Supreme Effort:

One Lawyer's Odyssey to the United States Supreme Court in a False Claims Act Case

James B. Helmer, Jr.[1]

I. *CERTIORARI*

For fourteen years my partners Paul Martins, Rob Rice and I had worked on a False Claims Act case concerning poorly constructed and uninspected generator sets sold to the United States Navy. These generator sets (Gen-Sets) provided all the electricity which allowed the *Arleigh Burke*–class destroyers to track and defeat 100 targets simultaneously on land, on water, in the air and under the water. Without the electricity provided by the Gen-Sets, the destroyers would have a very short life expectancy in combat.

After a five-week jury trial in Dayton, Ohio and on the eve of giving the case to the jury for decision, the trial court dismissed the case on the basis that there was no evidence that the invoices for payment from the subcontractors who built the Gen-Sets to the prime contractor were provided or "presented" to the Navy. The trial court based the decision principally on a split decision from the District of Columbia Court of Appeals authored by then-Appellate Judge John Roberts.[2]

We appealed. A divided Sixth Circuit Court of Appeals reversed the trial court and determined that Judge Roberts was wrong in holding that any section of the False Claims Act except for Section (a)(1) required "presentment" of a claim for liability to attach so long as government funds were involved. The case was remanded for a retrial.[3]

As the time for petitioning the United States Supreme Court to grant *certiorari* to review the Sixth Circuit's opinion was about to expire, the defendants got a new lawyer—former Solicitor General Theodore Olson. Attorney Olson requested an extension of time to prepare a *certiorari* petition. Justice Stephens, without waiting for any responses, granted the motion.

Mr. Olson's *certiorari* petition was filed on August 17, 2007. It was soon joined by an *amicus curiae* filing by the United States Chamber of Commerce. The Chamber urged the Supreme Court to take the case and overturn the Sixth Circuit because business owners were now somehow unsure whether they could defraud the government and be pursued under the False Claims Act.

The odds of any case being accepted by the United States Supreme Court are astronomical. The Court will receive in the neighborhood of 9,000 *certiorari* petitions in a term but will take only about five dozen. The issue of statutory construction in

1. President, Helmer, Martins, Rice & Popham Co., L.P.A., 600 Vine Street, Suite 2704, Cincinnati, Ohio 45202. See www.fcalawfirm.com.

2. *United States ex rel. Totten v. Bombardier Corp.*, 380 F.3d 488 (D.C. Cir. 2004), *cert. denied*, 544 U.S. 1032 (2005).

3. *United States ex rel. Sanders v. Allison Engine Co.*, 471 F.3d 610 (2006), *vacated and remanded*, 553 U.S. __, 2008 U.S. Lexis 4704 (2008).

our case was interesting but not particularly difficult. We thought the Supreme Court would have better things to do.

In this century, Mr. Olson has enjoyed remarkable success as an advocate before the United States Supreme Court. Having twice argued successfully *Gore v. Bush* to the high court, which many believe determined who became President, Mr. Olson spent several years as George Bush's nominated Solicitor General, arguing the position of the United States on many cases before the Supreme Court.

And the Chamber of Commerce has a truly remarkable record of success in obtaining Supreme Court review. Approximately one-half of the cases it urges the Supreme Court to take and review are accepted by the Supreme Court.

The Supreme Court granted the Petition for *Certiorari* on October 29, 2007.

When the Supreme Court grants *certiorari* to review an appellate court decision, it overturns the appellate decision 80 percent of the time. We had our work cut out for us.

The Clerk's Office sent many materials to us. We were informed that our case would be heard in about four months at the February 2008 session. We were provided a calendar which gave five possible days set aside for argument in the last two weeks of February. We were also sent various rules and handbooks concerning the Supreme Court.

II. GETTING STARTED

After three decades of trial practice with little direct contact with the Supreme Court, I had resigned myself to the playing fields of the various trial and appellate courts to which my clients' causes take me. I was shocked the Supreme Court was fitting one of our cases into its schedule. It was like being invited to play in the Super Bowl. As a Cincinnati Bengals fan, I knew how unlikely it was to get to the Super Bowl and how unpleasant the final result of the trip can be.

It took about a day for the shock to wear off. It was suggested we hire one of the Supreme Court "mafia," the small group of attorneys in D.C. specializing in Supreme Court cases, to argue the case. But, such experts do not come cheap. Moreover, who could we hire who had spent as many years as I had dealing with the False Claims Act (24) or working on this destroyer case (14)? To quote Ulysses on his Odyssey: "No Man."

Opportunity arrives each and every day for all of us. Most opportunities we turn down. A few we seize. This looked like one I should embrace. I decided to become a Supreme Court lawyer.

My first call was to Jeb White, Executive Director of Taxpayers Against Fraud, who had already authored an *amicus curiae* brief in support of our position in the Court of Appeals. Jeb is a young lawyer who eats, drinks, and sleeps the False Claims Act and is totally dedicated to its effective implementation. Jeb had also played a background role in two previous False Claims Act cases which had been decided by the Supreme Court.

As it turned out, my first call was the right one to make. Over the next several months, Jeb White played a huge role. His advice was always right on target. His

contacts wide-ranging. His scholarship superb. But, most of all, his organizational approach was fascinating to watch. In my numerous telephone calls with him, I took pages of notes. His e-mails would fill a box. Jeb would eventually be involved in all aspects of the preparation including organizing several *amicus curiae*, co-authorizing a brief, participating and planning the moot courts, enlisting scholars to write on issues, coordinating with the United States Department of Justice to join in the argument on our side, tracking down transcripts of the Supreme Court arguments on the historically significant *Marcus v. Hess*[4] and *Bornstein*[5] False Claims Act cases, attending all the moot courts, and finally the Supreme Court argument itself. In short, if you had Jeb on your side, you did not need much else.

A. Georgetown Supreme Court Institute

Jeb's first suggestion was to immediately contact the Georgetown Supreme Court Institute to determine if they would accept me as a candidate for training in their moot court program. Georgetown Law School has built a replica of the United States Supreme Court courtroom at its Washington, D.C. campus. The Georgetown Supreme Court Institute invites former Supreme Court law clerks, federal Court of Appeals judges, law professors and lawyers who have argued before the Supreme Court to review the briefs and act as Supreme Court justices in training lawyers to argue to the high court.

The ground rules were pretty simple. The Georgetown Supreme Court Institute will train counsel for one side of the case only and decides who that is on a first-come basis. Thus, the need to contact the Institute immediately. Second, the Institute will schedule the moot court training session as close to the actual Supreme Court argument as possible. It wants the trainee completely prepared—as its moot court justices will be—so that the trainee can get the most out of fine-tuning the argument. My Supreme Court argument was scheduled for Tuesday, February 26, 2008. The Georgetown Supreme Court Institute would hold my moot court training on Friday, February 22, 2008.

