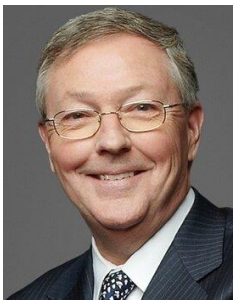
LAW360

Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Why I'll Miss Arguing Before Justice Breyer

By **Carter Phillips** (February 17, 2022, 5:29 PM EST)



Carter Phillips

When then-Judge Stephen Breyer was nominated by President Bill Clinton to the U.S. Supreme Court in 1994, I had never met him, but I did know of him.

I had used a casebook he co-authored, "Administrative Law and Regulatory Policy: Problems, Text, and Cases," when I taught administrative law at the University of Illinois College of Law.

It was hot off the presses in 1979, my first year teaching, and after a quick read, it was clear to me that it was better than all the other casebooks on the subject.

The authors focused on deregulation, which was just getting started in those days, and the important implications of fundamental agency shifts in policy that have shaken up administrative law now for decades.

When he was appointed, I had argued 19 cases before the Supreme Court, and I knew that Justice Byron White was correct in saying that each new justice makes the court a little different.

So I looked forward to Justice Breyer joining the court and to seeing how the bench would change with his presence.

My first argument before Justice Breyer in 1995 left me with one of my more vivid memories from all of my oral arguments.

The case was Hercules Inc. v. U.S., which was a government contract case involving Hercules' claim that the federal government should indemnify it against claims arising out of the production and sale of Agent Orange during the Vietnam War.

At one point during the oral argument, Justice Breyer asked me, "Do you have a lot of experience in government contracts"?

My answer was: "Not an extraordinary amount of experience, no, your Honor. I'm sorry."

Even at that, my answer was hyperbolic; I had never worked on a government contracts case before representing Hercules.

But what made the exchange memorable was that Justice Breyer's question prompted my wife, who was sitting in the courtroom, to laugh out loud, which I very clearly heard and recognized.

In case it is not obvious, arguing before the Supreme Court is hard enough without your family laughing at you. She still maintains that she thought he was joking.

Justice Breyer was rightly famous for his humorous questions during oral arguments, but that was not one of them.

There was one other facet of the argument that became a pattern with Justice Breyer, and that was his proclivity to ask questions — and sometimes multipart questions — right after the white light would flash on the podium.

The light tells counsel that he or she has only five minutes of argument time remaining.

For petitioners, this practice by the justice was a bit distressing, because rebuttal time in those days could not be reserved. So a long question by itself ate into the rebuttal, and any time spent answering the question also meant there would be less time later.

What made this practice doubly frustrating was that Justice Breyer's questions were right on target, revealing some aspect of the case that was very concerning to him and probably others — and, if asked 10 minutes earlier, would have been a wonderful opportunity to try to score points with the justice and advance the argument.

But when the question ended with less than two minutes left for argument, the response was necessarily more compressed, and frankly much less effective.

Fortunately, at some point Justice Breyer changed course. He did not abandon his proclivity to ask lengthy and multipronged questions. But he did ask them earlier in the argument.

Indeed, since I have a tendency to develop dry mouth during my arguments, I always welcomed a question from Justice Breyer because I knew that I would have plenty of time to take a drink of water while he was setting up the question. Sometimes I could finish a glass of water before the justice finished his question.

And whether he agreed or not with my position, he had a special way of making his point.

In 2014, I argued Alice Corp. Pty. Ltd. v. CLS Bank International, which involved a particularly difficult question concerning the "abstract ideas" exception to the subject matter requirement for patent validity.

And as I was trying to explain the novelty of my client's invention that used computers to allow very complicated cross-border deals to be handled securely, Justice Breyer, in his inimitable fashion, interrupted me.

He asked why that was less abstract than the patent in a prior case the court had declared invalid. And he followed up with:

> I mean, imagine King Tut sitting in front of the pyramid where all his gold is stored, and he has the habit of giving chits away. Good for the gold, which is given at the end of the day. And he hires a man with an abacus, and when the abacus keeping track sees that he's given away more gold than he has in storage, he says, stop.

