A SUPREME COURT SIMULATION COURSE

by

Martin Wishnatsky
P.O. Box 413
Fargo, ND 58107
(701) 306-1368
martin@lighthouse.fm

Brief biography: Martin Wishnatsky has a Ph.D. in Political Science from Harvard University (1975), and is the author (Martin Weil) of *A Pretty Good Club: the Founding Fathers of the U.S. Foreign Service* (Norton: New York, 1978) and “Can the Blacks Do for Africa What the Jews Did for Israel?” *Foreign Policy* 15 (Summer, 1974): 109-130. He taught at UCLA for two years (1972-74), was then a stockbroker for three years, and worked for ten years on Wall Street as a back office consultant (1980-1990) before becoming a pro-life missionary. From 1992 to date, he has had extensive experience in legal research and writing, which led to the development of this article. He currently manages a Christian radio station in Fargo, North Dakota (www.lighthouse.fm).
CONTENTS

Abstract . . . . . . . . . . . . . . . . . . . 3

I. Purpose and Goals . . . . . . . . . . . . . . . . . . . . . . . . 4
   A. Skills Acquired . . . . . . . . . . . . . . . . . . . . . . . . 4
   B. Costs and Benefits . . . . . . . . . . . . . . . . . . . . . . . 5
   C. Simulations Elsewhere . . . . . . . . . . . . . . . . . . . . . 5

II. How the Course Works . . . . . . . . . . . . . . . . . . . . . . . 6
   A. Selecting the Case: picking the argument session . . . . . . . 7
   B. Oral Argument . . . . . . . . . . . . . . . . . . . . . . . . . 11
   C. Case Conference . . . . . . . . . . . . . . . . . . . . . . . . 11

III. Exams. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 12

Sample Syllabus . . . . . . . . . . . . . . . . . . . . . . . . . . . 13
ABSTRACT

This proposal sets forth the methodology and rationale for creation of a full-term undergraduate Supreme Court simulation course. Although the idea of including a Supreme Court simulation in a constitutional law course is not new, this is the first proposal of which the author is aware, to make a single case currently pending before the U.S. Supreme Court the subject matter of an entire course.

The choice of the case upon which to base the course is critical, not only for choice of subject matter, but also in terms of timing: Supreme Court oral argument has to occur during the course, but not so soon that the case is decided before the term ends. The students identify with the participants in the process and experience by simulation what it is like to litigate and decide a case before the nation’s highest court.

A sample syllabus is included. A spreadsheet in oral argument date order of pertinent case events for the 2005 and 2006 Supreme Court terms is available on request.
A SUPREME COURT SIMULATION COURSE

I. Purpose and Goals

This is a role-playing reality course: Supreme Court island. Every student will play a part, as a Supreme Court justice, clerk to a justice, or part of the legal team for a party.

The course is about one case and one case only. But because that case is currently pending before the Supreme Court, it will have a deep legal history. In the process of role-playing this case, students will learn how lawyers think, argue, and write, and how Supreme Court justices hear and resolve cases. “The use of active Supreme Court cases allows students to grapple with some of the most current and controversial constitutional issues. It is also fun to compare how the student court resolved a case with the opinion of the real Court.”  

This is not a casual course for the non-working student. It is an intense high-immersion exposure to real-world litigation at the highest level. The course demands active participation by the students and even some dramatic flair. Students representing the parties will be subject to withering questioning. Justices will be expected to present and defend their positions on how the case should be decided.

A. Skills Acquired

In the process of role-playing the selected case students will gain a basic working knowledge of legal research. They will have to be able to read and comprehend relevant case law, and to trace back precedents through Supreme Court and federal (circuit and

---

district court) reporters. However, this will all be done strictly to carry out their roles in the case at issue. This is not a general constitutional law course. It is a role play exercise where legal research skills are relevant because the role being played requires them. Students will also learn group decision-making skills as members of a legal team or working together with their colleagues on the court.

