WHY ME?

Walter Dellinger*

When I was asked to write about my first Supreme Court argument, I wondered what could possibly be interesting about that subject. Then I realized that there is at least one good question to ask anyone about his or her first Supreme Court argument: Why were you hired? That is, why in the world would anyone entrust their Supreme Court case to someone who had never argued one?

Supreme Court arguments are highly coveted and a number of experienced, outstanding advocates regularly appear before the highest court. The advantages of experience are obvious, and every party who has a case before the Supreme Court has an array of choices among that group of attorneys, most usually backed by excellent law firms and each with a track record that assures a highly competent performance, and often a stellar one. Experienced advocates are expensive, of course, but a party with limited resources can almost always find one or more seasoned Supreme Court veterans to take the case for a discount—or for free.

In my case, the first trip to the Supreme Court podium led through Williamsburg, Virginia. In the fall of 1989, I was a panelist at the Supreme Court Preview at William & Mary Law School, which had become a favorite annual event for me. Co-sponsored by the Institute for the Bill of Rights and the American Society of Newspapers, the weekend consisted of the correspondents who covered the Supreme Court and a few law professors previewing the leading cases of the Term for editorial writers and interested members of the public.

---

* Mr. Dellinger, the Douglas B. Maggs Professor at Duke Law School, heads the appellate practice at O'Melveny & Myers LLP. A former Assistant Attorney General and Head of the Office of Legal Counsel, he was Acting Solicitor General during the 1996-97 Term.

In 1989 the Preview was held in late October, and one of the cases on the list to be discussed was *Baliles v. Virginia Hospital Association*.[1] As a recent grant, it was near the end of the list of cases to be decided, and the panel assigned to assess major statutory cases never got to it.

The week after Williamsburg, I was in my office at Duke when I received a call from Judy Henry, who introduced herself as one of the Richmond lawyers who had successfully argued the *Virginia Hospital Association* case in the Fourth Circuit.[2] She had attended the Supreme Court Preview to learn how the panelists would assess the prospects for her case in the Supreme Court, only to be disappointed by the absence of discussion of *VHA*. But, she said, she did have the opportunity to hear me speak at the Conference.

Coming to the point, she said she would like to suggest to her client the possibility of considering me to argue the case in the Supreme Court. She, her partner Martin A. Donlan, and Laurens Sartoris, the head of the Virginia Hospital Association, had already made several trips to Washington to interview each of the law firms with leading Supreme Court practitioners, and were on the verge of choosing one.

It was still possible to consider me, but the selection process was basically at an end and time was extremely short. The petitioner's merits brief was soon to be filed, and work would have to begin immediately on the Association's brief for respondent, due thirty days later. They needed to finalize their decision within a couple of days. It was clear that if I wanted to be considered, I would have to come to Richmond the next morning to be interviewed.

I told her I would think about whether I could possibly attempt to do this case, and would phone her back in a couple of hours. Her call left me dazed. I had never argued a case in the Supreme Court, or been responsible for briefing one on the merits. I had argued a few cases in the Courts of Appeal. (A year earlier, my wife had gone to Washington to be Special Assistant to the Director of the FBI, and while she did that, I became a Professor in Residence in the Civil Appellate Section at the

1. 493 U.S. 808 (1989) (granting certiorari).

2. *See Va. Hosp. Assn. v. Baliles*, 830 F.2d 1308 (4th Cir. 1987); *Va. Hosp. Assn. v. Baliles*, 868 F.2d 653 (4th Cir. 1989).

Department of Justice in order to get some "real" experience.) And I had written my share of law review articles and been active in public affairs, testifying fairly frequently on constitutional issues before the House and Senate Judiciary Committees. But the prospect of being responsible for a case in the United States Supreme Court intimidated me.

And I knew absolutely nothing about the case. So I headed to the law library, picked up the Federal Reporter in which the Fourth Circuit's opinion appeared, and wandered down to the faculty lounge to read it over coffee. As I thumbed through the opinion walking up the stairs, I immediately saw that the case was both important and complex.

The Virginia Hospital Association had sued the governor and various health-care officials of the State of Virginia. Its member hospitals had provided care to low-income patients under the Medicaid program and were supposed to be reimbursed by the state for the reasonable cost of that care, under something called "the Boren Amendment," with which I was completely unfamiliar. The Association believed that the reimbursement methodology used by the state was consistently unreasonable, and sought to remedy the resulting shortfall by suing in federal court, where it contended that the state officials were depriving the hospitals of a "right secured by federal law." The basis for the hospitals' suit was one of the Reconstruction-era Civil Rights Acts, Section 1983.[3]

The idea that there was a federal right to sue in federal court over these reimbursement disputes was controversial, to say the least. I knew little about that area of the law, but I knew that the Rehnquist Court was hardly hospitable (to put it mildly) to expanding the reach of federal courts, particularly when state officials were the target of the questionable federal litigation.

