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THE TRIAL AND APPEAL OF CONSTITUTIONAL ISSUES

ALFRED L. SCANLAN*

The subject matter assigned me today is rather generalized—"The Trial and Appeal of Constitutional Issues." Although I have had some experience in this area of the law, I am sure that many in this room have had as much and more. Certainly the collective experience of this group would be something that I could learn from as much as I could add to it. After all, the techniques and essentials in conducting cases involving constitutional issues are not significantly different from those involved in the usual lawsuit.

True, there was a time when constitutional litigation was reasonably rare. Like theology in the Middle Ages, constitutional litigation used to be the queen of the legal sciences. However, a tremendous increase in constitutional litigation, as you know, has transpired in the last twenty years or so. This phenomenon illustrates Mr. Justice Jackson's remark that "Americans believe in the Government by law suit." In Europe, power struggles that would call out regiments of soldiers, in the United States call out battalions of lawyers.

This process especially accelerated under the Warren Court. Still, I might add that the Burger Court has proven to be less than recalcitrant in deciding constitutional issues which might have been avoided or postponed without injury to the national interest. As a result, a number of activities in areas formerly thought to be the preserve of the legislature, or even of the private sector, have now been constitutionalized. For example, the Court constitutionalized the conduct of our prisons, the running of public school systems, and military discipline (even at a minor level). Moreover, we have constitutionalized hospitals, and indeed, in certain areas through an expansion of environmental considerations, courts have on occasion attempted to constitutionalize the construction of highway projects and pipelines.

I think there are a number of reasons for this process of constitutionalizing so much societal activity. It is not the purpose of my talk, however, to deal with these. I merely make the point that constitutional litigation has increased tremendously and that there are a number of reasons why

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this has occurred. First, the Court has expanded the concept of equal protection to the nth power. At its last term, the Supreme Court struck down an industry practice requiring women to take maternal leave at a certain time. It might not have been the best policy, but in the old days, one would not have thought that such a requirement was a violation of equal protection.

Secondly, substantive due process, albeit in a slightly disguised form, has returned. At the last term of the Supreme Court the question was presented whether a state could charge an out-of-state student a higher tuition rate than an in-state student. Involved was a legislative presumption that a student's out-of-state residence at the time he entered the school held over through his four year stint at college. The Court struck down this irrebuttable presumption. The holding, in my view, was a pure substantive due process result. Again, it might not be the best policy, but in the old days, under the New Deal Court, prior to the Warren Court, the presumption would not have been regarded as constitutionally offensive.

Then we saw in the abortion decisions, and before that in *Griswold v. Connecticut*,¹ the flimsy reliance on the ninth amendment, to create the so-called "right of privacy," drawn from penumbræ, permutations, emanations, and what have you!

Finally, another factor which has generated much constitutional litigation is the technique of carrying the concept of "state" or "governmental" action to extreme reaches. There is an old saloon up in New York, called McSorleys' Old Ale House, where a man could get a drink in private for generations. That male sanctuary no longer exists. The saloon had a license from the state and therefore, "state" action was present. Women could not be discriminated against.²

So constitutional litigation has increased, unfortunately for us. By "us," I refer to the diocesan attorneys and others in a similar situation. We are usually the defendants in most constitutional cases and thus not the beneficiaries of this expansion of the right to bring constitutional litigation. Of course, that is not always so. At least two cases come to mind where our side was that of the plaintiffs. I refer specifically to *Barrera v. Wheeler*³ and *Brusca v. Missouri State Board of Education*.⁴

Now permit me some general observations about constitutional litigation. The objective still is to win the case, as in any other case. Another point which should be borne in mind is that even in this day, where constitutional litigation is rather promiscuous, courts still often prefer to dodge deciding a constitutional case if it can decide the case on another ground. Thus, for instance, where you have a case that raises a question of statu-

¹ 381 U.S. 479 (1965).

² *Seidenberg v. McSorleys' Old Ale House, Inc.*, 317 F. Supp. 593 (S.D.N.Y. 1970).

³ 475 F.2d 1338 (8th Cir. 1973), *aff'd*, 417 U.S. 402 (1974).

