# Oral Advocacy and the Re-emergence of a Supreme Court Bar

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Over the past generation, roughly the period since 1980, there has been a discernible professionalization among the advocates before the Supreme Court, to the extent that one can speak of the emergence of a real Supreme Court bar. Before defending that proposition, it is probably worth considering whether advocacy makes a difference—whether oral argument matters. My view after one year on the opposite side of the bench is the same as that expressed by no less a figure than Justice John Marshall Harlan—the second one—forty-nine years ago, after he completed his year on the Court of Appeals for the Second Circuit.[1] Justice Harlan lamented what he saw as a growing tendency among the bar "to regard the oral argument as little more than a traditionally tolerated part of the appellate process," a chore "of little importance in the decision of appeals."[2] This view, he said, was "greatly mistaken."[3] As Justice Harlan told the bar, "[Y]our oral argument on appeal is perhaps the most effective weapon you have got."[4]

By the time he made his remarks to the Fourth Circuit Judicial Conference meeting in Asheville, Judge Harlan had become Justice Harlan, and his remarks included reflections on not only his time on the Court of Appeals but also a few months on the Supreme Court as well. My experience has been limited to what Article III of the Constitution refers to as an "inferior" court—surely James Madison's fabled gift for finding just the right word failed him in that instance. Oral argument before a court of appeals and the Supreme Court differs in some significant respects. On the court of appeals, we hear arguments in panels of three and hear many more cases than the Supreme Court hears. We therefore give the parties less time for oral argument. Rather than the half-hour per side that is typical in the Supreme Court, we often budget ten or fifteen minutes a side. But at the same time, because we sit in groups of only three, we are able to be a little more flexible, keeping counsel as long as we think they are being useful—an additional ten minutes, fifteen minutes, even a half-hour.

**"Your oral argument on appeal is perhaps the most effective weapon you have got," Justice John Marshall Harlan remarked in 1955 in an address to the judicial conference of the Fourth Circuit. Having served on the Court of Appeals for the Second Circuit and recently been appointed to the U.S. Supreme Court, Harlan viewed the tendency to belittle the value of oral argument as a mistake.**

We also hear argument regularly from intervenors and *amici*, while in the Supreme Court the only non-party that is heard from, except in rare cases, is the United States, through the Solicitor General's Office.

There is also a substantive difference between arguments before the Supreme Court and before a court of appeals. In the court of appeals, we spend quite a bit of time at argument debating and puzzling over what Supreme Court opinions mean, because we are bound by them inexorably. That is typically not a significant part of an argument in the Supreme Court. Most advocates there have found that it is not a worthwhile expenditure of their time to debate with the authors about what their opinions mean. But these distinctions aside, the enterprise of oral argument and its role is really quite similar in a court of appeals and the Supreme Court.

My main conclusion after a year of being on the other side of the bench is that oral argument is terribly, terribly important. I feel more confident about that now than I ever did as an advocate—now, when the question "does oral argument ever matter?" does not carry the

same existential angst it did when it was what I did for a living. Oral argument matters, but not just because of what the lawyers have to say. It is the organizing point for the entire judicial process. The judges read the briefs, do the research, and talk to their law clerks to prepare for the argument. The voting conference is held right after the oral argument—immediately after it in the court of appeals, shortly after it in the Supreme Court. And without disputing in any way the dominance of the briefing in the decisional process, it is natural, with the voting coming so closely on the heels of oral argument, that the discussion at conference is going to focus on what took place at argument.

Oral argument is also a time—at least for me—when ideas that have been percolating for some time begin to crystallize. I—and I think many judges—are aggressively skeptical when they prepare to confront a case. Upon reading a brief, my reaction is not typically "Well, that's a good argument," or "That's persuasive," but instead "Says you. Let's see what the other side has to say." In researching the cases, my reaction is, "I bet there's some authority on the other side that balances it out." But however open you try to keep yourself to particular positions, those doors begin to close at oral argument. After all, the voting is going to take place very soon thereafter, and the luxury of skepticism will have to yield to the necessity of decision. Those closing doors often get a push from what happens at argument, whether it be the questions from the other judges or the responses by the attorneys. And the former can be just as important as the latter, because it is the protocol on the inferior court on which I sit—and, I believe, the general practice on the Supreme Court as well—that the judges do not discuss the cases before oral argument except in unusual situations. Thus, oral argument is the first time you begin to get a sense of what your colleagues think of the case through their questions.

