Cline v. General Dynamics: My Trip to the U.S. Supreme Court (Part II)

by

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FYI

This is the second of a two-part series about my recent experience before the U.S. Supreme Court. In the previous article, I discussed the background of the case and its rise to the Supreme Court. Here, I describe the remainder of the journey.

After receiving word that the Court granted *certiorari*, my co-counsel and I attempted to seek out anyone who could provide us with some insight about arguing a case before the high Court. We quickly discovered that Ohioans with experience before the Supreme Court are rare. Ultimately, I recruited three of my former law school professors to join our team.

The first task was to begin the research and the brief. I also undertook a major effort to lobby the Equal Opportunity Employment Commission (EEOC) and U.S. Solicitor General's office to join with us in the case and file an amicus brief in our support. After numerous letters, telephone calls, time and effort, both agencies finally agreed.

Immediately after our brief was filed, we began preparation for oral argument, which was still six weeks away. This part of the process, unlike a normal appeal, was even more onerous than researching and writing the brief. Since the Supreme Court's jurisdiction encompasses the entire country, any issue remotely related to the issues presented by our case became fair game. This meant I not only had to become intimately familiar with the Age Discrimination in Employment Act (ADEA), but also that I had to know the ADEA's interactions with and relation to Title VII, the Employee Retirement Income Security Act (ERISA), and federal case law and regulations interpreting those statutes.

About two weeks before oral argument, my co-counsel and I traveled to Washington, D.C. to observe some live Supreme Court arguments. The courthouse was a grand spectacle. The classic Corinthian style stone building, built in 1935, is immense.

When we arrived that morning, there was a line of over a hundred visitors stretched down the steps and across the front sidewalk of the courthouse waiting to gain entrance. However, a security guard at the head of the line informed us that there was a separate entrance on the side of the building for members of the Supreme Court Bar. We followed his instructions and indeed there was a "special" entrance, maintained by guards and equipped with its own metal detector.

Upon entering, our identities and membership to the bar were cross-checked with computer records and we were given instructions to the "lawyers lounge" and private lockers, which were separate from those available to the general public. In all, the special accommodations and amount of respect shown to us was impressive. Later, my co-counsel, when asked what it was like at the Supreme Court, said, "I think it's the last place in the country where attorneys are treated with respect."

Inside, there are numerous statues, photographs and exhibits of former Justices. We took an unguided tour, marveling at the historical display of our nation's most prestigious court. When the time for oral arguments approached, we proceeded to the "Court Chambers", as it is called. Great oak doors open into a room measuring 82 feet by 91 feet with a 44 foot ceiling. It is captivating, ornate, intricate, historic and beautiful.

We entered from the rear area of the room, which is for public seating, and, closer to the bench, is a special section for members of the bar. Beyond that are two sets of counsel's tables, the closest to the bench being for those presently arguing before the Court. The set behind that is reserved for counsel scheduled to present the next argument.

Centered between the tables is the podium, only a dozen or so feet from the Justices' bench. Of course, it feels like only a few feet when you are presenting your case with nine Justices focused squarely on you.

The atmosphere is extremely formal, and absolutely silent. Any sound or rustling of papers is met by a stern "Sssssshhhh" by one of the secret service agents, each equipped with a *Matrix*-style wired earphone.

The Justices enter through a black curtain hanging behind the bench, and everyone rises to the clerk (who sounds more like a town crier when bellowing: "Hear Ye, Hear Ye") calling the Court into session. Chief Justice Rehnquist first deals with administrative matters, such as ruling on motions and swearing in new members of the bar. He then introduces the first case and the appellant's attorney approaches the podium.

In watching those arguments, we saw that counsel did not make it more than 30-60 seconds into their prepared presentation before the Justices broke in and initiated an ongoing stream of questions lasting the entire time allotted for argument. The best way to describe it is to liken it to playing tennis against a professional, hoping only to keep the ball in play and hit it over the net. Rarely does a question have a right answer because the issue is, at best,

controversial with untold consequences flowing from the eventual opinion.