By the time I had poured myself a cup of coffee, I had flipped almost to the end of the Fourth Circuit opinion—and I was ready to call Judy Henry and tell her there was no point in my coming to Richmond. There was no way they would hire me for this case.

As luck would have it, two of my favorite faculty colleagues, Jeff Powell and Lawrence Baxter, were in the lounge

3. 42 U.S.C. §1983.

taking a late-afternoon coffee break. I told them what was up. But then I added that I had already decided not to go to Richmond to interview for the assignment. I had a full course load that fall and probably couldn't do justice to the case. And they would never hire me, anyway.

Both Jeff and Lawrence protested vigorously, insisting that I shouldn't pass up this opportunity. I could do it: They would write the brief with me, and, they were convinced, I'd be great at this.

Their arguments—and especially their offer to help—gave me pause. But it still made no sense to make a mess of my next day's schedule by going to Richmond on a fool's errand. The interview was sure to begin with the prospective client asking me how many Supreme Court cases I had argued and end shortly after I replied, "zero." I told Jeff and Lawrence of the distinguished firms and leading Supreme Court practitioners already interviewed by the client. What could I possibly say that would make them want to hire me instead?

A very long silence ensued. Finally, Jeff looked up and exclaimed "I know why they'll hire you!" Lawrence and I looked at him skeptically. "And why is that?" I asked.

"Because," said Jeff, "you are going to go in there tomorrow morning and argue the case to them." He suggested that I walk in the door, hand them my resume, ask for a podium and tell them that all I wanted to do was to spend twenty minutes arguing the case.

"That's one of those truly great ideas," I responded, "that has one truly critical flaw. I don't know anything about this case. I have never read the Boren Amendment, which appears to be critical to the suit, or any of its legislative history, nor any of the scores of lower-court cases on 'implied federal causes of action' or any of the relevant opinions of the Supreme Court."

"Not a problem," Lawrence responded. "It's what, five o'clock, now? To fly to Richmond for a nine o'clock interview tomorrow, you'll have to leave for the airport no later than six in the morning. That's what? Twelve or thirteen hours from now? That's plenty of time in which to learn enough to figure out a winning argument."

That night was one of my happiest in the law. Lawrence and Jeff and I tore up the Duke Law Library. By ten o'clock we

had assembled all the cases and the legislative history. By midnight we were well on the way to sort of speed reading through a plethora of apparently relevant opinions. By 3:00 a.m. we had a concept of how the case ought to be briefed in the Supreme Court. By the time the sun came up, I had notes for an oral argument. I went home to shower, shave, and head to the airport.

***

The argument I made that morning in the Richmond offices of Judy Henry's law firm went well beyond the twenty minutes they had agreed to hear from me. Judy, her partner Marty, and Larry Sartoris from the Association peppered me with tougher and tougher questions for more than an hour. We talked about my lack of Supreme Court experience, and the fact that the American Hospital Association very much wanted them to hire a leading Supreme Court practitioner for the case. They said they would let me know soon.

I thanked them, shook hands, and headed down the hall. As I waited for the elevator to arrive, Judy and her two colleagues called me back in. They were ready to decide on the spot. I was hired.

***

Now, many Supreme Court arguments later, I often suggest to prospective clients that they are better off hiring someone with substantial Supreme Court experience. But I have to admit that my first Supreme Court argument may have been the best I ever made.

I'm not sure why that was so. But several possibilities come to mind. First, I had great help. H. Jefferson Powell is one of the greatest constitutional scholars I have ever known. His Harvard Law Review article, *The Original Understanding of Original Intent*,[4] was already a classic. Lawrence Baxter, who had come to Duke from South Africa, was one of the great administrative-law scholars of the British Commonwealth. His

4. 98 Harv. L. Rev. 885 (1985).

comparative sense of how administrative systems ought to operate was invaluable to a critical understanding of both the federal and Virginia processes for administering Medicaid reimbursement.[5] Jeff and Lawrence plunged into the work; each wrote a third of the brief. I undertook to write the part where I thought we were most likely to lose the case. We worked late into the night for weeks. When deep snows came one night, we walked to a hotel right off the Duke campus, and were back at work early in the morning.

Once, when I hit a brick wall in constructing the argument, Jeff came down to my office in the wee hours of the morning, and sat beside me at the keyboard until we came up with a solution. We alternately typed phrases and sentences on the keyboard like dual pianists—sometimes like dueling pianists. But we got through it.

We also had a great collaboration with our Richmond colleagues who had handled the case below. Judy and Marty had handled this dispute with the state for many years. There was no detail they had not mastered. Judy contributed to every page of the brief, and drafted the critical introductory sections. I learned on the occasion of my first case a lesson I have followed ever sense: Make full use of those—both in-house lawyers and outside counsel—who have handled a case before I was brought in. One of the worst mistakes Supreme Court counsel can make is to exclude from the process those who have been with the case from its inception.

