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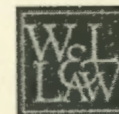
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## FINALS

THE TWENTY-SEVENTH ANNUAL JOHN W. DAVIS

MOOT COURT COMPETITION



MILLHISER MOOT COURT ROOM  
SYDNEY LEWIS HALL  
OCTOBER 27, 2006  
4:00 P.M.

## THE TWENTY-SEVENTH ANNUAL JOHN W. DAVIS 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 Henry St. George 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 are judged on their oral arguments alone.

This year, Mini Kaur and Matthew Morrison, the 2006-07 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 also served as judges in these preliminary rounds. Three faculty members—Professor Dorothy A. Brown, Professor Ronald J.



Krotoszynski, Jr. and Professor Ann MacLean Massie—judged oral arguments in the semifinals.

The Competition Administrators judged all briefs submitted by the participants for content, grammar and blue booking. They then selected those briefs with the four highest scores as Best Brief nominees. Professor Courtney Cahill, Professor Dorothy A. Brown and Professor Ronald J. Krotoszynski, Jr. selected the Best Brief winner from among the Best Brief nominees.

The 2006 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. 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 Board would like to extend its thanks and appreciation to all of the professors and student participants who helped make the 2006 John W. Davis Moot Court Competition a success.

## **RESULTS OF THE 2006 JOHN W. DAVIS MOOT COURT COMPETITION**

### **FINALISTS**

Josh Autry	Kristina Longo
Diane Meier	Meredith Stow <sup>15<sup>th</sup></sup>

### **SEMIFINALISTS**

Patrick Garry	Chaitra Gokul
Josh Payne	Amanda Thrash

### **QUARTERFINALISTS**

Nick Brauns	David Klass
Lisa Manning	Jeff Mauzy
Melanie McKay	John Michael Myers
David Parker	Marie Trimble

### **BEST BRIEF NOMINEES**

Josh Autry	Nick Brauns
Kristina Longo	Melanie McKay
John Michael Myers	Marie Trimble



## TODAY'S PROGRAM

### Round 1

*Counsel for the Petitioner:* Meredith Stow  
*Counsel for the Respondent:* Kristina Longo

### Round 2

*Counsel for the Petitioner:* Diane Meier  
*Counsel for the Respondent:* Josh Autry

## THE COURT

THE HONORABLE THOMAS E. JOHNSTON  
*Judge of the United States District Court in the Southern District  
of West Virginia*

THE HONORABLE HENRY C. MORGAN, JR.; '57, '60L  
*Judge of the United States District Court in the Eastern District  
of Virginia*

THE HONORABLE MYRON T. STEELE  
*Chief Justice of the Delaware Supreme Court*

## IN THE SUPREME COURT OF THE UNITED STATES

ORDERVILLE PUBLIC SCHOOL DISTRICT,

*Petitioner,*

v.

PARENTS WORRIED ABOUT PUBLIC SCHOOLS,

*Respondent.*

Competitors in the 2006 John W. Davis Moot Court Competition argue based on the following fact pattern:

### **The Orderville Schools: History and Attempts at Desegregation**

The city of Orderville is a diverse community in the State of Desert, with 65% of its residents White and 35% non-White. In Orderville public schools, enrollment breaks down differently, with approximately 60% non-White students. A majority of the White students live in neighborhoods west of downtown, whereas a majority of the non-White students live east of downtown. The public school district ("the District") operates four public high schools: one general public high school and one magnet school on each side of town (east and west). The schools are East Side High School, West Side High School, East City Tech and West City Tech.

Orderville has made consistent efforts over almost 50 years to avoid racial isolation in its schools. These efforts have included a pioneering exchange student program in the 1960s to desegregate the schools. The unfortunate and ill-intentioned segregation existing throughout the southern United States did not prevent Orderville from implementing such programs before most of the Civil Rights Movement had taken root throughout the country. Although Orderville never codified segregation in any de facto manner, de jure segregation problems led to grassroots efforts at desegregation.



As a progressive beacon shining among its sister municipalities, Orderville developed its desegregation efforts voluntarily, progressing from the exchange student program of the early 60s to a "Voluntary Racial Transfer" program later in that decade. This effort involved the District adopting a plan allowing students to transfer to any school with available space if the transfer would improve the racial balance of the school compared with the racial composition of the public schools.

Following this program, during the early 1970s the District put in place affirmative measures to increase its effectiveness in desegregating the schools. This plan requested volunteer transfer students and allowed for mandatory transfers if insufficient numbers of students volunteered. By the mid-70s, the District added its magnet school efforts as a way of offering students the opportunity to have more personal involvement in their choice of school and their focus of study.