B. *Amicus Curiae*

Before the Sixth Circuit Court of Appeals, the United States Department of Justice had filed an *amicus curiae* brief supporting our position and attacking the *Totten* decision. In addition, the Department of Justice Appellate Division dispatched a very able and experienced advocate, Steve Frank, to appear and argue. False Claims Act cases are unique in that the United States is always the real party in interest even when the Department of Justice elects (as it did in the destroyer case) to permit the relator and his counsel to handle the case. Accordingly, we had no difficulty in providing a few of our precious argument minutes to Mr. Frank so he could articulate the interests of the United States in assuring the False Claims Act was properly interpreted.

4. 317 U.S. 537 (1943)

5. 423 U.S. 303 (1976)

But at the Supreme Court level, the interests of the United States are represented not by the Department of Justice Appellate Division but rather by the Solicitor General's office. That office would determine what position, if any, the United States would advocate and whether a representative of the United States would appear before the Supreme Court.

As it turned out, the Solicitor General did file a brief in support of our position and did assign one of its more experienced advocates, Malcolm Stewart, to share our argument time. But, this was never confirmed to us until the evening of the date on which *amicus curiae* briefs were due when we saw the Solicitor General's brief for the first time. Although the Supreme Court regularly grants the Solicitor General's request for argument time, about once a term, for no explained reason, the Court denies such request. We dodged that bullet and the request to participate was granted.

Jeb White had obtained commitments from others, including Taxpayers Against Fraud[6] as well as one of the chief architects of the False Claims Act, Senator Charles Grassley (R. Iowa), to submit *amicus curiae* briefs on our behalf. We played no part in such briefing. Indeed, we only saw such briefs after they were already filed with the Supreme Court. But it was always comforting to know others agreed with our views and were working hard to express such opinions on this important case.

The *amicus curiae* briefs filed in support of our views addressed the principal arguments of the petitioners and also took head-on many of those raised by the *amicus curiae* supporting the petitioners. Such briefs underscored what we considered to be the appropriate outcome of this case and the significance for the Supreme Court to make the correct call. There were three *amicus curiae* briefs filed on behalf of the petitioners. Including the Solicitor General's, there were six *amicus curiae* briefs filed on our behalf.

C. Briefing

Words, logic. and precedent are a lawyer's tools. A persuasive argument is the product of the proper and best use of such tools. As the respondent, our brief needed to reply to arguments presented by our opponents. We had, of course, already briefed the issues in the lower courts on several occasions. The *certiorari* petition outlined petitioner's principal arguments as well as framing the question presented. Such question determined the scope of what the Supreme Court had elected to review and consider. Thus, we were able to begin drafting our brief even before petitioner filed the brief to which we would be responding.

In this case, petitioners relied heavily and successfully before the trial court on then-Judge Robert's majority opinion in *Totten*. Petitioners repeated this performance, albeit unsuccessfully, before the Court of Appeals. As Judge Roberts was now the Chief Justice of the Supreme Court, we expected again to see his *Totten* analysis repeated. We were not disappointed.

6. Cost underwritten by Taxpayers Against Fraud Lawyer of the Year Mike Behn. In my opinion, Mike should be Lawyer of the Century. I know his clients agree.

In *Totten*, a strong and well-reasoned dissent had been penned by Circuit Judge Merrick B. Garland. Judge Garland's reasoning was so thorough that it was hard to find much else to say. In addition, the Sixth Circuit Court of Appeals' decision, though not as complete as Judge Garland had been, was a straightforward use of canons of statutory construction backed up by legislative history from both the Senate and House of Representatives.

Since the case involved statutory interpretation and construction, we researched the view of the current Court and collected from both the literature and Supreme Court precedent the canons of statutory construction which would likely be consulted and form the framework of the Court's decision. We learned that some Justices were particularly fond of a particular text on statutory construction,[7] so we studied it.

My partner, Rob Rice, devoted his full attention to the brief for several weeks. Many others also spent constructive time on this project. It came together without great difficulty. We had, of course, spent more than a decade working with the facts and law on this case.

III. ARGUMENT PREPARATION

A. Know the Decision Makers

All lawyers have at least an academic interest in the make-up of our Supreme Court. As a law student and young lawyer clerking for a federal judge, I had paid close attention to any news concerning the Supreme Court and studied all of the current opinions handed down by the Court and many of the ancient ones. I enjoyed reading books about how the Court operated.[8] My personal contact with the Justices was very limited. As a law student I had worked on a law review article written by Professor Ruth Bader Ginsberg when she had delivered the Marx Lecture at the College of Law of the University of Cincinnati in 1974. I had dinner with Justice Antonin Scalia many years ago. I learned he was aware of the False Claims Act. He seemed genuinely intrigued to learn that some lawyer actually made his living using that ancient statute.

As I progressed into an active private trial practice, it became apparent that the actions of the Supreme Court had very little direct impact on my day-to-day business. Certainly, there were major decisions which had to be studied and applied by all trial lawyers. But, there was time to find and study such decisions as well as the decisions by the lower courts implementing and explaining the Supreme Court holdings. The chances that a trial lawyer from Cincinnati would ever be called upon to appear before the Supreme Court were minimal and grew smaller every year.

7. Lawrence E. Filson and Sandra L. Strokoff, *The Legislative Drafter's Desk Reference: Best Practices in Drafting Federal and State Laws and Regulations*, (2d Ed. CQ Press 2008).

8. Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court*, (Doubleday 2007); Bob Woodward and Scott Armstrong, *The Brethren: Inside the Supreme Court*, (Simon & Schuster 1979); Howard Ball, *The Vision and the Dream of Justice Hugo L. Black*, (Univ. of Alabama Press 1975); J. Harvey Wilkinson, III, *Serving Justice: A Supreme Court Clerk's View*, (Charterhouse 1974); Joseph C. Goulden, *The Benchwarmers: The Private World of the Powerful Federal Judges*, (Weybright and Talley 1974); Henry J. Abraham, *Justices and Presidents: A Political History of Appointments to the Surpeme Court*, (Oxford Univ. Press 1974); Robert G. McCloskey, *The Modern Supreme Court*, (Harvard Univ. Press 1972).

Thus, I would need to start from scratch to learn about the current Supreme Court, its protocol, and especially the brethren who now occupied each of the nine slots who would decide my case.

First, I read everything I could about each of the nine Justices. From the numerous books, articles, and speeches and writings by each of the Justices, I began to believe I knew them. I knew where they went to school, how many children they had, what their legal careers had been, how they got their Presidential appointments and what significant opinions each had authored. I also learned of the collegiality displayed by all of the Justices to each other, in contrast to the impression a casual observer might reach from seeing some of the combative dissenting opinions. I learned what I considered to be many personal but illuminating items of individual trivia: what the Justices liked to eat, where their law clerks typically came from, what they liked to do with their summer recesses, what kind of cars they drove, and even some about their social lives. While I would certainly be a stranger to each of them, I did not want to feel that any Justice was a stranger to me.

