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Supreme Court Brief

Tony Mauro and Marcia Coyle

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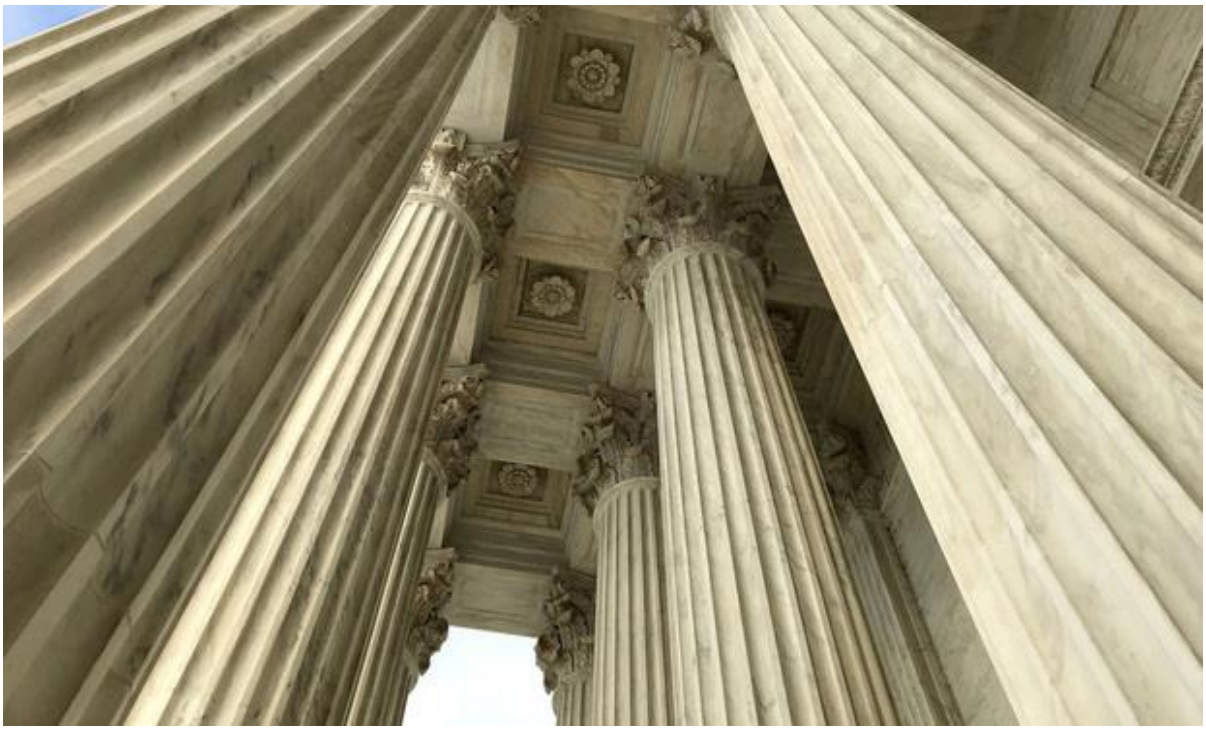
Good morning SCB readers! Today's oral arguments are the last until the court's long winter recess ends on February 20, so stop by if you want to see the justices before they come back looking sheepish with their winter suntans.

In today's briefing, we preview today's cases and speak with Ruthanne Deutsch, a former Ginsburg clerk who wrote an amicus brief that was mentioned during oral arguments Tuesday. There's more, including a ***new video*** *from Marcia and an addendum to last week's item on "justice sightings."*

As always, send your questions, suggestions and feedback to ***mcoyle@alm.com*** *or* ***tmauro@alm.com****.*



Encino Motorcars, Part Deux

The first case up today, ***Encino Motorcars v. Navarro***, may seem like déjà vu all over again.

Bearing the same name, the case went before the court in 2016 to resolve a dispute under the Fair Labor Standards Act: whether "service advisors" at car dealerships must be given overtime pay.

