



## The Constitutional Role of the State Solicitor General

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**[00:00:00] Tanaya Tauber:** Welcome to Live at the National Constitution Center, the podcast sharing live constitutional conversations and debates hosted by the center in person and online. I'm Tanaya Tauber, the senior director of town hall programs. In this episode, we explore the history of the office of the solicitor general, the role of state solicitors in litigating cases before the Supreme Court, and some of the landmark cases they have litigated.

**[00:00:30] Tanaya Tauber:** Joining the conversation is Dan Schweitzer, director and chief counsel of the Center for Supreme Court Advocacy at the National Association of Attorneys General, Lindsay See, solicitor general of West Virginia, and Barbara Underwood, solicitor general of New York. Jeffrey Rosen, president and CEO of the National Constitution Center, moderates.

**[00:00:54] Tanaya Tauber:** This program is presented in partnership with the Center for Excellence in Governance at the National Association of Attorneys General. Here's Jeff to get the conversation started.

**[00:01:05] Jeffrey Rosen:** Thank you and welcome, Dan Schweitzer, Gen. See, and Gen. Underwood. Dan, let's begin with you. You have this important role helping state solicitors general, whose role has grown significantly, both over the past 100 years and recently since the 1980s, the number of cases have increased, and there've been landmark cases, including Brown and Gideon, involving state AGs. Tell us about the evolving role of the state AG in American history.

**[00:01:36] Dan Schweitzer:** Sure, thank you, Jeff, and it's a real honor to be here today, with the National Constitution Center. State attorneys general offices have been players in many of the major cases throughout American history, and certainly dating back 50 plus years when you look at Brown v. Board of Education, Gideon v. Wainwright, Miranda, Roe v. Wade, through the present. When you

look back at who argued cases for the states, dating back 50 years or further, most of the time it was an assistant attorney general. Every once in a while it was an attorney general. And the real trend that we're focusing on today is the growth of the solicitor general position, which is the person who is the, appointed to be the top appellate lawyer in the state.

**[00:02:30] Dan Schweitzer:** As far as I can tell, the first solicitor general was in New York and created by statute in 1909, and Barbara, Solicitor General Underwood, can tell me if I'm wrong on that. But it took a while for the position to take hold. In the late '80s there were only about eight states that had a solicitor general. By the early 2000s, it was about half the states, about 25 states had a solicitor general. And today we're up to 44 states, plus DC, Puerto Rico, and the Virgin Islands have a solicitor general.

**[00:03:03] Dan Schweitzer:** And so when you look at who argues for the states in the Supreme Court today, it is by and large solicitors general and deputy solicitors general. So last term, 22 of the 24 cases argued by state attorneys were argued by SGs or deputy SGs. In this term, all but two of the cases argued by states attorney general offices will be argued by solicitors general and deputy solicitors general. And again, they're some of the most important cases that the court is hearing, and Solicitors General Underwood and See will talk about some of them.

**[00:03:38] Jeffrey Rosen:** Thanks for helping us understand the growth of this important office and the number of cases that SGs are now arguing before the court. Gen. Underwood, tell us about the current role of the solicitor general. You've drawn an important distinction between defensive and offensive cases brought by SGs. Tell us about that and some of the very important cases that you've brought yourself.

**[00:04:03] Barbara Underwood:** Well, when I was looking over the cases that I have argued, I realized that they represent several different types of cases. A classic long-time role has been to defend state laws when somebody challenges a state law as violative of either the federal Constitution or in conflict, preempted by, a federal law in some way, then it falls to the attorney general and, in the high courts at least, the solicitor general, to defend those laws. And the recent Bruen case was really an example, it was a very high-stakes case, but it was an example of a very standard kind of case, that is somebody challenges a state law as unconstitutional, and the attorney general defends that state, is charged with defending those laws.

**[00:04:59] Barbara Underwood:** And I mean, we've had other cases in the Supreme Court that nobody paid the slightest bit of attention to, but they somehow got to the Supreme Court, and there was a challenge to the constitutionality of the state law, and it needs to be defended.

**[00:05:14] Barbara Underwood:** And then the related kind of case would be challenging, basically challenging state enforcement authority. It's also defensive in that way, that is, somebody says the state isn't entitled to bring such and such a kind of an action. I had a case like that a few years ago in which the claim was that the state couldn't enforce anti-discrimination and fair lending laws against nationally chartered banks, and this was actually before the world was quite so fractured, and we had an amicus brief that I think may have been a 50 state amicus brief of, on the general proposition that all the states have an interest in defending their authority to enforce their own laws, even if they have different views about what those laws should be and when they should be enforced. And we successfully defended our authority to enforce these laws against nationally chartered banks.