Second, I wanted to talk to each Justice by name and not make the *faux pas* I had read about where counsel had misidentified the Justice who was questioning him. I had color pictures of each Justice, in the order in which they would sit on the bench, posted in my office so I could see them every day and all day. As I got closer to the argument, I was tested with flash cards and different pictures, some older and some more current, of each Justice. My office staff added pictures of Diana Ross, Florence Ballard, and Mary Wells, the most successful American vocal group of the '60s known as the Supremes, to gauge my progress.

Third, I wanted to know how the Justices conducted themselves during oral argument. I began reading transcripts of arguments. I had some cassette tapes of the arguments from the landmark decisions, but these were all cases before the current bevy of Justices were appointed.

Somewhere in the process I discovered that the OYEZ project[9] had actual tape recordings of arguments for about the last ten years with streaming transcripts and pictures which could be viewed over the Internet. The contrast between reading a cold transcript and hearing the actual argument was stark. You could often tell from the tape that a Justice's questions or comments were sarcastic, were humorous, or sometimes angry, things you would never pick up from just reading the transcript. I listened to hundreds of hours of arguments.

B. Know Your Opponent

Multinational corporations usually hire top counsel. Having taken a spanking in the Court of Appeals, General Motors Corporation reached out to perhaps the best appellate advocate of his generation, Theodore B. Olson.

Mr. Olson had successfully argued twice before the United States Supreme Court in the Florida election swamp which produced a presidency for George W. Bush. He then became President Bush's selection for the 42nd Solicitor General of the United

9. www.Oyez.org.

States, where he continued successfully presenting cases before the United States Supreme Court. His background included heading the appellate practice group of a major law firm. He had also served a previous tour in the Department of Justice as Assistant Attorney General for the office of the Legal Counsel for President Reagan. This prior government service was at about the time I rediscovered the Civil War–era False Claims Act and began prosecuting the *Gravitt* case.[10]

Mr. Olson's argument in the *Sanders* case would be the 49th time he had appeared before the Supreme Court. He had been successful in about 75 percent of his previous arguments. Personally known and respected by the Justices, articulate, experienced, and absolutely at the peak of his game, we expected a formidable presence. We were not disappointed.

Indeed, Mr. Olson had previously argued on behalf of a relator before the Supreme Court and prevailed on the issue of relator's standing to bring a *qui tam* case.[11] I had personally argued that same issue successfully 11 times before the lower courts, so I made the journey to Washington, D.C., to see Mr. Olson's Supreme Court argument. It was a worthwhile trip. I did not expect then that a few years later I would be arguing against Mr. Olson before the same Court.

Even the best lawyers have weaknesses. Transcripts of many of Mr. Olson's arguments are readily available. I spent many hours reviewing them. I also consulted with several attorneys who had litigated with and against Mr. Olson. Lawyers all have noses and they all have opinions about Mr. Olson. I suspected that in some of those opinions some truth existed. And, of course, Mr. Olson has lectured and written frequently. Consulting such presentations would also provide clues about him.

Mr. Olson is obviously very savvy at responding to questions from the Justices. But, it seemed to me that he was also very good at times at not answering the question he was asked. Rather, he would answer a question he wished he was asked.

In addition, while I fully expected Mr. Olson to be meticulously prepared—and he was—I did not believe he would be very knowledgeable about the tens of thousands of exhibits in the trial, the testimony of the dozens of witnesses, or, for that matter, the massive record in this case. I expected that he would leave such details to his handlers or perhaps to the lawyers who had been unsuccessful in the lower appellate court. I received a clue supporting my hunch when Mr. Olson's associates refused to include items in the Supreme Court Appendix from the lower courts which we requested. We were told this case presented just an issue of law, after all.

Thus, what I expected was that Mr. Olson might fumble on questions concerning what really happened in this case. But, a fumble is only truly costly if the opposing team can recover it. I wanted to make sure we could. As it turned out, I did not have to wait long. The first question asked of Mr. Olson concerned what happened below. It did not receive a complete answer. The ball was now on the ground and I intended to pick it up.

10. *United States ex rel. Gravitt v. General Electric Co.*, 680 F. Supp. 1162 (S.D. Ohio), *appeal dismissed*, 848 F.2d 190 (6th Cir.), *cert. denied sub nom, General Electric Co. v. United States*, 488 U.S. 901 (1988).

11. *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000).

C. In a Case of Statutory Construction, You'd Best Know the Statute

The Supreme Court took this case to interpret the False Claims Act. That statute has been around since 1863, when Abraham Lincoln championed *qui tam* actions as a way to deal with rampant malfeasance by government contractors supplying the Union Army war machine.

Although the False Claims Act has received attention from Congress on nearly a dozen occasions, it has had only three major iterations: the 1863 version, the 1943 version, and the 1986 Amendments.

There exists substantial legislative history for all three versions with the exception of the House of Representatives for the 1943 version.[12] The legislative history for the earlier debates is in maddingly tiny print. To aid students of the law, for many years I have included all the legislative history in the appendix to my False Claims Act treatise.

The legislative debates are colorful and laced with references to privateers, parasites, saw dust substituted for ammunition, freshly painted rotten ships sold as new, $400 hammers, and $1,000 coffee pots. Even this author and his first *qui tam* client are referenced as their testimony before both houses of Congress was used in supporting the 1986 Amendments.[13] Many would find this history interesting. One or more of the Justices might seize upon some part of it to advance an argument or question. I wanted to know it better than anyone in the court room.

Years ago, I wrote an office manual on how to handle a False Claims Act case, turned it into a book, and had it published. I have since rewritten that book five times as False Claims Act law continues to develop and expand. The most recent version was published in the fall of 2007, so much of this area of the law was fresh in my mind. Nevertheless, I thought it was wise to review the entire book as I began my preparation.

I keep behind my desk three collections of False Claims Act research. One is two volumes and contains all Sixth Circuit Court of Appeals decisions and most District Court opinions within that Circuit. Even still larger are several binders containing the leading cases from other jurisdictions. The third, and by far the smallest binder, contains all of the United States Supreme Court decisions about the False Claims Act. I had read these materials. Some I had read often.

I quickly decided that reviewing the lower court decisions would be a waste of time. Rarely does it seem the Supreme Court adopts wholesale the analysis, writing, or words of inferior courts. But, the Court's own analysis, writing, and words looms large in nearly all decisions. Although I had read the Supreme Court's False Claims Act cases dozens of times, I now had an incentive to know those cases more thoroughly than ever.

12. The House, with only 23 members present, passed a resolution to abolish all the *qui tam* provisions of the False Claims Act on April Fool's Day, 1943, at the urging of Attorney General Francis Biddle. No hearings or debates were held. James B. Helmer, Jr., *False Claims Act: Whistleblower Litigation*, §2–5 at p. 50 (5th ed. Top Gun Publishing 2007).

