

May it please the court

Veteran attorney Paul Clement on arguing the nation's biggest cases at the Supreme Court

by JENNY ROUGH



→ In his 33 years of legal practice, Paul Clement, 58, has clerked for late U.S. Supreme Court

Associate Justice Antonin Scalia, served as the 43rd solicitor general of the United States, and worked as a partner at Kirkland & Ellis. In 2022, he opened Clement & Murphy, a boutique appellate practice in Alexandria, Va., and he still lectures at Georgetown University. But he's best known as the guy who has argued over 100 cases before the Supreme Court, including two this term so far. (Both should get rulings by summer.) His past high-profile cases include a victory for coach Joe Kennedy in a lawsuit that protected personal prayer in public spaces and a win for Little Sisters of the Poor in a lawsuit where they objected to a contraceptive mandate. Here are edited excerpts of my recent interview with Clement about his life and legal work.

WHAT PROMPTED YOU TO PURSUE A LAW CAREER?

I came very close to not going to law school. My father wasn't a lawyer, but he encouraged the Clement children to go because he thought it would be an interesting career path. After I got in, I deferred my enrollment to do a one-year master's program in economics in England. I had to decide: Should I keep going and get a Ph.D., or just finish the master's and head to law school? I had a wonderful mentor in England, but I didn't meet him until second semester. Had we met first semester, I might be teaching econ somewhere!

YOU WERE THE SUPREME COURT EDITOR OF THE HARVARD LAW REVIEW. IS THAT WHAT SPARKED YOUR INTEREST IN THE SUPREME COURT?

You read a lot of Supreme Court cases as a law student, and I soon realized the Supreme Court gets to decide the rule for everyone else. Trials in the lower courts are interesting, but even appeals courts ultimately get overruled by the Supreme Court. As the Supreme Court editor, my job was to review the high court's previous term. It was perfect for me: interesting, intellectual, and also

practical—because once you're done with the first issue of the year, you can coast.

PRETEND WE'RE AT A DINNER PARTY. CAN YOU TELL US AN ANECDOTE ABOUT CLERKING FOR ANTONIN SCALIA?

The clerkship was distinguished by being very oral. There wasn't a lot of memo writing, except for one-page bench memos that Scalia wanted. (Those were great exercises in writing concisely.) If there was an issue in a case that bothered me or the justice, we'd meet in his office and hash it out. I couldn't be afraid to mix things up with a legal giant. I think that really helped me later in my practice because, you know, once you've disagreed with Justice Scalia over a legal issue in chambers, what's left to be intimidating in the law?

DO YOU REMEMBER MOMENTS WHERE YOU DISAGREED WITH HIM?

Oh, absolutely. There were plenty.

COULD YOU GIVE AN EXAMPLE?

No, because I believe very firmly in chambers' confidence. I'd like to think I was a good law clerk and still am.

WELL, DID YOU EVER CHANGE HIS MIND?

Not very often. But maybe once in a while.

IN OCTOBER YOU ARGUED AT THE SUPREME COURT IN *GLOSSIP V. OKLAHOMA*. WHAT'S THAT CASE ABOUT?

Richard Glossip is facing the death penalty. He claims the state of Oklahoma violated his due process rights because the prosecution didn't turn over evidence it should have, and it elicited false testimony from a key witness. What makes this different from most capital cases is that my client, the state of Oklahoma, agrees. We're not saying Glossip is innocent, but we're asking for a new trial. What's really extraordinary is that the lower court disregarded the state's confession of error and doesn't think there's a basis for overturning the conviction. So at oral argument, Seth Waxman argued for Glossip, yours truly argued for the state, and then the court appointed Chris Michel, an amicus, to defend the lower court's judgment.

“It's a pretty awesome undertaking. You're facing nine incredibly smart justices who are all asking questions, most of which aren't designed to highlight the best features of your case.”

WHAT ABOUT THE DECEMBER CASE YOU ARGUED, *SEVEN COUNTY INFRASTRUCTURE COALITION V. EAGLE COUNTY, COLO.*?

Utah got the green light to build 88 miles of railroad track to connect to the national rail system, which runs into Colorado and down to the Gulf Coast. My clients are proponents of the project. Colorado's beef, in a nutshell, is that the environmental analysis conducted by a federal agency under the National Environmental Policy Act wasn't good enough. The issue is how much does the agency have to focus on the 88 miles in rural Utah versus the downstream impacts in Colorado or the Gulf?

HAVE YOU EVER BEEN CAUGHT COMPLETELY OFF GUARD BY A JUSTICE'S QUESTION DURING ORAL ARGUMENTS?

You work hard not to be. In that situation, the right answer is, “I don't know,” or, “That's not something we've considered.”

But I can't think of a moment when that's ever happened. By saying that out loud, it'll probably happen next time.

HOW DO YOU PREPARE FOR THESE CASES?

You can't prepare too much. I typically do at least two moot courts for a Supreme Court argument, maybe one at Georgetown and another at my office.

IS IT A LOT OF WEEKENDS AND NIGHTS AND HOURS SPENT MEMORIZING PRECEDENT AND TEXT?

Yeah, in a nutshell. I take each argument every bit as seriously as I did my first and work just as hard. After you've done a few cases, you get a sense of what's important. If there's only five or six precedents that matter, you're not rewarded spending your time reading a hundred cases that are less relevant.

DO YOU PREFER REPRESENTING THE PETITIONER OR THE RESPONDENT?

Petitioner. You get the rebuttal.

IN U.S. DISTRICT COURT, YOU PARTNERED WITH BECKET FUND TO REPRESENT JEWISH UCLA STUDENTS WHO WERE BARRED FROM A CAMPUS “JEW EXCLUSION ZONE” DURING PRO-PALESTINIAN PROTESTS LAST YEAR. WHY IS RELIGIOUS FREEDOM IMPORTANT TO YOU?

It's important to who we are as a country. The framers of the Constitution included religion clauses because of their own experience. They wanted to form a nation that avoided discrimination on the basis of religion and create space for the free exercise of religion.

WHEN YOU ARGUE BEFORE THE SUPREME COURT, DO YOU STILL GET THE JITTERS?

I still get nervous. It's a pretty awesome undertaking. You're facing nine incredibly smart justices who are all asking questions, most of which aren't designed to highlight the best features of your case. If you've been preparing and preparing, there's a point when you want to kick off your shoes and watch the football game. But that's not in your client's or the court's best interest. The nerves keep you going. If I ever stop getting nervous, I'll go do something else. ■