**[00:06:22] Barbara Underwood:** And then there are the cases that are, I would say, affirmative in nature, in which the state is asserting its interest and challenging something else, quite commonly a federal action, because it would be rare that a action by another state was the occasion for a challenge by a state. Could happen, but well, it can happen, we have the original jurisdiction, we just had an argument in a dispute between two states over a compact. But that's unusual.

**[00:07:00] Barbara Underwood:** It's not so unusual these days for states, a coalition of states, to challenge a federal administrative or statutory action as unconstitutional and infringing in some way on the interests of the state, and it's really been happening, I would say, more and more, and I think it has led to concern on the part of some justices—I don't know if it'll be enough to make a doctrinal difference—but about whether every controversial action taken by the attorney general will be the occasion of a lawsuit by the group of states that doesn't like it, and a defense by the group of states that does like it. Sometimes it seems that way.

**[00:07:56] Barbara Underwood:** There's still a requirement that the state not just have a preference about the law but have some impact on its operations and its interests, but courts have recognized fairly slight impacts and interests, and I think if there's any pushback against this at all, it will be to perhaps insist on more substantial interests to add up to state standing. We tend not to get deeply involved

in challenges to other states' standing, because we could have our own, any state could potentially be on either side of this issue, and so [laughs] it's hard to develop general principles. That's for the court [laughs] to develop, I guess.

**[00:08:51] Barbara Underwood:** So those are the cases, I think, that have increased in number, the cases in which states, and quite often a coalition of states, have sued to enjoin the enforcement of a federal regulation or a federal statute or some combination. And then the federal government defends, and another coalition of states either intervenes or files as amicus to support the defense. I guess those are the major categories, I would say, of state litigation in the Supreme Court. There's quite a lot more of it than I ever imagined there would be when I first took this job. I have done a fair amount of Supreme Court litigation in the federal SG's office, but I didn't really think that that was gonna be a major portion of my work in the state solicitor general's office, and lo and behold it turns out that it is. [laughs]

**[00:09:52] Jeffrey Rosen:** It is fascinating, you have this very unique perspective in having served as federal SG and state SG, and comparing the roles is extremely illuminating. Gen. See, West Virginia has a model where county prosecutors handle trial or criminal indictments, and there are different ways that states approach these cases. Tell us about those and the different cases you've been involved with at the Supreme Court.

**[00:10:14] Lindsay See:** Absolutely, and really happy to get to be here this afternoon as well. One of the things that I learned when I started out is there's a lotta similarities in state SG offices, but a lot of differences based on different state laws and how we set up our structure. So in West Virginia, for instance, our local county prosecutors are the only ones who have authority for criminal cases, to bring charges and to try cases. That's not something the attorney general's office is part of. So that is all county-specific.

**[00:10:44] Lindsay See:** But then, once something goes on appeal, then all of those cases shift from the county prosecutors over to the AG's office. So we have a model that allows for the sort of local control and accountability and discretion of the original charges, but then we're able to have the AG's office, who hopefully, if we're doing our job right, we can be looking at all of those interests across the state and trying to advocate for a strong and consistent position in our state supreme court. So that cooperation on the county level, on the state level is something that

I've really enjoyed, and seeing the differences in how different states do that, that's not true for everyone.

**[00:11:17] Lindsay See:** I think that piece of the state work that we do is really important. That's a majority of what we do, that's where most of our cases come from, and I think there's a huge importance to that sort of work. And I agree with Gen. Underwood, it's almost surprising how much of that takes you to the federal level, and on the Supreme Court level. We haven't had any criminal cases yet since I have been here, although there are some pending cert petitions, that have taken us up to the Supreme Court.

**[00:11:44] Lindsay See:** But on the couple of cases where I've had the opportunity to argue there, it really illustrates this defensive-offensive distinction that Gen. Underwood was mentioning that I think is a really helpful way to think about what we do as state SGs. A lot of what we do are cases that come up, either they're a criminal case and you're defending it as a state. All of us, to different degrees, represent different clients, our state agencies and elected officials, so when they're sued or involved in litigation, whenever it gets to the appellate level and specifically the Supreme Court level, that's when my group will get involved.

**[00:12:18] Lindsay See:** So the first case I was involved in, it's one of those where nobody really pays attention to it, which was helpful for, you know, set expectations for your first time in front of the court. Was obviously important to us. There was a tax case, and so we worked really closely with our tax and revenue department in defending them and made the best argument we could there. So that was definitely in this sort of defensive bucket.

**[00:12:39] Lindsay See:** West Virginia v. EPA was an example of the opposite approach. That's one where the state as the state was involved, and so the attorney general of West Virginia and the other states on our side of the coalition made the affirmative choice to sue EPA in that case and to instigate that litigation. It's also an example, as Gen. Underwood was mentioning, we have a lot of these cases where you have coalitions of states on both sides. New York led really strongly the coalition of states on the other side, and something that I think can get lost, but I've really appreciated in this role, is even when we're working with very important, deeply controversial and sensitive cases like this, I really value the professionalism of my colleagues on both sides of that coalition. I really enjoyed the opportunity to get to work with New York, with Gen. Underwood, with her former deputy Steven

Wu was really involved there, too. So to see the quality of the litigation, I think, matters.