By the late 1970s and into the 1980s, the results of the 1970s plans showed a slight increase in segregation rather than a decrease. Orderville's branches of the ACLU and NAACP filed a complaint seeking a court order for Orderville to adopt a mandatory desegregation plan. The lawsuit was dropped, however, after Orderville voluntarily instituted its "Orderville plan." This plan divided the District into zones. Each zone paired majority-dominated schools with minority-dominated schools. Then the District assigned students to a school such that the racial composition of the students at the schools would more closely match that of the entire school district. The plan also made a voluntary transfer option available to students.

The Orderville plan's implementation never reached fruition because opponents successfully challenged its constitutionality to the Supreme Court. The Court ruled in 1985 that such a plan made the drawing of zones impossible due to the clustering of housing patterns along racial lines. Furthermore, the crowding at the District's schools that would result without busing students made facilities and enrollment planning difficult and would likely contribute to "White flight" from the minority-dominated schools. The Court ultimately found that the plan violated the Equal Protection Clause.

During the late 1980s and early 90s, Orderville began devising a new plan. By 1995, having considered all the options and educational goals, Orderville designed its current plan ("Open Choice Plan"). This plan seeks to make the four high schools unique—with each having its own specialized curriculum designed to attract certain types of students.

Each student may submit a prioritized list of enrollment preferences. Then the District evaluates how to assign students to schools based on that list and a series of tiebreakers. If assigning all students to their first choice school would result in an excess of students seeking admission to that school, the District's tiebreakers figure into a weighted formula to determine which students attend oversubscribed schools and which are assigned to their second, third, or fourth choice school.

The tiebreaker system gives primary emphasis to students who have siblings attending the school at which the student seeks admission. This tiebreaker accounts for roughly 15% of the admissions to Orderville schools each year. Secondary importance goes to racial balance. This tiebreaker accounts for approximately 15% of all yearly admissions decisions to Orderville schools. Thirdly, the District considers distance from the desired school(s). This factor represents the decisive tiebreaker for about 70% of all admissions decisions. Finally, if all other factors weigh equally, the District resorts to a lottery system. The lottery system tiebreaker has never been used.

The racial balance tiebreaker used by the District applies when the racial makeup of the student body differs by more than 10% from the racial make up of the students of the public schools of the District. Thus, if enrollment would drop below 50% non-White students or rise above 70% non-white students at any school, the racial tiebreaker would affect enrollment. So, if the racial balance of the school differed by more than this 10%, and if the sibling preference tiebreaker did not cure this discrepancy, then the racial tiebreaker would trigger and the District would then make admissions decisions based on this racial tiebreaker. The District applies this tiebreaker to White and non-White students alike.

The schools of the Orderville District, unfortunately, vary widely in their quality. Standardized test scores, numbers of college preparation and Advanced Placement courses, percentages of students taking college entrance exams, numbers of students attending college following graduation, school rankings, and disciplinary statistics all make West City Tech and East City Tech the more popular and more oversubscribed schools. Moreover, some of the programs offered at the magnet schools are unavailable at West Side and East Side.

Although Orderville schools have never been segregated by law, if school assignments merely followed housing patterns, the school enrollment would result in gross *de facto* segregation. That is, the



demographic profile of the individual high schools would not mirror the demographic makeup of the school population of Orderville as a whole.

### The Dispute

Parents Worried About Public Schools (PWAPS) is a non-profit organization comprised of residents of Orderville whose children have been denied assignment to the high school of their choice under the Open Choice Plan. Children of PWAPS members fall into both racial categories employed by the Open Choice Plan (White and Non-White). PWAPS has filed an action against the Orderville School District in the United States District Court for the Northern District of Desert. PWAPS alleges that the Open Choice Plan's use of a race-based tiebreaker violates the Equal Protection Clause of the Fourteenth Amendment. The suit names two members of PWAPS as plaintiffs: Jessica Baker and Michael Green.

Jessica Baker is the mother of Albert Baker, an only child and a rising senior at West City Tech. Jessica and her husband Jack, Albert's father, live with Albert in row house in a neighborhood east of downtown Orderville. Jessica and Jack have always pushed Albert to perform well in school and stayed involved in his schools' Parent-Teacher Associations. Albert has plans to attend a top-tier liberal arts college and become a writer someday.

The Bakers, who are non-White, are terribly unhappy with Albert's high school enrollment. Albert's daily commute to school is lengthy and difficult. Jessica drops him off at a public bus stop each morning where he takes various buses to get to school. Between traffic and switching buses, the commute takes Albert over an hour each way. Albert wanted to go to East City Tech, a local school within walking distance of his house. East City Tech offers a specialization in advanced writing, a program that Albert hoped to pursue. He ranked East City Tech as his first choice during high school enrollment.

