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ADVOCACY BEFORE THE SUPREME COURT

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The Supreme Court: How It Was, How It Is

William H. Rehnquist

How the Court Does Its Work: Oral Argument

* * *

Lawyers often ask me whether oral argument “really makes a difference.” Often the question is asked with an undertone of skepticism, if not cynicism, intimating that the judges have really made up their minds before they ever come on the bench and oral argument is pretty much of a formality. My answer is that, speaking for myself, it does make a difference: I think that in a significant majority of the cases in which I have heard oral argument, I have left the bench feeling different about a case than I did when I came on the bench. The challenge is seldom a full one-hundred-and-eighty-degree swing, and I find that it is most likely to occur in cases involving areas of law with which I am least familiar.

There is more to oral argument than meets the eye – or the ear. Nominally, it is the hour allotted to the opposing counsel to argue their respective positions to the judges who are to decide the case. Even if it were in fact largely a formality, I think it would still have the value that many public ceremonies have: It forces the judges who are going to decide the case and the lawyers who represent the clients whose fates will be affected by the outcome of the decision to look at one another for an hour, and talk back and forth about how the case should be decided.

But if an oral advocate is effective, how he presents his position during oral argument will have something to do with how the case comes out. Most judges have tentative views of the case when they

come on the bench, and it would be strange if they did not. [...]

But a second important function of oral argument can be gleaned from the fact that it is the only time before conference discussion of the case later in the week when all of the judges are expected to sit on the bench and concentrate on one particular case. The judges’ questions, although nominally directed to the attorney arguing the case, may in fact be for the benefit of their colleagues. A good oral advocate will recognize this fact, and make use of it during his presentation. Questions may reveal that a particular judge has a misunderstanding as to an important fact in the case, or perhaps reads a given precedent differently from the way in which the attorney thinks it should be read. If the judge simply sat silent during the oral argument, there would be no opportunity for the lawyer to correct the factual misimpression or to state his reasons for interpreting the particular case the way he does. Each attorney arguing a case ought to be much, much more familiar with the facts and the law governing it than the judges who are to decide it. Each of the nine members of our Court must prepare for argument in four cases a day, on three successive days of each week. One can do his level best to digest from the briefs and other reading what he believes necessary to decide the case, and still find himself falling short in one aspect or another of either the law or the facts. Oral argument can cure these shortcomings.

On occasion of course we get lawyers who do not come up to even the minimum level of competence in representing their client before our Court, either from lack of training and ability or,

even worse, lack of preparation. But the great majority of advocates who appear before us exceed the minimum level of competence one might expect, and most of them are far above average in the profession. In my day as a law clerk, it seemed to me that criminal defendants were not as capably represented as they might have been, because at that time the so-called "criminal lawyer" was often possessed of a second-rate education and second-rate abilities. But that is no longer true today with the proliferation of public defender and similar offices which attract bright and able younger lawyers. The truly outstanding advocate before our Court is still a great rarity: * * * the lawyer who knows the law, knows the facts, can speak articulately, but who knows that at bottom first-rate oral advocacy is something more than stringing together as many well-constructed relevant sentences as is possible in one half hour.

We who sit on the bench day after day to hear lawyers practice this art are bound to become, whether we like it or not, connoisseurs of its practitioners. Rather than try to draw up a long list of do's and don'ts for the oral advocate, I have tried in the following paragraphs to catalog some of the species of practitioners who have argued before the Court in my time.

The first is the lector, and he does just what his name implies: He reads his argument. The worst case of the lector is the lawyer who actually reads the brief itself; this behavior is so egregious that it is rarely seen. But milder cases read paraphrases of the brief, although they train themselves to look up from their script occasionally to meet the judges' eyes. Questions from the judges, instead of being used as an opportunity to advance one's own arguments by response, are looked upon as an interruption in the advocate's delivery of his "speech," and the lawyer after

answering the question returns to the printed page at exactly where he left off; returns, one often feels, with the phrase "as I was saying" implied if not expressed. One feels on occasion that at the conclusion of his argument the lector will say, "Thus endeth the lesson for today."

The lector is very seldom a good oral advocate. It would be foolish for a lawyer to stand before an appellate court with nothing written out to guide his presentation, but the use of notes for reference conveys a far different effect from the reading of a series of typed pages. The ultimate purpose of oral argument, from the point of view of the advocate, is to work his way into the judge's consciousness and make the judge think about the things that the advocate wishes him to think about. One of the best ways to begin this process is to establish eye contact with as many of the judges as possible, and this simply can't be done while you are reading your presentation.

An oral advocate should welcome questions from the bench, because a question shows that at least one judge is inviting him to say what he thinks about a particular aspect of the case. A question also has the valuable psychological effect of bringing a second voice into the performance, so that the minds of judges, which may have momentarily strayed from the lawyer's presentation, are brought back simply by this different sound. But the lector is apt to receive fewer questions than a better advocate just because he seems less willing than other lawyers to take the trouble to carefully answer the questions. When he has finished reading a presentation to the Court, all he has done is to state a logical and reasoned basis for the position he has taken on behalf of his client before the Court; but this much should have been accomplished in his briefs. If oral

argument provides nothing more than a summary of the brief in monologue, it is of very little value to the Court.

The second species of oral advocate who comes to my mind is what I shall call the debating champion. He has an excellent grasp of his theory of the case and the arguments supporting it, and with the aid of a few notes and memorization can depart from the printed page at will. But he is so full of his subject, and so desirous of demonstrating this to others, that he doesn't listen carefully to questions. He is the authority, and every question from the bench is presumed to call for one of several stock answers, none of which may be particularly helpful to the inquiring judge. He pulls out all the stops, welcomes questions, and exudes confidence; when he has finished and sat down, one judge may turn to another and say, "Boy, he certainly knows his subject." But simply showing how well you know your subject is not the same as convincing doubters by first carefully listening to their questions and then carefully answering them.

The third species of oral advocate I shall simply call "Casey Jones." This lawyer has a complete grasp of his subject matter, does listen to questions, tries to answer them carefully and does not read from any prepared text. He is a good oral advocate, but falls short of being a top-notch oral advocate because he forgets about the limitations of those he is trying to convince. The reason I call him Casey Jones is because he is like an engineer on a nonstop train – he will not stop to pick up passengers along the way.

He knows the complexities of his subject, and knows that if he were permitted to do so he could easily spend an hour and a half arguing this particular case without ever repeating himself. He is probably right. For this reason, in order to get as

much as possible of his argument into half an hour, he speaks very rapidly, without realizing that when he is arguing before a bench of nine people, each of them will require a little time to assimilate what he is saying. If the lawyer goes nonstop throughout the thirty minutes without even a pause, except for questions, even able and well-prepared judges are going to be left behind. To become a truly first-rate oral advocate, this lawyer must simply learn to leave the secondary points to the brief, to slow down his pace of speaking, and to remember that the lawyer who makes six points, of which three are remembered by the judges, is a better lawyer than a lawyer who makes twelve points, of which only one is remembered by the judges.