⁴ 405 U.S. 1050 (1972).

tory interpretation and one of constitutional dimension, it is wise to press the statutory interpretation point, if it is on your side. For example, take the case where there is a question of whether or not a man is entitled to an administrative hearing under a statute, whether it be a zoning case or any type of a case, and he has been denied a hearing. The appellants can make two arguments, *i.e.*, that the statute impliedly conferred a right of hearing upon him and, that if he is denied a hearing, there has been a violation of procedural due process. In such a case, press the statutory point. Even today, courts do not like to decide constitutional issues if they can duck them with straight faces.

There are other techniques that are helpful in constitutional law cases. One is the doctrine of "ripeness." That is, a constitutional issue should not be taken up until it is ripe for consideration, because, for instance, the record below is inadequate to serve as a basis for a constitutional decision. Two leading cases in that area are *Powell v. Texas*,⁵ and *United States v. Fruehauf*.⁶ Even in the *Barrera* case, the ripeness point was present. The Eighth Circuit interpreted the statute to require that in the Missouri situation, the state had to permit federally financed public school teachers to go on the premises of religious-related schools to teach special reading and special mathematics. They refused, however, to reach the constitutional issue as to whether or not, if the statute was so interpreted, it violated the establishment clause. It did so on the grounds that there was no evidence in the record before it of any plan to so use special teachers.

The doctrine of mootness also may help to avoid premature decisions of constitutional issues. We saw a recent illustration of that in *DeFunis v. Odegaard*.⁷ I am sure you are all familiar with it. DeFunis claimed he was discriminated against by the admission policies of Washington State University Law School which favored blacks and certain other minority groups. In a cowardly display, but nevertheless illustrative for my purposes, the Supreme Court ducked the issue completely.

However, if you do have a constitutional objection, press it from the beginning and preserve it at every stage. Otherwise, you may find when you reach the appellate level that you have waived it. There is another area where this advice may be helpful, that is, as an appellee. Remember, that if you raise a constitutional issue and you win the case on other grounds, nonetheless, in defending against an appeal, you are entitled to raise that ground even though the trial court judge did not even pass on it, or even though he rejected it but ruled in your favor on other grounds.

In constitutional litigation, as in all cases, the facts always are of commanding importance. My brief experience on the bench and my larger

⁵ 392 U.S. 514 (1968).

⁶ 365 U.S. 146 (1961).

⁷ 416 U.S. 312 (1974).

experience as a practicing lawyer have convinced me that most judges want to do equity—they want to achieve the right result, even at the level of so-called constitutional policy. In this process the facts most frequently are determinative. Remember the old case of *Yick Wo v. Hopkins*?⁸ On its face, the San Francisco fire ordinance appeared evenhanded in its coverage. In actuality, the ordinance was only enforced against Chinese laundrymen, not white Protestants, Irishmen, Italians, or anyone else who ran laundries. The facts of that case explain that a law fair on its face can nevertheless be unconstitutionally applied. And in the civil rights cases of the last 20 years, the school cases, the transportation cases, the public facility cases, it was the factual proof of overwhelming discrimination in terms of numbers, quantity, and quality that moved courts to conclude that the law could not sanction such unfairness. The same was true of the reapportionment cases. The facts established the great disparity of population among the various constituent political subdivisions of a state. Coming closer to our particular interests, in *Tilton v. Richardson*,⁹ which upheld a federal construction grant to private universities, we had a full trial on the merits. During the course of the trial, the attorneys who represented the universities were able to build a good case to show, by facts of record, the true nature of a Catholic college and led at least five members of the Court to see it that way and give us one for a change.

Now in the recent *Roe*¹⁰ and *Doe*¹¹ abortion cases, all I can say is that I think the Court simply closed its eyes to the medical facts. Justice Blackmun, of all people—a former counsel to the Mayo Clinic—refused to recognize the undisputed medical fact, for example, that life begins either at conception or, at the latest, within five days thereafter. There is not a doctor in the country—even the abortionist doctor Vuitch—who would deny that. I think one of the problems is that in most of these important constitutional cases it is a state assistant attorney general who handles the case. Many of the compelling medical facts were found in the briefs or from *amici curiae*. Thus, the medical facts were really not in the basic record.

That may be a partial excuse, but I do not really think so. Nevertheless, the situation presented in the abortion cases just illustrates my point, *i.e.*, that the facts are the most potent tool for appealing and convincing constitutional advocacy. For that reason, beware proceeding to a judgment on the motion to dismiss, or a motion for summary judgment, or even on the basis of stipulated records.