The high court by a 7-1 vote **kicked the case back** to the U.S. Court of Appeals for the Ninth Circuit with instructions to give the Labor Department—which ruled that they were entitled to overtime pay—less deference in interpreting FLSA. Now it's back at the Supreme Court and we can expect "Chevron deference" and canons of interpretation to be bandied about today—an argument **the late Justice Antonin Scalia would have loved**.

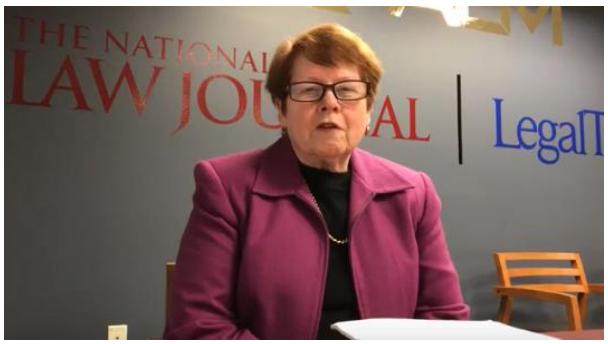
Former U.S. Solicitor General **Paul Clement** argued for the Encino dealership the first time around, and he'll do so again, this time with a team from **Kirkland & Ellis**. Los Angeles firm **Fisher & Phillips** is also on the briefs with Clement, as it was last time around.

As for the Navarro side—representing service advisors—veteran advocate **James Feldman** will be the lawyer at the lectern. Last time, **Stephanos Bibas** from the **University of Pennsylvania Law School** argued for the employees, but he has since gone on to become a judge on the Third Circuit.

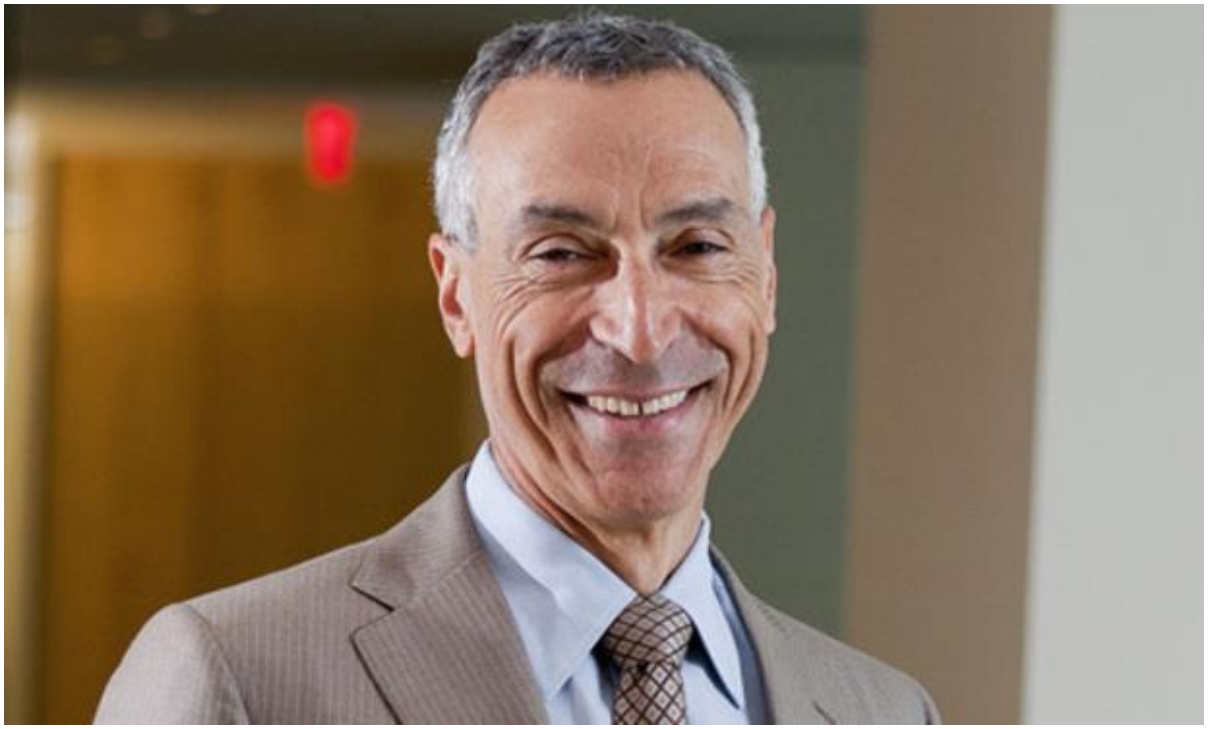
Feldman is a solo practitioner and teaches at Penn Law, where he is on the faculty of the school's Supreme Court Clinic, which Bibas founded. Clinic students are also involved. Small world, no?