**[00:13:34] Lindsay See:** And I think that goes back to the last point Gen. Underwood was making. I really wanna emphasize this idea about the importance of the state's role, and I think the responsibility for those of us who are in these sort of positions to try to use that role well. Being here on the state side has really given me a strong appreciation for the importance of the state voice, the unique interest and perspectives we can bring to the court. I had practiced in DC, and it was fantastic experience, and I have great respect for the federal solicitor general's office, it's a really important role. And I think sometimes there's this idea, there's the nickname of the federal SG is the 10th justice. And being in this position, I think it's really important to make sure that's not the only voice we're hearing, that it's not just the federal perspective, it's the state perspective, too.

**[00:14:22] Lindsay See:** So I think that's a really important perspective we can give the court, but I also agree that I think especially when we do have a rise of cases where it can just look like everybody is gonna sort of line up in the traditional, expected categories, I would hate to see that role diluted in any way. And so I think there's a real opportunity for responsibility and using that important voice well. And so I'm certainly watching to see where the court will go when it comes to doctrines like state standing, but I would hate to see any of those concerns undermine the importance to make sure that we're able to have the voice and perspectives of the states in these critical cases.

**[00:15:02] Jeffrey Rosen:** Thank you for emphasizing that crucially important voice that the states have, and giving us examples of how you've exercised it. Dan, what's your sense of how the states handle criminal matters from a national perspective, which is an issue that's come up. In many states the AG handles direct appeals all the way up to the Supreme Court, and then there are hybrid states. What are different states' approach in this regard?

**[00:15:26] Dan Schweitzer:** Sure. I would put the, maybe parroting Solicitor General Underwood, put it into three buckets. There are states like West Virginia where they handle the direct appeals of criminal cases. And I think the majority of states do it that way, where they handle direct appeals and will take it up to the Supreme Court if necessary. There are states that don't handle any direct appeals of criminal law matters, and Gen. Underwood can correct me, I think New York

largely falls in that category, works with local district attorney's offices, or state attorney's offices that handle their appeals and take them up.

**[00:16:13] Dan Schweitzer:** And then there are some states, like Illinois, where for most of the state, the attorney general's office handle the direct appeals, but for the largest county, like Cook County, they handle typically their direct appeals to the Supreme Court.

**[00:16:31] Barbara Underwood:** If I could just make a factual observation here, unlike, I guess, West Virginia, the attorney general has a small but real original criminal jurisdiction. So we handle our own direct appeals in our own criminal cases, but we do not handle direct appeals in cases that originate in the district attorney's offices, they handle those cases all the way up, and those are the bulk of the appeals. The criminal work that we do, we do a lot of federal habeas corpus work, because those are nominally suits against state officers, and we do the defense of state officers.

**[00:17:16] Dan Schweitzer:** You jumped the gun on me, I was just gonna add that, although not technically criminal cases, habeas corpus is an important aspect of the criminal justice system, and state attorney general offices by and large handle habeas corpus cases up through the system into the Supreme Court. The role of the solicitor generals in handling criminal matters varies greatly from state to state. In some states they have a criminal appellate unit, in most states there's a criminal appellate unit that handles most of the criminal appeals, and the state solicitor general doesn't get too involved in them, except for exceptional cases, until it hits the Supreme Court. And then at the Supreme Court level, the solicitor general unit will take over. That's the most typical model, though there are always variations, 'cause that's what happens when you have 50 states and they all do it a uniquely different way.

**[00:18:13] Lindsay See:** And I guess I'd jump in there, one of the other differences on that point, there's cases that, in the solicitor general group here, that we handle entirely. From beginning to end, it's our case, it's our brief, it's our argument. A lot of what we do is working closely with other attorneys in the AG's office as well. Given the volume of appeals, it's my role to oversee all of them, but my team can't do all of that. So a lot of it is working with other groups and divisions. So criminal is a really good example, we have a division who focuses exclusively on that. But my team works really closely with them too in terms of consulting and advising on

cases, so I think that's another way where you'll see some similarities and differences between offices.

**[00:18:52] Jeffrey Rosen:** That is great, and one of our audience members, Paul Summers, thanks you for providing this discussion about solicitor generals and appellate advocacy. Thanks for that, Paul. Gen. Underwood, you've argued a remarkable range of cases before the court, both at the federal and state level. Maybe tell us specifically about one or two of the most notable ones, including Bruen, a case where New York was defending its gun regulations, and the Trump case, where New York brought a lawsuit against President Trump?