In that respect, I call your attention to the tendency on the part of three-judge federal courts to browbeat you into a stipulated record or cross motions for summary judgment, because they do not have the time to

⁸ 118 U.S. 356 (1886).

⁹ 403 U.S. 672 (1971).

¹⁰ *Roe v. Wade*, 410 U.S. 113 (1973).

¹¹ *Doe v. Bolton*, 410 U.S. 179 (1973).

spend on the case before them. Moreover, as far as our side is concerned, in church-state and abortion cases, for instance, a state court usually is more likely to be a friendlier forum. However, we do not usually get the chance to select the forum. The suit is usually instituted by an opponent and most frequently is brought before a three-judge federal court, seeking relief from alleged violations of the establishment clause or, in the case of abortion, under the ninth and fourteenth amendments.

One other point: on occasion you may find help in the doctrine of abstention. Sometimes you can show that the state statute challenged is not precisely clear in its interpretation and thus convince a federal court to abstain. A partner of mine very recently brought a suit before a three-judge federal court to compel the State of Maryland to provide relief classrooms or child centers for the non-retarded disadvantaged child, *i.e.*, the physically handicapped child who was not mentally retarded. The three-judge court abstained and sent the case back to the state court for interpretation of the state law. He surprised himself by winning the case in the state court on nonconstitutional grounds.

I would like now just to touch upon techniques for marshalling the facts. Facts are not only "stubborn things;" they can be very compelling and convincing things. Justice Cardozo once said: "Facts are the coin which we must have in our pocket if we are able to pay our way with legal tender. Until we are provided with a plentiful supply of it, we should do better to stay at home."

Now, one of the ways you can marshal the facts is in a comprehensive complaint, or as the case may be, answer. We did this in the original Maryland reapportionment case. Actually, the record that reached the Supreme Court in that case was composed basically of our complaint, with a host of exhibits attached to it regarding population statistics, tax revenues, and the like, plus the state's demurrer. So too, in the preparation of an answer, try to make it as comprehensive as possible. Thus, even if you are browbeaten into a stipulated record before a three-judge federal court, at least you have an answer that contains some facts that might be helpful. If you have to go the summary judgment route, the elaborate affidavit is a technique to be used in shoveling a lot of facts into the record. The courts, at least the federal courts I have dealt with, despite the rule about the relevancy of the material that an affidavit must contain, are pretty lax in enforcing that rule. Therefore, if you are preparing an affidavit in a summary judgment case involving constitutional questions, pour facts into the affidavit. It can not do any harm, and ultimately on appeal, might do a great deal of good.

The best device of all, of course, for marshalling the facts and getting them into the record, is through an actual trial of the case. I repeat myself by saying avoid, if you can, summary judgments and stipulated records and try to get the case heard, so you can get the evidence in there. In the Catholic University case for example, there was a full trial. The plaintiffs,

two priest-professors, complained that the clerical discount system under which priest-professors are paid less than the lay professors discriminated against them, and also violated their first amendment rights of free speech and academic freedom. However, when they got on the stand under cross-examination by the Archbishop's attorneys, they had to admit that they were not curtailed in any way, no one ever interfered with the teaching, no one ever dropped in to their classroom, no one ever told them what to write, no one ever tried to impede their public status, or their private status for that matter. So that complaint, once it was subjected to cross-examination and adverse facts, exploded in their face. Although they have persisted in the claim on appeal, the record negates it.

Now let me turn to a different aspect of the conduct of constitutional litigation, *i.e.*, the appeal of such cases. It has been my personal experience, both as a practicing attorney and during my one year on the appellate bench, that many lawyers for whom I had a high regard as trial attorneys and were good lawyers, somehow had not mastered the art or technique of arguing an appeal. Too often, it was a jury speech repeated, first to the Circuit Court of Appeals, and then again before the Supreme Court. Arguing an appeal is a technique that is different from the trial of a case. Many lawyers, of course, have mastered both. Yet, there are some that have mastered the trial technique, and yet are not skillful in the appellate advocacy.