Throughout the history of the Supreme Court, other Justices have shared Justice Harlan's view on the importance of oral argument. Justice Joseph Story reported that

> [Chief Justice Marshall] was solicitous to hear arguments, and not to decide causes without hearing them .... No matter whether the subject was new or old; familiar to his thoughts or remote from them; buried under a mass of obsolete learning, or developed for the first time yesterday—whatever was its nature, he courted argument, nay, he demanded it.[5]

Chief Justice Charles Evans Hughes said that oral argument was desirable because it allowed the Court to "more quickly ... separate the wheat from the chaff."[6] In 1951, Justice Robert H. Jackson reported that the Justices on his Court would unanimously say that they relied heavily on oral argument.[7] And fifty years later, the current Chief Justice has written that oral argument does make a difference and that in a significant minority of the cases he has left the Bench feeling differently about a case than when he went on.[8] Thus, as the character of oral argument has evolved throughout the history of the Court, the Justices have not wavered in their commitment to its importance.

It used to be that you could have an oral argument at the Supreme Court and win your case without actually having to go through the oral argument. In his memoir, Erwin Griswold describes the practice of the Hughes Court of sometimes cutting off a respondent when the Justices had heard enough and were prepared to rule in the respondent's favor—a practice that still exists on many courts of appeals.[9] According to Griswold, Chief Justice Hughes once told a respondent's counsel that "[t]he Court does not care to hear further argument," but counsel kept talking. The Chief Justice repeated his statement. The counsel just spoke more loudly, apparently having understood the Chief Justice to say "We can't hear you," as opposed to "We don't care to hear you." At this point an exasperated Chief Justice looked

**In his memoir, Erwin Griswold described how the Hughes Court would sometimes cut off a respondent when the Justices had heard enough and were prepared to rule in the respondent's favor. Griswold served as Solicitor General from 1967 to 1973.**

to the petitioner's counsel, who of course had just realized he was going to lose his case because they were cutting off the respondent's argument, and said "Won't you please tell counsel that the Court does not care to hear further argument." Petitioner's counsel got up, strode to the lectern, and said "They say they would rather give you the case than listen to you."[10] Which I guess was drawing some solace from his defeat.

Oral argument today—both in the Supreme Court and in most courts of appeals—consists largely of responding to questions from the bench. In his famous 1940 lecture on oral advocacy to the Association of the Bar of the City of New York, John W. Davis told advocates that they should state the nature of the case, its prior history, the facts, and the applicable rules of law.[11] In his equally famous 1951 talk to the State Bar of California, Justice Jackson said "[B]egin with a concise history of the case, state the holding of the court below and wherein it is challenged[,] . . . follow with a careful statement of important facts, and conclude with discussion of the law."[12] Well, those must have been the days. Nowadays, the most uninterrupted time that an advocate is likely to get before the Supreme Court is a couple of minutes at the outset of argument. When I was preparing for Supreme Court arguments, I always worked very hard on the first sentence, trying to put in it my main point and any key facts, because I appreciated that the first sentence might well be the only complete one I got out in the course of the argument.

Supreme Court oral argument has always been vigorous and rigorous. Some advocates have collapsed in the face of it. The story has been told oftentimes of Solicitor General Stanley F. Reed paling and being unable to

**Solicitor General Stanley F. Reed was unable to continue his argument defending the Agricultural Adjustment Act in 1935 after being barraged with technical questions from the Justices.**

proceed when he was faced—as the *New York Times* put it—with "a barrage of technical questions" from the nine Justices while trying to defend New Deal legislation before the Hughes Court.[13] A little less well-known is the story of the advocate in a commercial-fraud case that was argued sixty years ago. The Justices were a bit exercised about the facts,

**Thomas Ewing, a Senator from Ohio who would serve in the Cabinet under two Presidents, fainted while delivering oral argument before the Supreme Court in 1869. The propensity to faint obviously ran in the family: his son, General Thomas Ewing (pictured), suffered the same misfortune when he collapsed before the Justices during oral argument in 1895.**

and the questioning focused on a particular affidavit. At one point, Justice William O. Douglas demanded to know "who drafted this affidavit?," at which point the lawyer fainted dead away, hitting his head on the table on the way to the floor. Court was adjourned and a doctor was called for. When argument resumed, the lawyer—bruised but unbowed—stood up, looked at Justice Douglas, and said, "That he had."[14]

