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Litigator and Scholar

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LITIGATOR AND SCHOLAR

*Richard D. Freer**

David Bederman must have found more than twenty-four hours in each day. Otherwise, it is difficult to explain all that he accomplished. David's achievements as a scholar are well documented. I merely summarize: a dozen books, published by the leading academic presses; over 125 articles, plus monographs and book chapters; and nearly 100 public lectures. How blessed we are to have seen David deliver his magnificent lecture, *Public Law and Custom*, last fall. It showed not only his mastery of various topics of law and history but his facile and creative mind. It also showed why students not only adore but respect him. Put bluntly, very few full-time academics can hope to be as productive or to have the kind of impact David has had.

But there is another side to David's professional life. He was an extraordinary *lawyer*. Over his years at Emory, he represented clients in litigation throughout the country. He argued cases in the Second, Third, Eighth, Ninth, and Eleventh Circuits. And he served as counsel in several cases at the Supreme Court of the United States. In four of those cases, he made the oral argument. In three of the four he argued, he represented the petitioner, which means he defied the odds simply by getting the Court to hear the case. And he won three of the four cases. This is the kind of record full-time litigators dream of.

This engagement as a litigator is one of the things that set David apart. Most of us in the academy travelled a different path. After law school and perhaps a clerkship, we spent two or three years at a large law firm and then found our way onto a law school faculty. Practicing law was a way station. And though we did just fine at the tasks assigned us, most of us never had much responsibility. Certainly, speaking for myself, no client placed any appreciable part of its fate in my hands.

David was different. After practicing with Covington & Burling, he entered the academy two decades ago. But his experience at that great law firm was not a way station. Over the years, clients sought him out and entrusted him with enormous responsibility. All of us professors have great respect for the

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practicing bar. For most of us, though, our respect for lawyers is vicarious. Again, speaking for myself, I knew great lawyering because I had *seen* it. David, on the other hand, knew great lawyering because he *did* it.

Again, most of us—even most practicing litigators—do not get a single Supreme Court case. David had several. Though the cases reflect fascinating stories of human travail and tragedy, as well as of commercial venture, there is one consistent theme: each involves a claim by or against a government or government entity—including a state commission, a state university system, a bi-state authority, the United States of America, and even a ministry of the Iranian government.

Two of the cases are of particular interest to me because they became leading opinions in Eleventh Amendment doctrine. The Eleventh Amendment provides that federal courts may not entertain cases against a state or an agency of a state. There are exceptions, as when the state waives its immunity from suit and when Congress properly abrogates the immunity. Usually, we think of sovereign immunity as a government's being free from the imposition of *liability*. Eleventh Amendment immunity is different, in that it provides immunity from *suit itself*. It reflects the dignity of the states; as sovereigns, they generally should not be subject to suit before the courts of the federal government.

In 2000, I was asked to become a contributing author to the multivolume Wright & Miller treatise, *Federal Practice and Procedure*. One of the substantive areas in my charge would be the Eleventh Amendment, and among other tasks, I was to undertake a new edition of the materials. Once I thought I had my arms around the scope of this aspect of the project, I went to talk to David. I knew that he had thought a great deal about governmental immunity,¹ and I wanted his reaction to the planned organization and coverage for the new edition. David was, as always, gracious and insightful.

I did not realize it then, but David would contribute much more to my effort. By the time the new edition was published, two of David's Supreme Court cases would have made significant contributions to the development of Eleventh Amendment jurisprudence. All of us have had the pleasure of citing academic works written by a colleague. But I count it a singular honor to write about important cases on which my colleague served as counsel (and won) at

¹ See, e.g., David J. Bederman, *Admiralty and the Eleventh Amendment*, 72 NOTRE DAME L. REV. 935 (1997).

the Supreme Court.² David Bederman affected the law not only through his books and articles but through his advocacy as well.

David's first Supreme Court case was *Lucas v. South Carolina Coastal Council*.³ Here, he was one of three lawyers who represented a landowner who purchased lots on which to build residences. The state passed a law that prevented the owner from building, which rendered the lots valueless. The landowner sued in state court and argued that the state law effected a taking of his property, for which he was constitutionally entitled to just compensation. The state supreme court rejected the claim. The Supreme Court reversed in a five-to-four decision. Justice Scalia wrote the majority opinion. The case involved thorny issues of justiciability, which David and his colleagues negotiated, allowing the Court to rule in favor of their client on the merits.

The following year, David was back at the Supreme Court, this time presenting the oral argument in *Smith v. United States*.⁴ Here, he represented an Oregon woman whose husband died from injuries sustained by falling into a crevasse in Antarctica. The man worked as a carpenter for a construction company that had been retained by an agency of the federal government. During a recreational hike, the man had strayed from the marked path when he fell. The plaintiff filed a wrongful death claim against the United States, arguing that the government was negligent in failing to provide adequate warning of the dangers presented by crevasses in areas off the marked path. Under the Federal Tort Claims Act, however, one may not sue the federal government for a claim that arises in a "foreign country."

