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Q&A With Seth Waxman: Part I and II

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Seth Waxman's first argument before the Supreme Court came in 1992 when, as a private practitioner, he squared off against lawyers who included a deputy solicitor general named John Roberts Jr. in the habeas corpus case *Withrow v. Williams*. Waxman won.

More than 20 years later, Waxman has 65 Supreme Court arguments under his belt—more than just four other active practitioners.

The former solicitor general and now chief of appellate and Supreme Court litigation at Wilmer Cutler Pickering Hale and Dorr argued four cases this term—including the patent case *Bowman v. Monsanto*. It was a particularly sweet victory for Waxman, who has represented Monsanto for a dozen years. Monsanto's business model would have crumbled if Waxman had lost.

In a recent interview at his office at Wilmer, Waxman, 61, talked about Monsanto and about how his Supreme Court practice has evolved. A transcript of the interview, edited for length and clarity, will appear over two days. The first segment is about the Monsanto win.

Mauro: Let's start off with Monsanto and why that was an important win.

Waxman: You know, it was an unbelievably important win in the sense that losing that case would have been cataclysmic for, not just for Monsanto's entire business, but essentially for the future of innovation in biotechnology and with respect to other technologies that are easily massively replicable. Take the Microsoft golden [master] disk as an example. Protected under the intellectual property laws, but with the press of a button you can have 10 million identical copies. If the patent holder who has invested untold hundreds of millions of dollars in developing the technology has to recover the investment plus a reasonable rate of return on the very first sale on the very first product, the whole model falls apart.

Bowman was a really unusual case in a lot of respects. When the seeds that use

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Monsanto's technology are sold, the purchaser has to sign a license agreement him or herself with Monsanto that provides that the technology is to be used for the sole purpose of planting a single commercial crop in a single season. That had been challenged in a series of cases in which a small handful of farmers had chosen to ignore that limitation and challenged the legal scope of the limitation under the patent laws and under contract law. What was most notable about that progression of I think seven or eight cases up through the [U.S. Court of Appeals for the] Federal Circuit was that we won every time.

So, when Bowman lost, it was sort of a ho-hum moment. That just was not a surprise ruling. When he petitioned, we waived the response. It seemed like the Supreme Court had already been confronted with these rulings by the Federal Circuit on this point and even had the benefit of an SG brief explaining why that holding was correct. I was surprised then to get a request from the court to file a brief in opposition. We wrote a brief in opposition that explained why the Federal Circuit was right. This wasn't controversial. I figured that was the end of it.

When the court conferenced the case, they issued another invitation to the SG. At which point, I had to tell the client this is unusual. The SG said, 'You should deny.' Usually, in most instances, that's sort of the end of it, except perversely when it involves the Federal Circuit.

When the Supreme Court granted cert, I was just … there's no word to describe it other than just puzzled. I didn't really see how the court, under these circumstances, in this case, could come to a conclusion that Monsanto had no intellectual property rights with respect to these soybeans that include its technology. When the Supreme Court grants cert, in general it's rarely just to affirm. With respect to the Federal Circuit in particular, it's quite rarely to affirm.

People were really worried. I don't mean just Monsanto. I told Monsanto, 'We are going to win this case.' More broadly, in the biotech community and even in the software and internet community, people kept asking me, 'What is going on here?' 'Why did the Supreme Court grant review in this case?' It's a really interesting case. It's a really interesting technology. Maybe there are questions. Whatever the reason, we needed to dress for success.

Because we won and we won 9-nothing, I think, all it did was raise the same old questions that had surfaced before. Why did the Supreme Court grant cert in the case, two dozen amicus briefs and all this coverage about it and concern about the business model for innovation, if they were just going to unanimously affirm? I'm still giving the same answer, which is: 'They don't clue me in on why they grant review.'

Mauro: The case also got portrayed as sort of a David and Goliath story, or perhaps Johnny Appleseed. How did you deal with that?

Waxman: Monsanto's entire business is selling to farmers. In the soybean business in particular, the technology is relatively new. Now, something like 97% of the soybeans grown in the United States have Monsanto's technology. It saves so much money. It's so much more environmentally friendly. Anything that pits Monsanto as against a little farmer is inconsistent with Monsanto's business. They can't alienate farmers and stay in business.

There was a substantial body of very vocal skeptics and opponents of seemingly anything that has any association with

Monsanto, which I find puzzling. Some people somehow came away with the impression that Monsanto was trying to oppress some organic farmer.

The peculiarity of this case is that Mr. Bowman, as he proclaimed over and over again, thinks that Monsanto's technology is amazing. He wouldn't dream of planting crops without Monsanto's technology. He just preferred for the planting that follows his winter week not to have the paperwork.