Next we come to the spellbinder, who is fortunately today much more of a *rara avis* than even in the days when I was a law clerk. The spellbinder has a good voice, and a good deal of that undefinable something called "presence" which enables him to talk with the Court rather than talk to the Court. This species of oral advocate has much going for him, but he tends to let his natural assets be a substitute for any careful analysis of the legal issues in the case. He is the other side of the coin from Casey Jones, who won't let up on legal analysis long enough to give the judges even a mental breathing spell. The spellbinder's magniloquent presentation of the big picture could be copied in part with profit by Casey Jones, but the thorough attention to the subject of the latter could be copied by the spellbinder. The spellbinder's ultimate weapon is his peroration, or at least so he thinks. A florid peroration, exhorting the Court either to save the Bill of Rights from the government or to save the government from the Bill of Rights, simply does not work very well in our Court.

These are but a few of the varied species of oral advocates that have come before our Court in my time. If we were to combine the best in all of them, we would of course have the All American oral advocate. If the essential element of the case turns on how the statute is worded, she will pause and slowly read the crucial sentence or paragraph. She will realize that there is an element of drama in an oral argument, a drama in which for half an hour she is the protagonist. But she also realizes that her spoken lines must have substantive legal meaning, and does not waste her relatively short time with observations that do not advance the

interest of her client. She has a theme and a plan for her argument, but is quite willing to pause and listen carefully to questions. The questions may reveal that the judge is ignorant, stupid, or both, but even such questions should have the best possible answer. She avoids table pounding and other hortatory mannerisms, but she realizes equally well that an oral argument on behalf of one's client requires controlled enthusiasm and not an impression of fin de siecle ennui.

* * *

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Rehnquist

1986

Rex E. Lee

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Let me begin by reviewing a few numbers. The reason that the Solicitor General of the United States has the greatest lawyering job in the world is that one of his two responsibilities is to handle litigation for only one client, the United States of America, before only one court, the United States Supreme Court. In other words, he represents the world's most interesting client before the world's most interesting court.

The Supreme Court in any given year will consider about 160 cases on the merits. The Solicitor General's client is a party in about sixty of those cases. In addition, his client will participate as *amicus curiae* both in the briefing and the oral argument of about twenty-five or thirty more cases. Those numbers alone render unique the relationship of this particular little twenty-three member law firm to the only court before which it practices. I know of no other court of general jurisdiction in the world in which one law firm appears in more than half of its cases.

There are some other numbers that make this relationship even more remarkable. First, the national average for winning cases before the United States Supreme Court is fifty percent. (Now if you poll the lawyers it will come out slightly higher than fifty percent, but I will assure that by any objective measurement it is fifty percent.) But this particular firm rather consistently wins seventy percent or more.

Next, the national average for persuading the Court to consider the case on the merits -- that is to note jurisdiction of appeals or to grant certiorari -- is about three percent to five percent. For the Solicitor General's office, it is somewhere between sixty percent and seventy percent. A final example, and perhaps the most significant of all, is this: About two dozen or more times each year, the United States Supreme Court will enter an order asking the Solicitor General to express the views of the United States in a case in which the United States is not involved as a party.

Those numbers are only part of the story. Beyond the numbers there is a widely held, and I believe substantially accurate, impression that the Solicitor General's office provides the Court from one administration to another -- and largely without regard to either the political party or the personality of the particular Solicitor General -- with advocacy which is more objective, more dispassionate, more competent, and more respectful of the Court as an institution than it gets from any other lawyer or group of lawyers.

The relationship I have just described is one that has great advantages for both institutions. The advantage to the Court is that in more than half of its cases it has a highly-skilled lawyer on whom it can count consistently for dependable analysis rendered against the background of an unusual understanding and respect for the Court as an institution.

The benefit to the Solicitor General and his clients is obvious. What lawyer would not value a relationship in which the court before which he appears with frequency, asks him, "what should we do about this case in which you are not involved?" I think that it is not only proper for the Solicitor General to use the adversarial advantages that result from that kind of relationship; it would be a breach of obligation to the President who appointed him to fail to do so. But it must be done with discretion, with discrimination, and with sensitivity, lest the reservoir of credibility which is the source of this

special advantage be diminished, with adverse consequences not only to the government's ability to win cases, but also to an important institution of government itself.

* * *

[Rex E. Lee served as Solicitor General during the Reagan Administration]

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Defending Congress

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Seth P. Waxman

Like judges, the Solicitor General is a reactive creature; every decision he makes comes in the context of a specific request from a Cabinet department, an independent agency, a United States Attorney, or a litigating division of the Department of Justice. In every instance, the process begins with a written analysis and recommendation, which is then circulated to every government component that might conceivably have an interest in the matter. These components in turn prepare their own analyses and share them with each other. I recall cases from my tenure in which as many as a dozen different agencies and components have expressed views.

After all of these memos are in, an Assistant to the Solicitor General prepares an independent analysis and recommendation; a Deputy writes another; and the entire package lands on the Solicitor General's desk for decision. Ordinarily, between five and ten of these recommendation packages arrive every day. Most are reasonably straightforward, but sometimes the recommendations differ widely. Meetings are convened in which representatives of each component gather to consider each other's views, with the Solicitor General trying to reconcile differences and fashion a single coherent position.

These meetings are about the most exciting and challenging thing the Solicitor General gets to do. It is genuinely thrilling to collaborate with a collection of

dedicated government lawyers each of whom brings to the table the unique perspective of the component he represents for the purpose of trying to arrive at a position that will fairly reflect the views of the United States as a whole. Sometimes it just cannot be done. But in a surprisingly large percentage of cases, a position can be developed that leaves everyone satisfied or at least equally dissatisfied. The beauty of the system is that each government component reflects a unique conception of on what constitutes the interest of the United States. In that way, the government acts as a microcosm of the country as a whole, mirroring the complexity and diversity of American views.

The process often includes advocacy by lawyers for other parties to the litigation and sometimes by attorneys for other persons or entities that are not directly involved with the litigation but nonetheless have an interest in the case or the issue. The process always involves the Solicitor General's independent evaluation of the relative importance of each case and the cost of pursuing it. As a party in about forty percent of all cases in the federal courts, the United States appeals only a small fraction of the decisions it loses, and it petitions for rehearing or certiorari only rarely. Solicitors General understand the cataclysmic effects that a less-discriminating process would have on the judicial system.

