# Edward Bennett Williams for the Petitioner: Profile of a Supreme Court Advocate

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## Introduction

> It is not often that the same lawyer can be tough and quick and a tremendous adversary in the courtroom and also write law review articles and appellate briefs and make oral appellate arguments of excellent quality. Well, Ed Williams could do it all.
>
> Associate Justice William Brennan, 1989[1]

As a law student at Georgetown University, Edward Bennett Williams would often walk down to the Supreme Court on Sunday afternoons.[2] "I never failed to be thrilled when I looked up at the magnificent portico on that building and saw the words chiseled into stone: Equal Justice Under Law."[3] Williams' career before the High Court breathed life into these words, yet little has been written about his Supreme Court advocacy.

In 1975, Arthur Schlesinger, Jr. wrote a column in *The New York Times* cataloging occupations that best prepare a candidate to be President of the United States.[4] Among others, he considered college president, general, business manager, labor leader, and Supreme Court Justice.[5] Afterwards, Schlesinger received a letter from a reader pointing out that the list was incomplete because it left off Supreme Court advocate.[6] The reader had a specific advocate in mind for the 1976 Democratic nomination:

> A great and skilled lawyer like [Edward Bennett] Williams must know human nature very well. He must be able to think on his own two feet. On appearing before the Supreme Court,

> Williams said, "If Justice Douglas asks you a question, you have to be careful not to alienate Justice Potter Stewart with your answer. You need five judges on your side."[7]

The reader believed an effective Supreme Court advocate could take on any challenge, including the presidency. Five years before Schlesinger's article, Williams argued *Monitor Patriot Co. v. Roy*.[8] Defending the *Monitor Patriot* newspaper against a defamation suit, Williams took the measure of a down side of running for office:

> I believe that when a candidate announces for office, he lays his life before the press for scrutiny. And I believe that anything in his life is relevant to his fitness for office, his private life or his public life, his character, his mental and physical health, his record, whether it be academic, professional, commercial, social, marital, or criminal. I believe that all of that is appropriate for public discourse.[9]

One can glean many of these insights by studying the Supreme Court advocacy of Williams. Yet the Edward Bennett Williams canon focuses almost exclusively on his career as a trial lawyer. The most recent biography of Williams devotes just six of its more than 500 pages exclusively to Williams' career before the Supreme Court.[10] History has run with *Life Magazine*'s account of Williams as "the man who [could] get you out of bad trouble."[11] Williams is usually tied to the notorious characters he defended, rather than to the constitutional rights he shaped.[12] His twelve cases before the Supreme Court do not fit neatly within the legendary-trial-lawyer schema.

To be fair, there is more at work here than history's tendency to categorize. First, Williams did not partake in the arms race for Supreme Court arguments. Today, Supreme Court arguments are a talismanic number on a résumé—not just a badge of honor, but a meal ticket. It is shocking to discover an advocate not opportunistically clawing his way through the sixteen marble columns. In 1971, the executive editor of the *Washington Post*, Ben Bradlee, asked his dear friend Williams to argue *New York Times Co. v. United States*,[13] commonly known as the *Pentagon Papers* case.[14] An elated Williams called his law partner Joseph Califano and said, "The *Post* wants me to argue the *Pentagon Papers* case in the Supreme Court!"[15] However, Williams was then in Chicago, tied up in a private securities matter arising out of divorce proceedings, a case his client refused to settle.[16] Williams told Califano, "I don't see how I could do it with this trial in Chicago. I just can't do it. My guy wants to try this case and I've got to stay with him if he's going to have any chance."[17] While the *Pentagon Papers* case became a landmark Supreme Court decision, Williams quietly won a hung jury for his client in Chicago.[18]

Biographers also focus on Williams as a trial lawyer because he himself preferred trial practice. Trial and appellate practice are markedly different beasts:

> Procedures on appeal are quite different than those in the trial court. Essentially, the appellate process is more "reflective" than trial court proceedings and requires a rigorous and refined adherence to procedural and legal doctrines. Notably, the "drama" of trial is absent on appeal . . . There is no witness testimony; nor is there any jury to instruct or persuade.[19]

At a glance, appellate practice seems to gut the very drama Williams loved about trial: "Running a trial is a lot like making a movie—but infinitely harder. It requires direction, production, and writing."[20] It is easy to see why Williams told a reporter from *Life Magazine* in 1957, "Trial law is what I like—anything else bores me."[21]

Nevertheless, the career of Edward Bennett Williams is not fully painted with a trial lawyer brush. According to Associate Justice

**Edward Bennett Williams was asked by his friend Ben Bradlee of the *Washington Post* to argue the *Pentagon Papers* case before the Supreme Court in 1971. Williams had to decline because he was conducting a trial in Chicago.**

William Douglas, "Edward Bennett Williams, best known perhaps as a criminal lawyer, would certainly be in any list of the top appellate advocates who appeared in my time."[22] Before the Supreme Court, Williams represented a United States Congressman, multiple indigents, a corporation, a mob boss, a Jesuit college, and a union, among others. To overlook a dozen Supreme Court cases, many of historic importance, would do a disservice to a uniquely versatile advocate.

This piece examines the Supreme Court advocacy of Edward Bennett Williams in four parts. Part I explores the trial skills Williams brought to bear in the Supreme Court. Part II highlights the critical role his advocacy played in expanding the safeguards of the Fourth Amendment. Part III examines his two Establishment Clause cases in the context of lifelong commitment to Jesuit and Catholic education. Finally, Part IV takes a fresh look at Williams' "contest-living" through the lens of his representation of Frank Costello before the High Court.

## I. The Trial Lawyer Goes to the Supreme Court

Edward Bennett Williams' transition from the trial courts to the Supreme Court had an inauspicious beginning. On February 7, 1955, 34-year-old Williams argued his first case before the Court: *United States v. Bramblett*.[23] The following day, the *Washington Post* ran the headline: "High Court Meets in Bramblett Case, Finds Defendant and Counsel Absent."[24] The article only got worse for Williams in the opening paragraph: "The Supreme Court's black-robed decorum and clock-like punctuality were interrupted yesterday when one of the leading attorneys, Edward Bennett Williams, failed to appear."[25]

Williams' client, former United States Congressman Ernest K. Bramblett, had been found guilty by a jury of padding his office payroll and taking kickbacks.[26] The government's attorney, Charles Barber, began his oral argument promptly at the scheduled 1:30 p.m.[27] As the Justices are wont to do, they began whispering to each other during the

government's argument.[28] Only they were not discussing the merits of the case. Justice Sherman Minton could be overhead repeatedly whispering to Justice Felix Frankfurter, "Where's the other attorney? Where's the other attorney?"[29]

After Barber concluded the government's argument, "[t]he justices retired behind their red velvet curtains for a five-minute recess."[30] Upon returning, a Justice announced that there had been a "misunderstanding."[31] Edward Bennett Williams was eating lunch at the Metropolitan Club on the other end of Washington, D.C., thinking the case was scheduled for the next day.[32] Williams "rushed up to the Court, apologized profusely and judicial decorum was resumed."[33]

It may seem impossible to reconcile this ill-fated beginning with any definition of victory, especially in light of the Court's 6–0[34] decision against Williams' client. However, after the decision was handed down, Justice Frankfurter told Williams, "You made a brilliant argument."[35] Williams responded, "I wish you'd write a letter to my client and tell him that, because we lost."[36] The 1955 *Washington Post* article did not tell the whole story. Williams was under the impression that the argument was on the following day because he was given the wrong date by the scheduling clerk at the Supreme Court.[37] Apologizing to the Justices for arriving an hour late, Williams took the blame.[38] Apparently, the scheduling clerk had been known to bungle the oral argument schedule in the past.[39] When Chief Justice Earl Warren looked into the mix-up, he was impressed that Williams shouldered the responsibility.[40] The incident earned Williams a great deal of respect from Warren, who would serve as Chief Justice for much of Williams' career before the Court.[41] Warren and Williams became fast friends, watching the Washington Redskins from Williams' owner's box every Sunday for eight years.[42] Williams even gave Warren's eulogy at the Supreme Court in 1974: "Earl Warren was the greatest man I ever knew. His friendship was a rich and lasting treasure which I shall hold as one of my dearest possessions during life."[43]

