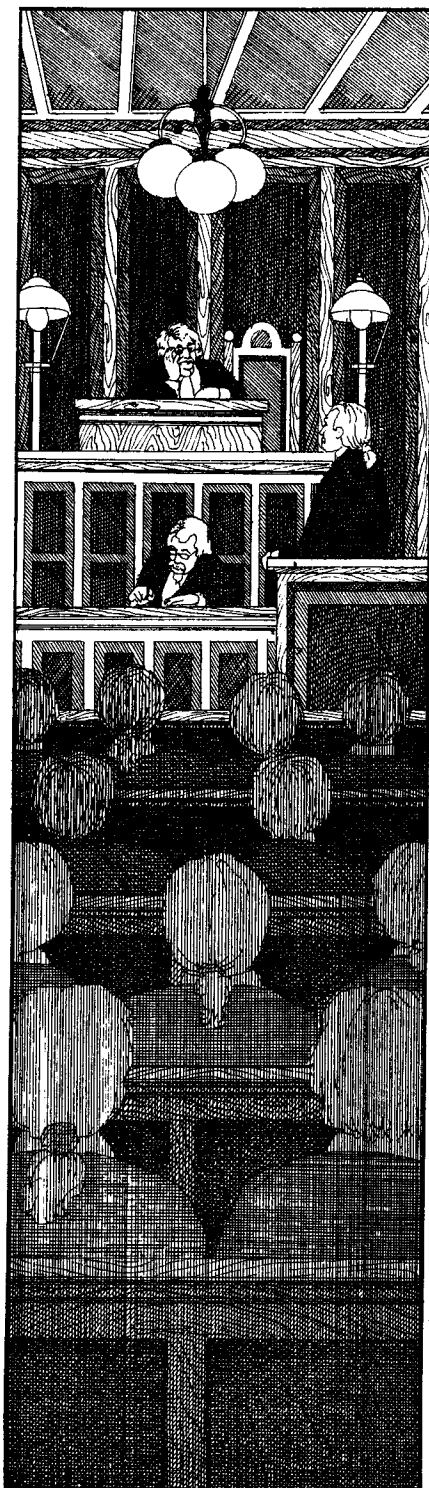


# Legal Lore



## A Supreme Effort

by Joe G. Roady

The news that I was going to argue before the Supreme Court created quite a commotion, as you might imagine. Of course, my wife, Edwina, would go to Washington with me, and I thought my mother might be interested. But even a cousin and two of her friends joined the group. I had to admonish my entourage that it would not be appropriate decorum for them to burst into spontaneous cheering when I made a vital point in argument. They reluctantly agreed. My cheering section was joined by two officers of my client corporation, two in-house counsel for the parent corporation, one of my partners, and his wife. So the home-court advantage of the government was overcome by a greater number of my team in the audience.

There is something special about arguing before the Supreme Court. The case involved a Fifth Amendment question arising in a condemnation by the government for the purpose of preserving a wilderness area in its natural condition. I now know more than I ever wanted to know about the taking and just compensation clause. There are better than fifty cases by the Supreme Court *alone* on taking questions — not to mention the Court of Appeals decisions, which are enough by themselves to make your head swim. But I knew that if I didn't read any one case, that would turn out to be the very case one of the Justices would ask about. So I read them all.

We set up a Supreme Court task force in our law firm to complete the

necessary research and to organize the brief writing. With organization, the writing of the brief turned out to be fairly easy, at least from my point of view, although the associates were required to do a lot of research to make certain we didn't miss a case on the point — or on the periphery.

The toughest part of the preparation was programming my memory bank with all of the cases, the record, the statutes, the legislative history, the law review articles, and even a doctoral dissertation on the background behind the legislation. For the brief-writing first and the memory bank later, I had my associates prepare loose-leaf notebooks on all of these categories, with the case notebooks broken down into briefs and opinions. The relevant case opinions occupied four full notebooks.

### Fine Nuances

I prepared a rough outline of my oral argument and refined it as I went along. Although I knew that my entire time before the Court might be taken up by questions, it was clear that I had to be prepared to talk for thirty minutes if no questions were forthcoming. Between the review of the cases, briefs, statutes, and other authorities and the refining of my outline, I was kept pretty busy — almost to the exclusion of everything else. I studied like crazy for what I imagined would amount to a thirty-minute oral testing on the fine nuances of the Fifth Amendment and the cases construing it. As it happened, the Court was more interested in the facts of the case, the practical questions involved in condemnation proceedings, and the effect

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on economic uses of property — but that gets ahead of my story.

