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My Supreme Court Debut: A 1st Time For Everything

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As the end of the year draws near, all eyes are turning to the the U.S. Supreme Court and the decisions it will issue during its October 2017 term. In this Expert Analysis series, attorneys that have argued before the high court — from veterans to recent first-time arguers — reflect on their very first time standing before the justices.

Lindsav Harrison

My first argument before the U.S. Supreme Court was unusual in that it was also my first argument in any court of any kind. I had been at my law firm for about one year after clerking for almost three, and while I had worked on a variety of interesting matters, I had not yet had a chance to argue an appeal or even a motion. Moot court had been my favorite activity in law school, and I was an avid college and high school debater, so I was itching to stand on my feet and advocate on behalf of a client.

One afternoon, a colleague sent an email asking if any associates were interested in taking on a pro bono appeal. The client, Jean Marc Nken, was an asylum-seeker from Cameroon who had been pursuing his immigration case unsuccessfully for many years. When conditions in Cameroon worsened, he tried to reopen his case but the immigration courts denied his request. Jean Marc was placed into a detention facility, leaving his U.S. citizen wife to raise their young son alone. His only recourse was to petition the Fourth Circuit for review of his case, and though the standard was challenging, he had a strong argument that the immigration judge had not fairly considered the evidence. As the child of a Soviet immigrant, I was drawn to the case and volunteered to represent Jean Marc, hoping that the Fourth Circuit would at least grant oral argument.

Before I could even begin drafting the brief, I received an alarming call from Jean Marc. Shortly after I entered my appearance, the immigration authorities had placed him into a car and brought him to an airport to be deported. Fortunately, he refused to get out of the car and rather than forcibly remove him, they decided to put him back in detention. That day, I prepared and filed a motion to stay his removal while his appeal was pending, but the Fourth Circuit denied the motion. In a departure from other circuit decisions, the Fourth Circuit determined that a statute enacted 11 years earlier had modified the standard for stays of removal, making them essentially impossible to obtain. Most other

circuits applied the typical, far more reasonable standard for stays of removal. The circuit split called out for the Supreme Court's review.

After consulting with Ian Gershengorn, the Jenner & Block partner supervising the case (this was years before he became acting solicitor general of the United States), I spent an all-nighter drafting an application for the Supreme Court to grant a stay of removal, or in the alternative, to convert the application to a petition for certiorari and grant the petition. We filed it the next day, and after a few short weeks, the court granted the stay of removal and the petition for certiorari.

I turned to Ian with excitement: He would have another argument in the Supreme Court! His response was to ask why I thought he would be arguing it. Even when I reminded him that I had not argued any appeal in any court, he said that he was confident in my abilities and would support me all the way.

Support is an understatement for what Ian and the rest of my Jenner & Block colleagues provided as we briefed and prepared for argument in the case. I worked through five separate moots, practicing the art of responding to questions while getting my main arguments out. The moots were as tough as any actual argument: Experienced advocates like Paul Smith, Don Verrilli and David DeBruin attacked every possible weakness and then talked through the best ways to respond and improve. They did this on weekends and evenings, and gave as much time and energy and effort to this pro bono matter as to their billable matters for other clients. My good friend, Steve Vladeck, provided critical assistance as well, helping craft the briefs to be as precise and persuasive as possible.

As the argument drew near, I actually grew less and less nervous. The main factor in my lessening nerves was preparation: There were only so many questions I could be asked in 30 minutes, and I felt confident I had already faced almost all of them in my many moots. I had also digested multiple treatises — on remedies, on immigration law and a wonderful book by David Frederick on Supreme Court advocacy. I had listened to the oral argument in every case remotely related to mine. And I spent basically every shower practicing my responses to possible questions. I had become near-certain that our reading of the statute was correct and that we would persuade at least five justices of our position.

In addition, I played a psychological trick: I convinced myself that no one expected a first-time advocate to be very good, and I was confident I would at least outperform expectations. Finally, there was the matter of timing: The argument was scheduled for Jan. 21, 2009 — the day after the Obama inauguration. Washington, D.C., was consumed with excitement about the new president, which provided a much-needed distraction.

The day before the argument, I watched President Barack Obama's inaugural address, inspired by both the substance of his words and his great oratorical skill. I then reread the briefs for the hundredth time, looked over my notes from moots and prep sessions, and reviewed a few key cases. Long after dark, I drank a glass of red wine in the hopes it would overtake the excitement and nerves and bring much-needed sleep. At around 1 a.m., the wine finally did its job.