13. *False Claims Reform Act: Hearings on S. 1562 Before the Subcommittee on Administrative Practice and Procedure of the Senate Comm. On the Judiciary*, 99th Cong., 1st Sess. 49–61 (1985); *False Claims Act Amendments: Hearings Before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee*, 99th Cong., 2d Sess. 353–354, 389 (1986).

Fortunately, there are only 12 Supreme Court False Claims Act decisions.[14] I had previously studied and written about each of them. I had cited most of them in the various briefs I have submitted to numerous courts in the more than 50 *qui tam* cases I have handled. But, with a renewed sense of urgency, I outlined each one. I then prepared a two-page memorandum about each case, including any separate opinions, with emphasis on how it might be relevant to the arguments in *Sanders*. Nearly all the cases made points, had quotes, or had analysis around which the current Court could decide *Sanders*. Those memoranda would eventually become half of the Supreme Court notebook I would take to the podium.

Because *Bornstein* had involved subcontractors as our case did, it deserved special attention. Interestingly, although Justice Stevens was a member of the Court when *Bornstein* was decided, he did not participate in that decision. It would have been nice to have had his thoughts about subcontractors who cheat the taxpayers. However, as a former Navy officer in World War II, I did not think Justice Stevens would have warm and fuzzy feelings for Navy subcontractors who delivered substandard critical hardware.

Of next importance to me were the decisions in which current members of the Court participated. These decisions made it clear that many members of the Court are very critical of the language of the False Clams Act and some are down right hostile to its drafting. The Solicitor General's attempts to defend the language had received decidedly mixed reviews. In fact, the most recent decision of the Supreme Court in 2007 had pointedly rejected the Solicitor General's arguments and view.[15] A storm was gathering.

While this trend concerned me, it got worse. Next, I turned to the transcripts of the oral arguments in the False Claims Act cases.

Transcripts are available, with some effort, of all the False Claims Act oral arguments in the Supreme Court. I studied them all. As I considered myself something of a student in this area, I attempted to answer all the questions in my own words. While I may not have improved on any of the answers given by my colleagues, it was part of my preparation. And, although I know some lawyers who are perfectly capable of losing arguments with themselves, I say that I did not lose any of those make-believe arguments.

I was trying to determine both what questions I might receive, who would be asking the questions, and what I could point to that would both satisfy the examiner and help establish our position for the other Justices. I was shocked to discover that each of the Justices save one would ask questions, that the questions would likely be prepared well in advance and designed so little wiggle room would be available, and that

14. United States Supreme Court False Claims Act opinions: *Allison Engine Co., Inc. v. United States ex rel. Sanders*, 553 U.S. __, 123 S.Ct. 2123 (2008;) *Rockwell International Corp. v. United States ex rel. Stone*, 549 U.S. 457 (2007); *Graham Co. Soil & Water Conserv. Dist. v. United States ex rel. Wilson*, 545 U.S. 409 (2005); *Cook Co., Ill. v. United States ex rel. Chandler*, 538 U.S. 119 (2003); *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000); *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997); *United States v. Halper*, 490 U.S. 435 (1989); *United States v. Bornstein*, 423 U.S. 303 (1976); *United States v. Neifert-White Co.*, 390 U.S. 228 (1968); *United States v. McNinch*, 356 U.S. 595 (1958); *Rainwater v. United States*, 356 U.S. 590 (1958); *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943).

15. *Rockwell International Corp. v. United States ex rel. Stone*, 549 U.S.457 (2007).

whatever answer was provided would likely be unacceptable to some of the Justices. What a challenge.

I also learned from reviewing the transcripts how failing to answer directly these well-prepared, scripted questions had led to arguing counsel being slammed not only by the questioning Justice but also and often by that Justice's brethren. Evading the loaded questions invariably led to members of the Court embarrassing some fine advocates. I became determined not to join that club.

After I had studied all the transcripts, I discovered that many of the arguments, essentially those in the last ten years, can also be heard on tape. Listening to the arguments while following the written transcript caused a whole new realization. I could now hear the inflection in the Justices' words. Were they angry, sarcastic, thoughtful, disappointed? Sometimes, and for one Justice in particular, they seemed to be using the questions for a cheap laugh. I spent many hours listening to the arguments to prepare for making a presentation which would largely consist of answering questions.

D. Know Your Case

The Supreme Court reviews and opines in about 60 or so major cases each year. I do not do that many in ten years. As this was my clients' and my only shot before this Court, I figured I should know the case better than anyone in the Courtroom.

I already had a head start. My partners, Paul Martins and Rob Rice, and I had worked on this case for fourteen years. We thought it unlikely our opponent would spend fourteen days preparing. Nor could the Court, with its docket, devote the time to the case that we could.

Since our opponents did not want any part of the trial or factual record included in the joint appendix, we had a clue that they would be incapable of advancing any argument based on the facts and, therefore, probably spending little if any time understanding those facts or the nuances of government contracting or warship construction. Perhaps the case would not turn on the facts. But I was convinced the facts were compelling and, if presented properly, would make it difficult for five Justices to conclude that the Navy and the taxpayers had not been cheated. The facts became my white whale.

The five-week jury trial in this case produced a massive record of transcripts, exhibits, trial briefs, arguments, evidentiary rulings, evidentiary stipulations, and evidentiary summaries. I had taken twenty notebooks of notes during the trial. The Sixth Circuit Joint Appendix itself was 1,735 pages. I reviewed every word.

There is nothing like the specter of being embarrassed before your client, partners, professional colleagues, and the whole world to sharpen your focus. I had thought I was prepared when I argued before the Sixth Circuit Court of Appeals. But this was different. I now saw things in the record which had not seemed significant to me before. I figured several of these matters would be unknown to my opponents but perhaps vital to the Court's ultimate resolution of the case.

I will not disclose all of those items here as I plan to retry this case and use them in ambush. But, there is one I should mention since it became pivotal in the oral argument.

The Defendants had successfully convinced the Trial Judge, and now were arguing to the Justices, that we had not entered into evidence any claim for payment that the subcontractors had submitted to the Navy and, therefore, without evidence of such "presentment" we could not prevail. We had, of course, not shown the invoices from the prime contractors, who had a direct contract with the Navy on one hand and the Defendant subcontractors on the other hand, to the Navy. But, we had introduced boxes of invoices from the subcontractors to the prime contractors—each one being false because the Gen-Set parts had not been built as promised. We also had introduced boxes of Certificates of Conformance from the subcontractors. These documents all certified—falsely as it turns out—that each of the Gen-Sets had been built to the contract specifications.