During my preparation, I had two moot court practice sessions before the partner and associates who had assisted on the brief, together with our firm's counsel (one a former judge and the other a law professor). I presented my oral argument to them, they grilled me as though they were the Justices. As it turned out, the questions asked by my moot court scarcely resembled those asked by the Supreme Court, but the practice sessions helped the preparation immensely. I might add that I also practiced a couple of times with my wife as the sole Justice. Edwina, being the objective person she is, thought I was dynamite.

As the week of the argument approached, I could sense that all of the planning and effort in the preparation were coming together. I had an interesting case, good facts, and an important constitutional question. All this combined with the anticipation of presenting them to the highest Court made the whole situation exciting without my being excited, if that makes sense. Friends would ask whether I was nervous or excited, and the honest response was always negative. I felt at times that something must be wrong with me not to be either nervous or excited.

The answer was that my preparation had reached the level where confidence in my ability to handle whatever came along simply left no room for nervousness. My excitement was in knowing that I was ready.

The plan for the week of the arguments was that we would fly to Washington on Monday, attend the arguments being presented on Tuesday (to reconnoiter the area), and present my case on Wednesday. Thank goodness my case was not scheduled as the first case on Tuesday so that I could have time to get the feel of the proceedings before I went on.

Monday night passed fitfully, not because of any tension, but because there was a convention at the hotel, or revelry of some sort, right outside our door. Unfortunately, we were on a level with a restaurant and next to the elevator. The hotel moved us to a quiet area.

On Tuesday morning Edwina and I went to the Supreme Court building. We were promptly separated by a courteous but insistent marshal who

allowed me to enter the courtroom because I was a member of the Supreme Court Bar, but consigned Edwina to the waiting line outside the building.

Fortunately, she was able to get into the permanent line (as opposed to the three-minute line) and come in well in advance of the beginning ceremonies. The three-minute line appeared to consist mainly of tours by high school students and younger. They would be escorted in to sit awhile and observe the court in session (I wonder if they could possibly understand what was happening), and then be escorted out. I was somewhat surprised that the commotion created by their movement was allowed while the Court was in session.

### **On-Deck Circle**

As you know, the Supreme Court building is imposing. The courtroom is not as imposing — at least for me — because I would have had it much larger. Perhaps that's just as well, because if it were more imposing, the chamber itself might add to the tension of appearing there.

Before the Justices came in, I tried to take in details like where the lawyers for each side and the clerks sat and where the clock, the podium, and the warning lights were. The podium was a part of the counsel table so I was pleased to find that if a question required resort to some paper I had not placed on the podium, it would be within easy reach. I also learned that the lawyers in the on-deck case were required to sit at a reserved table throughout the first case. That way counsel for the petitioner could step directly to the podium when his or her case was called.

I was informed that counsel does not begin until recognized by the Chief Justice. He does introduce himself or those at the counsel table with him. When the Chief Justice calls your name, you begin with the traditional salutation, "Mr. Chief Justice, and may it please the Court."

The Justices enter the courtroom promptly at ten, and I do mean promptly. You hear a signal from behind the bench, the clerk begins his incantation, and the Justices appear almost all at once from behind drapes to the rear of the bench. One of the innovations of Chief Justice Burger has been to change the shape of the bench from straight, which made the Justices on the extreme ends seem far away, to slightly curved.

I did not feel that the room was austere. It seemed a comfortable place in which to do the business of the Court. The rows of chairs reserved for members of the bar, however, were spaced so closely that once in, it was difficult to get out.

I sat through two cases Tuesday morning — after the announcement in summary form of the day's decisions and the swearing in of new admittees to the Supreme Court Bar. The proceedings in the cases went about as expected with members of the Court frequently interrupting counsel with questions. No surprise there. After a while, with your attention riveted to the argument and the questions and answers, you scarcely notice the movement of the three-minute spectators through the courtroom.

The entire Court was sitting. That gave me the opportunity to watch each Justice and learn how each went about asking questions. They were uniformly courteous. They homed in quickly on weak spots in argument or on positions that were extreme or unfair. I appreciated the tenacity with which the Justices tore into unfair positions because (as you might guess) I thought that the government's position in my case was essentially unfair.

In one of the cases on Tuesday morning, the government appeared in support of one of the parties. The assistant to the Solicitor General, who spoke on behalf of the government, was a man. He appeared in the traditional garb — morning cutaway coat and striped trousers. This raised the great question for Wednesday's session: Would the Solicitor General's assistant in my case, a woman, dress accordingly? (She did not.)

