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IN FRONT OF THE BURGUNDY CURTAIN

The Top Ten Lessons I've Learned About Advocacy Before the Nation's Highest Court

THE CHAUTAUQUA INSTITUTION recently asked me to prepare a speech entitled “Behind the Burgundy Curtain: The Inner Workings of the Supreme Court.” The burgundy curtain refers to the signature velvet burgundy curtain that hangs behind the Justices when they hear oral argument. I responded by saying, “But I’ve actually never been behind the burgundy curtain; I’ve just been in front of it” in the course of briefing and arguing cases before the Court. So instead of discussing what happens behind the burgundy curtain, here are the top ten lessons I’ve learned about advocacy before the Supreme Court.

1. CONSTITUTIONAL CHANGE IS INEVITABLE

I’ve learned that the Court will continue to change the meaning of the Constitution. Although all of the Justices have expressed the importance of judicial restraint, the Court inevitably makes new ***10** law every time it interprets the Constitution. It’s a zero sum game: the Court either expands individual rights or expands the government’s right to regulate individuals.

For example, since I’ve been watching the Court, the Court has declared partial birth abortion a constitutional right and then declared it not a constitutional right. The Court has declared laws criminalizing sodomy constitutional and then declared those laws unconstitutional. The Court has declared restrictions against corporate campaign speech constitutional then declared them unconstitutional. The Court has declared affirmative action in higher education admissions both constitutional and unconstitutional, and that was on the same day. And the Court has declared that Congress has power under the Commerce Clause to ban the possession of marijuana solely for personal use, but that Congress lacks the Commerce Clause power to ban the possession of a firearm within 1000 feet of a school. Thus, I cannot say, “Now I have a settled understanding of what the Constitution means.”

The most surprising revelation to me was the Court’s 2008 decision in *D. C. v. Heller* to resurrect what had been previously understood to be the dormant Second Amendment to the Constitution. Our Constitution was already 219 years old when *Heller* held that I have a personal and fundamental right to bear arms. This was certainly big news to me at the time -- and I am from Texas.

2. IT'S NOT ALL THE SUPREME COURT'S FAULT

The Supreme Court is not the impetus for constitutional change -- we are. In thinking about the Supreme Court, the public typically focuses on one decision that announces a new right, such as *Roe v. Wade*, or the one particular Justice that authored that opinion, such as Justice Blackmun’s opinion in *Roe* parsing the right to abortion according to the trimester of a woman’s pregnancy.

But the Supreme Court does not make sweeping changes in constitutional law by accident, or by its own design. Rather, the Court is limited to deciding the cases that the parties ask the Court to decide. Justice Scalia recently remarked during the oral argument in ***11** the recent campaign finance decision of *Citizens United*: “We are not a self-starting institution. We only disapprove of something when somebody asks us to.” Private citizens, public interest organizations, corporations, States, Cities, and the federal government are responsible for setting the agenda for change.

The earliest and most noteworthy example of this is the NAACP's campaign leading up to *Brown v. Board of Education*. Beginning in the 1930s, it mounted a brilliant campaign over several decades to bring an end to segregation in public facilities and institutions. The NAACP strategically picked the right cases to bring to the Court, including the 1950 case of *Sweatt v. Painter*, which invalidated segregated law schools in Texas and which laid the groundwork for *Brown* four years later.

The NAACP's model continues today. Coordinated and strategic movements are underway to press for judicial change in the areas of abortion, campaign finance, voting rights, affirmative action, and gay rights -- and that's just to name a few of the hot button issues. It should come as no surprise that the Court's Second Amendment decision in *Heller* resulted from a well-orchestrated and financed campaign. The lawyer that filed that case also filed the Second Amendment case decided this June. That case, *McDonald v. Chicago*, held that the Second Amendment is incorporated into the Fourteenth Amendment and therefore applies to the States and local governments. Both in *Heller* and in *McDonald*, the lawyer strategically recruited gun enthusiasts who were subject to the Nation's most restrictive gun laws.