Buried in the Sixth Circuit Joint Appendix that Petitioners did not want included in the Supreme Court Joint Appendix was the contract between the Defendant subcontractor and the prime contractor, Bath Iron Works. It provided in part:

> "U.S. Navy inspectors at the [prime] shipbuilder's facilities cannot release material for use until the [subcontractor's] Certificate of Compliance is available. Payment of your [subcontractor's] invoice will be withheld pending receipt of the Certificate."

Sixth Circuit Joint Appendix p. 611, §6.1.

The subcontractor's Certificates of Compliance, all of which were in evidence in this case and all of which were false records as defined by the False Claims Act, had to be shown to the Navy. In fact, they were an express condition for payment to be made to the subcontractor. The case fit squarely within the language of the False Claims Act, 31 U.S.C. §3729(a)(2):

> "Any person who . . . knowingly makes, uses or causes to be made or used, a false record or statement to get a false of fraudulent claim paid or approved by the Government . . . is liable. . . ."

Although in the record, we had not cited to the subcontractor's contract and the requirement that the Navy receive the Certificate as a condition for payment to any lower Court. It was not in the Supreme Court brief we filed or in the Supreme Court Joint Appendix. But, the Supreme Court Rules permit use at oral argument of any matter in the Joint Appendix in the Court of Appeals.[16] I was assured by the Clerk of the Supreme Court that the Sixth Circuit Joint Appendix would be available to the Supreme Court.[17]

My opportunity to use this exhibit and explain its significance was assured when the first question asked was incompletely answered by the Petitioners. Justice Scalia

16. "The record is on file with the Clerk and available to the Justices, and counsel may refer in briefs or in oral argument to relevant portions of the record not included in the Joint Appendix". *Rules of the Supreme Court of the United States* , S.Ct. Rule 26.2

17. I later learned that although the docket sheet indicated the Sixth Circuit Joint Appendix had been transmitted to the Supreme Court, it had not. Instead, after my oral argument and citation at oral argument to the Sixth Circuit Joint Appendix, the Supreme Court ordered the immediate transmittal of the Sixth Circuit Joint Appendix. It got to Washington the next day.

would comment that in light of this provision we won no matter how the Court determined whether "presentment" was a requirement of (a)(2).

After immersing myself in the record below, I also wanted to review all the lower Court's opinions. Because of its fourteen-year journey, and four Defendants who made every conceivable motion, there existed dozens of Court orders. I needed to refresh myself about all of them, especially the summary judgment rulings which had originally been entered in our client's favor by United States Magistrate Judge Timothy S. Hogan but which were later vacated by the Trial Judge. And, of course, the Sixth Circuit's opinion would likely draw questions from some Justices as would then-Judge Roberts' *Totten* opinion. I also reviewed the transcript and tape of our arguments before the Sixth Circuit.

Next, I reviewed every case which cited *Totten*, our Sixth Circuit opinion, or the sections of the False Claims Act at issue in our case. It was a long list.

I then read, reread, and re-reread each of the petitioners' briefs and all of the nine *amicus curiae* briefs. I outlined the major points of each and began searching and identifying both the parts I admired and the parts which contained overreaching. I wanted to see if there was any language I should borrow and what arguments might be used by a Justice unfriendly to our views. I would continue this process over and over, up until the night before the argument.

E. Study What Others Who Argue Before the Supreme Court Believe Important

There are numerous articles and even treatises by advocates who have appeared before the high court. All of them include helpful pointers as you prepare.[18]

F. Memorize Critical Matters

In every trial and appellate argument I have made, one of the last things I do is memorize critical matters. These include specific procedural or evidence rules, page numbers of the Joint Appendix or of lengthy exhibits, exhibit numbers themselves, as well as case citations, including the jump pages for applicable quotations.

A trial lawyer's mind is like a bathtub. You fill it up with much information and enjoy it while the water is warm. As the case ends and the water cools, you pull the plug and it all drains away.

This is the type of information you will only need for a short while and then you can empty it from your mind.

G. Practice Your Argument Every Day

When I played football my first responsibility was to cover a speedy pass receiver. Often an entire series of plays would be run to attempt to trick me as to what that receiver was going to do. To prepare I was taught a technique called "visualization." This

18. Two easy to read and well-indexed treatises are Eugene Grossman, et al., *Supreme Court Practice*, (9th ed. BNA Books 2007) and David C. Frederick, *Supreme Court and Appellate Advocacy: Mastering Oral Argument*, (Thompson-West 2003).

technique is not only taught to football players. Major corporations, like McDonald's, use it with their executives.

Visualization requires you to be in a relaxed state. A darkened room, comfortable recliner and music to your taste sets the stage. You empty your mind of the day's trivia and problems. You then imagine all the things that sneaky pass receiver might do to you as well as how you will respond. In this fashion your mind sets up a pathway which you can access with much quicker reaction time when you actually experience the receiver running his pass routes. Of course, you always visualize intercepting the pass, returning it for a score, and being congratulated by your teammates.

Preparing for an argument, especially one which will largely consist of short and—of necessity—quick responses to numerous questions can benefit greatly from such visualization practices. I pictured the whole day: getting up, breakfast, getting to the Court, what the Courtroom would look like, where I would sit, what the Justices would look like, what the other counsel would say and especially how I would answer the many questions I expected. I went over hundreds of questions, thousands of times in my mind. I wanted no mystery and no surprises. I made sure there would be none. And there weren't.

The next part of the preparation involved actually arguing the case every day. Each morning, the first thing I did was stop by my partner Rob Rice's office where he would pepper me for 30 to 45 minutes with questions and complain about every response. I never won a single argument with him. As it turns out, some of his questions were precisely the ones asked by some of the Justices.

As a result of this preparation, I reaffirmed the great opportunity which we had been afforded. I remembered how startled I had been as a college graduate to be told I would need to study three hours for every one hour of class in law school. I remembered how I would often prepare three weeks for a one hour or less argument in the Court of Appeals or Trial Court. Now I was preparing intensely three months for a fifteen-minute session. But, with such preparation comes confidence. And with confidence can come credibility.

H. Physical Training

Mental preparation is only a part of what needs to be done. You do not want your physical needs to impact adversely your few minutes before the Court.

You are playing in the lawyer's Super Bowl. You must train accordingly. Your mind works better when your body is properly fueled, rested and in good condition. I increased my daily workouts, added one more hour of sleep, took more vitamins and avoided all around me who became ill. I also planned a special diet which, among other things, virtually eliminated meat and contained liberal doses of honey, just as I had used in my football days.

I. Focus

Finally, it is critical to focus on the task at hand. There will be no second chances, no mulligans, no do-overs, and no off-the-record discussions. It is therefore vital to avoid or eliminate all the distractions which constantly surround all of us. Unplug the television. Rely upon your partners to keep your business afloat. Explain to your clients your task. Several of mine not only encouraged me, they also wanted to participate and ended up coming to Washington to see the argument.