When an Act of Congress is challenged, the process remains much the same, but the calculus alters somewhat. The

situation differs because a decision about how to respond to a constitutional challenge implicates in the most direct way the Solicitor General's responsibility to account for the interests of all three branches of government.

In the unique context of a constitutional challenge to legislation, the interests of the Congress and the Executive are generally pretty clear: they have spoken. And as a result, at least when those interests do not conflict with the Solicitor General's duty to the courts, the Department of Justice defends Acts of Congress in all but the rarest of cases. Except in two well-recognized circumstances, which I will discuss momentarily, the Solicitor General generally defends a law whenever professionally respectable arguments can be made in support of its constitutionality. Unlike litigation decisions in other cases, when an Act of Congress has been challenged, the Solicitor General ordinarily puts a heavy thumb on the scale.

Vigorously defending congressional legislation serves the institutional interests and constitutional judgments of all three branches. It ensures that proper respect is given to Congress's policy choices. It preserves for the courts their historic function of judicial review. And it reflects an important premise in our constitutional system that when Congress passes a law and the President signs it, their actions reflect a shared judgment about the constitutionality of the statute. In the mine run of cases, it is fair to presume that the Congress that passed the legislation and the President who signed it were of the view that the law conformed to the Constitution as construed by the Supreme Court. In such cases, Solicitors General defer to Congress and the President's articulation of the constitutional "interests of the United States," as reflected in the enactment.

They do not attempt to reach our own best view of a statute's constitutionality; rather, they try to craft a defense of the law in a manner that can best explain the basis on which the political branches' presumed constitutional judgment must have been predicated.

* * *

[There are two exceptions to this presumption.] The first exception applies when an Act of Congress raises separation of powers concerns. It is not surprising that the President and Congress occasionally find themselves at odds regarding the proper interpretation of their own, and each other's, constitutional powers. In that event, the Solicitor General ordinarily defends the President's powers and prerogatives, and Congress traditionally appears as amicus to present its own views.

* * *

The second exception to the general principle of defending Acts of Congress is an exception that assumes great significance in light of the Supreme Court's recent jurisprudence: arises when defending the statute would require the Solicitor General to ask the Supreme Court to overrule one of its constitutional precedents. In that instance when a contrary constitutional ruling is directly on point the interests of the legislative and judicial branches are in direct tension. On the one hand, Congress has made a constitutional judgment. Yet under *Marbury v. Madison*, the Supreme Court has the final word on the meaning of the Constitution. The Solicitor General has an obligation to honor the important doctrine of *stare decisis* and a duty to respect the rulings of the Court. Those responsibilities are at least commensurate with the Solicitor General's duty to

respect congressional determinations about a statute's constitutionality.

Most commonly, cases falling under this exception involve statutes whose constitutionality has been undermined by Supreme Court decisions rendered after the law's enactment. Congress, after all, rarely defies a Supreme Court ruling. For example, in recognition of the Court's new jurisprudence, the Department of Justice recently notified Congress twelve times during a single year that, in light of intervening judicial precedents, it could no longer defend a statutory provision that

the legislature and the Executive might have considered constitutional at the time of enactment. [...]

[Seth P. Waxman served as Solicitor General during the Clinton Administration]

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1998

David A. Strauss

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The Solicitor General is engaged in advocacy, not impartial commentary or advice, and the Court knows that. But the Court has a significant community of interests with the institutional agenda of the federal government, including the Solicitor General's Office. The Court does not want to see the government unable to perform its legitimate functions. Receiving a responsible account of what the government thinks it needs to discharge those functions — an advocate's account, but one intended to illuminate the government's view of what it needs — is a great asset to the Court. When what the Court receives from the Solicitor General is instead an argument, or a judgment, that is motivated by political concerns — even political concerns of the highest moral order — the Court is no longer getting the kind of material it most needs, and the community of interest between the Office and the Court is eroded.

In addition, as long as the Office engages in forms of advocacy that are familiar to the Court — defending the institutional interests of the government, without regard to the political agenda of the Administration in power — the Court has a good sense of the limits and value of the advocacy it is receiving. Familiarity, in this context, is a signal virtue. The Office will function best, both in the achievement of its own objectives and in helping the Court do its job, when it seems to the Court that it is seeing the same, familiar Solicitor General's Office in every case

preferably, the same Solicitor General's Office that it saw when the other political party was in power. The Court can discount for the Office's professional biases and proceed accordingly. The Court also knows that, to the extent the Office is concerned with the government's institutional interests, rather than the Administration's political interests, the Office has a stake in maintaining a long-term relationship with the Court and will act accordingly. The Office will not risk its credibility for the sake of victory in a single case.

When part of the work of the Office responds to a particular Administration's political agenda, the relationship between the Office and the Court can come unsettled. Many issues that come before the Court are not high profile political controversies like abortion but are nonetheless potential opportunities for the Administration to score political points: areas like criminal law, civil rights, environmental protection, antitrust, labor law, and tax enforcement, for example. If the Solicitor General's Office sometimes takes positions because it is promoting the Administration's agenda, the Court is then entitled to wonder, in each of these areas, whether it is hearing from the institutional Office — which is concerned primarily with maintaining its relationship with the Court, and with whose biases and predilections the Court is familiar — or the political Office, which may be addressing not the Court but a very different audience, and for whose tendencies and

biases the Court will not have as good a feel.

More importantly, lawyers concerned with promoting a single Administration's political agenda do not have the same incentives to maintain their long-term credibility with the Court. Once the Solicitor General and his staff are free to go beyond the institutional interests of the government, and to advocate a political agenda, they will naturally ask themselves: Why should we husband our credibility for institutional issues we care about less or, worse still, for a subsequent Administration instead of spending it on our own political agenda? The point is not that adherents to the Administration view will engage in misleading or other improper advocacy. It is that, given the ongoing relationship between the Solicitor General and the Court, the Solicitor General must be selective in almost everything he does: seeking certiorari,

stays, or summary reversals; using strong rhetoric (for example, arguing that a case seriously impairs the government's ability to enforce the criminal laws); and so on. If the Office's time horizon is four years, and if the Solicitor General sees his agenda as the pursuit of a small number of politically salient causes, then he will have an entirely different attitude toward this task, and the Office's ability to perform its institutional role will be weakened.

* * *

[David A. Strauss, a professor at the University of Chicago Law School, previously worked in the Solicitor General's Office.]

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U.S. Changes Stance in Case On Obscenity

The New York Times

November 11, 1994

Linda Greenhouse

Stung by Congressional criticism of its legal interpretation of a child-pornography law, the Clinton Administration reversed course in a brief filed with the Supreme Court today and disavowed its previous position that the law applied only to depictions of nude children.