The law reports mark *United States v. Bramblett* as a loss for Edward Bennett Williams. He was an hour late for the argument, and the Justices unanimously decided against his client. Still, Williams' debut in the Supreme Court won him the respect of the Justices, a career's worth of goodwill, and the lifelong friendship of Chief Justice Warren. Michael Tigar, a Williams protégé, revealed that Williams would often remind his children, "Life is not a plateau. You either move up or you fall back."[44] Williams' loss in *Bramblett* certainly allowed him to move up, laying the foundation for a remarkable career before the Court.[45]

### A. Use of Trial Skills in the Supreme Court

Williams did not check his trial skills at the door of the Supreme Court, employing his uncanny power of persuasion in front of juries and Justices alike. While trial and appellate practice are quite different arts, certain talents serve an advocate in both arenas. Williams once said, "The whole world is divided into engineers and salesmen. When I was at school I was miserable in science and had no feeling for math and couldn't drive a damn nail. I guess law was my outlet for salesmanship."[46] Fittingly, in *The Art of Appellate Advocacy,* Jason Honigman called "the job of an appellate lawyer, like that of a trial lawyer . . . essentially one of salesmanship."[47] Honigman continues, "If a trial could be analogized to a living body, a record in an appeal would correspond to a corpse. Skill in appellate advocacy is largely the ability to breathe life into that corpse."[48] Williams infused his Supreme Court arguments with the drama of the courtroom. Faded transcripts and muffled audio recordings of Williams' oral arguments still bear the strong marks of a trial lawyer.

Against conventional wisdom, Williams often began his oral arguments with a similar strategy: "I think it would be useful and helpful to the Court if I reset the factual backdrop against which the legal issues are framed at the very outset."[49] Even in the Supreme Court, Williams begrudgingly gave up his ability to steer the facts to embrace his theory of the case. He became a criminal expert of sorts for the Court, even clarifying trial practice phenomena for the Justices. In 1977, Williams took on *Nixon v. Warner Communications, Inc.*, arguing that the audio recordings that resulted from the Watergate investigations should be released to the public.[50] During oral argument, Chief Justice Warren Burger tried to grapple with a criminal-procedure hypothetical:

> Mr. Williams, suppose you have a celebrated criminal case, kidnapping, rape, murder . . . and one of the elements of evidence introduced at the trial are statements made which in the aggregate amount to a confession by the defendant . . . and these statements are all on the record now in trial, not subpoenaed in the ordinary sense but produced by the prosecution.[51]

Williams immediately threw Burger a life preserver: "Extrajudicial statements, Mr. Chief Justice?"[52]

Even when the cases were not criminal in nature, Williams made the Supreme Court his comfort zone by analogizing the issues to ones with which he was familiar. In *Viking Theatre Corp. v. Paramount*, Williams analogized antitrust violations to "economic murder."[53] Similarly, when the government was trying to revoke the citizenship of his client, Frank Costello, in *Costello v. United States*, Williams noted, "The government has the burden [of proof,] which is very close to the burden in a criminal case."[54] In the same case, he made an analogy to perjury, another trial-court comfort zone: "If this case were here not as a denaturalization case but as a perjury case, I think that it is fair to say that, qualitatively, the evidence here would not support a perjury conviction."[55] *Costello v. United States* was not a criminal matter and perjury was not at issue, but Williams thought like a trial lawyer, even in the Supreme Court.

**B. Use of Physical Evidence: The Spike Microphone**

The only inscription inside the entire courtroom of the Supreme Court is a metal plate located on top of the podium for the advocates. The inscription reads, "Do Not Adjust Microphone," although there are now two skinny black microphones on top of the podium. In 1960, while arguing *Silverman v. United States*,[56] Edward Bennett Williams made use of a third microphone. At issue in the case was the government's installation of a spike microphone ("spike mic") into the heating duct of the petitioner's home. The tiny device gets its name from the metal spike that is used to lodge the microphone into a wall.[57] Through the use of this spike mic, the government could overhear conversations within the home.

Less than a minute into his oral argument, Williams revealed that he had a prop sitting on top of the podium: "Precisely stated, the question is whether evidence which is obtained by the federal government by the use of *this* electronic eavesdropping device which is known as a spike microphone . . . may be offered against petitioners in a criminal proceeding."[58] Listening to the audio of the oral argument, one can hear Williams pick up and drop the actual spike mic on the podium every time he referred to it. Not surprisingly, the Justices were at once infatuated and mystified by the use of physical evidence in the Supreme Court. Almost in disbelief, a Justice immediately interrupted the argument and asked, "This is the device?"[59] Williams held up the spike mic and said, "This is precisely the device, Your Honor."[60] Justice William Brennan, also transfixed by the exhibit, asked, "Mr. Williams, is that a custom-made or an assembly line device?"[61] Williams, thinking on his feet, further demonized the

spike mic by answering, "I hope it's not an assembly line article, Mr. Justice Brennan, but it is an article which has some widespread use at the present time by federal law enforcement agents."[62]

Williams demonstrated with great force the power of the tiny spike mic to the Justices:

> Directly behind where the officers were inserting this microphone was the heating register for the petitioner's premises. They laid the tip of this needle against the heating duct and they converted the heating system into a giant conductor of sound. They made every register in the premises . . . a microphone so that . . . they were able to hear conversations in every part of the dwelling house.[63]

Williams repeatedly referenced the spike mic, holding it up like a trial lawyer might hold up a murder weapon. This use of physical evidence helped Williams overcome the current law of searches and seizures. As Williams correctly conceded during his oral argument in *Silverman*, "the penumbra of the Fourth Amendment did not cover [seizing] conversations"[64] according to Supreme Court jurisprudence in 1960. Williams had to show that the government was engaged in more than just listening. Brandishing the spike mic gave the Justices the impression that this eavesdropping device was like a putrid insect. A Justice acknowledged that consent may have been given to the government to enter the premises, but no consent was given for "sticking *this thing* in!"[65] The presentation of physical evidence transformed permissible eavesdropping into a concrete trespass in the eyes of the Justices, resulting in Williams' first victory in the Supreme Court.

### C. *Wong Sun*: Witness Testimony in the Supreme Court

In 1962, Williams argued *Wong Sun v. United States*,[66] another Supreme Court case with the trappings of a trial lawyer. By 1962, Williams was a perennial player at the High Court, arguing his fourth case over all and his third in as many years. At issue in *Wong Sun* was whether the government agents had probable cause to enter the Laundromat of Williams' clients, James Wah Toy and Wong Sun. The Laundromat was located in San Francisco on Leavenworth Street, a 30-block main drag slashing through the city into the mouth of the San Francisco Bay.[67] The great length of Leavenworth Street embraced Williams' theory of the case, mainly that the federal agents lacked probable cause and were fishing the entire street in the hopes of finding the Laundromat in question. At oral argument, Williams noted:

> At the time that the agents went to Leavenworth Street, they had no reason to believe that the laundry . . . was the [correct] laundry . . . It was a different name, [the agents] had not [been] given the address. Leavenworth is one of the longest streets in San Francisco, presumably, in so far as this record is concerned, those agents were engaged in a systematic investigation of Chinese laundries on Leavenworth Street.[68]