What a fascinating issue: Is Antarctica, which comprises one-tenth of the earth's land mass but which has no government, a "foreign country"? David had argued the case at the Ninth Circuit and, after an adverse ruling, convinced the Supreme Court to take the case. The Court rejected the claim and held that Antarctica is indeed a foreign country. Justice Stevens dissented, asserting that the question of whether the federal government should be responsible for the torts of its agents in Antarctica is "profoundly important" because it reflects "our concern about ordinary justice."⁵ This marked David's only loss at the Supreme Court.

² 13 WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3524.2, at 337–38 (3d ed. 2008) (discussing *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994)); *id.* § 3524.4, at 432–55 (discussing *Lapides v. Bd. of Regents of the Univ. Sys. of Ga.*, 535 U.S. 613 (2002)).

³ 505 U.S. 1003 (1992).

⁴ 507 U.S. 197 (1993).

⁵ *Id.* at 205 (Stevens, J., dissenting).

The very next year, he was back for the third time, in *Hess v. Port Authority Trans-Hudson Corp.*,⁶ which is a major Eleventh Amendment case. One of the difficult issues in Eleventh Amendment jurisprudence is whether agencies formed by a state are “arms of the state” and therefore entitled to immunity from suit in federal court. In *Hess*, David and his colleagues represented railroad workers injured on the job for the Port Authority, which is formed by New York and New Jersey under the interstate compact authority, with the approval of the federal government. Plaintiffs sued in federal court under the Federal Employers’ Liability Act. The Port Authority claimed Eleventh Amendment immunity as an arm of the state. The Third Circuit upheld that argument and dismissed the case.

David and his colleagues gained review by the Supreme Court and won. The Court held that the Port Authority was not an arm of either New York or New Jersey, and permitted suit to proceed in the federal courts. In the opinion, the Court established important guideposts for determining the applicability of the Eleventh Amendment.

In 2002, David won another Eleventh Amendment case, this time presenting oral argument in *Lapides v. Board of Regents of the University System of Georgia*.⁷ In this case, a professor of a state university (an arm of the state) sued concerning the university’s alleged placement of derogatory material in his personnel file. The professor sued in state court, and the university (along with individual defendants) “removed” the case to federal court. (This is a process by which a case filed in a state court system may be transferred to the federal court system.) After removing the case, the university then claimed immunity from suit in federal court under the Eleventh Amendment. The Eleventh Circuit accepted the argument and held that the university could not be sued in federal court.

The Supreme Court, agreeing with David, reversed. The result is the leading case on waiver of Eleventh Amendment immunity by litigation conduct. The Court concluded that the state could not have it both ways—it could not invoke the jurisdiction of the federal courts and then argue that the Eleventh Amendment removed that jurisdiction. This seems obvious, but as noted, the lower appellate court had ruled the other way. And the Supreme

⁶ 513 U.S. 30 (1994).

⁷ *Lapides*, 535 U.S. 613.

Court, in reaching its decision, actually had to overrule precedent that was over a half century old.⁸

David's fifth Supreme Court case (and victory) came in *Ministry of Defense and Support for the Armed Forces v. Elahi*,⁹ in which David represented a ministry of the government of Iran and successfully argued that the plaintiff, who was trying to recover assets from an arbitration award in favor of the ministry, could not do so. Again, David had to overcome contrary lower court decisions, and his advocacy proved persuasive.

Some people talk of a disconnect between the practice of law and the academy. Some professors may see the real world as too practical and not sufficiently theoretical and nuanced. Some lawyers may see the academy as excessively ivory tower. For David, there was no such line of demarcation. He moved seamlessly from the highest level of one to the highest level of the other. His scholarship informed the real world. And his representation of clients informed his scholarship. David's success in both realms suggests that, at least at the top, there is no great divide between the practice and the academy.

Most of us struggle to do one thing well. David was an extraordinary scholar and an extraordinary lawyer. Along the way, David earned his Ph.D. from the University of London and an advanced degree from the Hague Academy of International Law.

Impressive as all this is, I am convinced that for David it was all secondary. His real passion, his real love, was his family. His professional commitments did not rob his beloved Lorre and Annelise of their husband and father. Indeed, most of my discussions with David through the years were not about law. They were about family.

David Bederman was the professor's professor and the lawyer's lawyer. He was also a model for what a husband, father, and son should be. I am enriched and honored that he was my friend.

⁸ Ford Motor Co. v. Dep't of Treasury, 323 U.S. 459 (1945) (allowing a state to raise immunity from suit after litigating in federal court and losing on the merits), *overruled by Lapidus*, 535 U.S. 613.

⁹ 129 S. Ct. 1732 (2009).