The fault in these cases, however, does not rest entirely with an overly aggressive Court. There is some interesting evidence that the problem may be hereditary. The *Washington Post* of October 23, 1895 carried an item describing how General Thomas Ewing had fainted and collapsed while arguing a case before the Supreme Court. The story went on as follows:

> An extraordinary coincidence that was brought to the mind of one of the ancient Supreme Court employees, and that was amply verified in the course of the day, was the fact that about forty years ago, Hon. Thomas Ewing, the father of Gen. Ewing, who was twice a United States Senator from Ohio, Secretary of the Treasury under President Harrison, and the first Secretary of the Interior under President Taylor, had precisely such a mishap, affecting him in a very similar way, and under exactly the same conditions. While making an argument before the Supreme Court he fell in a faint to the floor, in about three feet of the spot where his son sunk on the carpet yesterday.[15]

When the elder Ewing collapsed, he was actually not removed from the Court until after midnight.[16] The Court did not continue to hear arguments in other cases over the prone body of Senator Ewing. It adjourned; the Justices gathered around Senator Ewing; his family and friends were called for; and physicians were summoned. He eventually recovered and went on to live several more years of a very productive life. Among the family members who came to his side while he lay in the well of the Court was his son, who continued the family swooning tradition years later.[17]

Practically every advocate who has given any kind of advice about arguing before the Court has the same advice about questions: answer them. Former Solicitor General Rex Lee always used to say that oral advocates need to practice saying two words—yes and no.[18] Never put off answering a question. This is how Davis put it in his famous talk: "If you value your argumentative life do not evade or shuffle or postpone, no matter how embarrassing the question may be or how much it interrupts the thread of your argument."[19] Now,

**When seasoned advocate John W. Davis (pictured) made his 138th oral argument in the *Steel Seizure Case,* he was able to defer answering a question by Justice Frankfurter about an earlier case he had argued, *Midwest Oil*. When opposing counsel Solicitor General Philip Perlman tried the same delaying tactic, however, Frankfurter persisted until Perlman answered his question.**

fast-forward twelve years from that advice to the high drama of oral argument in the *Steel Seizure* case.[20] It was Davis's 138th argument before the Court, and perhaps his greatest day before it. His brilliance seemed to quiet the Justices[21]—except, of course, for Justice Felix Frankfurter, who asked about *United States v. Midwest Oil Co.*,[22] a case Davis had argued forty years earlier when he was Solicitor General that seemed to be inconsistent with his present position.

> MR. JUSTICE FRANKFURTER: What about the holding operation whereby the President took action in the Midwest Company cases, and the relationship of his action to the will of Congress?
>
> MR. DAVIS: It fell to my lot to argue that case. May I finish my brief presentation before I answer Your Honor?
>
> MR. JUSTICE FRANKFURTER: Yes.[23]

And it was in fact some time before Davis returned to Frankfurter's question, saying "Now, Your Honor mentioned the *Midwest Oil* cases. Let me dispose of that."[24]

But what was particularly revealing is what happened next, when Solicitor General Philip Perlman stood up to argue, defending President Truman's seizure of the mills. It was not to be Perlman's greatest day before the Court; he would have better. This time he was being badgered with questions.[25] Justice

Frankfurter asked him the same question he had asked Davis.

> MR. JUSTICE FRANKFURTER: . . . Do you suggest that this non-action of Congress is the equivalent to what was done in the *Midwest Oil* case?
>
> MR. PERLMAN: I want to go into that *Midwest Oil* case later on.[26]

But Frankfurter would not let him do that. He just ignored Perlman's effort to put off the question and came back with a half-dozen more questions on the same subject.[27] This surely must have seemed very unfair to Perlman. I think the lesson is: just because John W. Davis gets away with something, don't think that you're going to as well.