Williams could strengthen his argument by demonstrating that the Laundromat was one of many on the street. The problem was that the number of laundries on Leavenworth was not included in the lower court record.[69] But Williams pushed the limits of the record, mixing in such exclamations as, "[The agents] didn't even know if they were at the right laundry!"[70] After enough innuendo, Justice Clark sought clarification: "The record shows there weren't any other laundries?"[71] Williams replied, "The record is silent on that."[72] The point was too crucial for an advocate like Williams to stop there. Even in the Supreme Court, he thought like a trial lawyer and found a witness. The night before his oral argument in *Wong Sun*, Williams telephoned a close friend who lived near Leavenworth Street: Joe DiMaggio. Evan Thomas puts it best:

> Williams had to move quickly to find someone living in San Francisco who could drive down Leavenworth Street and check for other laundries. It is not often that Hall of Fame baseball players are used as private investigators, but that night Joe DiMaggio drove up and down Leavenworth Street counting Chinese laundries for his friend Ed Williams. . . . Williams was able to say that, though the record did not disclose the number, he could assure the Court that there were many Chinese laundries on the street.[73]

Williams hammered home his theory of the case. In response to a question from Justice White, Williams said, "What I think, Mr. Justice White, is that [the agents] did what any good investigators would do. They investigated every Chinese laundry on Leavenworth Street and there are many."[74]

Except in extremely rare situations, witness testimony and new evidence are, of course, off limits in the Supreme Court. It is fitting that the greatest trial lawyer of his generation stretched the bounds of an appellate record. Evan Thomas notes: "Officially, the Court could not be bound by [Williams'] off-the-record observation . . . [b]ut [his] thoroughness may have been a factor in the Court's five-to-four decision holding that the police had violated the defendant's Fourth Amendment rights."[75] Whether appellate practice purists see it as "thoroughness" or overzealousness, it is worth noting that Williams came into the case strictly for the Supreme Court argument. Surely, the scorched-earth preparation made famous by Williams would have inserted the number of laundries into the lower court record. Undoubtedly, the phantom testimony of DiMaggio helped persuade the Court to embrace Williams' theory of the case. Delivering the opinion of the Court, Justice Brennan held that the agents were "roam[ing] the length of [the] street (some 30 blocks) in search of . . . one laundry . . . somewhere on Leavenworth Street."[76]

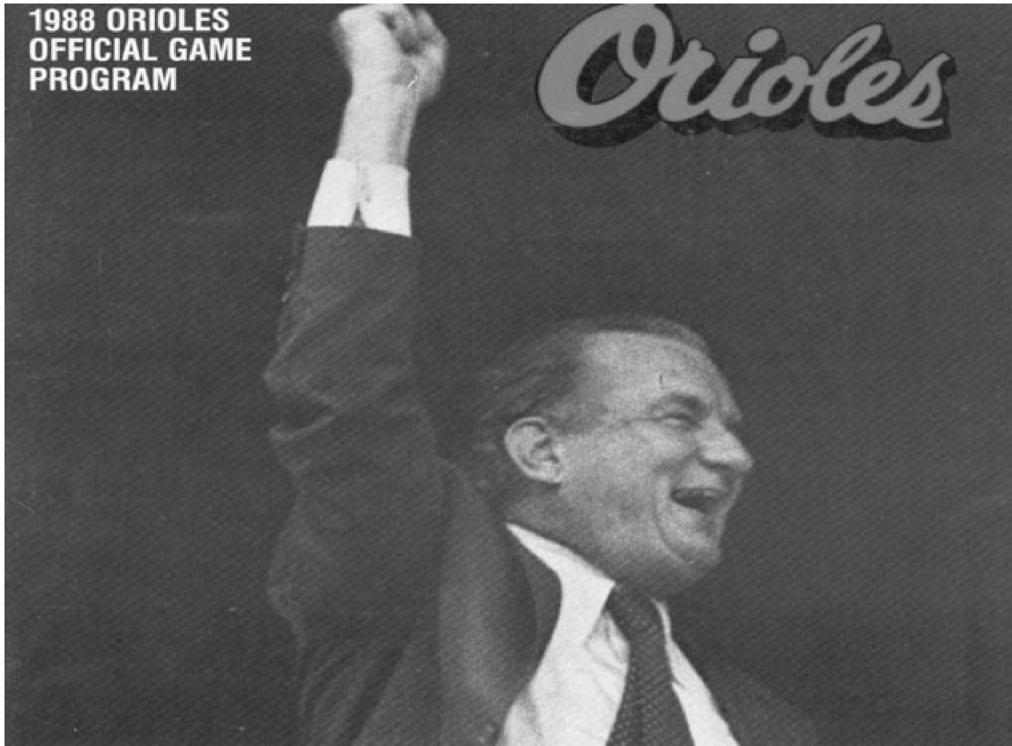
### D. *Wong Sun*: Supreme Court-Appointed Counsel

The use of witness testimony is just one way in which *Wong Sun* bears the imprint of a trial lawyer. The presence of Edward Bennett Williams was felt in the Supreme Court even in his absence. In 1983, the same year both of Williams' professional sport teams won championships,[77] the Supreme Court heard *Flanagan v. United States*,[78] a case not argued by Williams. One of the issues in the case was whether the Sixth Amendment guaranteed not only the right to counsel, but also the right to choose one's counsel. A Justice berated petitioner's counsel Edward Rubenstone for implying that an indigent defendant has the right to choose any counsel he wishes.[79] Rubenstone held strong by making an interesting and nuanced argument that there is in fact a right to choose one's counsel:

> It is a right to choose. It is a right to choose whom you want whether you are a millionaire or an indigent. . . . If an indigent goes up to Edward Bennett Williams, who charges I have no idea for his services . . . if he can convince Edward Bennett Williams that his case is interesting enough and important enough Mr. Williams may take the case. . . . The question is will his choice be accepted by the lawyer.[80]

Counsel's hypothetical was more than a flight of fancy. Twenty years earlier, Edward Bennett Williams had taken on, free of charge, the case of two indigents: James Wah Toy and Wong Sun. As it turns out, Rubenstone was correct; the facts in *Wong Sun* were "interesting enough and important enough" to pique Williams' interest. In this raid on a Chinese Laundromat on Leavenworth Street, Williams saw an opportunity to expand the safeguards of the Fourth Amendment.

Trial courts have procedures in place to appoint counsel for indigents, often employing a mixture of private lawyers and public defenders. As a criminal defense attorney,




**Williams (pictured) owned the Baltimore Orioles and the Washington Redskins.**

Williams was accustomed to court-appointing procedures, often taking on cases *pro bono*. However, it was the Supreme Court of the United States that asked Williams to take on *Wong Sun v. United States*. According to Supreme Court Rule 39 entitled "Proceedings *In Forma Pauperis*," the Supreme Court may appoint an attorney for someone unable to afford counsel "in a case in which *certiorari* has been granted."[81] In light of the competition for Supreme Court arguments among lawyers, such orphan arguments are rare.[82] Because of the rarity of court-appointed counsel at the appellate level, appointment is often considered a creature of trial courts. It seems fitting that Edward Bennett Williams would experience this rare blend of trial and appellate practice.

At the close of Williams' oral argument in *Wong Sun*, Chief Justice Warrren said:

> Mr. Williams, before you sit down, I want to express appreciation of the Court to you for having accepted this assignment and particularly for the double duty you've been compelled to make. The Court is always appreciative of the efforts of counsel and it gives us great confidence to know that members of the bar are willing to take these assignments without compensation to themselves and with great effort on their part.[83]

It is quite interesting that Warren referred to Williams' obligations as "double duty." Warren acknowledged not only the need to represent two clients, but also the need to investigate the many holes of an inadequate lower court record. If "double duty" is this opportunity to be a trial and appellate lawyer at once, Edward Bennett Williams was uniquely qualified to serve.

