

## FINALS

THE TWENTY-FOURTH ANNUAL JOHN W. DAVIS

MOOT COURT COMPETITION



MOOT COURT ROOM  
SYDNEY LEWIS HALL  
OCTOBER 24, 2003  
5:00 P.M.

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MOOT COURT COMPETITION

*"I may be crank on the subject of Moot Court; I have no doubt that Mr. Graves thinks I put too much emphasis on them...I concede that the thing may be overdone; and that after all the real school for practice must be the courtroom; but so much embarrassment can be saved the young practitioner, and so much added to his capacity for serving those who are unfortunate to be among his early clients, that I hardly think too much care can be taken in training him, so far as possible, in the tools of the trade."*

-John W. Davis, April 30, 1898  
In a letter written to Professor H. St. Tucker

The Washington and Lee University School of Law hosts the John W. Davis Moot Court Competition every fall. Law students and faculty developed the competition to provide participating students the opportunity to practice their oral advocacy and brief writing skills. In recent years, Washington and Lee University School of Law alumni and brothers Philip and Benjamin Gardner of Martinsville, Virginia have enabled the program to continue through their kind contributions. At the banquet for participants, professors and judges following the final round, the Gardner brothers will present the Gardner Moot Court Awards to those students who excel in the competition.

All second and third-year students, except members of the Moot Court Executive Board, are invited to participate. Each participant competes as Respondent or Petitioner's counsel in a mock case before the United States Supreme Court. Before participants present their first oral argument to the Court, they first submit a written brief. Participants advance in the competition based on the combined score for their brief and that round's oral argument.

This year, Ross Barton and David Edelstein, the 2003-04 Davis Moot Court Administrators, and Tyler Wood, Chairman of the Moot Court Board, created and wrote the problem and supervised the competition. In addition, all three served as judges during the preliminary and quarterfinal rounds. Moot Court Board members Evan Sauda and Michael Lawhead, along with last year's Semifinalist Kori Hubert, also served as judges.

Members of the Moot Court Executive Board judged all briefs submitted by the participants for content, grammar and blue booking. Three faculty members judged oral arguments in the semifinals. This year's faculty bench consisted of Professor Ronald J. Krotoszynski, Jr., Professor Ann MacLean Massie, and Professor Joan M. Shaughnessy. Members of the Moot Court Executive Board selected those briefs with the six highest scores as Best Brief nominees. Professor Ronald J. Krotoszynski, Jr., Professor Joan M. Shaughnessy and Visiting Professor Sean H. Donahue selected the Best Brief winner from among the Best Brief nominees.

Those students who excel in the competition may be selected to represent Washington and Lee at different extramural competitions across the country this coming spring.

The Moot Court Board would like to thank Professors Ronald J. Krotoszynski, Jr., Ann MacLean Massie, and Joan M. Shaughnessy and Visiting Professor Sean H. Donahue for their help in choosing and crafting this year's problem, as well as their assistance in the competition judging process.

The 2003 John W. Davis Moot Court Competition culminates today with the announcement of the Best Oral Advocate and winner of the Best Brief Award following the presentation of oral arguments.



### THE PARTICIPANTS

Counsel for the Petitioner

L'Shauntee Robertson

Susan Richter

Counsel for the Respondent

Sarah Hays

Helena Joly

### THE COURT

THE HONORABLE STANLEY F. BIRCH, JR.  
(Judge of the United States Court of Appeals, Eleventh Circuit)

THE HONORABLE JOHN G. ROBERTS  
(Judge of the United States Court of Appeals, D.C. Circuit)

THE HONORABLE JOHN M. ROGERS  
(Judge of the United States Court of Appeals, Sixth Circuit)

### WASHINGTON AND LEE MOOT COURT EXECUTIVE BOARD

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### IN THE SUPREME COURT OF THE UNITED STATES

BUSHWOOD COUNTY SCHOOL BOARD,  
*Petitioner*

v.