**[00:19:29] Barbara Underwood:** Well there were two, the two census cases, actually. I think of them as together. One was called Department of Commerce against New York, I guess, and the other was Trump against New York. But they were both challenges to various actions in regard to the census. Let me start with Bruen, because unfortunately, Kevin Bruen, who was at the time of the case the superintendent of state police, apparently has now got his place in history [laughs] on that opinion.

**[00:20:03] Barbara Underwood:** That case was a challenge, as, I guess, everybody knows, a challenge to a particular provision in New York's gun licensing laws that had been, actually, at various times in the 20th century, quite widespread, but at the time of litigation, it had been repealed by many, many states, and there were only about s- depends on how you count, but let's say seven states that had it. And that was a requirement that in order to get a license to carry a firearm in public, it was necessary to establish proper cause, which was something beyond just, "I want to carry a gun for my own protection," there had to be some specific reason why, distinguishing you from everyone else.

**[00:20:58] Barbara Underwood:** And the Court struck that down. It was clear from prior cases in this area that history was going to be important, and so preparing for this case involved mastering the law and the controversies about, I don't know, four or five different periods of history, ranging from 14th century England to precolonial and colonial period in the United States, to the period just after the framing of the Second Amendment of the Constitution, to the period in American history, really Reconstruction, the period after the 14th Amendment applied the Second Amendment to the states, and every single one of those periods has now been the subject of a great deal of historical research, still incomplete, really, because until 10 years ago this was not a highly-researched area. And so, as



you would expect in any new area, even one that wasn't so politically charged, different historians have different views of the available evidence, and the available evidence is also quite limited. I mean, enforcement practice with respect to prosecutions under what were mostly local laws is not, doesn't leave a lot of traces centuries later. So I felt as if I needed to be prepared to talk about, intelligently, about each one of those periods, and defend the relevance of whatever we had to whatever the rule was gonna turn out to be.

**[00:22:49] Barbara Underwood:** The biggest surprise to me in the argument was that it seemed as if the justices mostly wanted to talk about something that wasn't at issue in the case at all, which is, it's gonna be the next case, was the regimen of designating certain places as sensitive places. You know, Heller had said there can be designations of sensitive places. And so there were lots of questions about college campuses, and bars, and the subway, and residential neighborhoods, if they're deserted residential neighborhoods, those are addressed by the law New York has since passed, i- [laughs] in the wake of having its old law struck down, and so it was almost like a rehearsal of what the next case is going to be.

**[00:23:40] Barbara Underwood:** But it's one of the few times I can think of where I really, completely did n- I mean, I was able, prepared to talk about it to some degree, but I never would've predicted that that would be the center of the argument. And I feel as if argument preparation is largely aimed at trying to anticipate what's gonna concern the justices, and distilling, finding, figuring out what the answer is and then finding a very concise, punchy way of expressing it in a minute or less. [laughs] And it was a surprise, the way, to me, not the outcome so much, but the way the argument went.

**[00:24:22] Jeffrey Rosen:** Absolutely fascinating. As you say, the history was crucial. There's been an explosion of briefs filed by historians in cases post-Bruen and the National Constitution Center just did a great podcast on the state of the law post-Bruen, which confirms your insights that there's a lot of focus on designation of sensitive places, and also whether dangerous categories of people, felons or misdemeanants can be denied guns, all parsing this history in just the way that you described.

**[00:24:50] Barbara Underwood:** On Monday we had an argument, I didn't do it, my deputy did it, in the Second Circuit defending our new law against, it was five consolidated cases [laughs] defending attacks on basically every paragraph or every section of that law, which was kind of a marathon argument, and maybe a

preview of an argument to come, or maybe this one will be resolved on grounds that make it not so attractive.

**[00:25:20] Jeffrey Rosen:** Gen. See, let me ask you about *West Virginia v. EPA*, a hugely important case that resurrected in a meaningful way the major questions doctrine that's since become quite salient in cases this term. That one, too, involved text and history. Tell us about what it was like to learn about that text and history and to argue the case.

**[00:25:41] Lindsay See:** Uh, certainly. So that was a case that dealt a lot with text in a very technical area of the law, had to do with the Clean Air Act. Environmental law, even more than administrative law, generally tends to be very technical and scientific, so that was a big learning curve. One of the things that I really appreciate about appellate practice is you don't necessarily have a specialty in one particular area. So you get the opportunity to really dive in and learn about very different fascinating areas of the law.

**[00:26:09] Lindsay See:** One of the things that I think was helpful, is sort of a trend for some of these cases, they don't all just appear overnight. You know, that there's, often they're years in the making. It was more so in this case, because this particular case had dealt with changing regulations from EPA with different presidential administrations, so the case took longer. But even so, it can take several years to get up to the court, and on a case like that, that we knew was gonna be significant from the beginning, the SG group in West Virginia was involved from the beginning. So my predecessor had actually been working on earlier stages of the case, but when I started in 2017 it was already going. So I had a few years to get up to speed before we got to SCOTUS in 2022.