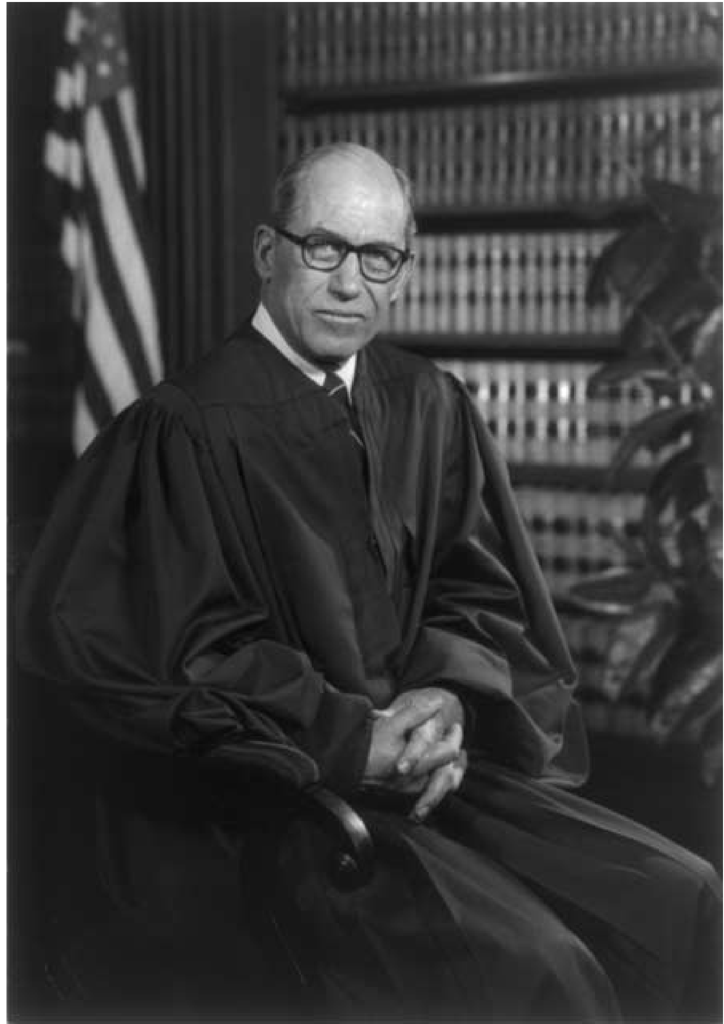
Over the last generation of advocacy before the Supreme Court, one thing that has remained fairly constant has been the level of questioning. I took the first and last cases of each of the seven argument sessions in the 1980 Term and the first and last cases in each of the seven argument sessions in the 2003 Term and added up the questions, and the statistics confirm that impression. There was an average of eighty-seven questions per argument in 1980 and ninety-one per argument in 2003. In both the 1980 and 2003 Terms, there were significantly more questions, on average, for the respondent than for the petitioner.

Davis famously said that an advocate should "[r]ejoice when the Court asks questions."[28] "[A]gain I say unto you," he wrote, "rejoice." But apparently too much rejoicing can be a bad thing. Recent studies have begun to suggest that you can tell how a case is going to come out simply by seeing which side was asked the most questions:[29] the side with the most questions is going to lose. In the twenty-eight cases I looked at, fourteen from the 1980 Term and fourteen from 2003, the most-questions-asked "rule" predicted the winner—or, more accurately, the loser—in twenty-four of those twenty-eight cases, an 86 percent prediction rate. So the secret for successful advocacy—you don't need to read Davis, you don't need to read Jackson—the secret to successful advocacy is simply to get the Court to ask your opponent more questions.

But while the level of questioning has remained constant over the last generation, there have been other changes, and significant ones. Others have commented often enough about the decline in the number of cases the Supreme Court hears on the merits.[30] The Court now hears just over half the number of cases it heard in 1980. There has been a lot of hand-wringing at the bar, of course, over this. I used to think it was a problem, but over the last year I have come to realize that it is not that serious a problem at all. I think the phenomenon is largely explained by the abolition of the Court's mandatory appellate jurisdiction in 1988, and perhaps by the departure from the Court of Justice Byron R. White. Justice White constantly advocated having the Court hear more cases, to the extent that he would write and regularly publish dissents from denials of certiorari, listing the various circuit conflicts he thought the Court was overlooking.

But whatever the reasons, the sharp decline in the number of opportunities for lawyers to argue before the Court has been accompanied, perhaps paradoxically or perhaps not, by an even more dramatic rise in the number of experienced Supreme Court advocates appearing before the Court, both in absolute terms and proportionately. That, in any event, was my impression, and I decided to test it by comparing the lawyers who argued in the 1980 Term and those who argued in the 2002 Term. In 1980, looking at oral arguments by non-federal government attorneys—that is, basically excluding the Solicitor General's Office—fewer than 20 percent of the advocates had ever appeared before the Supreme Court before. In 2002, that number had more than doubled, to over 44 percent.

