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My Supreme Court Debut: Just Me And My Flash Cards

By **Matthew McGill** (January 23, 2018, 2:09 PM EST)

As the U.S. Supreme Court continues its current term, all eyes are on the justices and the important decisions they will issue in 2018. 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.


Matthew McGill

Chris Landau is very tall, and in my U.S. Supreme Court debut, he made very sure I knew it.

On March 22, 2016, the Supreme Court heard oral argument in Commonwealth of Puerto Rico v. Franklin California Tax Free Trust. Veteran Supreme Court practitioner Chris Landau represented the commonwealth of Puerto Rico. I was there to argue for a group of bondholders of Puerto Rico's electric utility whose investments were imperiled by a new Puerto Rico law that subjected their bonds to bankruptcy proceedings to be administered by the courts of the commonwealth, under Puerto Rico law.

I had not expected to be in the Supreme Court. Our argument that Puerto Rico's new bankruptcy law was expressly preempted by the federal Bankruptcy Code had prevailed in the district court in Puerto Rico, and then in the First Circuit, unanimously. When the commonwealth filed its petition for a writ of certiorari in August 2015, I doubted that the Supreme Court would grant review. There was no circuit split on the question presented; the question had never before arisen and was unlikely ever to recur; and the electric utility and its bondholders had agreed to restructure the bonds in question. To me, the commonwealth's petition seemed quite like a long shot — and I would know, having taken some of my own over the years.

But clearly I had underestimated the appeal of the commonwealth's argument. In June 2015, Puerto Rico's governor had proclaimed that Puerto Rico's debts were "not payable." The petition argued that because the federal Bankruptcy Code does not allow Puerto Rico to put its public utilities into federal Chapter 9 bankruptcy proceedings, the First Circuit's decision had left Puerto Rico with no "ability to respond to the most acute fiscal crisis in its history." The commonwealth argued that to interpret federal bankruptcy law both to preclude Puerto Rico from restructuring its public utilities' debts under federal law and also to prohibit restructuring solutions under local law was "anomalous and draconian."

The court took the case. And because Justice Samuel Alito had recused himself, the case would be considered by an eight-justice court. But the commonwealth still needed five votes to reverse the judgment of the First Circuit. If the court divided four-to-four, the judgment would be affirmed.

My client at BlueMountain Capital accepted the news with good humor. “Look on the bright side: Now you’ll get to argue a case in the Supreme Court.”

But that was not immediately clear. There were multiple respondents in the consolidated cases who collectively had $2 billion on the line. Other bondholders wanted to consider more experienced Supreme Court advocates. (It turns out that an unexpected cert grant over your opposition in a multibillion-dollar case is not a set of circumstances that immediately and necessarily suggests, “let’s make this your first rodeo.”) One of my co-counsel suggested that my partner and mentor, former Solicitor General Ted Olson, should argue. And when Justice Antonin Scalia passed away five weeks before the oral argument — reducing the court to seven justices, with a majority appointed by Democratic presidents, and Puerto Rico needing only four votes to prevail — that suggestion became more … insistent.

But Ted was the strongest and most ardent advocate for me presenting the oral argument, and he is very persuasive. I will always be grateful for that. On Feb. 29, the bondholders settled on me as their advocate before the court.

What followed over the next three weeks was a terrifying gauntlet of four moot courts (the first of which I conducted in secret, out-of-state, to prepare for the next three) with panelists including former Fourth Circuit Judge J. Michael Luttig, and, drawing on the unparalleled depth of Gibson Dunn’s appellate practice, my partners Doug Cox, Miguel Estrada, Caitlin Halligan, Tom Hungar and Amir Tayrani. My co-counsel and renowned bankruptcy wizard, Thomas Moers Mayer of Kramer Levin Naftalis & Frankel also participated, alerting me to the Bankruptcy Code’s many hidden pitfalls (but not before seeing to it that I languished in them for a good long while).

After each of the moot courts, my former colleague Jonathan Bond, who now argues cases in the Supreme Court for the United States as an assistant to the solicitor general, joined me to review the questions from the moot court panelists and the answers I had flubbed. We worked to distill each answer to the most salient points, phrased as economically as possible, and arranged to circle back to one of our affirmative arguments. I would then try out the revised answer — saying it out loud — and we’d go back and revise it some more, laughing a lot along the way. By the end of it all, I had a stack of index cards, each with a shorthand question on the front and bullet-point answers on the back, that I drilled over and over again. I also had a profound appreciation for Jonathan’s deep understanding of the court and its cases, and his sense of humor.