On the night before a big game, my college football coach would get the whole team together to watch a movie he hand-selected for the occasion. We saw such movies as "High Noon," "The Wild Bunch," and "The Longest Day." Being aggressive and blood thirsty but in control was part of the training regimen.

For my pre-argument night movie, I selected "300." King Leonides and his Spartan warriors kicked the tar out of vastly superior numbers of Persian soldiers until a Greek traitor helped the Persians surround the Spartans. Surrounded and outnumbered, the Spartans were slaughtered. But, Greece was saved leading to Western civilization. King Leonides was immortalized. I hoped for a somewhat different ending to my battle of Thermopylae.

IV. GET ALL THE DETAILS YOU CAN DELEGATED TO OTHERS

A. Finding a Hotel and Getting to Washington, D.C.

Even when a snowstorm shuts down D.C., the Supreme Court will hear scheduled arguments. My argument was in February and who knew what the weather might be. Accordingly, I got a hotel within walking distance and did not wait until the last minute to travel to D.C. I came a week early.

B. Meet Supreme Court Staff and Spend Time in the Courtroom

Watch other cases argued. The Courtroom is magnificent and can itself be overwhelming given the large crowd and the incredible closeness with which you will be to the Justices. I spent as much time as I could in the Courtroom. The Supreme Court staff will provide tours and numerous other courtesies for arguing counsel. Make sure you meet them. I also wanted to eat in the Supreme Court cafeteria. While I did not expect to see any Justices, I did want to see what their staff and clerks had to eat.

C. Decide What Guests to Invite

I was fortunate to have my entire office attend as well as my client and his wife, my co-counsel from other cases and other clients who wanted to be part of this experience. I also noticed at the argument dozens of other lawyers who do False Claims Act cases and the entire Georgetown Law School class on Supreme Court practice who had attended one of my moot courts. None of them were disappointed in the experience.

Decide what guests to invite and then scramble with the Marshal's office to get them passes and instructions on where to go and what to do.

D. Decide What You Are Going to Wear

There are many experts on the impact clothing can have both on the wearer's confidence and the listener's impression of the speaker. I had my tailor make two new suits and shirts, and selected several "appropriate" ties and shoes.

V. "HELL WEEK"

There are many things to do the week before the argument. By this time you should already know the law, the legislative history, the Justices' likely concerns, the record, your opponent's arguments, and the contents of the briefing thoroughly. Now you fine tune. You do that in several ways.

A. You Write, Rewrite, and Re-rewrite Your Argument

I knew any prepared remarks would be very limited, as I expected nearly all my time would be spent answering the various questions of the Justices. In addition, as I would speak last, I knew I would have previous questions and probably incorrect answers to them around which I could choose to make my arguments. But, as a first timer, I believed I would get the courtesy of at least saying a few words before the interrogation began.

I had been trained by a very effective lawyer years ago to put all the good stuff in the first paragraph of your brief. I did not think I would get to say a paragraph, so I wanted a sentence or two I thought captured the essence of our argument. I went through dozens of first sentences, they were all typed and in my argument notebook. And I did not use any of them.

B. Prepare Your Argument Notebook

The notebook is one of the last things you study before making your argument. Court etiquette frowns on use of a legal pad. Furthermore, many people do not realize that you do not address the Justices from a podium like you do in most appellate courtrooms. Instead, there is a flat table with a small box lectern which holds several microphones, a sign stating "Do not touch microphone" and large white and red lights. The box lectern is not big enough to hold a standard notebook.

I prepared my materials to fit into a one-inch notebook. Since you cannot break eye contact with the Justice questioning you, use of tabs is essential so you can find what you need by touch alone.

The first section held the most recent iteration of the dozens of condensed versions of my argument. It also held a seating chart of the Justices with color pictures of

each. It had my alternate opening statements as well as what I considered to be Mr. Olson's top six arguments.

The second section contained the actual False Claims Act language for the sections before the Court from 1943 and 1986 with my margin notes. I wanted the exact language where I could find it quickly.

The third section contained the entire statutory text for 1943 and 1986 and the Program Fraud Civil Remedies Act, 31 U.S.C. §3801 *et seq*. The Program Fraud Civil Remedies Act has some similar language to the False Claims Act and was amended in 1986 at about the same time as the False Claims Act. Several Justices had referenced the Program Fraud Civil Remedies Act in discussing the False Claims Act.

The fourth section contained a summary and page and exhibit references to the critical exhibits in the case. I would memorize each of these, but I also wanted them close at hand in case I forgot something in the heat of the argument. I also included several pages of transcripts of witness testimony.

The next section contained a few pages of the legislative history which was on point to our arguments. If some Justice wanted to talk about legislative history, I would be ready.

The next section contained the entire underlined decision in *United States ex rel. Totten v. Bombardier Corp*. Chief Justice Roberts had authored the majority opinion while a circuit judge. It was, after all, the case that started the problem. Parts of both the majority decision and the dissent were so well written that I had yet to see any of the bright counsel who examined this presentment issue improve upon the language or analysis. I wanted the entire opinion at hand.

Obviously, the *Totten* section would be followed by a complete copy of the lower court's opinion in *Sanders*.

Finally, the notebook had a tabbed section for each of the Supreme Court's False Claims Act opinions.[19] I did not have the complete opinion behind each tab but rather my own two-page summary of each case prepared with an eye toward the issues in this argument.

C. Moot Courts

It is hard work preparing for a Supreme Court argument. The Moot Courts are just torture. I participated in three, all done just a few days before the argument and all done in D.C.

1. The Solicitor General Moot Court

I was invited by Malcolm Stewart to attend his Moot Court at the Solicitor General's offices. It was videotaped. Participants included many attorneys from the Solicitor's office who had themselves appeared before the Supreme Court many times. Edwin S. Kneedler, in fact, had argued 99 cases to the Supreme Court and he would "second chair" Malcolm at our argument. Mike Hertz, Mike Granston, and others from the

19. See n. 14, *supra*.

Department of Justice Civil Fraud Division also attended. Malcolm "argued"—which consisted largely of responding to numerous and mostly unfriendly questions—for over one hour until he admitted he was exhausted and wished to stop. His interrogators then critiqued him and debated the better responses to make for another hour. Malcolm did not look like he was having any fun. My discussion of the facts on this case that I had worked on for fourteen years and tried to a jury for five weeks and argued (and won) in the Sixth Circuit Court of Appeals was not well received.

2. Taxpayers Against Fraud Moot Court

The day after the Solicitor General's Moot Court, Jeb White had arranged for one more at TAF headquarters. The participants included Jeb and Cleveland Lawrence from Taxpayers Against Fraud, False Claims Act experts Peter Chatfield and Shelly Slade, and *amicus* writers and Supreme Court experts David C. Frederick and Barrett C. Hester. I argued for about one and a half hours. I was black and blue when we finished. Peter asked a few "friendly" questions but, for the most part, the rest of the make-believe justices were hostile to our position and to my responses. Interestingly, during the critique session after the argument, I received directly contradictory advice, with some advocating I stick to the law during the real argument and others espousing that our facts should be the real focus. I had much to think about.