The rest of Tuesday passed without event. We left the Court at noon because I wanted to devote that time to a last-minute review. We went back to the hotel — our belongings now moved to a quieter location — and I studied. We ate a quiet dinner, watched an hour or so of television, and then settled down for a good night's sleep. I was not apprehensive, so I felt that sleep would come easily, which it did.

At 12:20 A.M., the fire alarm sounded. Half asleep, I tried to turn off the alarm. Edwina picked up the telephone. We soon realized what was going on, but we could not smell smoke

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or see any evidence of fire so I suggested that we wait to be told to leave. Meanwhile, fire engines and police cars were appearing out front, the phone was dead (we tried to call the hotel operator), and people were coming out into the hallway. We were on the top floor so we realized we needed to make a decision quickly.

The alarm continued to ring, and no one gave us any instructions. With Edwina being particularly insistent about leaving, we grabbed the necessities and left. What each of us regarded as necessities was revealing. Edwina put her fur coat on top of her housecoat and grabbed her purse and jewelry. I put on my topcoat — only because it was cold outside — and grabbed my wallet, my credit cards, and the pages containing the outline of my remarks to be presented to the Court later that day. All of my clothes could have gone up in flames, but I was going to save that outline.

Anyway, we joined the other guests — dressed in every imaginable get-up — walking down the stairs and outside, until the word was given that we could return. There was no fire. Some prankster had pulled the alarm and the hotel could not correct the situation before everyone felt the necessity of leaving. So much for a good night's sleep.

On Wednesday morning, I met my partner and the in-house counsel at the Clerk's office at 9:00 to sign in and to receive the identification card that allows entry to the on-deck circle during the case before yours. Since my case was the last of the day, we were told to be in place not later than 12:50 because the Court would begin the afternoon session promptly at 1:00. I spent the remainder of the morning at the office of one of our Texas senators reviewing my notes.

It soon became clear that I was saturated with more information than I could ever disgorge and that further study would be superfluous. I spent the remainder of the time talking with my wife and was content just to wait. Short-

ly before noon, I checked with the marshal's office to make certain that the guests for whom spaces were reserved (you are entitled to six) were all taken care of. I ate a quick lunch at the cafeteria and proceeded to the courtroom at 12:40 P.M.

I was shown my place at the back-up table by a deputy marshal. I removed the necessities from my briefcase (the briefs, my outline, the opinions in the most important cases, and a few selected pieces of information) and placed them on the table in a state of readiness. At that point, I noticed two feather quills criss-crossed on a legal pad in the places reserved for counsel. They obviously were not to be used, because there were no ink wells. On the assumption that they were souvenirs, I appropriated one for me and the other for my partner seated beside me.

The case before mine seemed to take a long time. Arguments in it had begun before noon so argument did not take a full hour after one o'clock, but it seemed longer. Counsel for the petitioner finished but was somewhat slow in removing his effects, so I could not "proceed promptly to the rostrum," as directed in the instructions. As I was standing and waiting for my predecessor to pack and depart, the Chief Justice said cordially, "Mr. Roady, I think you may proceed when you are ready." I was on.

"Thank you, Your Honor," I said, and then the traditional, "Mr. Chief Justice, and may it please the Court." The words came easily and I felt comfortable. I was curious about how long they would let me go without a question. My curiosity did not last long.

I had been talking no more than two or so minutes when the first question came, followed by the second and third. For the next twenty-three or twenty-four minutes the questions came. There was only one brief period in the middle when I was not answering a question and had to resort to my outline.

The Court's interest in our case was apparent. The Justices were most interested in the practical problems. They had done their homework. However, I never did get to argue the fine nuances of all of those important cases. I recall discussing only two cases — the one on which the government principally relied and the most recent opinion close to our facts and question.

My change of plan to reserve only five minutes for rebuttal almost went

awry. When the white light on the rostrum went on — the signal that twenty-five minutes had expired — I was in the middle of answering a question. Of course I had to continue. After that came another question, then another, and I grew concerned that I might run through my rebuttal time. Fortunately, I was able to conclude the last answer and reserve the remaining time for rebuttal.

The time had raced by. I remember looking at the clock early in the argument and noting that only five minutes had passed. The next time, more than twenty minutes were gone.

When I stood for rebuttal, I knew that time was short and that I could not respond to every point that should be answered. I decided to hit the high spots and hope. Sure enough, more questions. I would estimate that of my entire thirty minutes, I spent at least twenty-five answering questions.

When the red light came on, I was still answering a question. You are, of course, supposed to finish your answer. As I finished, and the Justices were leaving, I was not ready for it to be over. I wanted more questions — anything to keep it going. I really don't know when I have enjoyed more any single event in my practice — or regretted as much that it was ending.

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