B. Costs and Benefits

A Supreme Court simulation course places great demands upon the instructor. He is not just a purveyor of information, but rather a manager and director of a complex litigation process. Oral presentations and commitment to active and involved participation will weigh as heavily in the final grade as the more conventional written submissions. Thus, the process of evaluating student performance for the instructor is more demanding than only grading exams or papers. Fliter comments:

The benefits of the simulation, however, far outweigh the costs. At a minimum, the students will gain extensive knowledge about one of the justices on the Supreme Court and they will become familiar with all of the sitting justices. They will learn about important precedents, tests, and doctrines used by the Court to decide constitutional questions and they will apply that knowledge to solve cutting-edge constitutional issues. They will develop an understanding of the process and politics of Supreme Court decision making. Along the way, the students will improve their research, writing, public speaking, and critical thinking skills. These skills that the students develop in the sophisticated Supreme Court simulation will serve them well in other classes, in law school, and in their future careers.²

C. Simulations elsewhere

A number of college-level constitutional law courses incorporate a Supreme Court simulation, but none have been located which devote the entire course to a simulation,

² Fliter, “Supreme Court Simulation” at 13.
and that of one case only. At the law school level, Supreme Court clinics are enjoying a wave of popularity. The Georgetown Law Center Supreme Court Institute conducts moot arguments for about two thirds of Supreme Court cases on behalf of a party to the case. The Stanford Law School Supreme Court Litigation Clinic provides litigation assistance to lawyers in preparing briefs and oral argument for cases granted cert. The professors directing the clinic have also represented parties and conducted oral argument before the Court. Yale Law School and the University of Virginia School of Law have just begun Supreme Court clinics in association with high court litigation firms. “Top students at both schools, many of them on the law review, will work on real-life petitions and both merits and amicus curiae briefs in pro bono cases. Yale Law School professor Dan Kahan reports that students there are clamoring to sign up.” Harvard and Northwestern are considering similar programs.

Street Law and the Supreme Court Historical Society have prepared curricula for high school teachers, which incorporate a Supreme Court simulation of historical cases.

II. How the Course Works

The federal courts have three levels: district court, where cases are tried, circuit courts, where they are appealed, and the Supreme Court, which hears appeals from the

---

3 See, e.g., syllabus for Political Science 417 (2003) at the University of Wisconsin-Madison (www.polisci.wisc.edu/users/ekasper/Past%20Courses.htm).
4 See www.law.georgetown.edu/sci/moot.html.
5 See www.law.stanford.edu/program/clinics/supremecourtlitigation.
7 See www.landmarkcases.org/mootcourt.html.
circuit courts and also from state Supreme Courts. There are 94 district courts organized into 12 circuits.

The written history of a Supreme Court case includes the district court opinion, the circuit court opinion, the application for Supreme Court review (known as a petition for certiorari), and supporting and opposing briefs. In this course the students will have available all of these, as do the justices\textsuperscript{8} hearing the appeal. These materials are freely available on the internet.

This course does not role play the certiorari phase, where the Supreme Court chooses which cases it will hear.

**A. Selecting the Case: picking the argument session**

In selecting a “live” case for a simulation, one has to select a moving target. A live case in the Supreme Court begins with the granting of a petition for certiorari. At that point a briefing schedule is established and in due course (often with extensions), the parties file their supporting and opposing briefs. If the case is one of general interest, there also may be several or many *amicus curiae* (“friend of the court”) briefs filed by interest groups who are not parties to the case. These briefs supposedly provide expert input from an objective perspective. More commonly, however, they are simply additional advocacy briefs shaped by the interest the amicus represents. Because of the significant public policy implications of many Supreme Court cases, the Court usually allows amicus briefs to be freely filed.

---

\textsuperscript{8} The term “justice” is used in the highest court in the state or federal system. In district courts or lower appeals courts, the term “judge” is used.
The Supreme Court term begins the first Monday in October and runs through the end of the following June. In July and August, during the recess preceding the beginning of the new term, the court typically schedules oral argument dates for pending cert cases. In the 2002 term and prior, the argument date was set at the time cert was granted. For instance, if a case was granted cert in March, an October argument date would be set at the same time. In the 2003 term and subsequently, however, the court has announced the argument dates for cases pending from the previous term in batches in July and August. These cases are normally set for argument in October, November, or December. It is from this pool of scheduled argument cases that the simulation case for the fall semester will be selected.

Oral argument is heard in two-week sessions, approximately once each month from October through April. During a session, the Court hears arguments on Monday, Tuesday and Wednesday. Thus, a typical Argument Calendar may contain a dozen cases, two per day for six days.

The first argument session of the term falls in the first two full weeks in October. The second (November) session begins in the first week that has a November date. Thus, it usually straddles the end of October and the beginning of November.