The change is even more dramatic if you look at what I will call experienced advocates,



**The author suggests that the retirement of Justice Byron R. White from the bench may have contributed to the reduction in the number of cases the Court agrees to hear each Term. A constant advocate for the Court to hear more cases, White would regularly write dissents from denial of certiorari, listing the various circuit conflicts he thought the Court was overlooking.**

or recidivists—those with at least three previous arguments before the Court. In 1980, only 10 percent of non-Solicitor General arguments were presented by experienced counsel. In 2002, that number had more than tripled, to 33 percent. In 1980, only three lawyers outside the Solicitor General's Office argued twice before the Court, out of some 240 argument slots for non-Solicitor General lawyers, accounting for 2.5 percent of the arguments. (For two of those three, it was their first and second arguments ever.) But in 2002, there were fourteen different non-Solicitor General repeat performers who argued at least twice—many more than twice—accounting for fully 24 percent of the non-Solicitor General argument slots, a tenfold increase.

I should be quick to point out that an experienced advocate does not necessarily make for a better argument. Several of the Justices have gone out of their way to emphasize that many first-timers—many only-timers—have presented wonderful arguments.[31] I observed first arguments in the Supreme Court by Michael Dreeben, Walter Dellinger, and Seth Waxman from the very uncomfortable position of the opposing counsel's chair. On each of those occasions, I would have gladly traded for a grizzled veteran as an opponent. But it is reasonable to suppose that arguing before the

Court is, like most things (including judging), something that you hope to get better at as you go along.

This rise in the number of experienced practitioners before the Supreme Court is reflected in, and abetted by, another development over the past generation: the rise of Supreme Court and appellate practice departments in major law firms. This is largely a phenomenon of the past twenty-five years, not limited to Washington, D.C., but certainly very evident there. In establishing Supreme Court and appellate practice as a recognized specialty, these private law offices, of course, have a very successful model on which to draw. Since 1870, the federal government has had such a specialized office—the Solicitor General's Office. This type of development in the profession has had something of a snowball effect. If one side hires a Supreme Court specialist to present a case, it may cause the client on the other side to think that they ought to consider doing that as well. This is just a variant on the old adage that one lawyer in town will starve, but two will prosper.

There has been a corresponding development on the state and local government side. More and more states are copying the federal model and establishing state solicitor general's offices. These offices certainly are devoted to and focused on litigation before their state supreme court and their state courts of appeals. But they also appear far more frequently before the Supreme Court of the United States now than they did in 1980. In the 2003 Term, for example, a solicitor general or someone from that office appeared for the states of Alabama, Illinois, Michigan, Ohio, Tennessee, Texas, and Washington. I do not want to put too much weight on the label, but in fact if you do have an office of appellate specialist at the state level, I think it is natural to hope and assume that lawyers from that office will bring more experience and expertise to their cases before the Supreme Court.

Along with the rise of specialists in the private bar and the rise of specialists representing state and local government, the United States Office of the Solicitor General is appearing in proportionately more cases before the Supreme Court than it did before. That office has gone from appearing as a party or an amicus in just over 60 percent of the cases in 1980 to appearing at argument in over 80 percent of the cases the last three Terms. Interestingly, the office's absolute numbers have remained about the same as the Court's docket has contracted. In 1980 the Solicitor General appeared in some sixty-six cases; in the last three Terms, he was in sixty-five, sixty-two, and sixty-two. I do not think the Supreme Court's docket has contracted simply by eliminating cases in which there was no interest on the part of the federal government. Instead, over the past several years the Solicitor General has filed and argued in cases that that office would have let pass twenty-five years ago.

There is a certain institutional dynamic at work here: the Solicitor General must sign off on every appeal by the federal government throughout the federal judiciary, from any level to any other level. If the federal government loses in a district court and wants to appeal to the court of appeals, that has to be approved by the Solicitor General. That role is much appreciated by those of us on the inferior courts, because it helps ensure (at least in theory) that the United States is maintaining a consistent litigation position throughout the country. But it is an enormously heavy burden on the very limited resources of the Solicitor General's Office to review, in every case, whether the government should appeal and what position it should take. The lawyers who do that work end up working extremely hard, often on very mundane issues. The reward, of course, is that those same lawyers have the opportunity to appear for their country before the Supreme Court. So however much the Supreme Court's docket may contract, there is pressure to have someone from the Solicitor General's Office appear in more and more of those cases.