In fact, the morning of the oral argument, I was in the Supreme Court cafeteria early. I walk in. I knew what farmer Bowman looked like. He was by himself. I walked over and just introduced myself. He couldn't have been nicer. Then, Dave Snively, who's the general counsel of Monsanto came in. I said, 'Dave, would you like to meet Vernon Bowman?' Mr. Bowman said, 'Oh Mr. Snively, just to understand, I don't have anything against Monsanto. I think Monsanto's products are wonderful. I just think you're wrong. But we're going to find out.'

Mauro: You think in the end, it wasn't a public relations minus for Monsanto?

Waxman: I don't think so. Most of the antipathy towards Monsanto comes from a belief that GMO's are bad for human health and bad for the environment. The science on this is utterly lopsided. That doesn't necessarily speak to sort of deep-seated fears for people about their health. The more public airing there is of this, I think the better for both sides.

I remarked to my wife a couple of years ago that one of the interesting things about representing Monsanto is the unbridgeable chasm that exists between views about Monsanto held by people who live in the Central and Mountain time zones and people who live on the coasts. You go out there [to the Central and Mountain time zones] and there's no debate about this. Monsanto's making the farms much more productive. It's reducing the use of herbicides and tilling and all this sort of stuff and increasing farm export, dollars and all this.

On the time zones that border an ocean, the word Monsanto seems like sort of a slur. It's almost impossible for the two sides even to believe that the other exists, much less speak to each other. That's been challenging. I am very much a child of the east coast. I also think very highly of the west coast. Most of my family and friends live on one or two of the coasts. That's one concern about Monsanto which really wasn't implicated by this case. This was simply a question of whether Bowman had to pay the tech fee or not.

Mauro: You go back a long ways with Monsanto, right?

Waxman: My relationship with Monsanto started with Charles Burson, who was the famous Attorney General of Tennessee and Al Gore's chief of staff in the Clinton administration [then general counsel of Monsanto.] He contacted me soon after I resigned [as solicitor general in 2001] and said, 'I know you're not working and don't really want to work. I'm here at Monsanto. We have some unbelievably fascinating legal issues. Would you be interested in consulting with us on some of them? We'll compensate you. I don't want to intrude on your family downtime.'

I said, 'Well, send me the materials if they're really fascinating.' He did. They were really fascinating. I started consulting with him about these technology issues relating to their recumbent in technology. He said, 'Look, if you do decide to go back to a law firm, please don't join a law firm that has a conflict representing Monsanto.' In any large law firm, there are conflicts issues all around. When I joined Wilmer, it turned out that it was quite possible still to represent him. You can say in essence that after leaving government for seven years, Monsanto was my very first client. They were the only client that I had when I came back into private practice.

Mauro: During oral argument in the case, it seemed like you knew your agriculture.

Waxman: I never show up in any court without knowing as much as I possibly can. I have in my other office around the corner pictures of me out at the grain elevator and visiting a soybean farm. I spent a huge amount of time talking to agronomists around the country about germination rates.

Justice Kagan asked me, 'If I plant my edamame, I'm going to be infringing Monsanto's patents?' I said, 'No, you won't be because edamame are immature soybeans.' You can plant your edamame and water it and fertilize it and pray over it, and nothing is going to make that thing germinate.

Reaching his 65th Supreme Court argument this term put Seth Waxman in the upper echelon of court advocates.

The head of appellate and Supreme Court practice at Wilmer Cutler Pickering Hale and Dorr is tied for fifth among active attorneys, and tied for third among those in private practice.

Edwin Kneedler and Michael Dreeben, both deputy U.S. solicitors general, come in first and second with 121 and 88 arguments, respectively, followed by Sidley Austin's Carter Phillips with 76 and Paul Clement of Bancroft with 69. Mayer Brown's Andrew Frey is tied with Waxman at 65 arguments.

In the second part of an interview at his D.C. office, Waxman discussed his practice.

Mauro: How would you describe your Supreme Court practice now? I know you've tried to have a mix of pro bono and paying cases.

Waxman: In the Supreme Court, I mean, in practice, I sort of had a rule of thumb since I started private practice, that I wanted to just try and spend a quarter of my time doing pro bono work. I don't divide it up into Supreme Court work versus Court of Appeals and District Court or anything like that.

I don't try to manage it exactly in a year. I've had years where I've got like 500 pro bono client hours and years where I only had less than 300. The *McConnell [v. FEC]* case is a good example. That year I must have spent easily 500 hours doing that just that case alone. Then, the next year when they announced this expedited briefing and argument schedule over the whole summer, I basically spent almost all the summer doing that. There have been big, big cases that I've done that have taken a huge amount of pro bono time.