## II. Contributions to the Fourth Amendment

In 1947, acting in his capacity as a professor at Georgetown Law School, a young Edward Bennett Williams posed the following hypothetical on his Evidence final examination:

> A, B, and C are indicted by a Federal Grand Jury for using the mails to defraud. The telephone wires of all of these men had been tapped by F.B.I. agents and conversations which they had among themselves had been recorded. . . . A and B immediately decided to plead guilty . . . and agreed to testify for the Government against C. At the trial, A and B are offered by the Government as witnesses. Counsel for C objects to the admission of their testimony.[84]

At the end of his exam hypothetical, Williams tendentiously asked his students, "Is there any way in which counsel for C can block this evidence?"[85] For Williams, the safeguards of the Fourth Amendment were critical. In addition to teaching the Fourth Amendment at Georgetown and Yale law schools, Williams made a career out of protecting people from wrongful methods of law enforcement. Much of the only book he ever wrote, *One Man's Freedom*, was a treatment of the Fourth Amendment.[86] After Williams railed against the government's use of wiretapping during his Supreme Court oral argument in *Costello*, Justice Frankfurter said, "If I may, I'd like to encourage you to make that speech to the Senate Committee on the Judiciary."[87] Williams responded, "I don't know that I'll ever be given that opportunity, Mr. Justice Frankfurter."[88] Frankfurter quipped, "You don't wait always to be given an opportunity."[89] Williams would indeed testify before Congress, sounding the alarm about the dangers of wiretapping and eavesdropping. The materials he used to prepare for his testimony before Congress now fill several boxes at the Library of Congress.

Most importantly, Williams took the fight to the Supreme Court. He argued four Supreme Court cases dealing specifically with the Fourth Amendment.[90] Factually, these cases covered denaturalization, gambling rings, espionage, and narcotics, but they all turned on the Fourth Amendment. William was a young lawyer three years out of law school when he posed that Fourth Amendment hypothetical to his students. He would not argue his first Supreme Court case for another eight years. Today, if a student were faced with that hypothetical on a law school examination, she would undoubtedly need to cite multiple Supreme Court cases argued by Edward Bennett Williams.

### A. The *Olmstead* Chimera

The phrase "reasonable expectation of privacy" has become idiomatic in Fourth Amendment jurisprudence. The phrase is attributable to the landmark Supreme Court decision *Katz v. United States*,[91] in which the Court grappled with the Fourth Amendment rights of a man overheard making wagers in a public telephone booth. It was actually Justice Harlan's concurrence in *Katz* that used the phrase:

> An enclosed telephone booth is an area where, like a home, and unlike a field, a person has a constitutionally protected reasonable expectation of privacy. . . . My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation of privacy be one society is prepared to recognize as "reasonable."[92]

Interestingly, Justice Harlan failed to cite a single case to support this "rule that has emerged from prior decisions." Harlan peppered his concurrence with citations to Fourth Amendment cases[93] that did not employ a reasonable-expectation standard. Before *Katz*, *Olmstead v. United States* had long been the law.[94] *Olmstead* held that wiretapping did not amount to a Fourth Amendment violation because there was no tangible seizure and no actual physical invasion.[95]

In his dissent, Justice Black expressed confusion over *Katz*'s new Fourth Amendment standard:

> To support its new interpretation of the Fourth Amendment, which in effect amounts to a rewriting of the language, the Court's opinion concludes that "the underpinnings of *Olmstead* . . . have been . . . eroded by our subsequent decisions." But the only cases cited as accomplishing this "eroding" are *Silverman v. United States* and *Warden v. Hayden*.[96]

Black's dissent revealed the silent advocate in *Katz*: Edward Bennett Williams. In *Silverman*, Williams won an arguably narrow victory,[97] specifically that the Fourth Amendment governs not only seizure of tangible items, but conversations as well.[98] Yet, four years later in *Katz*, the Court seemed to be relying on *Silverman* to introduce this new "reasonable expectation of privacy" standard. Questioning the cases cited by the majority, Justice Black identified the role of Williams: "*Silverman* is an interesting choice since there the Court expressly refused to re-examine the rationale of *Olmstead* . . . although such a reexamination was strenuously urged by the petitioner's counsel."[99] At oral argument in *Silverman*, Justice Frankfurter interrupted Williams' argument: "One aspect of your argument is to overrule *Goldman* . . . in your broad approach that is a consequence . . . and [it is] necessary to overrule *Olmstead*."[100] Williams wanted the Court to abandon *Olmstead*'s requirement of a physical trespass for a Fourth Amendment violation, but he also had a duty to his client: "Mr. Justice Frankfurter, it is not necessary to overrule *Olmstead* to reverse this case. I would hope that in reversing this case, it would overrule *Olmstead*. But this [case] is distinguishable because here there was a trespass."[101] Looking back, the spike mic that Williams waved around in *Silverman* gave the Court an easy opportunity to punt and keep the *Olmstead* physical-trespass framework intact. After railing against the practice of wiretapping in *Silverman*, *Costello*, and *Wong Sun*, Williams finally slew the *Olmstead* beast. In *Katz*, the Court was finally ready to embrace Williams' argument that no physical trespass was necessary to violate the Fourth Amendment.

### B. The *Katz* Hypothetical

Edward Bennett Williams did not put forth the "reasonable expectation" standard in a carefully crafted brief or thoroughly researched law-review article. His thoughts were elicited during an impromptu hypothetical thrust upon him during oral arguments in *Silverman*. Much of Supreme Court advocacy is fielding hypothetical questions in order to establish the outer limits of a position.[102] In *The Art of Oral Advocacy*, David Frederick notes, "In Supreme Court and court of appeals cases, the court will ask questions geared toward an understanding of what the next case in the doctrinal line will look like and how the court should rule in that case."[103] Perhaps sensing the changing times of the 1960s, the Court sought Williams' thoughts on a case that would come four years down the doctrinal line. That case was *Katz v. United States*, where the Court would lay down the "reasonable expectation of privacy" standard.

In *Silverman*, a Justice asked Williams, "What about visual ascertainment? With a telescope, you can see things that you can't see with a naked eye. What about using a telescope to look into a room across the street?"[104] Williams had to carve out a line to assure the Justices that looking into windows would not become an unlawful search and seizure. Williams replied, "If it was simply a telescope by which one looked across a street and [looked] into a window, which the occupant could reasonably foresee might be used in this way because he didn't pull the shade, then I would have [no] trouble with that."[105] Williams explained his standard as protecting people from the "lifting of sound

from the room and transmitting it to places where the persons engaged in the conversation have no reason to believe that it is being transmitted."[106]

Four years later, the hypothetical window imagined by Williams and the Justices in *Silverman* would become the glass walls of the public telephone booth in *Katz*. Looking back on settled law, it is easy to view a standard as the only viable option. The language of the Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[107] Turning the standard on the citizen's expectation of privacy does not necessarily flow from the language of the Fourth Amendment or the case law before *Katz*. A standard based on the occupant's expectation was a way for Williams to draw a line for the Justices of the Supreme Court. Fielding an impromptu hypothetical, Edward Bennett Williams put forth a way to think about the Fourth Amendment that has endured for decades.

## III. *Establishment Clause Cases*

A graduate of the College of the Holy Cross and Georgetown Law,[108] Edward Bennett Williams believed in Jesuit education. His well-documented philanthropy[109] to Catholic institutions ranged from the restoration of Saint Matthew's Cathedral in Washington, D.C. to the construction of the Edward Bennett Williams Law Library at Georgetown University Law Center, still the fourth-largest law library in the United States.