The net result is that the experienced lawyers of the Solicitor General's Office, on

a relative basis, are appearing far more frequently before the Supreme Court than they did a generation ago. This, too, contributes to the snowball effect. A client may not think that it needs a Supreme Court specialist until it finds out that the federal government's Supreme Court specialist is joining what, up to then, had been a purely private dispute.

Now, when you step back from all these developments and look at the net consequence, it is eye-catching. In 1980, the odds that the advocate making his way to the lectern for an oral argument before the Supreme Court had ever been there before were about one in three, including representatives of the Solicitor General's Office. By 2002, those odds were over 50 percent. It is interesting to note that a generation ago, a number of the Justices commented quite critically on the quality of oral argument before the Court.[32] Justice Lewis F. Powell said that he had high expectations of the bar when he joined the Court, but that the bar's performance "has not measured up to my expectations."[33] From Justice Powell, those are very harsh words. Chief Justice Warren Burger made the need for improved advocacy a recurring theme of his speeches, focusing on the poor quality of advocacy by those representing the states and local governments.[34] Around 1980, retired Justice Douglas said that 40 percent of the oral advocates before the Court were "incompetent."[35] And in a 1983 lecture, the current Chief Justice attributed the disrepute into which oral argument was falling to the prevailing poor quality of oral advocacy, noting that for many advocates before the Supreme Court, oral argument seemed to be an opportunity to present their brief "with gestures."[36]

My bold claim today, looking back at the last twenty-four years, is that things have changed, and for the better. First, there have been some very specific institutional changes. The establishment of an advocacy program at the Academy of State and Local Governments and similar programs at the National Association of Attorneys General were a direct response to Chief Justice Burger's critique.[37] These organizations provide not only amicus help, but also moot court training and other assistance to the representatives of state and local government. There has been a recent rise of similar programs available to all advocates before the Court. The Georgetown University Supreme Court Institute provided rigorous moot court preparation for advocates in two-thirds of the cases argued before the Supreme Court during the 2003 Term. The Institute's moot court program is highly valued by novice and experienced advocates alike because of the high quality and skill of the judges that Institute director Professor Richard Lazarus is able to attract to do the moot courts. These programs have made it easier for both first-timers and experienced advocates to do a more professional job before the Court.

There have even been changes along these same lines in the Solicitor General's Office. Everyone who has served in the Solicitor General's Office shares a belief that that office enjoyed a golden age roughly corresponding to the time that they served there. Suggesting that something has improved in the Office of the Solicitor General will to many seem like heresy, because it implies that there was at one time a need for improvement. All I will note is that a generation ago it was not the rule—certainly a practice, maybe even a common practice, but not the rule—that Solicitor General's Office lawyers went through moot courts before their arguments. That requirement was instituted by Judge Kenneth Starr, and I believe it has stuck, which I think has allowed some lawyers from the Office of the Solicitor General to become even better advocates.

I would not go so far as to say that the reemergence that I have identified of a Supreme Court bar was a response to the judicial criticism prevalent a generation ago. But perhaps to the extent that the Justices at that time identified an opportunity for improved

quality and professionalism, the bar identified the same opportunity and responded. The Supreme Court bar that I have been discussing is, of course, nothing like the Supreme Court bar of the John Marshall era. No one today is going to argue in half of the Court's cases, as William Pinkney did one year.[38] But more and more, there are familiar faces appearing at the lectern—not just the curiously attired lawyers from the Solicitor General's Office, but faces from the private bar and from the states as well. If I am right about this, I think it raises a number of interesting questions. If there has been a re-emergence of the Supreme Court bar, when did the old one die, and what killed it? What is the relationship between the Court's shrinking docket and the rise of the Supreme Court bar? More generally, is a specialized bar a good thing or a bad thing for the Court?

Obviously better advocacy—if in fact that is what comes with more experienced advocates—is a good thing. A well-argued case will not necessarily be well decided; sometimes the judges get in the way. But there is a significant risk that a poorly argued case will be poorly decided.[39] That is a risk of our adversary system. More experienced, better advocates should be a good thing.