Too many other non-White kids also selected East City Tech as their first choice (it was apparently also convenient for the other kids in the neighborhood). Under the Open Choice Plan's tiebreaker policy, a racial tiebreaker was applied to Albert and the other sibling-less kids who ranked East City Tech first. The tiebreaker determined that Albert belonged elsewhere. He ended up at West City Tech, a school with somewhat similar course offerings as East City Tech, minus the

advanced writing courses. At the time Albert was assigned to West City Tech, the school population breakdown was 75% White students and 25% Non-White students. Albert's assignment to West City Tech represented, to the Orderville School District, one small step towards a fully integrated public school system.

Michael Green lives west of downtown Orderville in a middle-class neighborhood with his wife, Linda, and their daughter, Elise. The Greens are a White family living in a predominately White neighborhood. Elise is a rising senior at East Side High School. Being an only child, Elise spent a great deal of her childhood playing science games with her father Michael, a chemist. Elise now has plans to become a molecular biologist.

Because Elise has always known she wants to double major in biology and chemistry in college, she sought to attend West Side. She was particularly excited to hear about West Side's excellent science facilities and Advanced Placement offerings. She ranked West Side first during high school enrollment, but because of exceedingly high demand for the school among White kids, was forced into a tiebreaker with others. The tiebreaker didn't work out well for her – White students were already over-represented at West Side. Elise was instead assigned to East Side High School, a school she randomly selected to rank second (she was sure that, with her interests and proximity to West Side, she would be assigned to her top choice). East Side High is located in a neighborhood inhabited primarily by minorities. The Orderville School District looked upon Elise's school assignment as another small step towards complete integration of Orderville's schools.

Jessica Baker and Michael Green are not happy. Michael thinks Elise deserves better than to be placed into an "average" school when she is clearly intelligent and ambitious enough for a magnet school. He also does not appreciate having to drive Elise to the other side of town and back each day. Jessica thinks Albert could do better at school if he did not have to wake up at 5 am each day to get there on time. Both parents joined PWAPS to try to have the system changed – other students (and their parents) should not have to suffer the way they have.



## BIOGRAPHIES OF JUDGES

### THE HONORABLE THOMAS E. JOHNSTON

*District Judge*

*United States District Court in the Southern District of West Virginia*

Judge Johnston was appointed to the federal bench in April, 2006, by President George W. Bush. He now presides at the United States District Court in Beckley, West Virginia, and also maintains an office in the United States District Court in Charleston, West Virginia.

Judge Johnston is a 1989 graduate of West Virginia University and a 1992 graduate of West Virginia University College of Law. He served as the United States Attorney for the Northern District of West Virginia from October 30, 2001, until his judicial appointment. Prior to serving as United States Attorney, Judge Johnston practiced law in Wheeling, West Virginia. He also served as a Law Clerk to the Honorable Frederick P. Stamp, Jr., United States District Judge, in Wheeling from 1992 to 1994.

### THE HONORABLE HENRY C. MORGAN, JR.

*Senior District Judge*

*United States District Court in the Eastern District of Virginia*

Judge Morgan was appointed to the District Court of the United States in the Eastern District of Virginia by President George H. W. Bush in October, 1992. He was appointed to senior status in February, 2000.

Judge Morgan is a "seven-year man" at Washington and Lee University, having received his B.S. in 1957 and his J.D. in 1960. While attending law school, Judge Morgan was a member of the Moot Court team and the Washington and Lee Law Review. After graduating from law school, Judge Morgan served as Assistant City Attorney in Norfolk, Virginia from 1960 to 1963. He was in private practice from 1963 to 1990 at the law firm Pender & Coward where he worked as a Member and later as Managing Partner. Judge Morgan also served as Vice Chairman and General Counsel of Princess Anne Commercial Bank in Virginia Beach, Virginia from 1985 to 1992.



## THE HONORABLE MYRON T. STEELE

*Chief Justice  
Delaware Supreme Court*

In 2004, Governor Ruth Anne Minner nominated Justice Steele as Chief Justice of the Delaware Supreme Court. The Delaware Senate confirmed Chief Justice Steele as the Seventh Chief Justice of the Delaware Supreme Court in May, 2004.

Chief Justice Steele received his B.A. in Foreign Affairs from the University of Virginia. He also received his J.D. and LL.M. at the University of Virginia School of Law (J.D., 1970, LL.M 2005). Chief Justice Steele served on active duty in the U.S. Army and retired as Colonel in the Delaware Army National Guard after serving as a Command and Staff Judge Advocate and Inspector General. Chief Justice Steele began his service on the Delaware Supreme Court in July, 2000. Previously, he served as a Vice Chancellor of the Delaware Court of Chancery from 1994 to 2000, as Resident Judge of the Delaware Superior Court in Kent County from 1990 to 1994, and as Superior Court Judge from 1988 to 1990.

## 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.