This time around, no one from the solicitor general's office will be weighing in. In the first *Encino* argument, the Obama administration supported the employees. This time, instead of reversing course outright—as it has done **in several cases**—the SG's office just decided to sit on the sidelines.

When Will SCOTUS Issue Next Opinion?



Marcia Coyle shares her take in a quick video. **Click here** to watch.



Death Row Inmates' Go-To Supreme Court Advocate

For at least two decades, former U.S. solicitor general **Seth Waxman** of **Wilmer Cutler Pickering Hale and Dorr** has been the "go to" advocate in pro bono death penalty cases before the U.S. Supreme Court. He will be at the lectern again in the last argument of the January session—***McCoy v. Louisiana***—to argue that Robert McCoy's defense counsel in his capital trial violated the Sixth Amendment when he told the jury that McCoy was guilty over McCoy's express objections.

Waxman spoke with me (Marcia, here) last spring about what drives his commitment to the work as an aside to an interview **about Wilmer's pro bono work**.

He has maintained his commitment to death penalty work, he said, even though **"in my heart of hearts, I don't think it's wrong for civilized society to take the life of someone who is an incorrigible murderer."**

In the arena of life or death, Waxman's advocacy has been far reaching. His successes in the high court range from persuading the justices that executing minors violate the Eighth Amendment in 2005 to convincing them in 2015 that Florida's death sentencing scheme was unconstitutional.

The roots of his commitment go back to his Yale Law School days when he was a research assistant to **Charles Black**. The law professor, he recalled, delivered a compelling keynote lecture at the University of Texas at Austin law school in the aftermath of the Supreme Court's decisions reinstating the death penalty.

"The whole process of reading the lecture and cases got me extremely interested," said Waxman who then decided that when he practiced, he would devote 25 percent of his time to pro bono work.

After joining Miller Cassidy, Waxman called Anthony Amsterdam who, working with the NAACP Legal Defense and Educational Fund, had argued and won *Furman v. Georgia*, invalidating the death penalty in 1972. He told Amsterdam that he wanted to handle a death case.

"Tony said: 'Where are you going to be in the next 10 minutes?' Three minutes later I got a call from Jack Boger [of the NAACP Legal Defense Fund) and he said, 'You wanted to take some death penalty cases. How many would you like?'"

From his first case, Waxman said, "I was totally on board."

The first death case he argued in the Supreme Court was for a double murderer who got habeas relief from the Sixth Circuit, he said. "I was actually appointed by the Supreme Court to represent him and my adversary was (now Chief Justice) John Roberts. It was the first time we met."

Waxman soon started a brown bag lunch group of D.C. lawyers who handled death cases. The group evolved into the ABA's pro bono habeas representation group. He lobbied other firms' managing partners to encourage participation.

"I've had a steady diet of death penalty representation cases in the Supreme Court and a much larger diet of cases in which I have either been on the briefs or helped other people argue," he said. "I probably will be in the game as long as I practice law. I'm motivated by fairness. It really is all about minimal procedural fairness."

Justices Pay Attention to "Former" Briefs

During arguments Tuesday in the civil procedure case *Hall v. Hall*, **Hogan Lovells** partner **Neal Katyal** made reference to a brief filed on behalf of eight former federal district court judges that underscored the "great discretion" judges have when it comes to case management.