In addition to financial support, Williams was an advocate in the courtroom for Jesuit and Catholic education. Williams argued *Lemon v. Kurtzman* in the Supreme Court on March 3, 1971.[110] The seminal case established what is now known as the "*Lemon* test," a three-pronged test to determine whether legislation concerning religion violates the Establishment Clause of the First Amendment.[111] Remarkably, *Lemon* was not the only Establishment Clause case Williams argued before the Supreme Court on March 3, 1971. That day, he also argued *Tilton v. Richardson*, a separate case interpreting the religion clauses of the First Amendment.[112]

*Lemon* and *Tilton* both centered around state aid given to church-related educational institutions. In *Lemon*, the Supreme Court considered the constitutionality of the Rhode Island Salary Supplement Act of 1969.[113] The Act authorized the state of Rhode Island to supplement the salaries of teachers of secular subjects in nonpublic elementary schools, mainly Catholic parochial schools. Williams represented the petitioner state education officials of Rhode Island charged with the administration of the Act. Leo Pfeffer and Milton Stanzler represented the respondent citizen group challenging the statute as a violation of the First Amendment. Opposing counsel painted a poignant picture of the apparent entanglement between government and religion. Even though the Act supplemented the salaries of only the teachers of secular subjects, Stanzler noted "each class day starts with a prayer for each of the students."[114] Stanzler also cited the following testimony of a nun: "As teachers, we by our example, particularly in our handling of the children, try to inculcate in them the same Christian attitude."

Williams could not employ the lofty constitutional rhetoric he used in the context of the Fourth Amendment. His task was to convince the Court that the Act was a practical and circumscribed method to retain qualified elementary school teachers in parochial schools. Williams countered the testimony of the nun by telling the Justices that nuns had been excluded under the "carefully circumscribed procedures"[115] of the Act:

> How many [teachers] have been declared eligible and have qualified under this Act? Only 161. Why? Because the Act is so tailored as to exclude those independent schools

**Williams supported a range of Catholic institutions in Washington, D.C., including the Edward Bennett Williams Law Library at Georgetown University Law Center, which is still the fourth-largest law library in the United States.**

> whose per pupil expenditure exceeds that of the public schools of the state of Rhode Island because indeed they don't need that kind of aid. Now how many of the parochial school teachers are qualified for this kind of aid? [Only] 342 the record shows. Why? Because the balance of them are nuns and nuns don't qualify.[116]

Williams showed his well-known sense of humor in response to a question about the nuns who taught in the Rhode Island parochial schools. A Justice asked, "I was wondering what these teaching sisters did with [their] $1800 [salary]?"[117] Williams replied, "I guess $1800 probably is just walking around money these days, Mr. Justice."[118] The Justice wondered, "Even in a convent?"[119] Williams responded, "Well, I think they are allowed to leave the convent, but I don't think they could go very far on $1800."[120] The dialogue elicited rare laughter from the courtroom.

Williams argued that the Act should pass constitutional muster under the "purpose and primary effect test."[121] Williams noted at oral argument: "This Court since it began the evolution of the purpose and primary test has found in four instances that the mere fact that an effect of a statute may be of aid or benefit to religion does not constitute a barrier to its passing constitutional muster."[122]

The problem for Williams was that the Court used *Lemon* to lay down a new Establishment Clause standard. In addition to the traditional requirements that the statute have a secular purpose and not have the primary effect of aiding or inhibiting religion, the Court added a third prong. According to the *Lemon* test, the statute must also not result in an excessive entanglement between government and religion.[123] Using the *Lemon* test, an 8–0 majority held that the Salary Supplement Act violated the Establishment Clause of the First Amendment.[124]

Williams had more success with the *Lemon* test in the other First Amendment case he argued that day. In *Tilton*, Williams represented four colleges, including the Jesuit institution Fairfield University.[125] At issue in the case was the Higher Education Facilities Act of 1963, which provided federal funding to

construct academic facilities at these church-related colleges. At oral argument in *Tilton*, a Justice stated, “Under your argument, a clergyman could be put on the federal payroll provided he was teaching physics or math. I’m just wondering how far this theory of yours goes.”[126] Williams was prepared for this question. He relied on another well-known Georgetown Law alumnus: “Well, we have clergymen on the payroll across the road here in Congress.”[127] Williams, of course, was referring to the late Father Robert Drinan, who ultimately stepped down from the U.S. Congress in 1980 at the direction of the Pope.[128] A divided 5–4 Court ultimately upheld the High Education Facilities Act,[129] finding that it passed the *Lemon* test.

The two cases Williams argued on March 3, 1971, *Lemon* and *Tilton*, started a Supreme Court conversation about religion. The decisions were published on the same day, each with citations to the other. Supplementing salaries in parochial schools was unconstitutional, but providing funds for Catholic university facilities passed constitutional muster. In his commencement address at Georgetown University Law Center in 2006, Chief Justice John Roberts compared the Supreme Court judicial process to the old tradition of weighing a hog in an English village: “They would get a log and balance it on a rock. They would put the hog at one end. Then they would pile stones on the other end until the log was perfectly balanced. Then they would try to guess the weight of the stones.”[130] Here, it was almost as if the Court weighed *Tilton* against *Lemon*, only to realize that the distinction did not settle the constitutionality of either case. The Court’s establishment of the excessive-entanglement prong of the *Lemon* test was a way to more accurately guess the weight of the stones.[131]

Edward Bennett Williams’ advocacy in *Lemon* and *Tilton* highlights his commitment to Jesuit and Catholic education. His victory in *Tilton* allowed Jesuit and Catholic universities to flourish. According to Evan Thomas, “The one institution Williams always stood ready to help was the Catholic Church.”[132] Williams represented the Catholic Church on the most important constitutional issues of the day on the highest stage.

## IV. Contest-Living

> The hell with all that book law. You can hire any lawyer to read law books, but Ed Bennett Williams has enough imagination and interest to win even when everything indicates that you won’t. Ed takes a case to win.
>
> Teamsters President Jimmy Hoffa, 1959[133]

No profile of any aspect of Edward Bennett Williams’ advocacy would be complete without taking measure of the driving force of his life: winning. Edward Bennett Williams once said, “I love contest-living . . . [M]y life in the law has been contest-living. It’s a life in which every effort ends up a victory or a defeat. It’s a difficult way to live, but it is a very exciting way.”[134] Williams described contest-living as striving with all one’s physical and spiritual strength for a worthwhile objective.[135] At the dedication of the Edward Bennett Williams Law Library in 1989, Justice Brennan noted that Williams lived by a code in which success depended only on winning.[136] Brennan was uniquely situated to gauge the success of Williams’ Supreme Court career:

> I can speak, I think, from some personal knowledge of his performance in the Supreme Court. In the Supreme Court, in my day, he argued twelve cases, many of great importance. I sat in all of those cases and he gave us a superb argument in every one of them and won most of them. Several broke new ground or clarified important constitutional principles.[137]

Charitably, Brennan noted that Williams won “most” of his cases before the High Court.

| Case | Year of Argument | Result | Party | Against Solicitor General? |
|---|---|---|---|---|
| *Bramblett* | 1955 | Lost, 6–0 | Respondent | Yes |
| *Silverman* | 1960 | Won, 9–0 | Petitioner | Yes |
| *Costello I* | 1960 | Lost, 6–2 | Petitioner | Yes |
| *Wong Sun* | 1962 | Won, 5–4 | Petitioner | Yes |
| *Costello II* | 1963 | Won, 6–2 | Petitioner | Yes |
| *Viking Theatre* | 1964 | Lost,[138] 4–4 | Petitioner | No |
| *Alderman* | 1968 | Won, 5–3 | Petitioner | Yes |
| *Ramsey* | 1970 | Lost, 5–4 | Respondent | No |
| *Monitor Patriot* | 1970 | Won, 7–2 | Petitioner | No |
| *Tilton* | 1971 | Won, 5–4 | Respondent | No |
| *Lemon* | 1971 | Lost, 8–0 | Petitioner | No |
| *Nixon* | 1977 | Lost, 5–4 | Respondent | No |

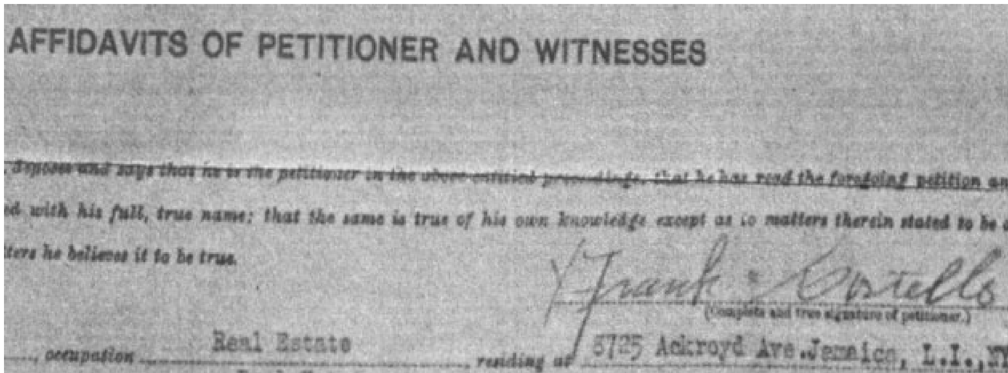
Williams actually went 6–6 before the Court, perhaps a lackluster record for the man famous for winning the impossible cases.