**[00:26:51] Lindsay See:** In terms of learning that area, there was a lot of technical information about what are the sort of—this case dealt generally speaking with what are the measures that you can use to have a particular power plant operate more efficiently? So a lot of that was learning about technology and what are the different measures and ways that different power plants and different types of energy producers around the country operate. So there was a lot of just trying to get up to speed on that technical aspect.

**[00:27:21] Lindsay See:** Another area that was interesting, because this was a case where the court was really interested in the major questions doctrine, which I'll just briefly explain. What that says is there's certain things where we think that if

there's a big change that an agency is making, that the Court may not presume that Congress is doing that lightly. So the Court's gonna look for a clear statement in a statute to say, "We want you to have the authority to do this." And, sort of a brief framework, I'll present this from our state coalition's side, although I'll try to be fair. Essentially our argument was, this statute dealt with EPA's and the states' power to set emission standards for power plants, and we read the statute to say that really meant focusing on what particular power plants could do to reduce their own emissions.

**[00:28:10] Lindsay See:** And EPA had said at various points, "Actually we can look at the entire country, the entire energy sector, and see what we can do to overall reduce those emissions." And our position was, that is a major policy change, because it has authority to say who can and can't be in the energy production industry, what type of power is going to be part of that market, that's the sort of thing that we would expect Congress to address clearly.

**[00:28:35] Lindsay See:** And so in that case the Court sided with us and said, "Yes, we would expect Congress to address that directly." Part of what made prepping for that really interesting is that had been a doctrine that was sort of in the water for decades, and it would pop up every so often in different cases. The Court's been relying on it more frequently in the past few years, but it would come up a little bit a- with not a huge amount of discussion.

**[00:28:59] Lindsay See:** So in terms of prepping for argument particularly, it was a lot of work and really interesting work to see what different justices thought about it. Because even the ones that we thought were, would probably end up, you know, generally speaking, on our side, they viewed the doctrine in very different ways in terms of what they thought the important interests were, what sort of role it played in terms of statutory interpretation. So a lot of that prep was thinking through what are the different ways that we think these justices look at this issue, and how can we have an argument that's trying to bring together as many of those threads we can to one coherent message. So that piece, sort of the justice by justice analysis, is something that can be really fascinating when it comes to this sort of prep, and that's something that I was really fortunate enough to have a team who helped me with that. Getting to work with a lot of other states helps too, that whole coalition aspect, you're able to get that perspective in, and really trying to come up with a message that's going to appeal to the justices that you need to hopefully get a majority.

**[00:30:02] Barbara Underwood:** I'll just add that in environmental cases generally, there's often a huge technical component that you have to master, because there might be questions about it. But the Court is not especially disposed, I would say, to get deeply into the technical weeds. And so in addition to being able to speak to that, you need an approach that is accessible and attractive to generalists, and I think, much as I have a difference of opinion about the rise of the major questions doctrine and its application here, it was, from the point of view of the challengers here, a pretty inspired way of addressing a challenge in terms that do not require mastery of scientific detail, which is always a good thing to do in, I think, in a technical case. As well as mastering the technical data.

**[00:31:10] Jeffrey Rosen:** It is very true, and in fact, Justice Kagan of course famously said in her dissent, "Whatever else this Court may know about, it doesn't have a clue about how to address climate change." And she said, "I cannot think of many things more frightening." So there was a vigorous dispute about the ability of the justices to address these technical issues.

**[00:31:27] Jeffrey Rosen:** Dan, there are all sorts of wonderful questions in the Q&A box asking about some basics, and I'll just ask you to pick up on a couple of 'em. What's the difference between the two generals, SGs and AGs, and how do the two approach cases? Are statewide solicitor generals normally appointed by the AGs? Are they ever elected directly by the people? And then, of course, where does the term solicitor general come from, and how is the role of SG different from AG?

**[00:31:58] Dan Schweitzer:** Sure. So the attorney general is the chief law enforcement officer of the state, elected in, I believe, 43 of the 50 states, appointed in seven others. The solicitor general works under the attorney general. In some states, there's a state statute that calls for the appointment of a solicitor general, in other states it's just done as a matter of practice. But either way, the solicitor general works for the attorney general and tries to further the mission of the attorney general, and defend the state in appellate litigation as need be.

**[00:32:41] Dan Schweitzer:** So the attorney general's job is to oversee the attorney general's office, which defends the states in litigation, defends state statutes, enforces consumer protection laws, enforces antitrust laws and environmental laws, and does all the important statewide law enforcement.