The filing of the brief, as well as a statement accompanying it, disclosed an unusual fissure in the top ranks of the Justice Department. The brief was signed by Attorney General Janet Reno and not by Solicitor General Drew S. Days 3d, the Government's top Supreme Court advocate, whose narrower view of the child-pornography law, as expressed in a brief last year, unleashed a storm of criticism on Capitol Hill.

All 100 Senators voted for a resolution last year condemning the brief by Mr. Days, and the crime bill that passed Congress this summer contained a section expressing the sense of the Congress that the brief did not reflect Congressional understanding of the scope of the 1978 law.

In the unusual statement with the brief today, Ms. Reno praised as sound and persuasive the interpretation of the law adopted by the United States Court of Appeals for the Third Circuit, in Philadelphia. The appeals court, affirming for the second time the conviction of a Pennsylvania State University graduate student, Stephen A. Knox, for having ordered three videotapes of scantily clothed young girls, said the law was not limited to nudity.

It was that interpretation that Mr. Days found impermissibly broad in the brief he filed last year. He told the Supreme Court then that both the plain meaning and the legislative history of the law, which makes it a crime to receive or distribute pictures of minors engaged in a "lascivious exhibition of the genitals or pubic area," showed that Congress meant to prohibit only depictions of children who were naked or whose genitals were visible through tight or transparent clothing.

The brief Ms. Reno filed today said that "neither nudity nor discernibility of the genitals through clothing is a required element of the offense." In her statement, the Attorney General said: "I believe that the Government must argue for that legitimate interpretation of the statute, which prohibits the receipt and possession of child pornography to the maximum extent allowed under the Constitution."

She also said, "The Solicitor General and I have discussed this case in light of the evidence and the law, and with great attention to the institutional issues affecting the Department of Justice." She went on: "As I am ultimately responsible for the positions taken by the United States, the brief filed today adopts the interpretation made by the Third Circuit, which I believe to be the correct one. For that reason, it bears my signature rather than that of the Solicitor General."

In fact, no lawyer in the Solicitor General's office signed the brief. It is virtually unheard of for the Federal Government to file a Supreme Court brief

without the signature of any member of the Solicitor General's office. Attorneys General rarely if ever sign briefs themselves. Mr. Days was traveling today and did not return a telephone call seeking comment.

The brief was greeted with glee by the organizations that had led the opposition to the earlier brief. John D. McMickle, a lawyer for the national Law Center for Children and Families, which led a coalition of groups in filing a brief in the case, said today that the Administration's new position was "the result of one year's worth of concerted effort and the Tuesday elections." He added, "This case is the first indication of how the Justice Department and the Clinton Administration will react in a conservative world."

The brief was filed in response to the Pennsylvania graduate student's second Supreme Court appeal of his conviction, for which he received a five-year sentence. Last year, in response to the Administration's initial brief, the Supreme Court sent the case back to the Third Circuit with instructions to reconsider the conviction in light of the Government's new position. The Third Circuit then rejected the new interpretation and reaffirmed Mr. Knox's conviction.

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Revisiting Adarand
Solicitor General Draws Fire Over Affirmative Action Law

Legal Times

August 13, 2001

Tony Mauro

Until last week, Solicitor General Theodore Olson had spent his first two months in office quietly placing a more conservative stamp on the Justice Department's briefs before the Supreme Court.

But with the Aug. 10 filing of a high-profile brief that supports a federal affirmative action program, Olson's less-visible conservative advocacy may have been eclipsed. The move could win the administration praise for taking a middle path, or open Olson and his boss, Attorney General John Ashcroft, to charges they have betrayed their conservative roots.

"Given the players here, John Ashcroft and Ted Olson, I'm not sure why this has happened, except as a political calculation," said Linda Chavez, president of the Center for Equal Opportunity and, briefly, President George W. Bush's nominee for secretary of labor. "It's very disappointing. When I discussed these issues with President Bush at the time of my nomination, I thought we were in sync."

The filing came in *Adarand Constructors Inc. v. Mineta*, No. 00-730, the latest round in long-running litigation over a Federal Highway Administration minority set-aside program for highway contractors, first enacted by Congress in 1990. After the Supreme Court first blocked the program in 1995, Congress re-enacted it, but the program was later modified to ensure that only economically

disadvantaged firms benefited. The U.S. Court of Appeals for the 10th Circuit upheld the revised program, prompting the white-owned Adarand firm to challenge it again.

One day before President Bush took office in January, Clinton administration Solicitor General Seth Waxman urged the Court not to disturb the 10th Circuit ruling. But in March, the Court said it would take up the issue again, prompting intense discussions within the Bush Justice Department about possibly changing its position and dropping its defense of the program.

On Aug. 10, the deadline for filing the brief, the administration made it clear it planned to defend the program. As of press time, the text of the brief was not available, but government sources confirmed that it would not change sides in the case.

Powerful factors weighed on the side of maintaining a defense of the highway program, says Washington University School of Law professor Clark Cunningham, who has filed a brief in the case supporting neither side.

"One of the department's clients here, in a sense, is Congress, which has reauthorized this program, so you would expect the solicitor general to abide by the wishes of his clients," says Cunningham.

In addition, says Cunningham, the strong identification of both Olson and Ashcroft as opponents of affirmative action may,

ironically, have pushed them to decide they had to continue defending the set-aside. "Their integrity as lawyers was under scrutiny, to be sure that they would not impose their personal beliefs on the case, so they might have bent over backward to defend it."

William Perry Pendley of Mountain States Legal Foundation, longtime lawyer for Adarand, also said last week that the administration's position can be explained as "a defense of Congress, which Ashcroft said he would do during his confirmation hearings."

Pendley said the brief was not a surprise. "We've been through three presidents and six secretaries of transportation on this, and nothing has changed."

Chavez said politics was at work, noting that many of the blacks and Hispanics who have become active in the Republican Party "got their start" with set-aside and affirmative action programs like the one at issue in Adarand.

But Chavez and others say there will be opportunities before long for the administration to redeem itself as other affirmative action cases make their way to the high court. Affirmative action programs in higher education-which Olson fought vigorously as a private attorney-are at issue in a series of cases that could get to the Court in the next year or so.

Since taking office in June after a contentious confirmation process, Olson

had taken positions that were generally pleasing to conservatives, positions that critics say the Clinton Justice Department would not likely have advanced.

In *Toyota Manufacturing, Kentucky, Inc. v. Williams*, No. 00-1089, Olson sided with the car manufacturer against assembly line worker Ella Williams, who successfully claimed that the carpal tunnel syndrome she developed on the job entitled her to accommodations under the Americans With Disabilities Act. Disabilities groups were angered by the brief, which says the case should be returned to lower courts.