The first decision that has to be made, is—shall an appeal be taken? In many cases where we have won, the choice was not ours to make. But there are times when we have to determine whether an appeal is worth it, and, in your particular situation, you have to consider interests sometimes outside of the immediate interest of your particular client. You must consider the interests of Catholic education, and the Church as a whole. A recent example—Mr. Skelly referred to the fact that they had elected not to push their cross appeal in the recent Pennsylvania case—I am sure that was done in part out of a consideration of the total picture. Again, we had a case in New Hampshire, the leasing case, which was lost before a three-judge court, and a local attorney, a member of this Association, communicated with others who had a real concern about taking an appeal. As a result of an exchange of views and cooperation on several levels, it was determined not to push that appeal—that the game was not worth the candle.

Now, assuming the election has been made to appeal or you are compelled to defend on appeal, the first thing to do is to *read the rules*. Do as I say, not as I sometimes do not do. In the Catholic University case, I had forgotten about the 70-page limitation on briefs. By the time I woke up to it, I was almost finished with the brief, and I wanted to put a summary of argument in, which would have been another five pages. I finally looked at the rules to learn that it was too late to move for permission to file a brief of greater length. I did not recheck the rules, I thought I knew them

and it turned out, I was not thinking clearly. So always read the rules of the particular court in which appeal is brought.

Next, the important matter of preparing a brief is of major concern. My experience again, as a judge, is that the brief in 90% of the cases is determinative. I think the first thing an attorney should do before he even thinks about writing his brief is to make sure he has the record mastered. If he has been the attorney in the trial below, that ought to be reasonably easy. If he has not been the attorney in the trial below, it is a little more difficult. Always prepare an index of the record, at least a consecutive index. Better yet is the preparation of both a consecutive index and a topical index, or subject matter index. I think you will find the preparation of an index to the record important and helpful in three respects:

1. First, an index will enable you to designate the record more accurately. You will not ask to include more in that record than you need. More importantly, you will not leave out anything that you need in making your arguments on appeal.

2. An index also is very helpful when you sit down to write the most important part of your brief, the statement of facts.

3. Finally, months later when you are about to prepare for oral argument, it is extremely helpful to have a topical or even consecutive index of the record handy, because it will refresh your recollection very rapidly, and thus, better enable you to prepare for oral argument.

The next part of a brief usually is taken up with the questions presented. Here, several little pieces of advice might be helpful. Abandon weak contentions, I mean really weak, as some contentions obviously are on the weaker side but not so weak that they should be abandoned. Still, abandon really weak contentions, concentrate on your strong points, the questions where you really have a chance and where the question is compelling in your favor.

When you state a question, try to make it an appealing formulation from your view of the case. At the same time, however, do not make it thinly disguised argument.

The most important part of any brief, in my opinion, is the statement of facts. There, the court for the first time sees what your case is all about. If you can do a good job there, you are halfway home. Statements of facts, obviously, should not be just a tedious recitation of insignificant and peripheral facts, but contain all the *material* facts. Usually, I think it is helpful, but not always, to set the facts forth in a chronological order. And in your statement of facts, do not be so impatient as to get into argument. You will have the rest of your brief for argument. Thus, in the statement of facts do not argue, do not editorialize, do not snipe at your opponent or his witnesses, just try to state the material facts fully and fairly. Above all, do not omit or gloss over some unfavorable facts, because sooner or later the court will pick it up when it reads your opponent's brief, or when you

are before it in oral argument. Therefore, do not gloss over unfavorable facts.

Another point to keep in mind is that if you have a long statement of facts, break it up a bit with subheadings. That will make a little easier reading for the court and is more calculated to maintain its attention. Liberal references to the record also are helpful. These show that you are telling the story as it occurred. Briefs which contain little or no references to the record below make a judge suspicious.

After you polished the statement of facts which, I repeat, in my opinion is the most important part of any brief, it is time to turn to the section on argument. There, I would say, state your strong points first. This is especially necessary if the brief is to be of some length. In any brief, hit them hard with your strong points at the outset. Otherwise, the danger is that if you submerge or put your strong points after your weak points, you might have already lost the court before it reaches your strongest arguments. And in your argument, unlike your statement of facts, do not hesitate to argue as strongly as possible. Do not opine or summarize, surmise, or conjecture. Argue! You are not writing a law review article—you are writing a brief. So do not hold back. Again, the use of illustrative headings can be helpful. In the Catholic University brief, for example, we could have said: "Governmental Action is Not Involved." We did not say that. Rather, we said in the heading of that section: "As a result of a Federal Research Grant, Tax Exemption and a Congressional Charter, is Catholic University a Partner with the Government of the United States?" This type of a heading makes more of the argument that we are about to make than would have been the case, if we merely had said: "Governmental Action is Not Involved."