But the developments I have noted do raise some concerns. Take the presence of someone from the Office of the Solicitor General in more than 80 percent of the Court's argued cases. If you asked me as an abstract proposition whether I would be troubled by the idea that the executive branch was going to file something in every case before the Supreme Court explaining its views, as a sort of super law clerk, my answer would be yes, I would find that very troubling. Eighty percent is pretty close to every case, and as the discernible federal interest in a matter before the Court wanes, concern about the role being played by the government increases.

On the private side, I would suppose that the Justices are pleased to see good and experienced advocates present a case. But there is no denying that something is lost as the bar becomes more specialized. The Chief Justice has referred to the "intangible value of oral argument," the point at which counsel and Court look each other in the eye and have a public "interchange" about the case.[40] If you have a case arising in Iowa that works its way through the Iowa courts, goes to the Iowa Supreme Court, and works its way to Washington, I think there is something beneficial both for the U.S. Supreme Court and certainly for the Iowa bar to have Iowa attorneys present that case. That is true, of course, only to the extent that those attorneys are able and willing to learn what practice before the Supreme Court is like and what it demands of them. That may turn out to be a very big challenge. It may be that not many lawyers with different practices to maintain can set aside the months necessary effectively to brief and to prepare for argument in a case before the Supreme Court. There is a corresponding challenge on the part of the specialist as well: to become intimately steeped in the local character and details of any particular case, so that they are able to convey that to the Justices.

Whether an advocate is a recidivist or presenting his first and only argument before the Court, he needs to have something of the medieval stonemason about him. Those masons—the ones who built the great cathedrals—would spend months meticulously carving the gargoyles high up in the cathedral, gargoyles that when the cathedral was completed could not even be seen from the ground below. The advocate here must meticulously prepare, analyze, and rehearse answers to hundreds of questions, questions that in all likelihood will actually never be asked by the Court. The medieval stonemasons did what they did because, it was said, they were carving for the eye of God. A higher purpose informed their craft. The advocate who stands before the Supreme Court, whether a veteran or novice, also needs to infuse his craft with a higher purpose. He must appreciate that what happens here, in mundane

case after mundane case, is extraordinary—the vindication of the rule of law—and that he as the advocate plays a critical role in the process. The advocate who appreciates that does infuse his work with a higher purpose, and that higher purpose will steel him for the long and lonely work of preparation, will bring the proper passion to his cause, will assuage the bitterness of defeat and moderate the elation of victory, and will, more and more, forge a special bond with his colleagues at the Supreme Court bar.

*This article is the printed version of a lecture delivered at the Supreme Court Historical Society's Annual Meeting on June 7, 2004.