Earlier, Olson filed a brief favoring an Ohio school voucher program that allows government monies to be used for religious school tuition.

The brief was submitted in *Zelman v. Doris Simmons-Harris*, No. 00-1751, even before the Court announced whether it would take up the case-an unusually early stage for the government to become involved.

"They didn't even wait for the Court to act," says Robert Boston of Americans United for the Separation of Church and State, which opposes vouchers. "Things really have changed at the Justice Department."

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The Influence of Amicus Curiae Briefs on the Supreme Court

148 U. Pa. L. Rev. 743

2000

Joseph D. Kearney and Thomas W. Merrill

* * *

The last century has seen little change in the conduct of litigation before the United States Supreme Court. The Court's familiar procedures—the October Term, the opening-answering-reply brief format for the parties, oral argument before a nine-member Court—remain essentially as before. The few changes that have occurred, such as shortening the time for oral argument, have not been dramatic.

In one respect, however, there has been a major transformation in Supreme Court practice: the extent to which non-parties participate in the Court's decision-making process through the submission of amicus curiae, or friend-of-the-court, briefs. Throughout the first century of the Court's existence, amicus briefs were rare. Even during the initial decades of this century, such briefs were filed in only about 10% of the Court's cases. This pattern has now completely reversed itself. In recent years, one or more amicus briefs have been filed in 85% of the Court's argued cases. Thus, at the close of the twentieth century, cases without amicus briefs have become nearly as rare as cases with amicus briefs were at the beginning of the century.

Attitudes within the legal community about the utility and impact of amicus briefs vary widely. Perhaps the most common reaction among lawyers and judges is moderately supportive. Amicus briefs, it is said, can provide valuable assistance to the Court in its deliberations. For example, they can present an

argument or cite authorities not found in the briefs of the parties, and these materials can occasionally play a critical role in the Court's rationale for a decision. Alternatively, these briefs can provide important technical or background information which the parties have not supplied. Those sharing this perspective can point to the frequent citation of amicus briefs in the Justices' opinions in support of the supposition that the Court often finds such briefs helpful.

Other members of the legal community, however, offer a much more negative assessment of amicus briefs. For example, Chief Judge Richard Posner of the Seventh Circuit has written that the amicus briefs filed in his court provide little or no assistance to judges because they largely duplicate the positions and arguments advanced by the parties. Those who share this assessment regard such filings as largely a nuisance—imposing unwarranted burdens on judges and their staffs with few, if any, mitigating benefits. According to those who harbor this negative assessment, the judicial system would be improved if amicus filings were prohibited or at least sharply curtailed.

Justice Scalia recently offered a third perspective on the widespread filing of amicus briefs. The occasion was *Jaffee v. Redmond*, where the Supreme Court recognized a "psychotherapist's privilege" under Rule 501 of the Federal Rules of Evidence. In a dissenting opinion joined in part by Chief Justice Rehnquist, Justice Scalia offered the following observation:

In its consideration of this case, the Court was the beneficiary of no fewer than 14 amicus briefs supporting respondents, most of which came from such organizations as the American Psychiatric Association, the American Psychoanalytic Association, the American Association of State Social Work Boards, the Employee Assistance Professionals Association, Inc., the American Counseling Association, and the National Association of Social Workers. Not a single amicus brief was filed in support of petitioner. That is no surprise. There is no self-interested organization out there devoted to pursuit of the truth in the federal courts. The expectation is, however, that this Court will have that interest prominently indeed, primarily in mind. Today we have failed that expectation, and that responsibility.

* * *

In this Article, we present empirical evidence designed to enhance our understanding about the impact of amicus curiae briefs on the Supreme Court. [...] In terms of the influence of amicus briefs on outcomes, our study uncovers a number of interesting patterns. We find that amicus briefs supporting respondents enjoy higher success rates than do amicus briefs supporting petitioners; that small disparities of one or two briefs for one side with no briefs on the other side may translate into higher success rates but larger disparities do not; that amicus briefs cited by the Court appear to be no more likely to be associated with the winning side than briefs not cited by the Court; and that amicus briefs filed by more experienced lawyers may be more successful than briefs filed by less experienced lawyers. Among institutional litigants that appear frequently before the Court, we confirm the finding of other researchers that the Solicitor General, who

represents the United States before the Supreme Court, enjoys great success as an amicus filer. We also track the amicus records of the American Civil Liberties Union ("ACLU"), the American Federation of Labor-Congress of Industrial Organizations ("AFL-CIO"), and the States, and find that they enjoy some success as amicus filers, although less than the Solicitor General.

[...] [A]micus briefs do appear to affect success rates in a variety of contexts. And contrary to what the interest group model would predict, we find no evidence to support the proposition that large disparities of amicus support for one side relative to the other result in a greater likelihood of success for the supported party. In fact, it appears that amicus briefs filed by institutional litigants and by experienced lawyers filers that have a better idea of what kind of information is useful to the Court are generally more successful than are briefs filed by irregular litigants and less experienced lawyers. [...] [T]he greater success associated with amicus briefs supporting respondents can be explained by the supposition that respondents are more likely than petitioners to be represented by inexperienced lawyers in the Supreme Court and hence are more likely to benefit from supporting amici, which can supply the Court with additional legal arguments and facts overlooked by the respondents' lawyers.

[Footnotes have been deleted.]

[Joseph D. Kearney is a professor at Marquette Law School; Thomas W. Merrill is a professor at Northwestern Law School]

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Friends with Agendas: Amicus Curiae Briefs May Be More Popular Than Persuasive

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Alexander Wohl

Almost like flowers, dozens of brightly colored legal briefs are delivered almost daily to the chambers of the nine justices of the U.S. Supreme Court.

Amid these bouquets of color--the result of the strict dictates of Court rules mandating that the cover of every type of brief be a specific shade--green frequently stands out, representing the submissions of "friends of the court."

In legal vernacular, these are amicus curiae, but some Court observers have described them disparagingly as "lobbyists of the Court."

Supreme Court Rule 37 allows a nonparty to file a brief in a case, with either the consent of both parties or leave of the Court, "that brings to the attention of the Court relevant matter not already brought to its attention by the parties."

With roots going back as far as ancient Roman law, the amicus submission originally was intended to provide a court with impartial legal information that was beyond its notice or expertise.

In modern Supreme Court practice, however, the amicus brief has become a form of third-party representation--a means of advocacy for interest groups, private individuals and business concerns that may not be parties to a case but have a very direct interest in it. That is a development some Court observers find troubling.

Amici often are "nothing more than extensions of the parties," suggests Professor Michael Rustad of Suffolk University Law School in Boston. "They have moved from being friends of the Court to friends of the petitioner and respondent."