***

There are no special tricks for preparing for a first Supreme Court argument. There is, for an advocate's first or twentieth argument, no substitute for preparation. And I was really prepared for this argument.

---

5. Jeff Powell became Deputy Assistant Attorney General in the Office of Legal Counsel at the Department of Justice from 1993 until 1996 when he returned to Duke. His latest book is *A Community Built on Words: The Constitution in History and Politics* (U. of Chi. Press 2002). Lawrence Baxter left a highly successfully academic career at Duke to put his ideas about administration into practice. He is now executive vice president and chief e-commerce officer at Wachovia Corporation.

And still I was nervous. In my hotel room I worked on my argument notes until two or three in the morning, then was back awake by 5:00 a.m. When Court convened, the first order of business for the Justices was the ceremony in which members of the Supreme Court bar move the admission of new members in open court. Partly out of a desperate effort to gain a modicum of sympathy from the Court, I arranged to move the admission of my wife to the bar of the Court that morning. The standard form requires the movant, when addressed by the Chief Justice, to say precisely: "Mr. Chief Justice and May It Please the Court. I move the admission of [name of applicant here] of the bar of [name of State here]. I am satisfied that he/she possesses the necessary qualifications." Only one alteration is permitted: One moving the admission of a family member may say, for example, "my son" or "my father." Movants are admonished that any additional statement may lead the Chief Justice to decline to grant the motion, and instead to take it "under advisement."

When I was called upon by the Chief to make my motion, I recklessly added a few words to the script, saying "I move the admission of Anne Dellinger, *my wife of twenty-five years....*" I got away with it, but I wouldn't advise it, and I wouldn't do it again. (If any member of the Court was the least bit moved by this familial moment, it certainly didn't show. I was pounded with questions from the start.)

I didn't realize before the argument that I would be encountering on the other side one of the finest lawyers ever to appear before the Court. In addition to the very able deputy attorney general of Virginia, Claire Guthrie, the case against a right to sue in federal court would also be argued by the Deputy Solicitor General of the United States, John Roberts, who is now a judge on the D.C. Circuit.

I still remember the phone call to my Duke office on the second Monday in June, 1990. It came from Roberts, as gracious an opposing counsel as he was a gifted advocate, calling to relay in person the news from the Supreme Court. "Congratulations," he said. "You won, five-to-four."[6]

6. *See Wilder v. Va. Hosp. Assn.*, 496 U.S. 498 (1990).

Editor's Note: Because Walter Dellinger knows only one side of this story, Richmond lawyer Judy Henry agreed to provide her recollection of why she and her colleagues chose someone who had never appeared in the Supreme Court to make his first argument in their important case. This is her side of the story:

WHY WE HIRED WALTER DELLINGER

Judith B. Henry**

When the Supreme Court granted certiorari in *Baliles v. Virginia Hospital Association*,[1] my law firm, Crews & Hancock, had been handling the case for more than three years. Our client, the Virginia Hospital Association, alleged a violation of a federal right guaranteed by the Medicaid Act relating to reimbursement of its member hospitals under the Virginia State Medicaid Plan. Despite the statutory command that hospitals be reimbursed for their reasonable costs in providing health-care services to the poor, no member of the VHA was being reimbursed for all of the costs it incurred in serving the needy under Virginia's Medicaid program. Each year, in fact, the gap between the costs incurred and the reimbursement received was widening.

My firm had successfully briefed and argued two appeals in the *VHA* case at the Fourth Circuit.[2] We believed in our case and in our argument. We were concerned, however, because the Supreme Court had granted certiorari to review an interlocutory judgment (which, while not unheard of, is unusual), and also because the Court reverses a much higher percentage of the cases in which certiorari is granted than it affirms. The case was so important and the risk of reversal so great that we decided, in consultation with our client, to explore the possibility of associating counsel with Supreme Court experience.

I asked a friend who had clerked with me at the Fourth Circuit, and who had subsequently clerked at the Supreme

---

** Judith B. Henry practices appellate law in Richmond, Virginia. She has served as an adjunct professor at the University of Richmond Law School and as a faculty member in the Appellate Advocacy Program of the National Institute of Trial Advocacy.

1. 493 U.S. 808 (1989) (granting certiorari).

2. *See* 830 F.2d 1308 (4th Cir. 1987); 868 F.2d 653 (4th Cir. 1989).

Court, to recommend attorneys who had appeared there that he felt were exceptionally good. He recommended several, all associated with prominent firms in Washington, and we put them on our list.