And he ended by asking why that is any different than my situation.

Sadly for my client, Justice Breyer hit precisely on the weakness of the patents.

My client's invention very cleverly figured out how to make complicated transactions secure, but Justice Breyer was correct that, at bottom, what the computer was doing was just keeping track of the money flow and calling a halt if the money ran out.

His use of the pharaoh and an abacus certainly made the argument more colorful. (By the way, I'm pretty sure the pharaohs did not keep gold in the pyramids for storage; they were tombs, but I don't think I would have helped my client's cause by raising that detail.)

Two of my most lasting memories of Justice Breyer did not actually occur in the courtroom.

The first was an exchange between us during a mock trial at the Shakespeare Theater Co. in Washington, D.C., where Justice Breyer was on the court, along with Justice Ruth Bader Ginsburg, then-Chief U.S. Circuit Judge Merrick Garland, U.S. Circuit Judge Patricia Millett and U.S. District Judge Amy Berman Jackson.

Tom Goldstein and I were the arguing counsel, and the case arose out of the play "Man of La Mancha."

I was defending the argument that Don Quixote — or more accurately Alonso Quijano — should be put under a guardianship because of his strange behavior, including tilting at windmills.

I should start by confessing that arguing at the Shakespeare Theater is a thousand times harder than arguing at the Supreme Court.

For one thing, the expectation is that the lawyers will be funny and entertaining while still trying to argue their side of the case.

In addition, the justices have weeks to prepare their questions, which, of course, are wonderfully funny. And having to respond to them with something approaching humor is not a natural reaction for most lawyers.

SCOTUSblog reported on the argument. I was arguing that windmills were a significant part of the local economy and that Quijano's unjustified attacks proved he was a danger.

SCOTUSblog described my exchange with Justice Breyer as follows:

> Justice Breyer noted that an energy lawyer had told him at dinner that windmills have killed 600,000 bats, "They just popped." So, the Justice wondered, "How do we know they're not monsters?"
>
> Phillips, it turns out, doesn't like bats. He took Breyer's finding to be evidence for the benevolence of windmills. "Yes, but, you know, bats eat mosquitoes and so on," Justice Breyer urged.

I received a sketch from the Shakespeare Theater that was done during the argument that shows me at the podium facing Justice Breyer.

He has a wonderful smile on his face. I keep that sketch on my desk.

The other memory occurred when I rode into the Supreme Court in January 1996 with Justices Antonin Scalia and Anthony Kennedy because of a 20-plus inch snowstorm that made it difficult to get to the court for an oral argument I was scheduled to appear for.

There are a number of side stories to that trip — how I ended up in the same car as the justices in the first place, a debate about authority to run red lights, and more[1] — but the sight of Justice Breyer in the basement garage at the court as we pulled in, seemingly directing traffic, is a memory I will not soon forget.

Justices Kennedy and Scalia were equally surprised to see their colleague taking on this role, and they joked about the tribulations of being the junior justice on the court.

Justice Breyer has a larger-than-life persona on the court. He is everything an advocate could ask for. He is smart, broadly knowledgeable, has a lovely sense of humor and asks questions that clearly reflect what he is concerned about.

That last quality is the one I will miss the most, because it is very satisfying to understand what the justice is really focused on and at least have a chance to explain why what he is thinking about should not drive the decision, even if I did not often succeed in persuading Justice Breyer in his thinking.

I always felt that he listened attentively and was unbelievably courteous in our exchanges.

On the day that Justice Breyer announced his retirement, one of my partners who clerked for the justice wrote me, saying, "I think the Court will miss him." Of that I am quite confident, but what I know for certain is that the bar will miss him deeply.

Carter Phillips is a partner at Sidley Austin LLP.

[1] https://supremecourthistory.org/a-snow-story-by-carter-g-phillips/.