In one instance, appellant's counsel was in mid-answer, explaining the impact that the outcome of the Court's decision would have on his clients, when Justice Scalia said something like, "We don't care what happens to your case. We only care about the issue before us." In other words, "face our wrath if you stray from the boundaries of the specific question."

Several weeks later, the time for our oral argument arrived. I flew to Washington two days in advance to spend some quiet time preparing. The morning of the argument, we were ushered into a special chamber to meet with the clerk and were given instructions on the procedural aspects of the process. "Remember", she said, "when you see the white light on the podium come on, you have five minutes left. The red light means your time is up."

We were then led into the Court Chamber and shown to our appropriate tables. On the tables were souvenirs, courtesy of the Court—handcrafted, white writing quills.

We took our seats and I took some comfort in being joined at the table by the Assistant Solicitor General, whom we had given permission to use 10 minutes of our argument time. Although an underdog, the fact that the United States supports your position provides some comfort.

After the Justices emerged through the ebony curtain, and our case was called, I had the advantage of seeing how appellants' counsel faired before I presented my clients' argument. As expected, the Justices' interrupted him less than a minute into his presentation. Justice O'Conner wanted to know why the Court shouldn't defer to the EEOC, particularly in light of the United State's presence in this case-a 90 mph return to his backhand.

As the argument went on, the Court had very difficult questions for appellant's counsel. When I heard Chief Justice Rehnquist say, "Mr. Biggerman, we will hear from you," I felt all eyes shift to me. It wasn't that I was nervous (well, maybe a little) as much as it was an indescribable feeling that I was about to contribute my small part to history.

I began my presentation and got no further than 82 words when Justice Ginsburg broke in: "Mr. Biggerman, how do you deal with the relaxed physical test for employees 50 or over?" There it was. Only this wasn't a repeat of the 90 mph shot, it was a 101 mph bullet that only Keanu Reeves, in the *Matrix*, could have avoided.

Out of the box, I was hit with practically the hardest question possible. Justice Ginsburg's question was not directly related to the issue at hand, and there really was no clear way to answer it. In fact, she later asked the Assistant Solicitor General the same question and also failed to get an answer that pleased her.

In fielding the continuous stream of questions, barraged mostly by Ginsberg and Breyer, I felt the pressure from each end of the bench. Only Justices Rehnquist and Thomas remained quiet.

At one point, Justice Scalia said: "I have to tell you that that seems to me so fanciful a version of what congress intended that I would not interpret the statute that way." That definitely fills you with confidence, doesn't it? However, my stress lightened a bit when he followed that comment with: "Now, I will go along with you if you can tell me that I am bound to accord deference to the agency's interpretation."

When the argument finally concluded, the adrenaline drained from me and left me exhausted.

The Assistant Solicitor General followed me, akin to the cavalry coming to the rescue. He had had the opportunity to hear all of the Court's questions and concerns fired at me for twenty minutes before he stepped into the line of fire. As a result, he was able to give answers tailored to the Court's inquiries.

A few days later, I returned to the normal practice of law in Cleveland, anxiously awaiting the decision. And when it came, I experienced a media barrage greater than I could have ever imagined. Disappointingly, we ended up losing the case; six votes to three.

The dissenters were Scalia, who wrote a separate opinion, along with Thomas and Kennedy who joined in an opinion authored by Thomas. The decision is, of course, as controversial as any Supreme Court opinion.[1]

To sum it up, even the arduous work, anxious moments and intense questioning by the Justices would not be enough to persuade me to turn down the same opportunity if I had it to do over again. It was one of the most profound experiences, not only of my career, but of a lifetime. Most attorneys only fantasize about going before the high Court and having a chance to make law like the cases in the text books, while I was blessed with the opportunity.

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Footnotes

1. *The Opinion was analyzed by Howard Besser in the previous issue in his article, entitled, "ECHOES OF ANIMAL FARM: High Court Rules Some 'Aged' People Have Greater Protection Under Age Discrimination Statute."*