Karl SPACKLER,  
*Respondent*

Competitors in the 2003 John W. Davis Moot Court Competition argue based on the following fact pattern:

Bushwood County High School, the only high school within Bushwood County, holds an annual Awards Ceremony at the end of the school year. The Awards Ceremony takes place on the day before graduation, and students are not required to attend. In the awards ceremony, students from all classes of BCHS achieving *cum laude* status, as well as the valedictorian and salutatorian of the graduating class, receive recognition for their achievements. All students who receive the awards are invited to the ceremony, but need not attend in order to graduate or earn such honors.

BCHS has had a long history of speakers (religious and secular) at school assemblies and events. The proof at trial showed that, dating back to 1923, BCHS regularly invited speakers to graduation and awards ceremonies. In the years between 1923 and 1992 BCHS had a religious invocation before the Awards Ceremony in 68 of the 70 years. Members of the clergy—typically preachers, priests, or rabbis—gave the invocation.

After 1992, the Bushwood County School Board ("Board") decided to allow the student election of a speaker who would address the entire school at the Awards Ceremony. From 1993-2000, the Board had a policy that expressly called for a vote on the presentation of an invocation at the commencement of the Awards Ceremony. In all but two years of this policy, students delivered a prayer at the beginning of the Awards Ceremony.

On July 12, 2000, the Board conducted a meeting open to the public, wherein a student's father brought the Supreme Court's opinion in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), to the Board's attention. This individual, apparently a local attorney, warned the Board that the current policy violated the Establishment Clause and would not survive a challenge in court. The Board then adopted the following policy:

Members of the student body who will receive awards at the ceremony shall take part in a vote, administered by the student council, to determine whether they want a student who shall receive an award to deliver an opening message at the awards ceremony. If a majority of these students elect to have a student deliver an opening message, a second vote shall be conducted to determine which award recipient shall deliver the message. Those students who wish to give the message must declare their intent to



be a candidate in the second election and shall present their proposed message to those students eligible to vote. The administration shall not review the speech except to protect against profanity, vulgarity, obscenity, libel and slander.

In adopting this policy, the Board provided the following explanation:

This reflects an attempt by the Bushwood County School Board to arrive at a policy that values the opinions and beliefs of its constituent members. This policy does not signal a radical departure from the prior policy, yet it recognizes that the Board cannot lawfully call for a prayer. This policy allows for the students to be a part of the ceremony by expressing their opinions, regardless of its secular or sectarian nature. The power of review reserved by the administration is limited to a non-substantive power; the content of the speech may only be altered to protect against vulgarity, profanity, obscenity, libel and slander.

The first year of this new policy passed without controversy after a student spoke about how his personal fight with cancer motivated him to excel in the classroom. In contrast, a student delivered a prayer in 2002. After the first election for the 2002 assembly revealed that the students wanted a student delivered message at the Awards Ceremony, three students tossed their hats in the ring and gave sample speeches at an assembly of awards recipients. Two of the three students presented speeches fairly characterized as religious.

The plaintiffs, a sophomore at BCHS who had a G.P.A. of 3.95 after the fall semester and his father, brought this case seeking injunctive relief to prevent a speech from being delivered at the 2003 awards ceremony, or any ceremony thereafter. The United States District Court for the Western District of Davis denied the Plaintiff's request for relief. The Judge reasoned that the policy passed all applicable tests and ruled that the policy did not violate the Establishment Clause. The United States Court of Appeals for the Fourteenth Circuit, however, disagreed with the trial judge. In a unanimous opinion from a three judge panel, the Court of Appeals reversed the District Court. Noting that the Bushwood policy was an impermissible attempt to skirt the Supreme Court's jurisprudence, the Court of Appeals concluded that the policy was unconstitutional.

The United States Supreme Court granted certiorari on the following question:

1. Whether Bushwood County School Board's policy that allows student speakers at an awards ceremony violates the Establishment Clause of the First Amendment.