Williams actually presented thirteen oral arguments before the Court, making two oral arguments in consolidated cases in *Alderman v. United States*. This would bring his record to 7–6 and might explain Brennan's depiction. A win-loss record never tells the whole story in light of certain forces unique to Supreme Court advocacy. Williams suffered three losses arguing for the respondent. He also suffered three losses at the hands a sharply divided Court. The following section examines Williams' famous "contest-living," using his representation of Frank Costello as a case study. Beyond the numbers, it is clear Williams' contest-living was alive and well in the Supreme Court.

**A. You Can't Lose If You Never Give Up**

In 1925, mob boss Frank Costello, the original "Godfather,"[139] applied for United States citizenship.[140] Although his naturalization forms have faded with time, it is evident that Costello characterized his occupation as "real estate." Costello's occupation would be the subject of a host of legal battles, including multiple trips to the Supreme Court. According to the Immigration and Nationality Act of 1952 (INA), citizenship could be revoked if "procured by concealment of a material fact or by willful misrepresentation."[141] With Costello's 1925 citizenship forms in hand, it appeared the government had a slam-dunk case against the notorious bootlegger. Even Costello's personal attorney "concluded that his client had lied on his citizenship papers."[142] Faced with this seemingly impossible case, Costello turned to Edward Bennett Williams.

When the United States sought to cancel Costello's citizenship in 1956,[143] Williams brought a familiar defense: wiretapping. Finding that the government had indeed made illegal use of wiretaps, the district court dismissed the case.[144] On appeal, the Second Circuit reversed, affording the government an opportunity to re-file the case.[145] The Supreme Court granted *certiorari* and reversed the decision


AFFIDAVITS OF PETITIONER AND WITNESSES

deposes and says that he is the petitioner in the above-entitled proceedings; that he has read the foregoing petition and
with his full, true name; that the same is true of his own knowledge except as to matters therein stated to be
he believes it to be true.

Frank Costello
(Complete and true signature of petitioner.)

occupation Real Estate residing at 5725 Ackroyd Ave.Jamaica, L.I.,NY

**Williams represented mob boss Frank Costello against charges that Costello mischaracterized his profession as "real estate" on his application for United States citizenship in 1925.**

of the Second Circuit, finding that the government failed to file the required affidavit of good cause with the complaint.[146] On remand, the district court once again dismissed the case, but failed to characterize the dismissal as with or without prejudice.[147] Williams had bought some time, but the war over Costello's citizenship was just beginning.

In 1958, the government brought a new case to denaturalize Costello under the INA, claiming Costello had willfully misrepresented his occupation to obtain citizenship.[148] The government highlighted Costello's prior testimony before a grand jury in the Appellate Division of the New York supreme court:

> Q: You were in the bootlegging business, weren't you?
> A: I was.
> Q: You smuggled whiskey into the country?
> A: Yes.
> Q: Your income was pretty heavy in those years, wasn't it?
> A: Well, it was profitable.[149]

Williams threw the kitchen sink at the government, raising defenses of *res judicata*, laches, estoppel, and illegal wiretapping. The judge dismissed each defense seriatim.[150] The district court judge mused, "Not even Costello's ingeniously alert counsel went so far as to contend that the fact that Costello's wires had been tapped gave him immunity from past illegal activities."[151] The government presented overwhelming evidence, and the district court ordered the revocation of Costello's citizenship.[152]

On December 12, 1960, Edward Bennett Williams returned to argue Costello's case in the High Court, just seven days after he argued *Silverman*. Williams summarized the issue at oral argument:

> There were a number of grounds alleged for the revocation and cancellation of citizenship; the one that is germane on this petition is that [Frank Costello] is alleged to have willfully misrepresented his occupation in his . . . application for citizenship in that he stated that his occupation was real estate when in fact the government contends he was a bootlegger.[153]

Williams marshaled several arguments in Costello's defense, but met an eerily cold Bench. The tea leaves of the oral argument did not read well for Williams. He attempted to argue that Costello was "in truth and fact in the real estate business," because he was the president of Koslo Realty, a company with extensive real estate holdings.[154] However, Justice Stewart, who would eventually side with the 6–2 majority against Costello, interrupted Williams: "[Costello] is alleged to have made

these material misrepresentations on three different occasions. When were they?"[155] The question sidetracked Williams' argument. It showed that the Justices did not think it passed the straight-face test to characterize Costello's occupation as real estate. Justice Brennan held in the opinion of the Court: "However occupation is defined, whether in terms of primary source income, expenditure of time and effort, or how the petitioner himself viewed his occupation, we reach the conclusion that real estate was not his occupation and that he was in fact a large-scale bootlegger."[156]

As a last-ditch effort, Williams mounted a familiar defense: "Wiretaps were extensively used. There were innumerable wiretaps. These wiretaps clearly vitiated the alleged admissions . . . by the defendant. [The] evidence was infected fatally with wiretaps."[157] But Williams was reduced to a voice crying out in the wilderness. The Court found that "any connection between the wiretaps and the admissions was too attenuated to require the exclusion of the admissions from evidence."[158]

In 1961, the Supreme Court delivered its opinion upholding the revocation of Costello's citizenship. It was not long before the Immigration and Naturalization Service provided notice of Costello's deportation to Italy. After years of litigation, it looked as though Williams had lost the Costello war. But in 1963, the man who lived for the contest made one last stand, appealing Costello's deportation all the way back to the Supreme Court.[159]

*Costello v. Immigration and Naturalization Service* came down to a matter of statutory interpretation. The INA provided that "any alien in the United States shall upon the order of the Attorney General, be deported who at any time after entry is convicted of two crimes involving moral turpitude."[160] It was undisputed that Costello had been found guilty of two separate offenses of income tax evasion in 1954.[161] At oral argument, Williams argued:

> It is our contention that an alien under the statute is not deportable for a conviction or convictions during the time he enjoyed the status of citizenship. It is our position that there must be chronological coincidence between alienage and conviction under the language of the statute.[162]

One of the Justices quickly reminded Williams of their holding three years earlier in *Costello v. United States*, namely that Costello had obtained citizenship fraudulently.[163] Justice Goldberg interrupted Williams' oral argument to point out that Costello was simply trying to profit from his fraud. Similarly, Assistant Solicitor General Wayne Barnett emphasized, "The only question, as Justice Goldberg noted, is whether the statute should be less harshly applied to the petitioner because he not only committed two crimes, but also committed a fraud to obtain a naturalization certificate which has been revoked for that reason."[164] In response to this damning characterization, Williams emphasized:

> We don't argue that he should profit from his own fraud . . . but we do argue that no penalty may be constitutionally imposed on him, the penalty of banishment or exile, without notice . . . and the construction that the government contends for brings about that precise result. . . . If he had known that he faced banishment or exile, he could have pled guilty to one count [in 1954] and avoided the consequences of a dual conviction.[165]

Williams also noted what the meaning of "is" is. Williams focused on the plain language of the statute: "any alien . . . shall be deported . . . who *is* convicted of two crimes."[166] The present tense of the verb, Williams argued, suggested that the convictions had to coincide with alien status.

