



On Appellate Advocacy - Fifteen Minutes

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One month ago today, my 15 minutes of fame ended when the Supreme Court decided *Virginia v. Maryland*, a case that I argued in early October and wrote about previously in this column. I suppose that some could argue that my 15 minutes ended sooner than that, even in my little corner of the world. The day after a flurry of articles about the Supreme Court argument appeared in several regional newspapers and a few national ones, the world was besieged by a blizzard of headlines about Dr. Peter Agre — not because he happens to reside in the same neighborhood as I do, although that could be considered newsworthy in and of itself — but because of some award that he won.

Well, whatever delusions I had about my continuing fame ended when, at approximately the same time that the King of Sweden handed Dr. Agre the Nobel Prize in chemistry, the Supreme Court handed me, via a phone call and e-mail from its clerk's office, a 7-2 decision ruling against Maryland.

My 15 minutes may be over, but I'd like to extend them just a little longer before I follow the wise suggestion that one of my co-counsel, Adam D. Snyder, made soon after the argument when he told me that it was time to move on. Snyder's suggestion apparently reflected a view shared by more than just a few people who, based on the way some of the justices came after me with a harpoon, were not particularly optimistic about Maryland's likelihood of success.

This view was not limited to those who actually saw the argument, mind you, thanks to headlines in some newspapers, including my favorite, *The Daily Record's* "Justices Grill Maryland." I really liked that one. Thanks, editors.

I do not know what the actual circulation for this newspaper is, but I suspect it's huge — even after accounting for the cancellation of my subscription — because a lot of lawyers who I know for a fact were not at the argument offered their condolences before the Supreme Court even announced its decision. I felt a little like that character from the Monty Python movie who, after being thrown into a cart of corpses in response to the call "Bring out your dead," kept insisting, "I'm not dead yet."

Those words fell on deaf ears, unfortunately, and not just in the movie, as I learned when a member of the clerk's office called at precisely 10:00 the morning the case was decided.

The clerk first informed me that the court had rendered a decision in the case and that the decision was in favor of Virginia and against Maryland. The rest of the phone call was largely a blur.

I vaguely recall the clerk telling me that the chief justice wrote the court's decision and that he was joined by six justices, each of whom she named. I also have a faint recollection that she continued speaking and that she informed me that Justice Kennedy wrote a dissenting opinion in which Justice Stevens joined, and that Justice Stevens wrote a separate dissenting opinion in which Justice Kennedy joined. They always have been my favorite Justices. (They're now my mother's favorites, too.)

The one part of the conversation that I remember vividly is when the clerk paused for a moment, and then said, "I'm really sorry." I may have lost a case that I argued in the Supreme Court, but I'll bet that not too many of you can say that a clerk's office of any court has ever called and apologized for the way the court decided one of your cases.

Original action

The call from the clerk's office was one of many "firsts" that I experienced in this case. Just working on an original action case is one of them. Not many lawyers can say that they ever have had any case in the Supreme Court, much less a case in which the court has invoked and exercised its original jurisdiction.

The typical way in which to secure the Supreme Court's review of a case is to file a petition for a writ of certiorari that, if successful, will result in the court's exercise of its discretionary jurisdiction. Persuading the Supreme Court to do this has never been easy, and it has become even more difficult in recent years. Out of the thousands of cert petitions filed annually, the Supreme Court in the past decade or so has agreed to review an increasingly small percentage of them, with the result that it has decided only an estimated 80 cases each year during that time frame.

By comparison, few cases even qualify for the court's consideration as an original action, and fewer still are deemed sufficiently meritorious to warrant the court's attention. The United States reporters are littered with opinions and one-line orders in which the court has refused to get involved in one state's squabble with another for a variety of reasons, ranging from the lack of a concrete or ripe controversy, to the insubstantial nature of the issue involved, to the availability of another forum for resolving the dispute. As a result, since the Supreme Court's inception more than two centuries ago, the court has only issued approximately 200 original action decisions, total.

Even for an original action case, however, *Virginia v. Maryland* was unusual. The origins of the dispute between these two States over the Potomac River trace back to the early 1600s, when Maryland and Virginia were among the first colonies established in what is now the United States. History often plays a role in original action cases, but few, if any, of these cases involve royal charters, letters from Thomas Jefferson, James Madison, and George Washington, compacts, and other documents as old as the ones that Maryland and Virginia relied upon in support of their respective positions. I could go on, but will not, due to space limitations and, to be more candid, a still-bruised ego.

There is, however, one other “first” about the case that I will mention: I can virtually guarantee you that in no other case before the Supreme Court — original jurisdiction or otherwise — has a Supreme Court Justice ever said to an advocate, as Justice Scalia did to me, “I’ll be darned if I have to get a fishing license from your state.”

I’ll bet King Gustaf didn’t use the word “darned” when he sat down to dinner with Dr. Agre. When asked, however, whether I would do it again, my answer was, and remains, absolutely yes. But I’m glad my 15 minutes are up. It’s time to move on.

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