, Miss., Spring 1999), in 69 Miss. L. J. 57, 66 (1999); see also Sonny Lufrano, *Honoring “Your Honor”*, Atlanta Jewish Times 14 (Nov. 24, 2000).

8. 334 U.S. 385 (1948).

The tradition of women advocates before the Supreme Court dates back to the first argument by Belva Ann Lockwood in 1880.⁹ That was followed by a series of arguments by two women tax lawyers on behalf of the government during Prohibition.¹⁰ Some of the most prominent arguments by women have included Justice Ginsburg's appearances before the Court in a half-dozen landmark sex discrimination cases in the 1970s,¹¹ the many arguments by now-Judge Constance Baker Motley on behalf of the NAACP in school desegregation cases,¹² and even the argument by the daughter of Justice Brandeis in 1925.¹³

Women employed as attorneys elsewhere in the federal government also argued before the Court on behalf of the United States at a time when women were not yet hired to work as attorneys in the Solicitor General's office. Most significantly, Beatrice Rosenberg, who served in the Criminal Division's Appellate Section (which she ultimately headed) at the Department of Justice, argued dozens of cases before the Supreme Court beginning in the 1940s through the early 1970s.¹⁴ Bessie Margolin, who served at the Department of Labor and

9. Unfortunately, when Lockwood first applied to be admitted to the Bar of the Supreme Court of the United States in 1876, the Court denied the motion to move her admission, citing the fact that "none but men are permitted to practice before it as attorneys and counselors," and explaining that the Court did not feel "called upon to make a change until such a change is required by statute or a more extended practice in the highest courts of the States." Jill Norgren, *Belva A. Lockwood: First Woman Member of the Supreme Court Bar and First Woman to Argue Before the Court*, in S. Ct. Historical Socy., *Supreme Court Decisions and Women's Rights* 207, 214 (Clare Cushman, ed., CQ Press 2001). Over the course of the next two years, Lockwood drafted federal legislation which, after much lobbying, was enacted by Congress to require admission of women to practice before the Supreme Court of the United States. *Id.*; see also *An Act to Relieve Certain Legal Disabilities of Women*, 20 Stat. 292, ch. 81 (1879) ("[A]ny woman who shall have been a member of the bar of the highest court of any State or Territory or of the Supreme Court of the District of Columbia for . . . three years, . . . shall have maintained a good standing before such court, and . . . shall be a person of good moral character, shall . . . be admitted to practice before the Supreme Court of the United States."). In 1879, Lockwood became the first woman admitted to practice before the Court and, in 1880, became the first woman member of the Supreme Court Bar to participate in oral argument. She also argued before the Court for two days in 1906, at the age of 76. Norgren, *supra* this note, at 215-216.

10. Clare Cushman, *Women Advocates Before the Court*, in *Supreme Court Decisions and Women's Rights*, *supra* n. 9, at 227.

11. *Id.* at 229.

12. *Id.* at 224.

13. See Frank B. Gilbert, *Susan Brandeis: A Justice's Daughter Argues Before His Court*, in *Supreme Court Decisions and Women's Rights*, *supra* n. 9, at 234.

14. Cushman, *supra* n. 10, at 228-29.

was a key figure in the development of the Fair Labor Standards Act, argued almost as many from the 1940s through the mid-1960s.¹⁵

I continue to witness firsthand the enduring impact made by earlier generations of women advocates, including working now at my law firm with Shirley M. Hufstedler, who, in 1968, became the second woman appointed to a federal court of appeals. After leaving the bench to serve as Secretary of Education, she returned to private practice, is still practicing before the Supreme Court, and argued before the Court as recently as 1996.¹⁶

My generation has its own growing group of women Supreme Court advocates, although most of the women who argue before the Court, like their male counterparts, often have only one or two opportunities in their careers to do so. Most are attorneys in state attorney generals' offices, members of the criminal defense bar, law professors, or counsel to public-interest organizations. The attorneys in private practice who return to the Court on a regular basis tend to be from a much smaller pool of attorneys who served in the Office of the Solicitor General, clerked at the Supreme Court, or both. The women in that group include several alumna who preceded me at the Office of the Solicitor General and then went into private practice, such as Maureen E. Mahoney, Kathryn A. Oberly, Carolyn F. Corwin, and Barbara E. Etkind.¹⁷ Moreover, during my eight years in the office, five more women were hired as Assistants and a woman again served as Deputy Solicitor General. As those ranks continue to grow and other women at law firms continue to develop appellate practices, the number of women advocates in private practice who enjoy repeat appearances before the Court undoubtedly will grow as well.



15. *Id.*

16. *Exxon Co., USA v. Sofec, Inc.*, 517 U.S. 830 (1996).

17. *See Cushman, supra* n. 10, at 226-227.