3. Georgetown Supreme Court Institute

The next day I did the third moot court. Georgetown Law School has built a very accurate replica of the Supreme Court courtroom at its law school. The wood is, of course, not as old and the bench holds but five justices. But the carpet and curtains are exact, as well as the sign on the lectern not to touch the microphones. The five "justices" included two law professors who are experts on the Supreme Court and three experienced practitioners who were anxious to get at some Midwestern meat. Three dozen Georgetown law students who had studied all the briefs and debated the case in class also attended. Each student signed a confidentiality agreement not to disclose what they were about to witness. I hope they all got As.

The Georgetown moot court was also one and one-half hours with a one and one-half hour critique afterwards. The process is physically exhausting, as you concentrate on tough questions and even tougher interrogators. I began to appreciate the difference between a friendly question, an unfriendly question, and a question merely seeking information. I would see all three types from the real Justices.

The moot courts are like a full-contact scrimmage with a trip to the training room needed when they are over. Argument before the Supreme Court is totally unlike appellate and trial court argument. Reading or providing long quotations are frowned upon. The Justices expect and will demand "yes" or "no" answers to their questions—questions which have been carefully crafted to get at the heart of the matter and at

the core of the weaknesses of the advocates' cases. Based on the tons of transcripts I reviewed, it was apparent that lawyers who responded to a Justice without first providing the "yes" or "no" answer called for by most questions were in for a most unpleasant experience. The moot courts provided ample opportunity to provide such answers and then segue into the points you wish to make.

When I was a boy, I worked on a farm in South Carolina. Invariably, we had to pick cotton or crop tobacco on 100-degree days. That was more fun than doing the moot courts.

But the practice reinforced many thoughts I had about proper responses. I discussed them at length with my partner, Rob Rice, who had attended all the moot courts, had written a substantial part of our brief, and helped me try this case and is, of course, himself an expert on the False Claims Act case. We worked through the tougher questions and what appropriate responses would be to them. We emailed our thoughts to Malcolm Stewart, who always responded promptly and thoughtfully to our ideas.

As you might have already guessed, the questioning and the argument before the real court was substantially easier than the moot courts had been. The moot courts had been like trying to run a hundred yard dash with an anchor around your neck. For the real argument, the anchor was gone.

VI. THE TIP OF THE SPEAR: ARGUMENT DAY

As petitioners' counsel, Mr. Olson would have the privilege of the first argument. He was allotted 30 minutes, with any time not used available for a short rebuttal. We had agreed that the Solicitor General's Office would have 15 minutes of our time and would proceed second. It is, after all, the government's statute and we knew the Court would be most interested in hearing from the Government's top advocates on the construction issues presented. That meant that I would have the final 15 minutes and the opportunity to watch for nearly 45 minutes as my case was debated.

Being last meant I would be able to tailor my comments to what concerns were raised and be able to provide different or more complete answers to questions already asked.

Our case was the only one being argued this day. The Courtroom holds about 400 spectators. With the Court personnel and the large security contingent, there were about 500 people present.

It is a cozy setting, nonetheless. I had been in the Courtroom as a spectator for the school desegregation arguments in the late '70s and for Mr. Olson's argument on the False Claims Act in 2000. I had also witnessed two arguments the day before, had a complete tour the week before, and reviewed many books and pictures of the Courtroom. I would never be as comfortable as Mr. Olson. The Solicitor General is actually afforded his own office at the Court, which I am sure Mr. Olson used often. But, I did not want the Courtroom to feel strange or unknown. You do not appreciate how close you stand to the Justices—who virtually surround you—until you are there.

On the day of the argument, after you go through many layers of security checks, you register with the Marshal's office. You receive an all-areas pass and are led to a lawyer's lounge. Once there, I would meet Mr. Olson and his two associates. I took my own partner Rob Rice and my long-time assistant Gina Virginillo. There is a coat room, which we needed as it was in February.

We met the Merit Clerk of the Supreme Court, Denise McNerney, who provided us with a pamphlet on the Court's history (it would not be read this day), and a seating chart for the Justices. She did her best—as had her staff—to make us feel welcome.

Mr. Olson and I then received a final briefing from William K. Suter, Clerk of the Supreme Court. General Suter (in formal morning coat) went over the ground rules. Among other things, he advised of the two lights on the small lectern, white meaning five minutes left and red meaning done. In contrast to when Chief Justice Rehnquist ran the show, he advised us that the red light did not necessarily mean stop. If we were being asked a question or in the middle of an answer we were told we were to continue. Shortly, I would have this precise experience.

When General Suter asked for any questions, I inquired about the Court's access to the Joint Appendix in the Court of Appeals below. General Suter assured me the Court had it. He wished us both well.

Next was another trip through metal detectors and a chance to say hello to my client and his wife as well as to many of my friends in the False Claims Act bar and to various members of the Department of Justice.

You sit at very small tables, which look like they are more than 100 years old. There was room for Rob Rice and I. Seated directly behind us were my partners Paul Martins and Julie Popham. I noticed dozens of defense counsel seated behind Mr. Olson. Like nuns, they always seem to travel in packs.

On the table were two white legal pads and several pencils. I found this interesting as I had been informed that a *faux pas* before the Court was the use of a legal pad. There were also four crossed white quill pens. General Suter had told us they were a gift from the Court to memorialize our argument and we were to take them. I did.[20]

As I sat down, a member of the Court's staff put a large glass of ice water before me. It was not in a cup as I was used to seeing in various courtrooms. It was a glass and it was full of ice. I cannot remember water that ever tasted better.

Precisely at the stroke of 10:00 a.m., the Marshal cries the Courtroom into session. The Justices enter from behind three different large red/burgundy curtains in groups of three. I was seated directly in front of Justice Souter's chair. As he entered, he never took his eyes off me. I shall not forget that stare. It reminded me of a case I handled many years ago involving the Cincinnati Zoological Gardens. A 900-pound Siberian Tiger had fixed his gaze on my opponent during a view. The cat handlers advised that such gaze meant the tiger planned to eat the lawyer. I felt that same gaze now.

20. I gave one of the quill pens to my client Roger Sanders, a second to Rob Rice for all his efforts, the third was presented to Jeb White, Executive Director of Taxpayers Against Fraud, along with a framed copy of his *amicus* brief. The final quill pen is in our law firm's trophy case next to the model of the *U.S.S. Arleigh Burke*.

Justice Thomas read a brief synopsis of a decision by the Court. A few lawyers were sworn in and welcomed by Chief Justice Roberts. Our case was called and Mr. Olson began.