**[00:33:02] Dan Schweitzer:** The solicitor general plays a narrower, very important role of being the chief appellate lawyer in the attorney general's office, and so generally oversees at the very least the civil appellate work that the state AG office does. As Gen. See said earlier, in many states the solicitor general unit doesn't handle itself all of the office's appeals, but it helps out on most of the office's appeals by editing briefs, setting up moot courts, and the like.

**[00:33:39] Dan Schweitzer:** In some states like New York, it's a much larger solicitor general unit, and they handle themselves all or virtually all of the state's appeals. There is no state where the solicitor general is separately elected, though I believe in Puerto Rico the solicitor general is separately appointed by the legislature.

**[00:34:06] Dan Schweitzer:** I think that touched on most of those general questions you had posed to me, Jeff, though I'm happy to answer any others if I left out any.

**[00:34:17] Barbara Underwood:** Okay, I'd just add one curious thing. New York has this statute that goes back to the beginning of the 20th century that requires the attorney general to appoint a solicitor general, but it doesn't say what the solicitor general should do. It says the attorney general shall appoint a solicitor general to assist him in his duties, or something like that. And I'm not sure that the solicitor general of New York always and from the beginning was the chief appellate officer. I have the impression that the solicitor general may have been more of a kind of a chief assistant or chief right-hand person, or something, and that the appellate focus of the solicitor general kind of evolved over time, possibly inspired by the federal model.

**[00:35:13] Dan Schweitzer:** Yeah, I'd say the growth of the solicitor general position over the past 20 to 30 year is part of what I think is—it's a reflection of the insight that the legal bar in general has come to appreciate, which is the importance and need for appellate specialists. That being a good appellate lawyer is a skill that's very different from being a very good trial lawyer or a very good advisor to a state or federal agency, and that it's important to have someone who could bring that appellate specialty to bear, to bring consistency in state position and quality control to the state appellate work that the attorney general offices present to their state and federal appellate courts.

**[00:36:13] Lindsay See:** And we're an example of sort of the opposite of the New York model. My position has not existed very long, so I'm only the second solicitor general of West Virginia, and my predecessor started in 2013, so that was the first time the role started. But what Dan was just saying, this idea of the importance of the specialty of appellate law, that's something that I know that we have talked about a lot with people in our office as we're trying to have it—we're a decade in, but it's still a new role. But this idea that we can hopefully bring this level of quality control and expertise in this area, and ideally it complements really well the rest of the work in the AG's office. I learn a lot from the other attorneys in different divisions who have more trial expertise and expertise in other areas. And I think when the model's working well, it's when we can all bring our own specialties there and have this particular role that serves this function that's really supporting the rest of the important work going on in the attorney general's office as a whole.

**[00:37:10] Jeffrey Rosen:** Well I know our audience would love to hear more about what it's like to argue before the Court and to prepare cases. Gen. Underwood, you mentioned that the census cases were actually two cases, Department of Commerce versus New York and Trump versus New York, tell us about those cases and what it was like to argue them?

**[00:37:33] Barbara Underwood:** So the first case was on ... Actually both cases, but I'll start with the first one, which was the Department of Commerce case, was on a very compressed timeframe, because we were challenging the inclusion of a question about citizenship on the census form, and there were statutory and constitutional dates by which the form had to be finalized and printed and distributed and so forth. And so everything was moving very fast, and our argument, which was supported by evidence, so there was a trial, was that including such a provision on the actual census form would depress response rate, and would therefore cost New York seats in Congress and in the Electoral College, and cost it federal funding, because all those things are based on the census count of the population of the states.

**[00:38:37] Barbara Underwood:** And so before I was involved, some people in my office mobilized to put that evidence together, I mean, there were also some nonprofit, some organizations, voters rights organizations that were interested in doing this too. I don't mean to say we were alone in this, but we carried a very heavy laboring [inaudible 00:39:04] in establishing the proof that would be needed behind that particular claim.

**[00:39:11] Barbara Underwood:** It went rocketing up, so people in my shop were actually involved in some of the motion practice in the trial court, because we knew this was gonna bypass the Second Circuit and go right to the Supreme Court. And that was a case where the claim is the one I've described which was somewhat technical, and required some mastery of statistics, and some understanding, some discussions with the statisticians in the Census Bureau, and also experts outside, to establish the foundation for this prediction. I mean, our claim was never that this information cannot be collected by the Census Bureau, but rather that it can't be collected on the very form that is otherwise being used to determine how many people there are in the state, because it would depress responses.