3. FACTS MATTER

The third lesson I've learned is that facts matter. The Justices are human beings, not wooden scholars who are myopically focused on the legal principle being advanced by the parties. The Justices are acutely aware of the facts in every case, and they know that their decision not only sets the law of the Nation, but also that their decision immediately resolves the present dispute between the two parties.

***12** Here are two memorable examples in which I can only assume that the parties were so invested in their legal position that they were blind to the bad facts in their case. First, three terms ago a school district asked the Supreme Court to decide the extent to which the Fourth Amendment applies in the school environment. The school district certainly had all the law on their side. The Court in prior decisions had given school officials wide latitude to search students suspected of smoking cigarettes on school property and to drug test athletes and students who participated in extra-curricular activities.

But listen to the facts of this case: school officials had stripped-searched a 13-year old girl, including searching her bra and underwear looking for Advil. The school officials justified the search based solely on an unsubstantiated rumor that that the girl had brought the Advil to school. What was the school district thinking in bringing this case to the Supreme Court? The school district lost the case.

I would also put in the “what were they thinking category?” the case of *Tennessee v. Lane*. The State of Tennessee had challenged Congress's authority to require the State courthouse to comply with the Americans with Disabilities Act. Again, prior law was overwhelmingly in the State's favor. But these were the facts: a paraplegic had to crawl up two flights of stairs in order to make a required court appearance. I am still trying to figure out the State's strategy in bringing this case. Why didn't the State just install an elevator? Oh, yes, the State lost this case.

Lesson learned: don't expect the Court to defer to your legal position when they can't trust you to exercise common sense and decency.

4. TIMING IS EVERYTHING

The fourth lesson that I've learned is timing matters. Change does not happen overnight but does so over many years or decades, with precedent building on precedent. Choosing when to bring a case to the Court requires a special skill in predicting how ^{*13} far the Court is willing to go, in either expanding or retreating from prior precedent. Because the Court in recent memory has been deeply divided, usually one Justice is at the center of everyone's crystal ball. In the 1990s, it was Justice O'Connor. Today it's Justice Kennedy.

This guesswork is going on right now with the current challenge to California's Prop 8, the voter initiative that bans same-sex marriage. The trial court ruled in August that Prop 8 violates the equal protection and due process rights of gay citizens. There is a raging debate among those watching the case whether the decision to bring that case now is visionary or foolhardy.

If the Supreme Court ultimately holds that the Constitution guarantees the right to same-sex marriage, the plaintiffs will have achieved one of the most significant civil-rights rulings in recent memory. But if the plaintiffs lose, many will argue that the plaintiffs picked the wrong time to press for change and should have waited until same-sex marriage had gained wider public acceptance.

All eyes are on Justice Kennedy. On the one hand, Justice Kennedy has been known to rely heavily on the treatment of an issue by state legislatures, and only 5 States and the District of Columbia currently issue marriage licenses to same-sex couples. On the other hand, Justice Kennedy is a very independent thinker. And Justice Kennedy authored the previous two Supreme Court decisions involving gay rights under the Constitution, *Laurence v. Texas* and *Romer v. Evans*. In both of those cases, Justice Kennedy cast the decisive fifth vote in striking laws that discriminated against sexual orientation.

5. THE SUPREME COURT WANTS TO HEAR FROM THE PEANUT GALLERY

The fifth lesson I've learned relates to the role of the so-called *amicus curiae* brief. The Latin phrase *amicus curiae* means "friend of the Court." The former Chief Justice Rehnquist explained that an amicus is "someone who is not a party to the litigation, but who believes that the court's decision may affect its interest." These ^{*14} amici routinely include governments, public interest organizations, academia, Congressmen, former government officials, professional organizations, trade associations, businesses, and private individuals.

In recent years, amicus briefs have taken on increased prominence when a party petitions for the Court to review a lower court decision. The Supreme Court agrees to hear only less than 1% of the petitions filed each year. The party filing the petition, the petitioner, faces a tremendous challenge to convince the Court that her petition should fall in that 1%.

It has become increasingly critical for the petitioner to garner the support of outside groups to file an amicus brief in support of the petition. Nowhere is this more important than in business cases. If a corporation files a petition, I think that the Court has come to expect any relevant trade associations or the Chamber of Commerce to chime in and say that the issue is of recurring importance, or that the lower court's decision imposes intolerable burdens, or that private industry needs a uniform, nationwide rule to create a stable and predictable business climate.