## RESULTS OF THE 2003 JOHN W. DAVIS MOOT COURT COMPETITION

### FINALISTS

L'Shauntee Robertson	Helena Joly
Susan Richter	Sarah Hays

### SEMIFINALISTS

Kevin Georgerian	Katherine Suttle
David Thorneloe	Benjamin Thomas

### QUARTERFINALISTS

Kevin Brotzman	Benjamin Danforth
Rebecca Eley	Seth Johnston
Nathaniel Parker	Adam Smith
Michael Spencer	Seth Steed

### BEST BRIEF NOMINEES

Michael Spencer	Rebecca Eley
Nathaniel Parker	Sarah Hays
Susan Richter	Benjamin Thomas

The members of the Moot Court Executive Board would like to extend their appreciation to all student participants and faculty members who participated in this year's program. Without these individuals, the John W. Davis Moot Court Competition would not succeed as well as it has.



## BIOGRAPHIES OF JUDGES

### THE HONORABLE STANLEY F. BIRCH, JR. United States Court of Appeals for the Eleventh Circuit

Judge Birch, a native of Atlanta, after nomination by President George Bush as a United States Circuit Judge for the Eleventh Circuit and confirmation by the United States Senate, entered active service on June 12, 1990. He graduated from the University of Virginia, receiving a Bachelor of Arts degree in History in 1967, and from Emory University School of Law, receiving a Doctor of Law degree in 1970 and the degree of Master of Laws in Taxation in 1976. At the University of Virginia he was a member of the varsity lacrosse team, the University orchestra and the Theta Delta Chi fraternity. Judge Birch also studied at The Peabody Conservatory and Trinity College (Oxford).

Judge Birch formerly served as a Law Clerk to Chief Judge Sidney O. Smith, Jr., United States District Court, Northern District of Georgia (1972-1974). He served in the United States Army from 1970 to 1972 as a First Lieutenant and is a Vietnam veteran, having served with the Fifth Special Forces.

Judge Birch is a member of the State Bar of Georgia, the Atlanta Bar Association, the Gainesville-Northeastern Bar Association, the Old War Horse Lawyers Club, the Lawyers Club of Atlanta, and is a fellow of the Georgia Bar Foundation. He is active in Emory Law School Alumni Association affairs and is a past president of that group. In 2002 Judge Birch was named a Distinguished Alumnus of Calvert Hall (Baltimore) and The Emory University Law School. Judge Birch is a former member of the Board of Governors of the State Bar of Georgia, a former member of the Board of Directors of the Georgia Legal Services Program, a former member of the Board of Directors of the Federal Defender Program for the Northern District of Georgia, and a member of the Georgia Supreme Court Indigent Defense Commission 2000-2002.

Judge Birch practiced law in Gainesville, Georgia and in Atlanta with Vaughan, Davis, Birch & Murphy until he took his oath of office on June 12, 1990. His practice focused on copyright law in the entertainment and computer software industries. Judge Birch was counsel to, and a business associate of, Xavier Roberts, the creator and owner of the "Cabbage Patch Kids" doll copyrights and trademarks. Judge Birch also litigated many of the first cases involving software copyright issues in the Southeast. A frequent speaker and author on the law of copyright, Judge Birch has co-authored a book on copyright with Professor L. Ray Patterson of the University of Georgia Law School.

### THE HONORABLE JOHN G. ROBERTS United States Court of Appeals for the D.C. Circuit

Judge Roberts was confirmed by the Senate to a judgeship on the U.S. Court of Appeals for the D.C. Circuit on May 8, 2003, and sworn in on June 2. Judge Roberts graduated from Harvard College in 1976, and received his law degree in 1979 from Harvard Law School. Following graduation from law school, he served as law clerk to Judge Henry J. Friendly of the U.S. Court of Appeals for the Second Circuit and the following year to then-Associate Justice Rehnquist of the Supreme Court of the United States.

Judge Roberts served as Special Assistant to United States Attorney General William French Smith from 1981 to 1982 and Associate Counsel to President Ronald Reagan from 1982 to 1986. He then joined Hogan & Hartson where he developed a civil litigation practice, with an emphasis on appellate matters. From 1989 to 1993 he served as Principal Deputy Solicitor General of the United States. In that capacity he personally argued before the Supreme Court and federal courts of appeals on behalf of the United States, and participated in formulating the litigation position of the government and determining when the government would appeal adverse decisions.