I do a lot of pro bono amicus stuff in the Supreme Court. This term I did the brief in the Prop 8 case on behalf of the Republican former office holders. Then, the brief on behalf of me and other former SG's, White House counsels and heads of the office of legal counsel in the DOMA case which is also pro bono.

Since I've come out of the government, I don't think that I've had a term in which I haven't had a fair amount of pro bono involvement in the Supreme Court either arguing cases or briefing amicus briefs or working behind the scenes and not actually putting my name on briefs but still helping out.

Mauro: What kind of cases are those?

Waxman: Somebody else is on the party brief. This is their case. They want to do it. They ask whether I would be willing to help, to work on the brief and suggest edits and all that sort of stuff.

Mauro: How would you describe your practice now?

Waxman: I don't really see myself as principally a Supreme Court practitioner. I just like litigation. I like trial court litigation. I like appellate court litigation. I like litigating in state courts as well as federal courts. Before I went to the Justice Department, I was a trial lawyer. I had argued a couple of cases on appeal. They were all cases in which I tried the case except for the appointment that I got in *Withrow v. Williams* which came out of the blue. I don't try cases anymore in the sense of trial court litigation in which there is going to be extensive examination of witnesses, in other words, where the case really turns on the facts, not principally on the law.

I've considered three or four times taking over as trial counsel in big complicated trials particularly in cases where I won an appeal and there's going to be a retrial. I've been very very tempted. I came pretty close once. It's just impossible for me to manage the rest of my cases and also to be an integral part of our team here if I'm just going to disappear for six months and be involved in a long, really contentious three month or four month jury trial. I don't do that.

Most of the cases that I do are probably in district courts. I love litigating in the Supreme Court. Don't get me wrong. This is much fun as you can have professionally. There are some other folks in this town who really … that's what they do. They'll take some other stuff, if they have to, to fill in. I don't feel that way. I like new challenges. I was just hired this week by a major American university to basically represent it and help it in what I believe is going to be a mediation process on a really interesting issue of public importance. It's not a matter of public record now. It's quite likely the thing will never actually get to court. If it does, I'll try the case in trial court. That's really interesting to me. I haven't done this precise thing exactly.

Mauro: Do you have any Supreme Court cases lined up for the fall?

Waxman: Well, our firm has two. One is *Heimeshoff v. Hartford Life & Accident Insurance Co. and Wal-Mart Stores*. The other is *Medtronic v. Boston Scientific*.

Mauro: Will you argue those?

Waxman: Part of my major mission here is to help all the young lawyers build their careers. I'm hopeful that at least one of those cases will be argued by a younger colleague. We have other cases that are quite plausible, some unfortunately in which we're opposing cert. I don't have anything in particular lined up where the client has already said, 'You're arguing this case.'

Mauro: How do you keep the mix of paid and pro bono cases?

Waxman: I haven't turned away any Supreme Court arguments to keep the mix. I have turned away Supreme Court arguments for either conflicts or scheduling purposes. There's a case that's been granted that would've been unbelievably fun case to argue that I had to decline. We have an arguable conflict. It wasn't completely obvious to me that we had a conflict. It was enough of an issue that I told them that I couldn't proceed. There are two cert petitions that are in the works for really interesting cases in which it's heartbreaking that for conflicts reason, I can't take.

Mauro: You still like doing it?

Waxman: I still love doing it. I hope that I'll have some more arguments next term. This past year was a wild year. Not only with Supreme Court work. I've just finished a period in which I think I had 4 arguments in 5 and a half weeks. Not even in the Supreme Court.

I get a big kick out of it. The whole process of practicing law to me that's so wonderful is that there's an on off switch that's rotating between teaching and learning. You get a chance to do both.

Mauro: The questioning at oral argument has gotten a lot more intense since you first started arguing at the Supreme Court, hasn't it?

Waxman: I have not noticed the difference. Colleagues of mine and former colleagues of mine have said that they think that I get fewer questions than I used to. That is me personally. I haven't done anything to keep track of it.

For me, the oral argument is all about the questions. The more questions, the merrier. It gets frustrating if the questions keep interrupting each other so that you never really get the chance to answer any of the questions. The current chief [justice] is very good about this and sort of intervenes as somebody who was in the position of confronting those questions, and he'll say, 'Well, first answer Justice Sotomayor's question and then such and so.' Other members of the court are sometimes good at saying, 'Well, I think you told Justice Ginsburg you had three points. But you only got to one. Can you give me the other ones?'

There are things that advocates can do to sort of signal to the court that if I get interrupted and you're at all interested, I do have something more to say. Hopefully, it'll be a while before I get to the point where my response to that is, 'I think I did tell Justice Ginsburg that I had three points. I can't remember what the other two are.' I don't think that the level of questioning is dysfunctional.

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