The argument itself was held at the unusual hour of 1 p.m. — the case had been a late addition to the court's calendar, tacked onto a day when two cases were already set for argument in the morning. We arrived early, and listened to a short and very kind lecture by the clerk, General William Suter, who provided excellent advice (example: "Don't call the justices by name unless you are certain you have them right."), and offered everything from a sewing kit to throat lozenges in case of need.

We entered the courtroom and upon hearing the five-minute warning buzzer, I stood up with a page of

notes I had long ago internalized and reminded myself to fight my debater's instinct to speak as rapidly as humanly possible. I looked around and saw what felt like dozens of friendly faces in the bar section, which seemed to be filled by colleagues from Jenner & Block. I was consumed by a desire to make them proud.

The chief justice asked the first question, an easy one about whether empirical data existed on a subject (it didn't). Justice Anthony Kennedy followed up with a similar question, and in responding I was able to transition to an important point about the minimal risk that siding with our position would open the floodgates to stays of removal. Justice Ruth Bader Ginsburg asked about the date the statute was enacted, and again I was able to turn my answer into another important point I had wanted to make about the statute's history. This was going well.

The next question, from Chief Justice John Roberts, confirmed my instinct that I was on the right track: He asked if there was any way to "split the baby" in the case so that my client might win but other immigrants might not. I declined to advocate for a position that would not extend victory to similarly situated immigrants, and in the colloquy that followed, the chief justice asked about a technical point of immigration law that I had learned in my preparation. As the question was being asked, I realized that I would not be able to summon a citation in response — I may never have known the exact cite, or I may have forgotten it at some point. In any event, I admitted that I did not have the citation available. Fortunately, the chief justice was forgiving. I am grateful that I had the confidence to simply admit that I did not know — bluffing would have been far more embarrassing.

That low point was happily followed by a great high one. In his typically smart and direct manner, Justice Antonin Scalia challenged me on a point, but I was ready for the question and responded equally directly. The transcript says that his response was, "That's true." In the moment, it felt like he had stood up, applauded and awarded me his vote.

After 23 minutes of active questioning, I asked to reserve the balance of my time and ceded the podium to the government.

The attorney defending the position of the United States was just a bit more experienced than me. Edwin Kneedler had argued around 100 cases before the Supreme Court, and knew the immigration laws (and a whole host of other federal statutes) better than just about any other attorney in the country. It was a pleasure to watch him argue these issues that I had studied so closely over the preceding months — he skillfully used his deep knowledge of the immigration laws to bob and weave around the difficult points. Still, he faced difficult questions that made me confident the court understood our position and found it at least somewhat persuasive.

As I sat next to Ian, I realized the last rebuttal I had given was in a college debate round (a loss, alas). But I recalled the wisdom my partners had conveyed: Only argue points in which you are 100 percent confident — or, as Don Verrilli had put it, only try to hit home runs. That's easier said than done, but the justice's questions to the government did include a few fastballs down the middle.

I rose for rebuttal and made a few quick, important points. It was by far the most fun part of my argument, and I was interrupted only with questions that aided rather than thwarted my position. My favorite moment of all came after time had expired. Justice John Paul Stevens, in one of his signature moves, waited for time to expire before politely asking the chief justice for permission to ask just one more question. His question — whether under the government's reading of the statute, the Supreme Court itself would be divested of jurisdiction to stay a removal order — was perfect. In just a few subtle

words, it made several important points: that the government's reading of the statute could work a dramatic reduction of judicial authority, with profound implications for the separation of powers, and that under that reading, the court itself violated the statute by granting a stay of removal to Jean Marc Nken. In other words, if the court found that the statute meant what the government was arguing, it would have to admit that it had violated the statute in this very case. Given that time was expired, and given that Justice Stevens' question did all the work that was needed, my response was simple: "Yes, Your Honor."

After the argument, I visited Jean Marc in detention. First, I thanked him for having the confidence to allow me to argue on his behalf. Second, I told him that I could not guarantee him anything other than a fair and reasoned decision by brilliant justices who worked incredibly hard to get it right. When the decision was issued three months later — a 7:2 victory — we celebrated only briefly. There were briefs to prepare in what was to become my second argument in any court — the Fourth Circuit argument in Jean Marc's case that I had signed up to handle a year earlier. We won that one too, and then won asylum for Jean Marc. Today, he is a U.S. citizen, and the precedent set in his case has allowed thousands of other immigrants to remain here while pursuing appeals of their own.

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