The November session is the best one from which to pick a case. In the flow of the course, the students have to conduct argument before the Supreme Court does. Once the actual Supreme Court argument takes place, the course begins to head towards its conclusion. The student justices meet in conference and then retire to compose their opinions.
If the Supreme Court hears argument in early October, there will still be two months of the course left, too much time for the wind-up. Additionally, the earlier in the school term the Supreme Court holds its argument, the more likely the court is to pre-empt the student opinions by issuing its own opinion before the semester ends. Conversely, if the Supreme Court’s argument occurs too late in the semester, the students will not have time properly to analyze and ponder it before writing their own opinions.

Thus, the late October/early November argument session is ideal. It falls in the 10th or 11th week of the course, allowing at least a month for the students to write their opinions. A later argument also makes it far less likely that the court will issue a “premature” opinion. The case chosen has to be ripe, but not so ripe that it falls off the tree before the semester ends. The third argument session is in early December, and obviously too late.

The major drawback to using cases that are on the docket is that the Supreme Court might announce an opinion before my students have a chance to decide the case. Surprisingly, this has happened only twice in the thirteen years that I have been teaching my constitutional law courses. This situation can be avoided by selecting cases that are scheduled for oral argument (by the real Court) later in the term.9

The second argument session typically hears a dozen cases (11 in OT 2005 and 12 in OT 2006). By contrast the first argument session hears less than ten (8 in OT 2005; 9 in OT 2006). Thus the second session also has a larger group of cases from which to choose.10

---


10 The November argument session for OT 2006 included two high-profile cases: the constitutionality of the partial birth abortion ban and of an $80 million punitive damages award against Phillip Morris. Additionally, there were five criminal cases: three statutory; two Sixth Amendment), a bankruptcy case, a Westfall Act case (suing of federal employees), a Clean Air Act emissions case, and a section 1983 damages case.
The final consideration is whether the court will schedule the second argument session in time for one of its cases to be chosen for the course. This is the most delicate factor. The Court released the November argument calendar for OT 2006 on August 14, 2006. That left a scant two weeks before classes began to select the case and prepare to teach it: challenging, but not impossible. In OT 2005, the November session was announced on July 20, 2005, a much more comfortable interval. In OT 2004, the November calendar was released on September 1st; in OT 2003 on August 19th.11

In OT 2005 and OT 2006, however, all the November session cases were granted cert between February and June of the previous term. Thus, the instructor has the entire summer to familiarize himself with the pool of cases from which the ultimate selection will be made, 36 in OT 2005 and 29 in OT 2006. Cases with primarily technical, procedural, or standing issues could be screened out at that time. In OT 2006, nine of the cases dropped out when they were slotted into the October argument session on July 14th.

The ideal case will be scheduled for argument in November, allowing time for the class to hold its own argument sessions before the Supreme Court does, but also allowing a month to write opinions before the semester ends in December.12

---

11 The availability of briefs will also depend upon the particular case. Typically, the petitioner’s brief will be filed during the summer, but the respondent’s brief may not be submitted until the beginning of the semester and in some cases as late as early October. The petitioner’s reply brief may not arrive until two weeks before oral argument. Amicus briefs are due at the same time as the brief of the party they are supporting.

12 A spring term case is more problematical. The March argument session would be ideal, but that calendar was set on January 23, 2006 in OT 2005 and on January 17, 2007 in OT 2006, too late for a semester that begins the first week in January. A February argument session might be workable. It falls in the last two weeks of February (7th and 8th weeks of the semester) and is followed by spring break. The calendar was set December 18, 2006 for the February, 2007 session. There are, however, still seven weeks of classes after spring break. (Additionally, it would be difficult to work up a case for the second semester over Christmas break.)
B. Oral Argument

Oral argument is typically an hour in the Supreme Court and a half hour or 40 minutes in the appellate courts. The time is split equally between the two sides. If there are multiple parties on one side, they may with permission divide their portion of the argument. Oral argument is a time of testing, a crucible for the attorneys, who are peppered with questions from all directions. The justices probe those areas they feel are most critical to determining the outcome of the case.

Preparation for and participation in oral argument are key components of this course.

On September 14, 2006, at the direction of Chief Justice John Roberts, the Supreme Court announced that it would provide same-day release of oral argument transcripts. Thus, the verbatim transcript of the Supreme Court oral argument will be immediately available for class scrutiny. The class, using the transcript as a dramatic script, will re-enact the argument as it actually occurred, pausing to contemplate the significance of the questions asked and answers given.