When I started practicing, I occasionally saw one amicus brief in support of a petition. In a patent case last Term, *Bilski v. Kappos*, 11 amici filed at the petition stage, and those filings most likely influenced the Court's decision to hear the case.

Amicus briefs are generally less important after the Court agrees to decide a case, but they are nonetheless ubiquitous in big cases. For example, 82 amicus briefs were filed in the 2003 companion cases in which the Court ruled on the constitutionality of the University of Michigan's affirmative action programs.

On occasion, amicus briefs can have a huge impact, particularly in the deeply divided and controversial cases. Here are two examples.

The first example comes from the Michigan affirmative action cases. In upholding affirmative action in admissions at the law school, Justice O'Connor's opinion cited extensively from a brief signed by 29 former military officials that supported affirmative action. The Court also relied on similar briefs expressing support *15 for affirmative action filed by education experts as well as Fortune 500 companies. That diverse group remarkably helped shape the law of the land.

The second example is *Graham v. Florida* decided last Term. The Court held that sentencing a juvenile to life imprisonment without parole violated the Eighth Amendment. Justice Kennedy, writing for a 5-4 majority, reasoned that juvenile criminals are less blameworthy than adult criminals. He relied on the amicus briefs of the American Medical Association and American Psychological Association expressing the view that "developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds."

The remaining 5 lessons address what I've learned about oral argument. The Supreme Court's oral arguments are unlike any other Courtroom experience. The Court gives each side 30 minutes to present his argument but the advocate spends most of his time answering questions from the Justices. Most people know that Justice Thomas generally does not ask questions at oral argument. The last time I heard Justice Thomas ask a question was during the argument in *Virginia v. Black*, a cross-burning case in 2003, and Justice Thomas reportedly last spoke in 2006 in a death penalty case.

But as far as I'm concerned Justice Thomas's silence is a blessing because this still leaves eight Justices who can ask questions. Wasn't there once a TV show called "Eight is Enough?" Answering questions from eight Justices is a brutal experience. The Justices are exceedingly prepared and they fire off questions in rapid succession. For instance, in just 30 minutes, the Court asked then Solicitor General Elena Kagan over 70 questions in the campaign finance case, *Citizens United*, and over 60 questions in a case last Term about the constitutionality of a statute criminalizing material support to terrorist organizations.

The advocate's preparation for oral argument is likewise extremely challenging. I prepared for about 6 weeks for my first argument. *16 Ok, that was overkill. Advocates typically take anywhere from one to two weeks to prepare for argument. The good advocates overly prepare and then prepare some more, becoming experts in the field of the law at issue.

Advocates also undergo moot courts -- a grueling and physically exhausting mock argument where the advocate, about a week before the actual argument, stands up in front of his colleagues who pretend they are the Justices and pepper you with hostile questions for about an hour. In the Solicitor General's office, Walter Dellinger and Seth Waxman were notorious for having moot courts that lasted 3 or 4 hours long. Ted Olson was more efficient. His moot courts never exceeded an hour.

Although I am probably unique, I cried after my first two moot courts, and that was a relatively easy case, as I will later explain. After weeks and weeks of preparation, I still didn't know how to best answers my colleagues' questions, and it's just no fun being embarrassed when you are on the spot.

Now onto the remaining lessons:

6. YOU MUST ANSWER COMPLETELY UNREALISTIC HYPOTHETICAL QUESTIONS

An oral advocate's biggest challenge is answering the Justice's hypothetical questions, that is, a question from a Justice that assumes hypothetical facts that are not present in the case and often could never happen in real life. Answers to hypothetical questions reveal the party's reasoning, whether the party's theory has any limiting principle, and the potential ramifications if the Court rules in the party's favor.

Here is, ironically, a hypothetical example to illustrate.