The danger from this, says Rustad, who has written on what he terms the "selective distortion of amicus briefs," is not that amici are advocates, but that "in their advocacy they may misuse data or misrepresent empirical findings to the Court."

The potential for this kind of advocacy is particularly high at the Supreme Court, whose decisions often have a determinative effect on cases involving touchstone legal issues.

The vast majority of the cases that make it to the Court's oral argument calendar are now accompanied by at least one amicus brief.

In the 1995-96 term, amicus briefs were filed in nearly 90 percent of the cases the Court decided. During the 1980-81 term, by contrast, 71 percent of the Court's cases decided by opinion had amicus filings, and only 35 percent of the cases decided in the 1965-66 term included such briefs, according to a study by Bruce Ennis at Jenner & Block in Washington, D.C., who argues often before the Court.

Yet these figures do not fully account for the numbers of groups seeking input with the Court, since many amicus briefs are

filed by coalitions of groups with a shared interest in a case's outcome.

In *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), which concerned state restrictions on abortion, more than 85 "friends" filed amicus briefs.

During that same term, by comparison, the civil rights case of *Patterson v. McClean Credit Union*, 491 U.S. 164 (1989), concerning whether a cause of action for racial harassment by an employer existed under a portion of the U.S. Code, drew fewer than 20 amicus briefs.

Taken together, however, they represented more than 100 public interest groups and nearly half the members of Congress.

Proliferating Groups

A number of reasons are offered for the steady increase in amicus briefs filed with the Court.

First, as Ennis notes, "there is an increasing recognition in the public interest and business communities that Supreme Court decisions in a particular case may have profound implications beyond that case."

Another factor is the proliferation of advocacy groups in recent decades, according to Dean William L. Robinson of the District of Columbia School of Law, who chairs the ABA Standing Committee on Amicus Curiae Briefs.

Indeed, amicus briefs today are filed by a broad cross-section of groups and individuals, each of whom has a specific agenda and most of whom claim to represent the public interest.

For many financially strained advocacy groups, amicus briefs are a cost-effective way to make a legal pitch to the highest court in the land. Although good Supreme

Court briefs do not come cheaply, they are much less costly than litigating a case from scratch. "Pound for pound, it is as big a bang for the buck as you can get," Ennis says.

These factors have led to the overuse--and sometimes abuse--of the amicus process. One public interest lawyer acknowledges that filing an amicus brief in the Supreme Court boosts the reputation of advocacy groups or law firms, demonstrating not only that they are capable of putting together a brief, but also holding out their special expertise, as if to say, "We're important, we're players in the big league of the Supreme Court."

As a result, Robinson suggests, "A large number of amicus briefs just don't have anything special to say beyond what the parties are saying. They are being filed only because an entity wants to assert their views as an organization on a matter."

The Court itself disfavors redundant filings but does little to prevent them. Rule 37.1 warns that an amicus brief that does not bring new and relevant material to the justices "burdens the Court and its filing is not favored." And the Court works informally to prevent duplication of arguments by encouraging communication among the amici.

In a few cases, the Court may deny leave to file an amicus brief. But leave of the Court is not required if the parties agree to the filing, which they routinely do unless the prospective amicus is so politically unpalatable or intends to present arguments so outlandish that neither side wants to be associated with it.

The Most Influential Amicus

The key question about amicus briefs, once labeled "delusively innocuous," is how influential they really are.

Ultimately, the impact of an amicus will depend on the intellectual quality of the brief and what new arguments or information it brings to the Court's attention.

This was apparent last term, as a seemingly benign amicus brief submitted by Professor Laurence H. Tribe of Harvard Law School and several other leading constitutional scholars appeared to have a significant impact on Justice Anthony M. Kennedy's opinion for the Court in *Romer v. Evans*, No. 94-1039 (May 20, 1996), striking down a Colorado voters' initiative that barred the enactment of state and local laws or regulations protecting homosexuals from discrimination.

Though he never cited Tribe's brief, Kennedy seemed to accept the proffered argument that the amendment constituted a per se violation of the equal protection guarantee under the 14th Amendment.

In fact, Robinson explains, "It is very unusual for the Court to cite an amicus brief in its opinion, or for that matter even the briefs of the parties."

More likely, the Court's recognition will come as it did last term in *United States v. Winstar Corp.*, No. 95-865 (July 1, 1996). Discussing a difference of opinion about the government's policy for insolvent thrift institutions, the Court in a footnote cited as evidence remarks by the director of the now-defunct Federal Savings and Loan Insurance Corp. quoted in an amicus brief submitted by the Franklin Financial Group.

Notwithstanding its reluctance to identify influential amici, the Court has occasionally cited as a source for its decision reasoning raised in an amicus brief. Among those cases are *Mapp v. Ohio*, 367 U.S. 643 (1961), in which the justices applied the exclusionary rule to

the states, and *Teague v. Lane*, 489 U.S. 288 (1989), barring pre-emptory jury challenges for reasons related to race.

The most influential amicus, observers agree, is still the U.S. solicitor general. The only federal official required by statute to be "learned in the law," the "S.G." is both the chief advocate before the Court for the executive branch of the federal government and an informal adviser to the Court--the post has come to be known as the "10th justice."

The solicitor general frequently is requested by the Court to submit a brief in cases in which the executive branch is not a party. Even when not asked, the solicitor general may submit a friend-of-the-court brief without consent of the parties or leave of the Court.

As the number of amicus briefs continues to rise, there is a natural cry from some corners for increased scrutiny or regulation. Some, like Rustad, argue for a panel of independent experts to assess the veracity of claims and evidence in the briefs.

Others, like Robinson, believe no change is necessary because "the justices are able to make a fairly quick judgment and determine whether a particular amicus has anything to add or whether they are just reworking what the parties said."

For now, it seems unlikely that any major changes are in store for the amicus process. While that process is not perfect, it encourages that a variety of views and interests be heard on Supreme Court cases while offering support for justices seeking to sustain or sink a legal argument.

To paraphrase an adage: "With amici like these, who needs inimici?"

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Bruce J. Ennis

* * *

[II. Effective Communication Between
Party and Amicus]

The amicus and its counsel can help the party plan the party's strategy, and can provide research, drafting, and editorial assistance to the party. The amicus can organize one or more moot courts, etc. This assistance is a much neglected resource that can be extremely useful.

In the amicus brief itself, support for a party will usually take one of three forms:

A. Helping the Party Flesh Out
Arguments the Party is Forced to Make in
Summary Form

Because of page limits, or considerations of tone and emphasis, parties are frequently forced to make some of the points they wish to make in rather abbreviated form. A supportive amicus can flesh out those points with additional discussion and citation of authority. Or the amicus can support points the party is making by providing a detailed legislative or constitutional history, a scholarly exposition of the common law, or a nationwide analysis of relevant state laws.