The Court sided with Williams in a 6–2 majority, reversing Costello's deportation order.[167] The Court concluded that Costello's convictions occurred while he was a naturalized citizen and the deportation statute applied

to aliens only.[168] After almost a decade of litigation and multiple trips to the Supreme Court, Edward Bennett Williams won the Costello war. Looking at the numbers alone, Williams was 1–1 before the Court in his representation of Frank Costello. Beyond the numbers, as Robert Pack notes, "Williams and Costello won the only decision that counted—the last one."[169] Costello would spend the remaining decade of his life in New York City.[170] Even in the Supreme Court, Edward Bennett Williams won the impossible cases.

## Conclusion

Edward Bennett Williams often quoted the story of Susanna from Chapter 13 of the Book of Daniel.[171] As the story goes, two elders accosted the virtuous Susanna, threatening to tell the town that she was promiscuous if she did not submit to their desires.[172] Daniel exonerated Susanna by questioning her accusers separately, exposing holes in their stories. Williams referred to the story of Susanna as the "first transcript made of a cross-examination in all history."[173] Reviewing the most recent biography of Williams, Alan Dershowitz wrote: "Writing critically of a man who so recently died is, in effect, a denial of literary due process and of the right to confront one's accuser."[174] Unearthing a remarkable Supreme Court advocacy record is perhaps a small piece of Williams' literary due process.

Archibald Cox's biographer, Ken Gormley, once ruminated over the consequences of learning too much about great men:

> Many biographers face the harsh realization that they have learned so much about their subjects that they have grown to disrespect them or even to hold them in disdain because they discover that much of the public persona is a façade. I had the unusual privilege of discovering the opposite.[175]

Similarly, the deeper I researched the man known as the greatest lawyer of his generation, the more I found inspiration in his career. Williams had the unique ability to transition

**Williams presented thirteen oral arguments before the Supreme Court between 1955 and 1977.**

between trial and appellate practice. His trial skills infused his Supreme Court arguments with a unique energy, and his success as a Supreme Court advocate lent substantial credibility to the criminal defense bar. The safeguards guaranteed by the Fourth Amendment attest to a remarkable career before the Court. The Edward Bennett Williams Law Library at Georgetown University memorializes not just his philanthropy, but also his willingness to defend Catholic education on the highest stage.

Williams shared countless insights about Supreme Court advocacy in the classroom, inspiring scores of Georgetown and Yale law students. In 1971, as a student in Edward Bennett Williams' Constitutional Litigation Seminar at Yale Law School, a young Hillary Rodham attached a hand-written note to her final paper:

> After our first meeting, I thought that you possibly accepted Dean Goldstein's offer to teach again both to discover what if any changes had occurred in law schools and students and to share your convictions about the profession with those who perhaps could not decide if the life's commitment was a valid one. If the latter hypothesis were a factor in your decision at all, then I especially want to thank you.[176]

One man's contributions in twelve cases before the Supreme Court give testimony to the promise that a life in the law is a commitment worth making.

## ENDNOTES

[1] Audio tape: Dedication of Edward Bennett Williams Law Library (1989) (on file with the Georgetown University Law Center archives) [hereinafter "Library Dedication"].
[2] Audio tape: Edward Bennett Williams' second Ryan Lecture at Georgetown University Law Center (1981) (on file with the Georgetown University Law Center archives).
[3] *Id*.
[4] Arthur Schlesinger, Jr., "J.F.K. F.D.R. Y.O.U.?," *N.Y. Times*, Apr. 5, 1975.
[5] *Id*.
[6] Letter from John Kennedy to Arthur Schlesinger, Jr. (Apr. 5, 1975) (on file with the Library of Congress).
[7] *Id*.
[8] 401 U.S. 265 (1971).
[9] Audio tape: Oral Argument, *Monitor Patriot*, 401 U.S. 265 (1971) (No. 62) (on file with the National Archives).
[10] Evan W. Thomas, **The Man to See** 171–77 (Simon & Schuster 1992).
[11] Paul O'Neil, "Star Attorney for the Defense: Edward Bennett Williams, a Mouthpiece in the Great Tradition, Guards Hoffa and Others from the Law's Clutches," *Life Magazine*, June 22, 1959, at 110.
[12] O'Neil, *supra* note 11.
[13] 403 U.S. 713 (1971).
[14] "Library Dedication," *supra* note 1 (address of Joseph A. Califano, Jr.).
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] Christopher A. Goelz & Meredith J. Watts, **California Practice Guide: Federal Ninth Circuit Civil Appellate Practice** 4 (2008).
[20] "Defender for the Unpopular, Lawyer Edward Bennett Williams," *Life Magazine*, Oct. 21, 1957 [hereinafter "Defender for the Unpopular"].
[21] *Id.*
[22] William O. Douglas, **The Court Years 1939–1975: The Autobiography of William O. Douglas** 186 (Random House 1980).
[23] 348 U.S. 503 (1955).
[24] "High Court Meets in Bramblett Case, Finds Defendant and Counsel Absent," *Wash. Post*, Feb. 8, 1955 [hereinafter "Counsel Absent"].
[25] *Id.*
[26] *Bramblett*, 348 U.S. at 504.
[27] "Counsel Absent," *supra* note 24.
[28] Robert Pack, **Edward Bennett Williams for the Defense** 368 (Harper & Row 1983).
[29] "Counsel Absent," *supra* note 24.
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Bramblett*, 348 U.S. at 510 (Warren, C.J., Burton, J., and Harlan, J., abstaining).
[35] Pack, *supra* note 28, at 368.
[36] *Id.*
[37] *Id.*
[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] Earl Warren served as Chief Justice from 1953 to 1969, presiding over six of Williams' arguments before the Court.