## ENDNOTES

[1]John M. Harlan, "Address Delivered Before the Judicial Conference of the Fourth Circuit at Asheville, North Carolina (June 24, 1955)," in John M. Harlan, "What Part Does the Oral Argument Play in the Conduct of an Appeal?" 41 *Cornell L.Q.* 6 (1955).
[2]*Id.* at 6, 10–11.
[3]*Id.* at 6.
[4]*Id.* at 11.
[5]4 Albert J. Beveridge, **The Life of John Marshall** 94 n. 1 (1916) (quoting Justice Story in 3 **John Marshall: Life, Character and Judicial Services** 377 [John F. Dillon ed., 1903]).
[6]Robert L. Stern, Eugene Gressman, and Stephen M. Shapiro, **Supreme Court Practice** 578 (6th ed. 1986) (quoting Hon. C. E. Hughes, **The Supreme Court of the United States** 62–63 [1928]).
[7]Robert H. Jackson, "Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations," 37 *A.B.A. J.* 801 (1951) ("I think the Justices would answer unanimously that now, as traditionally, they rely heavily on oral presentations.").
[8]William H. Rehnquist, **The Supreme Court** 243 (Knopf 2001) (1987) ("Speaking for myself, I think [oral argument] does make a difference: In a significant minority of the cases in which I have heard oral argument, I have left the bench feeling differently about a case than I did when I came on the bench.").
[9]*See* Erwin N. Griswold, **Ould Fields, New Corne: The Personal Memoirs of a Twentieth Century Lawyer** 92 n. 25 (1992).
[10]*Id.*
[11]John W. Davis, "The Argument of an Appeal," 26 *A.B.A. J.* 895, 896–97 (1940).
[12]Jackson, *supra* note 7, at 803.
[13]"Reed in Collapse; AAA Cases Halted," *New York Times*, December 11, 1935, at 1.
[14]William O. Douglas, **The Court Years** 181 (1980). The case being argued was *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944).
[15]"Gen. Thomas Ewing Ill; Compelled to Suspend His Argument Before the Supreme Court," *Washington Post*, October 23, 1895, at 3. General Ewing collapsed while presenting oral argument in *Farmers' Loan & Trust Co. v. Chicago, Portage & Superior Ry. Co.*, 163 U.S. 31 (1896).
[16]**Memorial of Thomas Ewing** 284–85 (Ellen E. Sherman ed., 1873). Senator Ewing collapsed while presenting oral argument in *Maguire v. Tyler*, 75 U.S. (8 Wall.) 650 (1869).
[17]*Id.* at 284.
[18]Rex E. Lee, "Oral Argument in the Supreme Court," 72 *A.B.A. J.* 60, 61 (1986).
[19]Davis, *supra* note 11, at 897.
[20]*Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).
[21]Rehnquist, **The Supreme Court**, *supra* note 8, at 185 ("Davis's argument I thought was masterful.... [T]he Court had appeared to be almost in awe of Davis, and asked him only one question during his ninety minutes of argument").
[22]236 U.S. 459 (1915).
[23]Transcript of oral argument, *Youngstown Sheet & Tube Co. v. Sawyer* (Nos. 744, 745) (May 12, 1952), in 48 **Landmark Briefs and Arguments of the Supreme Court of the United States: Constitutional Law** 893 (Philip B. Kurland and Gerhard Casper eds., 1975) (hereafter oral arg. tr.).
[24]*Id.* at 896.
[25]*See* Rehnquist, **The Supreme Court**, *supra* note 8, at 185 ("Perlman was virtually peppered with questions from the [J]ustices"); Joseph A. Loftus, "High Court Jurists Sharply Question Defense of Seizure," *New York Times*, May 13, 1952, at 1 ("For nearly all of the two hours and ten minutes that [Perlman] was on his feet... he was under the steady pressure of interrogation."); Chalmers M. Roberts, "Right to Grab Steel Mills Is Argued in High Court; Justices Question Perlman on Failure to Use Taft-Hartley Act," *Washington Post*, May 13, 1952, at 1 ("Perlman... was the target of searching questions from practically all of the nine [J]ustices").
[26]Oral arg. tr. at 907.
[27]*See id.* at 907–09.
[28]Davis, *supra* note 11, at 897.
[29]*See, e.g.*, Charles Lane, "Questions from the Bench Seen as Clues to Final Outcomes," *Washington Post*, November 3, 2003, at A17.
[30]*See, e.g.*, Arthur D. Hellman, "The Shrunken Docket of the Rehnquist Court," 1996 *Sup. Ct. Rev.* 403.
[31]*See, e.g.*, Jackson, *supra* note 7, at 802; Rehnquist, **The Supreme Court**, *supra* note 8, at 248–49.

[32]*See* Stern, Gressman, and Shapiro, *supra* note 6, at 578–79.
[33]*Id.* at 579 (quoting Remarks of Justice Powell at Fifth Circuit Judicial Conference, "The Level of Supreme Court Advocacy" 4 [May 27, 1974] [unpublished manuscript]).
[34]*See generally id.* at 579 n. 8 (citing Chief Justice Burger's remarks to District of Columbia Judicial Conference); Warren Burger, "Opening Remarks at the Conference on Supreme Court Advocacy (October 17, 1983)," in 33 *Catholic U. L. Rev. 525* (1984).
[35]Douglas**,** *supra* note 14, at 183.
[36]William H. Rehnquist, "Oral Advocacy: A Disappearing Art," 35 *Mercer L. Rev.* 1015, 1024 (1984).
[37]*See* Burger, *supra* note 34, at 525–26.
[38]G. Edward White, III–IV **The Oliver Wendell Holmes Devise History of the Supreme Court of the United States; The Marshall Court and Cultural Change, 1815–1835** 208 (1988) (Pinkney "argued over half the cases before the Marshall Court in the 1814 Term").
[39]*See* Rehnquist, "Oral Advocacy," *supra* note 36, at 1020 ("I am a firm believer in the proposition that a poorly argued case, whether in the briefs or in oral argument, is apt to be a poorly decided case").
[40]*Id.* at 1021 ("The intangible value of oral argument is, to my mind, considerable. It is and should be valuable to counsel, to judges, and to the public . . . . [O]ral argument offers an opportunity for a direct interchange of ideas between court and counsel.").