For example, in the recent case of *Toll v. Moreno*, the World Bank submitted an amicus brief urging the Supreme Court to rule, on Supremacy Clause grounds, that certain state statutes which disadvantaged alien college students were unconstitutional. The alien students touched briefly on the Supremacy Clause, but the thrust and greater portion of their

brief was necessarily concerned with their equal protection and due process arguments. The Court ruled for the students, but it chose to decide the case on the basis of the Supremacy Clause theory that had been advocated primarily by the amicus.

Similarly, in the Supreme Court's latest round of abortion decisions, the plaintiffs devoted only one paragraph in their brief to the argument that nonphysicians should be allowed to engage in abortion counseling because they thought they would probably lose that issue. Instead, the plaintiffs chose to stress other important issues they thought they had a better chance to win. But the American Psychological Association, as amicus, marshaled empirical studies to show why counseling by nonphysicians would help to promote truly informed consent, and the Court agreed.

B. Making Arguments the Party Wants to
Make But Cannot Make Itself

It frequently happens that a party wants a particular argument to be made but is not in a position to make that argument itself. The party may simply lack credibility on that issue, or it may be unable to make the argument for political or tactical reasons. For example, governmental entities often feel compelled, for political reasons, to argue for very broad rulings: eliminate the exclusionary rule entirely, absolute immunity for all governmental employees, etc. But courts, including the Supreme Court, are institutionally conservative and usually prefer to decide cases on narrower

grounds if possible. An amicus can suggest those narrower grounds: qualify the exclusionary rule rather than eliminate it, distinguish a prior case rather than overrule it, or dismiss certiorari as improvidently granted, among others.

A good example of this type of cooperation is *Metromedia, Inc. v. San Diego*, in which San Diego sought to exclude most billboards from designated sections of the city, on grounds of traffic safety and aesthetics. The billboards carried primarily commercial messages, but they occasionally carried political messages as well. The billboard owners were represented by an experienced and extremely sophisticated Supreme Court advocate. He knew the Court would be closely divided, and would be more troubled by the regulation's prohibition of political speech than by its prohibition of commercial speech. The billboard owners, however, were not in a position to argue credibly on behalf of political speech because they did not themselves engage in political speech; they simply leased billboard space, primarily to commercial speakers. Their lawyer decided it would be important to demonstrate to the Court that organizations traditionally concerned with the protection of political speech were opposed to the San Diego ordinance, so he asked the ACLU if it would file an amicus brief emphasizing the political speech aspects of the case, and the ACLU agreed.

The Court, as expected, was closely divided. Although a majority of the Court agreed to a judgment striking down the

San Diego ordinance, only three other Justices joined in Justice White's plurality opinion. Those four thought the ordinance was constitutional insofar as it regulated only commercial speech, but they struck down the entire ordinance because it unconstitutionally regulated political speech, and the commercial and political regulations were not severable. Given the closeness of this decision, it seems clear that the billboard owners advanced their interests by enlisting amicus support.

C. Informing the Court of the Broader Public Interests Involved, or of the Broader Implications of a Ruling.

One of the most common forms of amicus support is to inform the court of interests other than those represented by the parties, and to focus the court's attention on the broader implications of various possible rulings. Governmental entities are uniquely situated to define and assert the "public interest" and their views as amicus will, therefore, carry substantial weight. If a governmental entity is already a party, amicus support from other governmental entities will enhance the credibility of the party's arguments.

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[Footnotes have been deleted.]

[Bruce J. Ennis was one of the leading members at the Supreme Court bar

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Appealing Practice

The American Lawyer

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Tony Mauro

Arguing a case before the Supreme Court of the United States has always been the Matterhorn of the legal profession: a terrifying, exhilarating, career-crowning half-hour ascent to the realm of the black-robed law gods. But whatever it was before, it is more so now. The Court's plummeting docket and its intense, almost manic questioning from the bench have combined to fundamentally change advocacy before the nation's highest court. Competition for coveted arguments is more intense. Massive preparation is more imperative. And clients who might have stuck with their local counsel before are reaching more often for high court specialists, the specialists say. The Matterhorn has become Everest, so the sherpas are in great demand. A statistical survey by *The American Lawyer* of the last five terms confirms the reemergence of a Supreme Court bar the likes of which has not been seen since the early days of the republic when Henry Clay, Daniel Webster, Francis Scott Key, and a handful of other advocates argued day in and day out at the Supreme Court. A scant 13 years ago, Chief Justice William Rehnquist was able to state flatly there is no such Supreme Court bar at the present time, because he rarely saw a private practice lawyer argue before him more than once a term. But now, even with the justices hearing only half the number of cases as then, it is not unusual for a small group of top specialists in private practice all white males to argue one to three times a term. Sidley & Austin's Carter Phillips argued and ultimately won three cases in the

space of a month last term, and has argued 12 cases in the last five terms. This summer Microsoft Corp. signed Phillips on to its defense team for its antitrust journey through the Supreme Court. With the supply of cases cut in half, the demand among the dozen or so firms with serious Supreme Court practices has become intense. In a practice area that venerates civility, lawyers are beginning to bump into each other as they pursue clients. A Massachusetts lawyer even went so far as to sue Phillips several years ago for taking an oral argument away from him in 1993. (Phillips prevailed in the suit, however.) Like fishermen going after a depleted catch, lawyers are trolling further and wider for the chance to argue before the Supreme Court. Upstart solo practitioner Thomas Goldstein is drawing disapproving perhaps envious glances from staid veterans for cold-calling lawyers who have lost cases that might attract Supreme Court attention. Goldstein will be arguing two cases this fall.

The drought of cases is also affecting the solicitor general's office, which has always attracted top talent by being able to offer them the prospect of arguing multiple oral arguments. Advocates from the SG's office do still get substantial face time with the justices but often in ten-minute snippets as *amicus curiae* instead of the full-blown 30-minute arguments that were once common. All this fierce competition takes place over what seems, from the outside, like a dubious prize: a half hour of jackhammering from justices

who sometimes seem more interested in making lawyers suffer than in hearing what they have to say. Antonin Scalia toys with lawyers. David Souter confuses them. William Rehnquist snarls at them, sometimes correcting their grammar. John Paul Stevens asks the one question the lawyer was not expecting. Stephen Breyer waits until the end of their presentation to pounce. And Ruth Bader Ginsburg? She interrupts everyone else.