The brief, filed by **Ruthanne Deutsch**, founding partner of **Deutsch Hunt**, continues a steady stream in recent years of amicus briefs filed with the court by former or retired government officials.

Last week, Deutsch **spoke with Supreme Court Brief** about representing former judges and what their perspective adds to a case.

"Judges bring hands-on experience in the courtroom, and a dedication to the judicial process based on that experience," she said. "With the rarest of exceptions, presiding judges speak to the Supreme Court only through their opinions. But retired judges have the freedom to speak directly to the court as amici. Much like other former public servants who file amicus briefs … former judges are well-situated to share with the Court the practical effects that a decision will likely have, with no personal or financial interests at play."

Read more here.

"Do you think Marbury versus Madison is right?"

That was the question **Justice Anthony Kennedy shot off** Tuesday at first-time appellate advocate **Stephen Vladeck** of the University of Texas at Austin law school during arguments in *Dalmazzi v. United States*, the case **we briefed you on yesterday** asking whether military appeals judges who served concurrently on the Court of Military Commission Review violated a federal ban on dual office holding.

Was Vladeck prepared for that still-debated question which triggered surprised laughter in the courtroom? "Not even a little!" Vladeck confessed later.

The Roberts Court loves plumbing the depths of a jurisdictional question. And so University of Virginia law school's **Aditya Bamzai's** amicus argument that the high court did not have appellate jurisdiction to hear the military justice case, seemed to dominate the 70-plus-minute arguments by Vladeck, Bamzai and Assistant to the Solicitor General **Brian Fletcher**.

Bamzai, who was granted 10 minutes of argument time, pointed to *Marbury* as the main support for **his argument** that the Supreme Court, under Article III, can only review decisions by the Article I U.S. Court of Appeals for the Armed Forces if they

are “appeals.” But that appeals court, though called a “court,” is part of the executive branch and there is no direct appellate jurisdiction over executive branch officers.

Kennedy said he was particularly interested in Article III’s grant of appellate jurisdiction to the Supreme Court “with such Exceptions, and under such Regulations as the Congress shall make.”

Vladeck **replied**, “So, I will confess, Justice Kennedy, that I may perhaps belong in the school of scholars who thinks that Chief Justice Marshall read both the statute and the Constitution to reach the constitutional questions he wanted to reach. I'm not sure that he nevertheless didn't end up with the right—with the wrong answer.” Vladeck urged the justices instead to look to the court’s 1807 decision in *Ex Parte Bollman*.

More Justice Sightings

Airports, grocery stores, theaters—the justices do get out and about. And when they do, someone is bound to notice—despite how few Americans can name a Supreme Court justice!

Last week, we **reported on everyday encounters** and asked for your experiences. To wrap up today’s briefing, here’s some of what you shared. Keep those memories coming!

"There was a celebrity race series (of a sort) during at least the 1980s (don't know how long it kept going). A cabinet member, representative, (NLRB member or General Counsel for my team, or a Supreme Court Justice would lead a team of five runners in the Capital Challenge. I ran a few times and in one race, as I neared the end, a group of young guys who had already finished came back and were urging on the older gentleman behind me. As we finished, I looked back and recognized Justice Kennedy. And I can prove our finish order: there is a photograph in the official race results program that shows Justice Kennedy running and 'my left foot' in the corner of the picture. And the results do show me right next to his finishing time. So, that's the closest I got to fame!"
— **Karen Cordry**, bankruptcy counsel, National Association of Attorneys General

Supreme Court Justice Kennedy moving with "All Deliberate Speed."