If the brief is more than 25 or 30 pages, I would recommend a summary of argument to be set forth just before you begin your argument. In the Supreme Court, such a summary is required in a brief of over 25 pages in length. In many courts a summary of argument is not required. But it is always a good idea. I know some judges that never get beyond the summary of argument. If you do prepare a summary, do not compose it until you are finished polishing your argument. Otherwise, the danger is that if you write the summary first and then write your argument, they may not be consistent. You might say things in the summary that never appear in the body of the argument, whereas if you write the argument first and then the summary, they will be consistent.

Another thing that is very important. When you are the appellee, do not wait for the appellant's brief before you start thinking about your own—even go so far as to outline what you are going to say as appellee. There is a story that Mr. Justice Jackson, when he was the Solicitor General, asked one of his subordinates: "How is our brief in the Jones case coming?" "Oh," said he, "the appellant's brief is not due until next week." And General Jackson replied: "What's the matter, doesn't the Govern-

ment have a case?" So do not let the appellant stake out the ground or form your brief is going to take. At least try to outline something, even before you get to see the appellant's brief.

Although I violated this rule recently myself, the shorter brief is better than the long one. Another Jackson story along these lines. Judge Leventhal tells this one: He was in the Solicitor General's office, and it was his first brief. It was a Panama Canal case. He put the draft in Jackson's in-basket on Friday, and when he came in on Monday morning, the brief was back in his in-basket. Written across it was: "Leventhal, the brief is excellent, but must it be as long as the Canal?" So try to remember, the shorter brief is usually the better one. And, I suppose, the more difficult one to write.

Now I turn to oral argument. As I indicated, oral argument is somewhat overrated as a factor in deciding cases. Nevertheless, it is sufficiently important to require attention and preparation. It is futile to talk about techniques or styles to be followed in oral argument. Everyone has a different style, and it would be presumptuous for me to suggest any style. Just be your natural self—be comfortable in making your argument.

There are some things, however, that you should bear in mind. Above all, never read your argument. That, expletive deleted, is an impeachable offense! It should be ground for disbarment. Please do not read your argument! It insults your profession, and any court would feel insulted. On the other hand, always have some notes or an outline to refer to. It is a convenient crutch, especially when the courts get you off your main line of argument by asking questions. Notes, of course, in my opinion, are almost indispensable. I would also advise against the Houdini trick of appearing without a note and arguing solely from memory. A performance of that kind may be good show business, but I do not think it is a sound lawyer's technique. The court gets more interested in wondering whether the lawyer will be able to pull it off, and does not hear what he is attempting to say.

Another admonition—always answer the court's questions when they are asked. By its questions a court manifests its interest in the case. Usually, most judges when they ask questions, are sincerely interested in getting an answer and not just posturing. Many of us at times will say: "Your Honor, I am coming to that just a little later on in my argument." One day in the Supreme Court, Justice McReynolds, an acerbic man, asked a question, to which a lawyer responded, "Mr. Justice McReynolds, I am coming to that a little later on in my argument." McReynolds cut him off with: "You're there!"

Now, when you get up to argue, hit the strong points of your argument at the outset; go to the jugular very promptly. I know that the appellant especially has to at least summarize the material facts. Nevertheless, as soon as you can, get to the essence of your argument. Above all, do not let your argument be a mere rehashing of your brief. Most courts read the briefs in advance. And be flexible in your oral argument. Sometimes, you

might even have to ditch one of your arguments, if you see it is just not catching on, and go to some other argument. Do not be afraid to abandon weak arguments in order to devote more time to stronger ones.

Well, I have probably taken up enough of your time in telling you what you already know. But I want to say that we all have a special responsibility as attorneys, either representing Bishops or other Catholic interests. Thus, we have to be mindful of the interests of our Church as well as our immediate client. This group represents a great step in that direction. If we are going to turn some of those damaging decisions, it has to be through a fully cooperative effort—there is no question about that. Speaking for myself, I have been in very few cases, where two heads have not been better than one. In this room there is a lot of talent, and we can mutually exchange experiences, problems and information. It is in the long run, I think, not only our profession and our Association, but our Church who will be better served thereby.