The argument is transcribed.[21] I am led to believe it will soon be available on tape recording. I recall the absolute silence from the gallery—except in response to Justice Scalia's humor. And though I recall my intense focus on the questions and answers, it seemed to me a very relaxed Courtroom, at least so far as the nine Justices were concerned.

I was also struck by the penetrating nature of some questions and the simplicity of others. We all size up people we meet for the first time every day. I quickly felt I was in a discussion with several of the brightest people I had ever met as well as with a few who seemed overmatched by the job.

When my time to speak arrived, it was clear that I would not use any of the numerous openings I had spent months preparing. Neither of the speakers who proceeded me so much as mentioned a single fact about the case which brought us all together. I did not want to leave without some discussion about the fraud which had occurred and how it impacted young men and women serving their country. I believed I would get the courtesy of a few sentences before the questions came and I did:

> "Electricity is the critical component in a modern warship that allows it to fight, to defend itself, and to carry out its mission. Because of that, the Navy imposed rigid requirements on all who work on its generator sets in manufacturing those generator sets.
>
> Those rigid requirements were passed down from the Navy to Bath. Bath was ordered by the Navy to pass those down in writing to each of its subcontractors who were going to work on these Gen-Sets, and Bath did that. Each of the subcontractors in this case knew they were working on the DDG-51 project, which is the *Arleigh Burke*–class destroyers. They knew that military requirements were called out in their paperwork that had to be met; and they did not satisfy those military requirements and yet submitted both claims for payment and, as Justice Ginsberg has pointed out, certificates of compliance.
>
> If you look at the Sixth Circuit's Joint Appendix at page 620, you're going to see, at paragraph 6.1 in the contract between Bath Iron Works and Allison the subcontractor, that Allison was required, when it delivered the Gen-Sets to the shipyard to give a certificate of conformance that all of these rigid requirements had been satisfied, and that certificate of conformance had to be given to the United States Navy, no money; no money was going to be paid to Allison." [I would have continued "without the Certificate being given to the Navy."]

21. www.oyez.org/cases/2000-2009/2007/2007_07_214/; www.fcalawfirm.com

And then the first of the 33 questions I would receive in the next 15 minutes or so began.

I barely noticed the white light go on. But the red light seemed like a MARS light from the top of a police cruiser. I was sure everyone in the Courtroom could see it strobing. But, it went off just as Justice Ginsberg was asking me a question. So I kept talking until she thanked me for my answer.

I was ready to sit down. I had not called anyone by the wrong name or referred to them as "judge." I had tried to first answer each question before explaining. And I had even been told by Justice Scalia that "even under Petitioner's theory, you win."

I did have one difficulty with the argument I had not contemplated. The Justices each have a microphone switch. Before they speak they have a switch to turn on the microphone. Sometimes, in the heat of discussion, they forget to turn on their microphone and begin speaking anyway. When this happens, a clerk quickly—and in mid-question—keys their microphone. But, the first few words of the question can be lost.

With nine Justices in somewhat of a semicircle, the bench is long. While I was responding to questions from Justice Breyer, seated at my far left of the bench, I was asked another question. No microphone. I did not hear the first part of the question. Nor did I recognize the voice when the microphone was turned on and I had no idea who was speaking to me. Accordingly, I started with Justice Breyer and looked in order across the bench at each Justice. When I got to Justice Souter his lips were moving. Do not just memorize their faces. Memorize their voices also and hope your peripheral vision is working.

When you argue before the Supreme Court, you are the tip of a very long spear held by many other people who have helped get the case to where it is. Many people who you will never meet are interested in the process and the outcome. There are news reports immediately available.[22] The transcript of a 10:00 a.m. to 11:00 a.m. argument was available online by noon.

In short, you are at the center of the American legal universe for those few minutes. You are a rock star.

And when you complete your argument and the Court retires, it is virtually like someone turning off a light switch. You are a nobody again. No one brings cold water to a nobody.

VII. EPILOGUE

I argued this case on February 26, 2008. The Supreme Court handed down a 9–0 decision on June 9, 2008. We were given a few minutes warning by both e-mail and phone call from the Clerk's office that the decision was being released.

The Court clearly upheld the Sixth Circuit's ruling that "presentment" was not a requirement of either §3729(a)(2) or (3). As such, the *Totten* decision, as well as the Trial Court's decision keeping the jury from deciding our case, were overruled. We

22. My favorite headline: "Allison Engine Throws a Rod."

were going back to trial which is all we had sought from our successful appeal to the Sixth Circuit.

But, the Supreme Court did not stop there. Instead, it used the case as a launching pad to talk about several common law fraud elements which it overlayed on the statutory False Claims Act cause of action. Some would find irony in such conduct as the Court specifically held that the False Claims Act is *not* a general federal fraud statute.

In *Sanders*, the Supreme Court unanimously followed the Sixth Circuit and rejected the *Totten* "presentment" rationale. The Supreme Court found that subcontractors can be liable under Sections (a)(2) and (a)(3) even if their false invoices never reach a Government employee, since fraud against the Government can certainly occur without such direct contact. Despite the vigorous efforts by the defendant subcontractors and their *amici*, the Supreme Court would not let Government subcontractors escape False Claims Act liability. At the same time, however, the Court was clearly concerned that the Sixth Circuit's decision might be misconstrued (as the defendants had done) to extend the False Claims Act to any claim for "Government funds." Thus, the Court decided that liability cannot be premised merely on claims that seek "Government funds," but must instead involve proof that the Government is truly the defrauded party. This can be done with evidence that a subcontractor made false statements to a prime contractor "intending" that the statements be "material" to the Government's decision to pay the claim—which would be enough of a "direct link" to show that the Government is the defrauded party. On the facts of *Sanders*, of course, such a "direct link" was clear, so the Supreme Court remanded the case for further proceedings.

Sanders is an important victory for the False Claims Act, since it will remain a viable tool to redress indirect fraud against the Government. Yet there are certain to be efforts to use the *Sanders* decision to narrow the application of the False Claims Act to dismiss cases involving clear fraud against the Government by inviting lower courts to focus myopically on undefined terms such as "intent" or "materiality" or "direct link." This would be against the holding and spirit of *Sanders*—where the Supreme Court said quite clearly that the False Claims Act must always be construed so that it reaches fraud against the Government.

It remains to be seen as to what impact the Court's bludgeoning of the False Claims Act will have. Congress is currently considering numerous amendments to clarify provisions of the Act which have been tortured by various court rulings. While the ultimate passage of such amendments remains uncertain at this writing, one thing does seem clear: the False Claims Act will continue to be challenged at every word by well-paid packs of government contractors' counsel. The need for sharp, motivated relators' counsel has never been more apparent.

The likelihood that some such relators' counsel will be called upon to appear and assist the Justices of the Supreme Court in the future is a certainty. Enjoy the ride.