**[00:40:12] Barbara Underwood:** So there was a lot of technical work to be argued, but of course the court, following a theme, here, following a pattern, here, is not much moved, I think, to get, to try to resolve technical disputes. And what happened at the end of the day was that we prevailed on an argument that we were very uneasy about actually making, or, not that it wasn't sound, but that it seemed possibly provocative, and that was that the Census Bureau and the Secretary of Commerce had misrepresented his reason for wanting to put this on the form, that it was pretextual. That he claimed he needed it in order to improve enforcement of the Voting Rights Act, when it was, I thought, most people thought preposterous that that was his objective, or that that information would in fact help with enforcement of the Voting Rights Act. And whether or not the government could put such a question on the census form, they couldn't do it and lie about why they were doing it under the Administrative Procedure Act.

**[00:41:35] Barbara Underwood:** So this wasn't a complete surprise that the Court was interested in it, we were prepared to talk about the statistical claim, we were prepared to talk about pretext, we were prepared to talk about various other what we said were violations of the Administrative Procedure Act. But I think it was, to some degree, a surprise that that's actually what the case ended up turning on. 'Cause there were people who were advising us not to make that argument at all. I mean, "Y- do you realize you're asking the court to find that the Secretary of Commerce is a liar? Do you think they're really gonna respond well to that kind of argument?" Well, we don't have to use those words, we can say misunderstood, misrepresented, mistaken, whatever. But, ultimately, the Court, it was 5-4, but the Court found that the reason that was given was pretextual, which is a nice way of saying it was false, knowingly false. [laughs]

**[00:42:36] Barbara Underwood:** So that was the first of the census cases, and then the second one, it was off the form, and they didn't have time to redo the form and put it on the form, but the second one was that the president then asked the Census Bureau to provide information about citizenship in a document in the same document or simultaneously with providing information about the census, so that the president could use that information to allocate seats in the House of Representatives. It was now an honest explanation [laughs] of what they were trying to do with the information, and the question was could they do it that way?

**[00:43:23] Barbara Underwood:** And that case raised a whole different set of issues about ripeness, and a little bit related to standing. We were challenging what the president said he was going to do. Maybe he wouldn't do it after all, maybe the Census Bureau wouldn't be able to produce the information in time, 'cause now the clock was ever closing in on us here. And that's what the argument was almost, was heavily about, and that's what we lost on that, 'cause we didn't lose ... the Court didn't rule on whether the government could do what it was doing here, it ruled that the issue wasn't ripe for decision.

**[00:44:07] Barbara Underwood:** And indeed, the clock ran out, and the administration change, and the administration did not send over that data with the census. So there's a way in which running out the clock is sometimes, doesn't so often work in the Supreme Court, it's more commonly [laughs] something that happens in the lower courts, but it happened here.

**[00:44:28] Jeffrey Rosen:** Such an interesting perspective, both to hear that you—the case wasn't decided on the grounds that you expected, and I mean, indeed, the Chief Justice's role was unexpected, and the crucial importance of timing, very, very illuminating. Gen. See, you argued, in addition to West Virginia and EPA, another case before the Court, Dawson v. Steager in 2018, involving an exemption in the West Virginia code from the state taxation of retirement income. Tell us about what it was like to argue that case, which had less dramatic constitutional consequences than EPA, and perhaps some concluding thoughts on arguing before the US Supreme Court more generally?

**[00:45:13] Lindsay See:** Absolutely. So that case, I won't get into the weeds of that case. It turned out to be, to me at least, a really interesting tax issue. But it was not one that I knew much about going into that case, which is, as we said earlier, something that is really fun about appellate litigation is you get the chance to dive into that.



**[00:45:32] Lindsay See:** But I think the similarities and the contrast between those cases—I'm happy to talk about sort of that experience of arguing. Because-

**[00:45:39] Jeffrey Rosen:** Yeah.

**[00:45:40] Lindsay See:** ... for both of them, what's true, I will say argument, I find it really fun, it can be stressful, but it's also not the most important thing before the Court. You know, in both of those cases, and in all of Barbara's, I know there's hundreds of pages of briefing by the time you get to oral argument, and really those briefs is what's doing the majority of the work. So I think that's important to emphasize, because the argument is the public piece, but the brief-writing is incredibly important. And I find that helpful when I am prepping for argument, if I start to get in my head a little bit about the nerves, is to remember the hard part is already done. The briefs are already filed.

**[00:46:17] Lindsay See:** In terms of the prep process itself, the experience is when you're in front of the Court, they can ask you literally anything that they want to. So it feels like studying for 12 finals at the same time. Obviously there's the key issues in your case that you wanna know as well as you can. We talked some before about really trying to understand the facts or the industry or the science of whatever your case is. I learned a lot about the tax code that I didn't know before in the first one, just like I learned a lot about carbon capture and sequestration for West Virginia versus EPA. So it's just a lot of studying and trying to distill it.

**[00:46:55] Lindsay See:** There's a lot of people, often, who are part of that process, people on the team who can help you with that research. But at the end of the day it's one person arguing, so it's a lot of sitting in a room, and whatever study style works for you, trying to learn and think through that.