When March 22 finally came, our case was second on the calendar, so I took my seat at the “back-up table” on the right side of the courtroom. I had second-chaired more than dozen Supreme Court arguments since joining Gibson Dunn, so I felt comfortable enough in the courtroom. I scanned the gallery and saw my parents, and then my wife, Lori. Lori was pregnant with our third child and had started a new job as a partner at her law firm on the day after I was tapped to handle this argument. She nevertheless miraculously had managed to handle everything — and I do mean everything — on the home front on the many nights I was holed up in a conference room with my flash cards.

My brother, David, also was there. I had arranged to move his admission into the Supreme Court bar

figuring that it would provide me an opportunity, before the oral argument itself, to step up to the lectern and make sure I still had my faculties of speech.

At 10 a.m., the buzzer sounded, and the eight justices took the bench. It was jarring to see Justice Anthony Kennedy now occupying the seat to the chief justice's right — the seat that had been occupied by Justice Scalia since Justice John Paul Stevens' retirement in 2010. And all of the other justices that, for years, I had observed sitting on the chief justice's left — Justice Ruth Bader Ginsburg, Justice Alito and Justice Elena Kagan, now were on his right. Likewise, those I was used to seeing on the chief justice's right — Justice Clarence Thomas, Justice Stephen Breyer and Justice Sonia Sotomayor — now were seated to his left. We knew this was coming, of course, but it still was disorienting, at least at first.

The court soon turned to motions for admission and the chief justice called me to the lectern. My voice cracked but remained operational through my 36-word motion, and my brother was admitted. At least he would go home happy.

Then, I had to wait. For an hour. Just me and my flash cards.

On days when the court has two cases calendared for argument — which is most days it hears arguments — when the first case breaks, there is a bit of a scrum as the advocates from the first case scramble to collect their papers and exit the courtroom while the advocates for the second case move into the seats at counsel table. As I gathered my belongings from the back-up table, I looked up to watch Justice Alito leave the bench and slip behind the curtain, leaving us with seven justices. By the time I got myself settled at counsel table, Chris Landau already was at the lectern ready to begin his argument.

Twenty five minutes later, when the chief justice called me to present argument, I rose from my chair and went to place my notebook on the lectern only to find that it had been raised nearly to the height of my eyeballs. I laughed briefly to myself and then began to turn the lectern's hand crank to ever-so-slowly return the lectern softly to Earth, or at least to a height where I could place my notebook on it without the aid of a stepladder.

As the justices patiently waited for me to reposition the lectern, I looked toward Chris sitting at counsel table, as if to ask, "Really?" There must have been a thought bubble visible over my head, because a soft laughter rippled through the gallery. This brought me a sense of calm, briefly.

I got two sentences out after, "Mr. Chief Justice and may it please the Court," before Justice Sotomayor asked her first question of me. Over the next 12 minutes, Justice Sotomayor peppered me with 14 more questions, before Justice Kagan finally broke in with one of her own. My flash cards were better training than I had ever imagined for Justice Sotomayor's lightning-round examination!

With my time winding down, Justice Ginsburg asked whether Congress was considering legislation to allow Puerto Rico to place its public utilities in federal Chapter 9 bankruptcy. And the moment she finished her question, my red light came on, signaling the end of my argument. I asked the chief justice whether I could answer Justice Ginsburg's question, and he said yes. Recalling advice from Ted Olson, I then took a breath and tried to collect my thoughts for one final sentence.

"Congress is considering a range of options for Puerto Rico, including Chapter 9, just as Congress considered a range of options for the District of Columbia during its own financial crisis in the 1990s, which resulted in a financial control board rather than Chapter 9."

With that, I sat down.

On June 13, the court affirmed the judgment of the First Circuit in an opinion authored by Justice Thomas. Justice Sotomayor dissented, and Justice Ginsburg joined her dissenting opinion. And two weeks later, Congress established the Financial Oversight and Management Board for Puerto Rico, and created a bankruptcy process for the commonwealth and its instrumentalities.

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