Let's assume the Court is hearing oral argument on the constitutionality of Prop 8. The first lawyer stands up and says the following: "Mr. Chief Justice and May it Please the Court: my client, a gay man, has a fundamental right to marry the person of his choice, even if the person is another man." Then Justice Scalia interrupts *17 and asks: "But counsel, if that's so, can the State ban polygamy?" Now I don't know how to answer this question but I would not respond this way: "But Justice Scalia, that's not this case. My client wants to marry only one man, not two or three men." And I would not respond to the question "can the State ban polygamy?" this way either: "Yes your Honor, because polygamy is gross."

Now let's assume the lawyer for the other side stands up and says the following: "Mr. Chief Justice and May it Please the Court. The Constitution does not regulate morality; the voters do." Justice Breyer then interrupts and asks: "Counsel, can a ballot initiative constitutionally prevent blond-haired people from marrying other blond-haired people?" Or "Counsel, can voters pass laws preventing people with genetic defects from marrying other people with genetic defects?" Now I would not respond this way: "But your Honor, you don't have to decide those questions: here the voters are discriminating against only gay people, not blonds or the disabled." Nor would I say this: "But Justice Breyer, those laws are stupid and mean-spirited; laws banning gay marriage are wise and well-intentioned."

Unfortunately, I don't have good answers to these questions either, but fortunately, this is not my case. Here is the point: the Prop 8 advocates better be able to answer these hypothetical questions in a way that does not reveal the soft underbelly of their legal position. Both parties must know if there any limits to their position, and if so, what is their limiting principle?

I used both Justices Scalia and Breyer in the above examples because they are legendary for asking absurd hypothetical questions that nonetheless really get to the heart of the case and expose the weakness in a party's position. Here is a paradigmatic hypothetical question from Justice Breyer in the 1998 case of *United States v. Bajakajian*. The United States argued that the constitution permitted the government to seize \$350,000 in currency that Mr. Bajakajian had failed to report as he was carrying the currency out of the United States. The government reasoned that the \$350,000 facilitated the crime, just as a ship that facilitates piracy is subject to seizure.

*18 During the argument, Justice Breyer asked: "So that means that the Constitution would permit, in your view, the Taj Mahal, for example, to be forfeited if it was once used to sell a teaspoonful of marijuana." At the time I thought and half-expected the advocate to respond: "Justice Breyer, are you crazy? The Taj Mahal is all the way over in India." But here is what the experienced government lawyer said instead: "if there's one transaction that takes place there, even on a single day, maybe or maybe not, but at some point yes, if you're running a business out of the Taj Mahal and selling drugs out of there, that would be an instrumentality [of a criminal offense] and could be forfeited as such."

Incidentally, the government lost that case in a decision with an unusual line-up: Justice Thomas authored the opinion joined by the 4 liberal leaning members of Justices Stevens, Souter, Ginsburg, and Breyer.

7. ON THE OTHER HAND, WHATEVER YOU DO, DON'T SAY, "THE GOVERNMENT CAN BAN BOOKS"

As discussed, when answering the Justice's hypothetical questions, the cardinal rule is you must answer the question and do so logically consistent with your legal position you are advancing. In other words, if the government can seize any instrumentality of an offense, then the government can seize the Taj Mahal if it's being used as a crack house. But in rare instances, I think you are better off just tossing logic and consistency entirely out the window.

For example, let's take the recent controversial case of *Citizens United*, where the Court held that corporations have a First Amendment right to make unlimited corporate expenditures to advocate for or against a political candidate. The Congressional statute in that case had barred political advocacy on only two forms of medium: broadcast TV and radio.

The case was actually argued twice, a highly unusual event. In the first argument, the Chief Justice, and Justices Alito, Scalia, and Kennedy asked the government lawyer a series of questions to the following effect. Question: "Can the government ban from the public *19 library a 500-page biography published by a corporation that ended with the sentence 'so vote for person X?'"

The government, consistent with cardinal rule of logical consistency, responded in effect as follows: Answer: "yes your honor, under your previous precedents, Congress could ban books containing express political advocacy." The Justices were visibly disturbed by this answer, and Justice Alito reacted at one point by saying "That's pretty incredible."

