
FINALS

THE TWENTY-FIFTH ANNUAL JOHN W. DAVIS

MOOT COURT COMPETITION



MOOT COURT ROOM

SYDNEY LEWIS HALL

OCTOBER 22, 2004

4:30 P.M.

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"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 Petitioner or Respondent'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 oral argument. As the competition progresses, emphasis shifts to participants' oral argument skills. In this final round, competitors will be judged on their oral arguments alone.

This year, L'Shauntee Robertson and Michael Spencer, the 2004-05 Davis Moot Court Administrators, created and wrote the problem and supervised the competition. In addition, both served as judges during the preliminary and quarterfinal rounds. Moot Court Executive Board members—along with 2003 Davis Quarterfinalists Kevin Brotzman and Seth Johnston, and 2003 Davis Finalists Helena Joly and Susan Richter—also served as judges in these preliminary rounds.

Three faculty members—Professor Samuel W. Calhoun, Professor Ann MacLean Massie, and Professor Blake D. Morant—judged oral arguments in the semifinals.

Members of the Moot Court Executive Board judged all briefs submitted by the participants for content, grammar and blue booking. The Board selected those briefs with the five highest scores as Best Brief nominees. Professor Margaret Howard, Professor Ronald J. Krotoszynski, Jr., and Professor Brian C. Murchison 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 Executive Board would like to thank Professor Ronald J. Krotoszynski, Jr. and Jonathan Albano of Bingham McCutchen LLP in Boston, Massachusetts for their help in crafting this year's problem. The Board would also like to extend its thanks to all of the aforementioned professors and students who served as judges in the competition.

The 2004 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
Brian Berkley Katherine Tritschler

Counsel for the Respondent
James Coleman Cavelle Johnston

THE COURT

THE HONORABLE
MARTHA C. DAUGHTREY
(Judge of the United States Court of Appeals, Sixth Circuit)

THE HONORABLE WALTER D. KELLEY, JR.; '77, 81L
(Judge of the United States District Court in the
Eastern District of Virginia)

THE HONORABLE EVERETT A. MARTIN, JR.; '74, 77L
(Judge of the Circuit Court in the Fourth Judicial Circuit of Virginia)

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IN THE SUPREME COURT OF THE UNITED STATES

KERRYWOOD UNIVERSITY,
Petitioner

v.

Martin PRINCE, Bartholomew Simpson, and Milhouse Van Houten
Respondents

Competitors in the 2004 John W. Davis Moot Court Competition argue based on the following fact pattern:

Kerrywood University is a state-run university with a majority of its students coming from outside the local area. The Kerrywood Gazette is a quarterly newspaper funded almost entirely by the administration, and is run by student editors as part of a class called "Journalism VI." The students working on the newspaper receive a grade for their work, which is supervised by Professor Elia Broozer. Professor Broozer allows the students a fair amount of latitude in running the paper to give them useful, real-world experience, but he often gives advice, which the staff usually follows. All issues of the Kerrywood Gazette are submitted to Dean George Boomhauer of the College of Arts and Sciences for a final review. This final review is usually nothing more than a rubber stamp, but Dean Boomhauer has blocked the publication of two news articles (not opinion pieces) in the past three years. In each case, the staff has made conforming changes to meet the Dean's concerns.

In January 2004, one of the staff's editorial columnists, Chip Muir, wrote an opinion column analyzing the benefits of a local redistricting plan that the state legislature was considering, and concluding that the plan should be adopted. Mr. Muir took the position that the redistricting would make it easier for Representative Richard Cunningham to be reelected to the U.S. House of Representatives.

Mr. Muir's column led to several dozen, one paragraph comments being submitted for inclusion in the "Rants & Raves" section of the Gazette. Although some comments dealt with the local issues raised in Mr. Muir's article, about two-thirds of the comments dealt with Representative Cunningham's support for President Bush's Iraq policies. These comments mostly expressed the view that, regardless of Representative Cunningham's views on issues of local concern, he deserved to be soundly defeated because of his support of the President.