Several weeks later, I attended the annual Supreme Court Preview at William and Mary, where the panelists were primarily legal scholars and journalists. One of the participants—Walter Dellinger, a professor of constitutional law at Duke—was particularly impressive. I liked his enthusiastic style and wry sense of humor, and I admired his ability to analyze a case in a straightforward, logical fashion, to simplify, without oversimplifying, the issues, and to cut right to the heart of the matter. After the seminar, I suggested to my colleagues that Walter Dellinger also be considered as a candidate to argue the case.

Three of us—Marty Donlan, the lead attorney on the case, Laurens Sartoris from the VHA, and I—proceeded to interview the attorneys we had identified as leading candidates. All had excellent credentials, and all were obviously very capable attorneys. Professor Dellinger was the last candidate we interviewed. In all candor, he was the dark horse, because he was the only candidate who had not argued in the Supreme Court, and because there was some concern that, as a law professor, he might be more of an academic than an advocate. This concern proved to be unfounded. He made the strongest presentation, and when we adjourned afterward to caucus, we unanimously voted to offer Walter the job. Fortunately, he accepted.

We selected Walter for a number of reasons. Although he was not the only attorney who came prepared to discuss the specific issues involved in the case, he was the only one who argued the case to us. He was not only familiar with the issues that had been briefed and decided below, but he had thought about how to develop the arguments in the Supreme Court. He was so knowledgeable, prepared, and articulate that he inspired confidence, and he communicated an enthusiasm for the issues involved in our case. We could see how he would advocate our position before the Court because he was advocating the case to us. And without having been hired, he already seemed to be invested in the outcome. This was important both to the client,

to whom the issues were critically important, and to us, as we had devoted three and a half years to litigating the case and absolutely believed that the hospitals' position was correct.

Drafting and revising the VHA brief and preparing for oral argument proved to be a truly collaborative effort between our firm and Walter and his colleagues at Duke. We brought to the table an understanding of hospital costs, of reimbursement principles, and of the Virginia State Medicaid Plan and its substantive and procedural shortcomings. Walter brought a broad-based knowledge of how this private cause of action fit into the bigger picture of Supreme Court precedent, and of how to showcase the key legislative history. He also brought his unique style and flair to the oral argument, which were very effective.

One moment from the oral argument stands out in particular. The United States had argued that not only did the Boren Amendment fail to contain express language stating that health-care providers had a right to sue, there was also nothing in the legislative history affirmatively suggesting that providers would have such a right. Walter responded by first establishing that lower courts had long recognized the right of providers to sue, and that Congress was aware of those decisions when it debated the Boren Amendment. Surely, he suggested, if Congress were taking away a right that previously existed, one would expect to see discussion of such a step in the Congressional debate. But, he argued, "there's not a word in the legislative history, the extensive legislative history in '80 and '81, that says, oh, in addition, we're making another major change. We're extinguishing the right of providers to sue in state and [f]ederal court." "There's not a word," he went on, "that Congress was withdrawing a right of which Congress was fully and clearly aware." Driving home the point, he said, "That is, in this case, *the dog that did not bark.*"[3]

By changing the expectations of what one would find in the legislative history, and flipping the presumption to be drawn from legislative silence, Walter had taken one of our most troublesome points—the absence of express legislative

3. Tr. of Oral Argument, *Baliles v. Va. Hosp. Assn.*, 496 U.S. 498 (1990) 16-17 (Jan. 9, 1990) (emphasis added) (available at 1990 U.S. Trans LEXIS 161, *41).

discussion of a right to sue—and turned it to our advantage. With his use of the canine metaphor, an allusion to the clue from which Sherlock Holmes solved one of his most famous cases,[4] Walter made our point both effectively and memorably. Just as Holmes deduced that the dog was silent because he knew the man who entered the stable in the middle of the night, Walter deduced that Congress was silent when it enacted the Boren Amendment because it knew that it had previously created an enforeceable right on behalf of providers under the Medicaid Act, and did not intend to take away that right.

Our confidence in Walter was rewarded when the VHA's position prevailed five-to-four in the Supreme Court.[5] On remand, the case settled, with the VHA obtaining significant revisions to the State Plan and substantial increases in the reimbursement received by Virginia hospitals participating in the Medicaid program. Across the nation, hospitals that provided health care for the poor benefited from the Court's decision confirming their entitlement to challenge inadequate Medicaid reimbursement.

On a personal note, since working on the *VHA* case, my practice has included briefing and arguing numerous appellate cases, as well as filing amicus briefs, in both state and federal courts. I appreciate the opportunity I had to work with Walter Dellinger on a Supreme Court case, and count that experience as an important milestone in my professional growth.

4. *See* Arthur Conan Doyle, *The Adventure of Silver Blaze* (George Newnes, Ltd. 1892) (serialized in Strand Magazine).

5. *See Wilder v. Va. Hosp. Assn.*, 496 U.S. 498 (1990).