The Court then did something extraordinary. It ended the Supreme Court Term for the year without issuing a decision in the case. Instead, the Court ordered the parties to submit supplemental briefs on the question whether the Court should overrule the precedents that the government relied upon at argument in saying that Congress could ban books. The Court then set the case for reargument the following Term. The Court's order came as a shock because *Citizens United* -- the petitioner that brought the case -- had not asked the Court to overrule its prior decisions.

Remember Justice Scalia's remark that the Court is not a self-starting institution? Well this order was clearly a self-starting move by the Court. But what happened to provoke the Court? I suspect a significantly contributing factor was the government's position that the Court's prior decisions permitted Congress to ban books containing political advocacy.

So the case was re-argued in a special sitting by the Court in September 2009. Given the stakes at issue, then Solicitor General Elena Kagan argued for the government. This was her first argument as Solicitor General and her first argument ever before the Court. At some point, the red light turned on indicating Ms. Kagan's time for argument had expired. The following unfortunate but remarkable exchange then occurred:

Ms. Kagan: "I see my time is up."

Justice Ginsburg: "May I ask you one question that was highlighted in the prior argument, and that was ... could [Congress] say no ... campaign biographies? Last time the answer was, yes, Congress could Is that -- is that still the government's answer?"

*20 Ms. Kagan: "The government's answer has changed."

She then went on to say that the First Amendment protects a book containing political advocacy but the First Amendment does not protect against censorship of electioneering pamphlets. Of course no good deed goes unpunished. Although her time for argument clearly had expired, Justice Alito asked this: "In light of your retraction, I have no idea where the government would draw the line." He in effect then said: "What's the difference between banning books containing political advocacy and banning pamphlets, newspapers, internet clips or DVDs that contain the same political advocacy?" Well General Kagan didn't give an answer; she said instead that those were not the facts of the case.

The two radically different approaches to the question "can the government ban books?" dramatically reveal government's fundamental dilemma. On the one hand, the government did not want to look silly saying that the First

Amendment permits the government to ban books. But on the other hand, the government could not come up with any logical or convincing explanation why the First Amendment protects books but not pamphlets, TV, or radio programs.

What is the lesson to be learned when the best lawyers in the country don't have a satisfactory answer to a question? Perhaps it's this: when party lacks a clear answer to a hard hypothetical question, maybe something is wrong with the party's position. So, while there has been massive criticism of *Citizens United*, perhaps one of those critics can step forward and offer a satisfactory solution to the government's dilemma in *Citizens United*.

8. NEVER LET THEM SEE YOU SWEAT

In terms of style, the best advocates are relaxed, clear, in control, and confident. They embrace the hard questions with gusto. But no matter how hard you prepare, it's impossible to prepare for every conceivable question. For instance, I was asked a bankruptcy question by Justice Kennedy in a case about student loans and asked *21 another bankruptcy question by Justice Breyer in a case about the social security system. I didn't know the first thing about bankruptcy and had no idea even what the Justices were asking, much less knew the answer to the questions. I said: "I don't know" and the argument moved on.

An "I don't know" answer is obviously not ideal, but it's far preferable to the mistakes that frequently occur at oral argument. The most common mistake is that the lawyer makes his best guess but hasn't fully thought through the implications of his answer. This is often disastrous, because the Justice usually has an agenda behind the question. For example, if the advocate in our hypothetical Prop 8 argument answers that it would be unconstitutional to prevent marriage between a blond-haired man and a blond-haired woman, a Justice is likely to press for a distinction between the physical characteristic of hair color and that of sexual orientation. Unless the advocate is prepared for the question, the advocate invariably ends up tied in knots, confused, and changing his position. The advocate loses credibility and the Justices lose confidence in the advocate.

Another mistake I see when an advocate is caught off guard is what I call the dear-in-the-headlights phenomenon. A Justice asks an unanticipated question and the advocate freezes up, with a long uncomfortable pause before the advocate eventually speaks. The question just hangs in the air and takes on perhaps an unjustified importance while the lawyer looks unprepared and knocked off his game. Woody Allen could have been advising Supreme Court advocates instead of playwrights when he said "Eighty-percent of success is just showing up." Here, showing up means projecting confidence and control. Lesson learned: don't let them see you sweat.