The vast majority of the editorial staff holds views on the Iraq war opposed to those of Representative Cunningham, and felt that their views should be published as well. The editorial staff decided to run an editorial expressing their opposition to the redistricting plan because of their disapproval of Representative Cunningham's support of the President. This editorial was not to have been signed by an individual. Rather, the editorial would simply have had the headline "Staff Editorial."

The bulk of the staff editorial focused directly on the President and used very heated rhetoric, calling the President "at best a moron and at worst a pathological liar," and saying his Iraq policies "totally sucked." The editorial further said that the President "led us to war to get sweetheart oil deals for his fat cat contributors," and that he was "directly and morally responsible for every Iraqi and American who has died as a result of the violence from this god-forsaken war."

The allegations in the above paragraph relied in part upon the documentary *Celsius 488* by the filmmaker/political activist Michelle Berry. *Celsius 488* has been very controversial, receiving accolades from the President's foes but drawing venom from his supporters. Investigations into the documentary's accuracy have questioned some of the conspirational inferences in the film and have found the presentation of some facts to be highly misleading. However, the investigations have also concluded that some of Ms. Berry's points have validity.

Soon after the editorial was submitted to Professor Brooker, he took it to Dean Boomhauer for comment. Dean Boomhauer strongly disapproved of the article. He said that the editorial's reliance upon Ms. Berry, "a notorious purveyor of lies," was unprofessional, that the tone of the article and the use of name-calling was unprofessional, and that he did not want the University to be seen as taking sides in such a controversial issue. Both Dean Boomhauer and Professor Brooker are well-known fundraisers for Republican political causes.

Professor Brooker agreed with the Dean and scheduled a meeting with the student editors. At the meeting, the editors stood by the tone and content of their editorial and refused to make the many changes Professor Brooker demanded. They questioned the motivations of Professor Brooker and Dean Boomhauer and felt that they had to stand up for their beliefs. The editors did admit that *Celsius 488* formed part of the factual basis for their opinions and that they were aware of the controversy surrounding the movie, but they thought that they were free to rely on the movie in an opinion piece.

After this meeting, Dean Boomhauer and Professor Brooker consulted with each other and decided to block the editorial from publication. The editor-in-chief went to Dean Boomhauer to try to change his mind, but to no avail.

The editorial board then sought relief through the internal administrative process but failed there as well. On April 24, 2003, ten days after their administrative remedies were exhausted, three members of the editorial board, all juniors, filed this lawsuit in the Northern District of Kerrywood.

The District Court entered judgment for the University. The District Court found that the *Kerrywood Gazette* was a non-public forum and that the proper standard to apply was the one announced in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). *Hazelwood* is highly deferential to educators, allowing them to control "student speech in school sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." The court further ruled that *Hazelwood* does not require viewpoint neutrality, but

that Kerrywood University's actions were constitutional even in the event that *Hazelwood* does require viewpoint neutrality.

On appeal to the Court of Appeals for the Fourteenth Circuit, the designation of the *Kerrywood Gazette* as a non-public forum remained undisturbed. Nevertheless, the Court noted that the facts of *Hazelwood* involved a secondary school, and concluded that the *Hazelwood* rule does not apply to colleges. Instead, the Court applied the standard of *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), which states that school censorship of speech is unconstitutional "unless the school can demonstrate that certain student speech might reasonably have led school authorities to forecast substantial disruption of, or material interference with, school activities." The Court went on to say that even if *Hazelwood* does apply to the instant case, it requires viewpoint neutrality. Furthermore, the Court felt that Kerrywood's actions were not reasonably related to a legitimate pedagogical concern.

Kerrywood University appealed to the Supreme Court, which granted certiorari on the following question:

(1) Whether Kerrywood University's censorship of a Kerrywood Gazette editorial violated First Amendment Free Speech guarantees.