[42]Edward Bennett Williams, "Address," 62 *Cal. L. Rev.* 5, 8–9 (1976).
[43]*Id.* at 9.
[44]Thomas, *supra* note 10, at 22.
[45]Seven years after his death, Williams finally got his victory in *Bramblett*. In 1995, the Supreme Court reversed *Bramblett*, embracing the argument Williams had made forty years before. *Hubbard v. United States*, 514 U.S. 695 (1995).
[46]"Defender for the Unpopular," *supra* note 20.
[47]Jason L. Honigman, "The Art of Appellate Advocacy," 64 *Mich. L. Rev.* 1055, 1055 (1966).
[48]*Id.*
[49]Audio tape: Oral Argument, *Wong Sun v. United States*, 371 U.S. 471 (1963) (No. 36) (on file with the National Archives).
[50]435 U.S. 589, 589 (1978).
[51]Audio tape: Oral Argument, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978) (No. 76-944) (on file with the National Archives).
[52]*Id.*
[53]Thomas, *supra* note 10, at 175.
[54]Audio tape: Oral Argument, *Costello v. United States*, 365 U.S. 265 (1961) (No. 59).
[55]*Id.*
[56]365 U.S. 505 (1961).
[57]*Id.* at 506.
[58]Audio tape: Oral Argument, *Silverman v. United States*, 365 U.S. 505 (1961) (No. 59) (on file with the National Archives).
[59]*Id.*
[60]*Id.*
[61]*Id.*
[62]*Id.*
[63]*Id.*
[64]*Id.*
[65]*Id.*
[66]371 U.S. 471 (1963).
[67]*Id.* at 480.
[68]*Wong Sun* Oral Argument, *supra* note 49.
[69]Williams did not represent Wong Sun and James Wah Toy at the trial level. He parachuted in for the Supreme Court argument.
[70]*Wong Sun* Oral Argument, *supra* note 49.
[71]*Id.*
[72]*Id.*
[73]Thomas, *supra* note 10, at 175.
[74]*Wong Sun* Oral Argument, *supra* note 49.
[75]Thomas, *supra* note 10, at 175.
[76]*Wong Sun*, 371 U.S. at 480–81.
[77]In 1983, the Washington Redskins won the Super Bowl and the Baltimore Orioles won the World Series.
[78]465 U.S. 259 (1984).
[79]Transcript of Oral Argument, *Flanagan*, 465 U.S. 259 (No. 82-374). Available at http://www.oyez.org/cases/1980-1989/1983/1983_82_374/argument.
[80]*Id.*
[81]*Sup. Ct. R.* 39.
[82]Tony Mauro, "Supreme Court Justices Turn to Ex-Clerks for Unusual Role," *Legal Times*, Apr. 14, 2008. Before this Term, the Supreme Court had not appointed counsel for five consecutive Terms. However, it appointed counsel for two cases this year. Interestingly, in 1989, Chief Justice John Roberts' first Supreme Court argument came as appointed counsel. *Id.*
[83]*Wong Sun* Oral Argument, *supra* note 49.
[84]Edward Bennett Williams' Evidence Final Examination at Georgetown University Law Center, Second Session Summer School, Aug. 28, 1947 (on file with the Library of Congress).
[85]*Id.*
[86]Edward Bennett Williams, **One Man's Freedom** 72–121 (Atheneum 1962).
[87]*Costello* Oral Argument, *supra* note 54.
[88]*Id.*
[89]*Id.*
[90]*Costello v. United States,* 365 U.S. 265 (1961); *Silverman v. United States*, 365 U.S. 505 (1961); *Wong Sun v. United States,* 371 U.S. 471 (1963); *Alderman v. United States*, 394 U.S. 165 (1969).
[91]*Katz v. United States*, 389 U.S. 347 (1967).
[92]*Id.* at 360 (Harlan, J., concurring).
[93]*Weeks v. United States*, 232 U.S. 383 (1914); *Hester v. United States*, 265 U.S. 57 (1924).
[94]277 U.S. 438 (1928).
[95]*Olmstead*, 277 U.S. at 466.
[96]*Katz*, 389 U.S. at 370 (Black, J., dissenting).
[97]With Williams on the briefs was Agnes Neill. The two married in 1960.
[98]*Silverman*, 365 U.S. at 512.
[99]*Katz*, 389 U.S. at 370 (Black, J., dissenting).
[100]*Silverman* Oral Argument, *supra* note 58.
[101]*Id.*
[102]David Frederick, **The Art of Oral Advocacy** 59 (West Group 2003).
[103]*Id.*
[104]*Silverman* Oral Argument, *supra* note 58.
[105]*Id.*
[106]*Id.*
[107]U.S. Const. Amend. IV.
[108]Pack, *supra* note 28, at 116–17.
[109]Thomas, *supra* note 10, at 388 ("Williams was truly generous to Catholic charities. He gave away about ten percent of his salary . . . and he often gave anonymously.").
[110]403 U.S. 602 (1971).
[111]403 U.S. 602.
[112]394 U.S. 165 (1968). This was not the first time the Court heard two oral arguments from Edward Bennett Williams in one day. He presented two oral arguments in one day in cases consolidated into *Alderman v. United States*, 394 U.S. 165 (1969).

[113] *Lemon*, 403 U.S. at 607.
[114] Audio tape: Oral Argument, *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (No. 89) (on file with the National Archives).
[115] *Id.*
[116] *Id.*
[117] *Id.*
[118] *Id.*
[119] *Id.*
[120] *Id.*
[121] *Id.*
[122] *Id.*
[123] *Lemon*, 403 U.S. at 614.
[124] *Lemon*, 403 U.S. at 614.
[125] *Tilton v. Richardson*, 403 U.S. 672 (1971).
[126] Audio tape: Oral Argument, *Tilton v. Richardson*, 403 U.S. 672 (1971) (No. 153) (on file with the National Archives).
[127] *Id.*
[128] Tony Mauro, "In Fond Remembrance of Father Drinan," *Legal Times*, Feb. 5, 2007.
[129] The Court struck down a clause of the Act requiring that the facilities be used for secular purposes for only twenty years.
[130] John Roberts, Chief Justice of the United States, Commencement Address at the Georgetown University Law Center (May 21, 2006).
[131] Though the *Lemon* test remains the standard, Justice Scalia once wrote: "Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being killed and buried, *Lemon* stalks our Establishment Clause once again frightening the little children." *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993).
[132] Thomas, *supra* note 10, at 258–59.
[133] O'Neil, *supra* note 11. Williams represented the Teamsters and Jimmy Hoffa in just shy of twenty lawsuits, never losing a single case. Joseph Califano, "In Memoriam: Edward Bennett Williams," 77 *Geo. L. J.* 1, 2 (1988).
[134] Marc Fisher, "Obituaries: Edward B. Williams, Famous and Powerful Lawyer, Sports Figure," *L.A. Times*, Aug. 14, 1988, at 39.
[135] "Library Dedication," *supra* note 1 (address of Vince Fuller).
[136] *Id.* (address of Justice Brennan).
[137] *Id.*
[138] Without writing an opinion, the Supreme Court affirmed the judgment of the Third Circuit by an equally divided Court.
[139] Pack, *supra* note 28, at 275.
[140] *Costello*, 365 U.S. at 267.
[141] *Costello*, 365 U.S. at 267.
[142] Pack, *supra* note 28, at 263.
[143] *United States v. Costello,* 145 F. Supp. 892 (D.N.Y. 1956).
[144] *Costello*, 145 F. Supp. at 895.
[145] *Matles v. United States*, 356 U.S. 256, 256 (1958).
[146] *Matles*, 356 U.S. 256.
[147] Pack, *supra* note 28, at 272.
[148] *United States v. Costello*, 171 F. Supp. 10 (1959).
[149] *Costello*, 171 F. Supp. at 17.
[150] *Costello*, 171 F. Supp. at 18–19.
[151] *Costello*, 171 F. Supp. at 35.
[152] *Costello*, 171 F. Supp. at 35.
[153] *Costello* Oral Argument, *supra* note 54.
[154] *Id.*
[155] *Id.*
[156] Costello, 365 U.S. at 272.
[157] *Costello* Oral Argument, *supra* note 54.
[158] *Costello*, 365 U.S. at 280.
[159] *Costello v. Immigration and Naturalization Service* ("Costello II"), 376 U.S. 120 (1964).
[160] Immigration and Nationality Act § 241(a), 8 U.S.C.A. § 1251(a)(4) (1952).
[161] *Costello II*, 376 U.S. at 121.
[162] Audio tape: Oral Argument, *Costello v. Immigration and Naturalization Service* ("Costello II"), 376 U.S. 120 (1964) (No. 83) (on file with the National Archives).
[163] *Id.*
[164] *Id.*
[165] *Id.*
[166] Immigration and Nationality Act § 241(a), 8 U.S.C.A. § 1251(a)(4) (1952).
[167] *Costello II*, 376 U.S. at 122.
[168] *Costello II*, 376 U.S. at 123.
[169] Pack, *supra* note 28, at 274.
[170] *Id.*
[171] Williams, *supra* note 86, at 186.
[172] *Id.* at 186–88.
[173] *Id.* at 190.
[174] Alan Dershowitz, "Winning Was Everything," *N.Y. Times*, Dec. 15, 1991.
[175] Ken Gormley, "In Memoriam: Archibald Cox," 118 *Harv. L. Rev.* 11 (2004).
[176] Letter from Hillary Rodham to Edward Bennett Williams (May 30, 1971) (on file with the Library of Congress).