Judge Roberts returned to Hogan & Hartson in 1993, serving as head of the firm's appellate practice. In the public and private sectors, Judge Roberts has presented oral argument before the Supreme Court in 39 cases, covering the full range of the Court's jurisdiction, including admiralty, antitrust, arbitration, education law, environmental law, First Amendment, health care law, Indian law, intellectual property, bankruptcy, tax, regulation of financial institutions, administrative law, labor law, federal jurisdiction and procedure, interstate commerce, civil rights, and criminal law.

Judge Roberts is a member of the American Law Institute and the American Academy of Appellate Lawyers, and has also received the Edmund J. Randolph Award for outstanding service to the Department of Justice. He serves on the Federal Appellate Rules Advisory Committee.

Judge Roberts is married to Jane Sullivan Roberts and has two children, Josephine and Jack.



THE HONORABLE JOHN M. ROGERS  
United States Court of Appeals for the Sixth Circuit

In November 2002, John M. Rogers was appointed as a Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit. Previously he was the Thomas P. Lewis Professor of Law at the College where he had taught since 1978. Prior to teaching he was an appellate attorney in the Civil Division of the United States Department of Justice, in Washington, D.C. from 1974 to 1978. He served as a visiting professor at the Department of Justice from 1983 to 1985. Judge Rogers has twice been a Fulbright Senior Lecturer in the People's Republic of China, in Beijing in 1987-88 and in Guangzhou in 1994-95. He is a Phi Beta Kappa graduate of Stanford University and a Coif law graduate of the University of Michigan, where he served on the *Michigan Law Review*.

Judge Rogers recently co-authored a casebook, *Administrative Law*, with Professors Michael Healy and Ronald Krotoszynski. Articles by Judge Rogers have appeared in journals such as the *Duke Law Journal*, the *Michigan Law Review*, and the *Vanderbilt Law Review*. His book, *International Law and United States Law*, explains the limited but important role of public international law in U.S. federal and state law. He is a member of the American Law Institute and the Council on Foreign Relations.

JOHN W. DAVIS (1892, 1895L)

The annual Moot Court Competition at Washington and Lee is named in honor of John W. Davis. Renowned for both his advocacy skills and his public service, Davis was considered the finest Supreme Court attorney of his day. Davis argued before the Court 139 times before his death in 1955, at the time a 20th century record.

Davis was born in 1873 in West Virginia, and attended Washington and Lee for both undergraduate and law degrees. Davis taught at Washington and Lee for three years after his graduation, but chose private practice over a permanent position at W&L. Davis practiced law in Clarksburg, West Virginia from 1897-1913, serving as a U.S. Congressman during 1911-13. From 1913-1918, he served as Solicitor General of the United States, after which he served as ambassador to the Court of St. James until 1921. Upon returning from London, Davis became the head of the prominent New York law firm of Davis, Polk and Wardwell. He rejected an appointment to the Supreme Court in 1922, choosing instead to continue practicing before it. He unsuccessfully ran for President as the Democratic nominee in 1924, losing to Calvin Coolidge. Davis then left the political arena, and spent the remainder of his life devoted to private practice.

Davis' advocacy record presents a complex and seemingly self contradictory history. He is best known for successfully defending the steel industry against seizure during the Korean War in *Youngstown Sheet and Tube Co. v. Sawyer* and for unsuccessfully defending segregation of public schools in *Brown v. Board of Education*. Davis also spoke in defense of religious liberty when Al Smith was attacked during the 1928 presidential campaign because of his Catholicism, and defended, *pro bono* a Yale divinity professor in the landmark case for conscientious objection, *United States v. McIntosh*.

Students of appellate advocacy know well *The Argument of an Appeal*, an address given by Davis to the Association of the Bar of the City of New York in 1940. Davis sets forth his "ten commandments" of oral argument, which, if followed, lead to success for the attorney and client. His admonitions, from "know your record from cover to cover" to "read sparingly and only from necessity" guide the participants today in the competition named in his honor.