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

FINALISTS

Brian Berkley
Cavelle Johnston

James Coleman
Katherine Tritschler

SEMIFINALISTS

Adam Nunziato
Meghan Smith

Lindsay Rubel
Soha Turfler

QUARTERFINALISTS

Michael Bauer
Stephen Meador

Ryan Corle
Jason Rogers

BEST BRIEF NOMINEES

Brian Berkley
Jason Rogers

Adam Nunziato
Lindsay Rubel
Katherine Tritschler

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 MARTHA C. DAUGHTREY
United States Court of Appeals for the Sixth Circuit

Judge Martha "Cissy" Daughtrey was nominated to the United States Court of Appeals by President William Jefferson Clinton in August, 1993. She was confirmed by the Senate in November of the same year.

Judge Daughtrey received both her B.A. (*cum laude*, '64) and J.D. ('68) from Vanderbilt University, where her academic honors included induction into Phi Beta Kappa and the Order of the Coif. From 1968-69, she served as an Assistant U.S. Attorney for the Middle District of Tennessee. From 1969-72, she served as an Assistant District Attorney for the Tenth Judicial Circuit of Tennessee. In the same time period (1971-72), she taught as a Lecturer at Vanderbilt University School of Law. In 1972, she became an assistant professor there, becoming the first woman appointed to the Vanderbilt Law faculty. In 1975, she became the first woman appointed to the Tennessee Court of Criminal Appeals. Judge Daughtrey sat on the Court of Criminal Appeals until 1990, during which time she returned to Vanderbilt as a Lecturer (1976-88) and Adjunct Professor (1988-90). In 1990 Judge Daughtrey once again set a record, becoming the first woman appointed to the Tennessee Supreme Court. She sat on the Supreme Court until her appointment to the Sixth Circuit.

THE HONORABLE WALTER D. KELLEY, JR.
United States District Court in the Eastern District of Virginia

Judge Kelley was nominated to the District Court of the United States in the Eastern District of Virginia by President George W. Bush in October, 2003. He was confirmed by the Senate in June, 2004.

Judge Kelley was a "seven-year man" at Washington and Lee University, having received his B.A. *cum laude* in 1977 and his J.D. *magna cum laude* in 1981. In the year between graduating from college and starting law school, Judge Kelley served as the Press Secretary for Congressman James R. Collins (R-TX). After graduating from law school, Judge Kelley clerked for The Honorable Ellsworth A. Van Graafeiland in the United States Court of Appeals for the Second Circuit. In 1982, Judge Kelley joined the Virginia firm Wilcox & Savage, PC, as an associate. He became a partner there in 1987. In 2001, Judge Kelley left Wilcox & Savage for another Virginia firm, Troutman Sanders LLP. During his time in private practice, Judge Kelley specialized in business litigation, with an emphasis on intellectual property and antitrust cases. He appeared in "The Best Lawyers in

America" for the category of Business Litigation and was consistently voted as being among the "Legal Elite" for civil litigation in *Virginia Business* magazine's annual survey.

Judge Kelley is currently an Adjunct Professor of Antitrust Law at Regent University School of Law in Virginia Beach, Virginia.

THE HONORABLE EVERETT A. MARTIN, JR.
Virginia Circuit Court for the Fourth Judicial Circuit

Judge Martin was elected to the Circuit Court bench by the Virginia General Assembly in 1995.

Like Judge Kelley, Judge Martin was a "seven-year man" at Washington and Lee, having received his B.A. in 1974 and his J.D. in 1977. After graduating from law school, Judge Martin clerked for The Honorable Richard B. Kellam in the United States District Court in the Eastern District of Virginia. He went on to earn a Master of Law in Taxation from New York University in 1980. From 1980-88, Judge Martin practiced privately, mostly with the former firm of Seawell, Dalton, Hughes and Timms. From 1988-90, Judge Martin served as an Assistant Commonwealth's Attorney in Norfolk, Virginia. In 1990, he became a judge in the Juvenile and Domestic Relations District Court.

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 Appel*, 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.