Thus, there will be two argument weeks: the week the student justices argue the case and the week they re-enact the actual Supreme Court argument.

C. Case Conference

After completion of the oral argument portion of the course (simulated and actual), the student justices will convene to vote on the case and with their clerks to write their opinions. By this point, all the class members should have a deep working knowledge of the facts of the case, their public policy implications, and the relevant law and precedent.
They will be challenged to reason and write like a member of the U.S. Supreme Court, cognizant of the historic disposition of the particular justice they represent.  

III. Exams

There will be a mid-term and a final in addition to the brief and opinion writing. The opinion-writing will be in three waves to allow for critique and refinement of the students’ legal writing and argumentation skills. Attorneys for the parties will issue press releases after each round of opinions, providing an in-depth critique or affirmation of the opinions reached.

The purpose of the written exams is to make sure that each student understands the high points of the case and the relevant arguments and precedents. They will be a series of pinpoint questions to probe the student’s knowledge of the case.

The actual Supreme Court decision will not come out until after the fall term is over. The students will then have an opportunity to compare the Supreme Court’s decision with their own.

---

13 See attached Syllabus for details of course structure and grading.
SUPREME COURT SIMULATION COURSE

SAMPLE SYLLABUS

I. Assigned Reading

A. General

Julie Dolan and Marni Ezra, *CQ’s Supreme Court Simulation* (CQ Press, 2002)

Chapter 1: Supreme Court Procedures and Players (13 pp.)
Chapter 2: Guide to the Simulation (13 pp.)

Earl Maltz (ed.), *Rehnquist Justice* (Univ. of Kansas Press, 2003)

Chapters on Justices Breyer, Ginsburg, Kennedy, Scalia, Souter, Stevens, and Thomas (about 30 pp. each)

Oyez.com justice profiles (www.oyez.org/courts/roberts/robt2)


Chapter Three: Life in the Marble Temple (60 pp.)
Chapter Five: Deciding Cases and Writing Opinions (80 pp.)

William Rehnquist, *The Supreme Court* (Knopf, 2002)

Introduction: A Law Clerk Comes to Washington (18 pp.)
Chapter 12: Certioraris: Picking the Cases to Be Decided (15 pp.)
Chapter 13: How the Court Does Its Work: Oral Argument (13 pp.)
Chapter 14: How the Court Does Its Work: Deciding the Cases (15 pp.)

B. Case specific

- District court opinion
- Circuit court opinion(s)
- Circuit court briefs (if available)
- Certiorari petition and responses
- Briefs on merits
- Amicus briefs
- Appendix (if available)
• Articles and books on the subject matter of the controversy
• Relevant case law (including opinions from other circuits where circuits are divided on issues presented)

For further reading see the book list of the Supreme Court Summer Institute (www.streetlaw.org/library/SCSI%20Book%20list.pdf).

II. Class Schedule

Week 1
Introduction to the US Supreme Court
- Dolan and Ezra, *CQ Simulation*, Chapter 1
- Rehnquist, *The Supreme Court*, Introduction & Chapter 12

Week 2
Who Are the Justices?
- Alito and Roberts articles
- Oyez.com justice profiles (www.oyez.org/courts/roberts/robt2)

Week 3
Oral Argument
- David O’Brien, *Storm Center*, Chapter 3
- Rehnquist, *The Supreme Court*, Chapter 13
- Select case from oyez.com

Week 4
Deciding Cases
- David O’Brien, *Storm Center*, Chapter 5
- Rehnquist, *The Supreme Court*, Chapter 14

Week 5
Simulation overview (assigning roles)
- Dolan and Ezra, *CQ Simulation*, Chapter 2

Week 6
The Case in the District Court
- District court opinion
- Relevant cited precedents

Week 7
The Case in the Circuit court
- Circuit court opinion(s)
Relevant cited precedents
Intercircuit conflict

**Week 8**
Midterm
Preparation for oral argument

**Week 9**
Oral argument (one hour each side)

**Week 10**
First Case Conference

**Week 11**
First draft of opinions submitted and critiqued

**Week 12**
Re-enactment of Supreme Court oral argument

**Week 13**
Second Case Conference

**Week 14**
Second draft of opinions and critique

**Week 15**
Final draft of opinions and critique

**Week 16**
Final exam

**Grading:**

- 20% class participation
- 15% midterm
- 25% final
- 40% opinion and brief writing