

# Litigator of the Week: Ted Olson Hits the Jackpot

By **Ellis Kim**

May 18, 2018

Even legal giants face setbacks, and for **Gibson, Dunn & Crutcher** partner **Theodore Olson**, who successfully argued the seismic sports-betting case before the **U.S. Supreme Court** this term, that meant first having to overcome “six or seven” losses in the lower courts.

So when the justices on Monday sided with him 6-3 (or 7-2, depending on how you tally it) and struck down a 1992 federal law prohibiting most states from licensing sports betting, it was a sweet win—and one with monster, market-moving implications.

But the victory came after years of dizzying, and for Olson, mostly disappointing litigation.

Since sports leagues first brought a lawsuit six years ago against **then-New Jersey Governor Chris Christie**, the case, *Murphy v. N.C.A.A.*, has ping-ponged around the courts. And Olson’s client lost at virtually every turn.

“You can’t help but get a little discouraged,” said Olson, who has argued and won some of the most important and polemical cases of our time, including *Bush v. Gore*, *Citizens’ United v. FEC*, and the same-sex marriage fight, *Hollingsworth v. Perry*. “But we felt it was the right case.”

When the Supreme Court agreed to hear the case—brushing aside the **Office of the Solicitor General’s** recommendation against doing so, and after the **U.S. Court of Appeals for the Third Circuit** sided with the sports organizations and against New Jersey—Olson passed around a song to colleagues and clients: “Still Not Dead,” by **Willie Nelson**.



“I felt like quoting this Willie Nelson song,” he said. “We felt we were not dead yet. As long as we were alive and still fighting we might win at the end of the day, which we did.”

Either way, he said he was “fascinated” from the beginning of the case.

It was also in some ways a natural fit—Olson’s legal reputation is known among sports stars. For example, he represented New England Patriots star quarterback **Tom Brady** during Deflate-gate.

But in this case, the weight of the **National Football League** and most major sports leagues fell against him.

Olson first got involved when then-governor Christie called Gibson Dunn partner **Debra Yang**, an old friend. He told her he was interested in bringing on Olson, who served as solicitor general under **President George W. Bush**, to challenge the constitutionality of the Professional and Amateur Sports Protection Act of 1992, which prohibited state-sanctioned sports gambling.

“To have an opportunity to involve myself in a case like this where it seemed obvious to me from the beginning, that Congress had decided to do something in a way that was inconsistent with the federalism structure,” Olson said, “I thought it was a great, classic challenge to the way of doing things that Congress was not permitted to indulge in.”

According to the American Gaming Association, Americans illegally bet at least \$140 billion on sports each year.

In 2012, and again in 2014, New Jersey moved to allow such gambling. In response, the National Collegiate Athletic Association and three major sports leagues sued to block the move, arguing that it violated the two decade-old sports betting law.

The sports leagues hired another legal superstar: **Kirkland & Ellis partner and former U.S. Solicitor General Paul Clement**, who just happens to also be Olson’s mentee and good friend.

(So impressive was the matchup, *The Lit Daily* previously compared it to the Floyd Mayweather-Manny Pacquiao brawl.)

Olson recalled that he and Clement were both in Philadelphia arguing the constitutionality of the sports wagering law on the final day of the Supreme Court 2013 term, when *Hollingsworth*, the pivotal same-sex marriage decision, came down.

“Just about the time we started our argument, we got

the decision from the Supreme Court,” Olson said, calling it “a very unusual moment.”

“It was exciting and exhilarating, but it was also distracting,” he said. “You know, you have to keep your mind on the case that you’re actually arguing.”

Because Olson and Clement faced off multiple times in the lower courts, that also meant that for the high court face-off, Olson only did a couple of moot courts with colleagues.

“But when you get to the Supreme Court,” Olson said, “nothing that you’ve done before is adequate preparation for what you’re about to do. You’ve got to go over again and really understand how each one of the nine justices is going to look at a particular case.”

In addition to reading over the justices’ records, Olson said he had the “delight” of turning to foundational works like the Federalist Papers, and the 1787 Constitutional Convention debates.

“One of the things that came up during our oral argument was that someone said this just gave Congress a right to overturn a state statute, and I said, ‘that’s one of the things that they specifically debated at the Constitutional Convention—whether Congress should have the power to overrule acts of state legislatures,’” Olson said. “So it was helpful to have done that research.”

Olson—who occasionally places bets on the **Kentucky Derby** (“My wife is from Kentucky”) and who, despite being a California transplant, has come to support the **Washington Nationals** and **Wizards** (“You have to switch your loyalties”) —said the New Jersey win this week will open the door to more “carefully regulated sports betting” and greater general interest in sports.

Nonetheless, Olson said he and colleagues did not break out the champagne after their high court victory. “Too much work to do.”