**[00:47:08] Lindsay See:** The other part of the prep process that's really valuable is the moot court system. And so what we do there when we prep for arguments is we have some other attorneys who come in and read the briefs, and just play the role of the justices and pepper you with questions. And for Supreme Court arguments in particular, advocates tend to do several of them. NAAG is really fantastic on that, Dan puts together a moot court with great appellate practitioners for every case that involves the states.

**[00:47:37] Lindsay See:** So for both of my arguments, spend some time in DC in particular with that moot court and others, and I really appreciate advocates who

are willing to donate their time, essentially, to help you prep for the case. Because that piece, talking on your feet and being able to kind of feel out the arguments and how they work, that's the part of the prep that I don't think there's any way to do it. You can't just read it and figure it out, you've really gotta practice, or at least I do, what does it sound like?

**[00:48:06] Lindsay See:** And then the last thing I'd say is just what the actual experience in the Court is like. I think my two cases are an interesting contrast, because one was 2018, before COVID, and then 2022. So in 2018, you had the full courtroom there. We also had the older court procedures, where we had 30 minutes on our side, and when those 30 minutes were over, the Court was pretty strict. You were done. So that was what the first case was like.

**[00:48:32] Lindsay See:** When I argued the second case, at that point it was a bit of a surreal experience, because the courtroom was basically empty. At that time, what the Court was doing was you could have, obviously the arguing attorney and you could have one other person. So for us, it was me and the attorney general of West Virginia. The rest of my team was not able to be there in person. So it was the justices, we had eight lawyers, 'cause there were four people arguing that case, the law clerks, and the press corporations, and nobody else.

**[00:49:03] Lindsay See:** But one of the things that of course the Court started doing was live-streaming arguments. So it was this interesting disconnect of a largely empty courtroom, but then so many more people who were able to listen to it in real time. So that was a piece that was really different about just the actual experience of arguing those two cases. It's a huge honor, I really enjoy the adrenaline and the rush of getting to do it, and being able to stand up and say you're here on behalf of your state or on behalf of a coalition of states, I haven't had the privilege of arguing as many times as Gen. Underwood has, but I would venture a guess that that doesn't get old, that responsibility and privilege.

**[00:49:42] Jeffrey Rosen:** Wonderful. Well, I'm so grateful to all of you for this superb discussion. It's just so illuminating to hear from two great advocates about the experience of arguing before the Court, both before and after COVID, in the state and federal context, and so grateful to NAAG for bringing us together. Dan Schweitzer, I think I will leave the last words to you, for why it is important for citizens to learn about the important role of state AGs in arguing before the Supreme Court?

[00:50:14] **Dan Schweitzer:** Well states are collectively the second-most frequent advocate in the Supreme Court behind the federal government, and certainly you said to tell the public, and let me say, when I speak to law students, what I tell them is that the cases that comprise your constitutional law casebook, your criminal law casebook, your federal courts casebook, they are argued to a large extent by state attorneys, and these days by state solicitors general. And for members of the public, those cases that affect our lives dramatically in a case like Dobbs, the abortion case, or Bruen, the Second Amendment case, or West Virginia against EPA on climate change, or sometimes less dramatically, but still it's important that the cases be presented well to the courts, that the Court can understand the arguments on both sides and issue an opinion that reflects the best scholarship and the best understanding possible, and state solicitors general have played a great role in making that possible for the Court and for the bar generally. And in terms of, and they have therefore helped the attorney general community in terms of putting the best foot forward, for these very important arguments in the Supreme Court.

[00:51:44] **Jeffrey Rosen:** Thank you so much, Dan Schweitzer, Barbara Underwood, and Lindsay See, for an illuminating discussion, and for modeling civil discourse at its best, and thank you friends for taking an hour out in the middle of your day to learn about the Constitution and the role of the Supreme Court. Thanks to all, and we'll look forward to reconvening with NAAG at the National Constitution Center in April. Thank you.

[00:52:13] **Tanaya Tauber:** This conversation was streamed live on March 24th, 2023. This episode was produced by John Guerra, Lana Ulrich, Bill Pollack, and me, Tanaya Tauber. It was engineered by the National Constitution Center's EV team. Research was provided by our wonderful interns here at the NCC, Emily Campbell, Sophia Gardell, and Liam Kerr. You can check out our full lineup of exciting programs and register to join us virtually at [constitutioncenter.org/townhall](https://constitutioncenter.org/townhall). As always, we'll publish those programs on the podcast, so stay tuned here as well, or watch the videos. They're available in our media library at [constitutioncenter.org/medialibrary](https://constitutioncenter.org/medialibrary). Please rate, review, and subscribe to Live at the National Constitution Center on Apple Podcasts, or by following us on Spotify. And join us back here next week. On behalf of the National Constitution Center, I'm Tanaya Tauber.