9. THE GENDER GAP IN THE SUPREME COURT BAR

I've learned that women have a harder time than men being successful advocating and arguing before the Supreme Court. Professor Richard Lazarus from Georgetown University recently defined the Supreme Court bar as the "elite private sector group of attorneys who are dominating advocacy before the Court." This group is *22 mostly men. In other words, men thus are overwhelmingly the most successful, well known, and repeat advocates before the Court. Men also unquestionably dominate the lawyers representing corporations appearing before the Court. With very limited exceptions, the women I see arguing before the Court are public interest lawyers, public defenders represented the criminally convicted, or government lawyers. Translation: women are doing the same work but for less pay.

What's behind this gender discrepancy? The Supreme Court (no less than the highest levels of the other branches of government) has historically been all male. There have 4 women out of 112 Justices. Up until recently, Justice Ginsburg was the lone female and even today, the men outnumber the women 2 to 1.

Some of the blame also lies in the historical male dominance in the Solicitor General's Office. By way of background, the lawyers from the Solicitor General's Office regularly argue before the Court and thus have the unique opportunity to

gain expertise in this area. By contrast, most other appellate lawyers will never argue in the Supreme Court. Thus, this elite Supreme Court bar largely consists of men who worked in the Solicitor General's office.

There has never been a female solicitor general before Elena Kagan, and she was Solicitor General only for the blink of an eye before being nominated to the Supreme Court. Similarly, in my 13-years there, I only worked with 1-3 other women at any give time and, shockingly, there was only 1 female supervisor for a very short time during those 13 years. The Office now has the most women ever: 6.

But I do not think those structural barriers totally explain why women have not been as successful as men. In my view, a lot of the problem results from the fact that litigation requires a war-like mentality. The Courtroom is a battlefield, and oral argument requires a fair amount of verbal jousting and sparring with the Justices. Male lawyers generally are more fearless in this type of verbal battle, even though from my experience many of those men are obviously clueless that they have no talent.

I've heard countless women -- but not a single man -- say to me: ***23** "I could never stand up before the Supreme Court; it would be way too stressful." But I've heard countless men, and very few women, say to me: "I would love to argue in front of the Court; that would be so exciting." That anecdotal evidence is consistent with my experience from kindergarten through twelfth grade where, with one exception, I saw only boys getting into fist fights.

Other attributes that hold women advocates back relate to other female stereotypes, however undeserved those stereotypes may be and even though these same attributes also hold male advocates back. As discussed, what's effective before the Court is the projection of strength, confidence, and control. What does not work is showing hesitation or insecurity. A whiny voice is also real turn off. Moreover, an emotional tone does not work, and showing compassion is typically a big "no-no." And while I've seen men effectively respond to a Justice's question by saying "As I tell my kids," I've never seen a woman use that rhetoric. Projecting motherhood does not sell as an advocate.

10. I HAVE NO MORE POINTS TO MAKE

When I originally drafted these lessons, I could only come up with 9 points. But then I remembered the lesson from my first oral argument before the Court.

This was a pretty simple case in which the Justices ended up writing a short 9-0 decision affirming the Ninth Circuit's decision. Very early into my argument, the Justices stopped asking me questions. I looked down at my notes and realized I had said everything I had prepared to say. An experienced advocate in this situation would say: "Your honor, if there are no more questions, we ask that the decision below be affirmed." But I looked up from my notes and said: "I don't have any more points to make." Chief Justice Rehnquist then remarked, "I don't believe my colleagues do either." The Justices and audience in the Courtroom laughed (presumably at my expense) and I sat down.

Now this was not a very sophisticated presentation on my part. A colleague in fact remarked to me afterwards, "Lisa, if the Justices ***24** did not know it was your first argument when you stood up, they certainly knew it by the time you sat down." Despite my colleague's remark, it was clear that the Justices were thrilled that I had ended early so they could break for lunch before noon. Lesson learned; when the Justices are done, you should be done as well.

Footnotes

^{a1} **Lisa Blatt** is a partner in the firm of Arnold & Porter LLP. Her next scheduled Supreme Court argument is *Henderson v. Shinseki*, No. 09-1036 (Dec. 6, 2010). Copyright © 2010 Lisa S. Blatt.

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