113 RICHARD CLIFFORD	"RACE" IPSA LOQUITOR	0:15:44
114 RUSS KITTENMEIER	RUN FOR THE SENATE	0:15:47
115 RICHARD KETCHUM +	KETCHUM IF YOU CAN	0:15:48
116 STEVEN FINDLAY +	US NEWS TEAM #1	0:15:49
117 JOHN PETTWAY	TAXING MOTION	0:15:50
118 DAVID STONNER	RUN FOR THE SENATE	0:15:51
119 PHILLIP CHOLAH	US PARK POLICE	0:15:52
120 CHAN WILLIAMS	SLATTERY'S SUPER SOYBEANS	0:15:53
121 GARY SHONNERS	HOBBINS HARRIERS	0:15:55
122 HOANNA DARCIN	SHINS OF COMMISSION	0:15:57
123 GEORGE SAMARTINO	FASTEST BUNCH OF INTERROGATORS	0:20:02
124 AL FREEMAN +	RADIO-TV ROADRUNNERS	0:20:03
125 TOM DIBACCO	ABC NEWS BIKERS	0:20:04
126 SUZY COFFEY	"MIDDLE-AGE MUTANT MOONSHINE MILITIA"	0:20:04
127 LYLE ROBERTSON	PAYNE'S PACERS	0:20:06
128 BRENT HANDLEY	THE ROAD RUNNERS	0:20:07
129 MARK HOLMAN	RIDGE RUNNERS	0:20:10
130 MICHAEL POWELL	MEL'S MILERS	0:20:11
131 IAN BOWLES	RUN FOR THE SENATE	0:20:12
132 CAROLE RIVERA	HEALTHY HEELERS	0:20:19
133 HILTON WRIGHT	BYRON'S BULLWEEVILS	0:20:20
134 JERRY BUCKLEY	US NEWS TEAM #1	0:20:21
135 REP. MICHAEL BYNUM +	SCISSOR-TAILED FLYCATCHERS	0:20:22
136 JOHN HOLLAND	HARDY'S HARES	0:20:24
137 MIKE BAHR	GRAHAM'S HACKERS	0:20:27
138 NICOLE STEPTOE	ROVING REPORTERS	0:20:30
139 THOMAS O'CONNOR	TEAM C, QUESTER U	0:20:31
140 JIM JESPER	BULL BURDENS	0:20:32
141 JOE ZYTNICK	SHINS OF COMMISSION	0:20:34
142 PHILLIP SCURONI	THE BIPEDAL LOCOMOTORS	0:20:35
143 WILLIAM MCELHENEY +	US PARK POLICE	0:20:36
144 JIM MONDOVEK	SHINS OF COMMISSION	0:20:37
145 MICHAEL MELLA	THE ALSO RANS	0:20:38
146 JENNIFER DARLING	VIA SATTELITE	0:20:39
147 SEN. MAX BAUCUS +	ROCKY MOUNTAIN RACERS	0:20:40
148 ROBERT GRADY +	ONE OUT AND RUNNERS	0:20:41
149 MALCOLM BREWERY	MRIT RUNNERS	0:20:42

"As you might imagine, I'm more sensitized than most to the presence of a Justice .... Very recently, Justice Alito, unaccompanied by family but accompanied by court security, attended a Christmas performance by the Folger Consort, at the Folger Theatre, the same night my husband and I did. I did say hello to the Justice on that occasion but did not engage him in conversation ... Justice Sotomayor lives near my husband and me. Once she was leaving Ted's Bulletin as Dan and I were entering. I did not say anything to her, but Dan mentioned to some tourists that they had just seen a Supreme Court Justice walk. The tourists – a father and a pre-teen daughter – proceeded to chase the Justice down and get her autograph, which I'm told she gave cheerfully. The father particularly wanted his young daughter to see a female Justice.
— Veteran high court litigator **Roy Englert Jr.**, Robbins, Russell, Englert, Orseck, Untereiner & Sauber

"This was at the Supreme Court not 'in the wild,' but still unusual and memorable. The morning of June 28, 2012, I was at the Court right before NFIB v Sebelius came down. Went to the cafeteria to get some coffee… and ***found Justice Kagan doing the same****.*
The conversation went as follows:
'Hi, Justice Kagan,' I said, 'it's an honor to meet you. My name's Ilya Shapiro.'
'Oh, Mr. Shapiro, I read your work.'
'Well, thanks; I read your work too!'

'Then I guess we're even-Steven…' –and she departs out a back door."
— **Ilya Shapiro**, senior fellow in Constitutional Studies, Cato Institute