Lawyers who subject themselves to this abuse universally describe it as fun, but it sure doesn't look that way. No lawyer has fainted during oral argument lately it happened several times in the last century but it seems only a matter of time. Supreme Court argument is not a game for the faint-hearted. A dozen years ago, three or four of the nine justices were content to listen to lawyers' arguments, asking few questions. Now, all the justices except Clarence Thomas arrive on the bench with an irresistible urge to ask questions lots of them. And even Thomas, when he asks a question three or four times a term, packs a punch aided by the element of surprise. Nine prima donnas, eight of whom are interested in talking during oral argument, is how Laurence Tribe, a professor at Harvard Law School and a sometime advocate before the high court, describes it. No Court in my lifetime was remotely as active as today's Court. Tribe has argued seven cases in the last five terms. To help get lawyers in shape to argue before the justices, the Public Citizen Litigation Group, Georgetown University Law Center's Supreme Court Institute, the State and Local Legal Center, and the National Association of Attorneys General as well as some of the top private firms run moot courts throughout the term. With fewer cases on the docket, the justices are more prepared for every argument. It's an extraordinarily hard court to argue before,

says Public Citizen's Alan Morrison, whose Supreme Court Assistance Project often coaches first-timers. Morrison has argued four times in the last five terms himself. Even the veterans say they've had to ratchet up preparations for oral arguments in speed as well as time. Subtle changes in the Court's calendaring often mean cases are set for argument more quickly than before. For three weeks before the argument, you don't do anything else, says veteran advocate H. Bartow Farr III, of Washington, D.C.'s Farr & Taranto. You talk to your wife, but you have a vacant look in your eyes, because you are thinking about your jurisdictional argument. Court clerk William Suter helps relieve argument-day stress with a friendly tour, briefing, and handshake. He lets it be known that justices are aware if a lawyer is before them for the first time. Not that they are any less inquisitive toward newcomers than veterans. You get to talk maybe for a minute and a half, if that, then it's off to the races, says Hogan & Hartson's John Roberts, Jr. President Clinton's lawyer Robert Bennett, of Skadden, Arps, Slate, Meagher & Flom, who usually can be expected to dominate a conversation, counted 35 interruptions from the justices during his 15 minutes of argument on behalf of President Clinton in the Paula Jones case. I thought I could keep them away from me for a minute, Bennett recalled soon after the argument. But he couldn't. Lawyers count themselves lucky if they can get through their half hour still standing. You argue the way I play tennis, says Phillips. You do your best to get the ball back to the other side. You're not looking to slam it like Pete Sampras.

Jeffrey Sutton of Jones, Day, Reavis & Pogue, a relatively new specialist on the scene, prepares one- and two-sentence answers to the questions he anticipates, because he knows he'll be interrupted if

he goes on longer than that. Chief Justice Rehnquist has chided Scalia and Ginsburg for cutting off lawyers during their answers to questions, but they gleefully do it again. It's the academic in me, Scalia once confessed. The devil makes me do it. The justices themselves seem to know that a half hour before them today is not the same experience it used to be. I'd be scared to death to be a lawyer before the Supreme Court today, Justice O'Connor said at the recent annual conference for the U.S. Court of Appeals for the Ninth Circuit. I don't know how you ever keep up your train of thought. At the same conference, O'Connor also dealt with a question that seems to get asked every time a justice appears in public: Do oral arguments matter? Of course they do, O'Connor replies echoing what every other current justice has said at one time or another. Justices don't arrive at oral argument as blank slates, O'Connor suggested. You've tentatively thought it through. You think you know how you're leaning, she said. A lawyer can shake that confidence. The intensity and the importance of the arguments seems to have raised the stakes involved. Bad performances at oral argument have gotten lawyers fired and even sued in recent years. During the now-legendary 1995 arguments in *Shalala v. Whitecotton*, which involved the National Childhood Vaccine Injury Act, Wyoming attorney Robert Moxley, of Cheyenne's Gage and Moxley, was so rattled by the barrage of questions from the bench some of which were ambiguous that he began contradicting himself in his answers. As he tried to backpedal, a furious Rehnquist asked him, How can you stand up there at the rostrum and give these totally inconsistent answers? Moxley apologized, but Rehnquist said the answers made him gravely wonder how well prepared Moxley was.

Moxley's clients fired him the next day, not waiting for the outcome of the case. (They lost 9 to 0.) Moxley, who insisted he was well prepared, said afterward that I felt like I dropped out of a tall cow's ass. Asked to explain the metaphor, he said, The taller the cow, the bigger the pile. In a more recent argument, a lawyer's erratic performance before the Supreme Court earned him a malpractice lawsuit. In *Glickman v. Wileman Bros. & Elliott*, California fruit growers couldn't agree about who should argue before the Supreme Court in their First Amendment challenge of a federal program that levied fees against them for generic advertising of California fruit. Fresno, California, lawyer Thomas Campagne of Thomas E. Campagne & Associates, who had represented the growers in lower court proceedings, won a coin toss over University of Utah College of Law professor Michael McConnell, a veteran advocate before the high court. For a sometimes bizarre and raucous half hour in December 1996, Campagne only glancingly mentioned the First Amendment issues in the growers' case, instead reprising his gripes about the administration of the fruit promotion program. In one verbal detour, he guessed that Scalia wouldn't buy green plums because you don't want to give your wife diarrhea. Scalia sputtered, I've never seen a green plum. Campagne lost the case, 7 to 2. After the argument one of the growers, Dan Gerawan, hit Campagne with a malpractice suit claiming his Supreme Court arguments fell below the standard of care. The suit and a cross-suit filed by Campagne were settled out of court. But one of the novel grounds in Gerawan's lawsuit somehow signaled a turning point and even spawned a law review article. Campagne's malpractice, according to Gerawan, included failure to refer to a specialist, namely McConnell. The Supreme Court specialist had arrived.

The modern specialized Supreme Court bar began forming around 20 years ago. Some whimsically trace its beginning to a Supreme Court rule change that stated the Court looks with disfavor on any oral argument that is read from a prepared text. An oral argument could no longer be a brief with gestures. Not long after, Stephen Shapiro left the solicitor general's office to launch a Supreme Court specialty at Mayer, Brown & Platt. Soon Carter Phillips brought solicitor general Rex Lee to Sidley & Austin, a rival Chicago firm. A smaller boutique Onek, Klein & Farr (now Farr & Taranto) billed itself as a Supreme Court specialist, though not exclusively. A handful of other firms have followed suit with Supreme Court and appellate practices most of them populated by former Court law clerks and alumni of the solicitor general's office. Those experiences count, giving lawyers insight into the folkways of the Court and the kinds of arguments that appeal to the justices. There's no way to overstate the value of that experience, says Phillips, a clerk for the late Warren Burger. It's a very warm environment if you've been there before. Everyone says hello. In that sense, the growth of the Supreme Court specialist is not unlike the rise of the Washington lobbyist, says University of North Carolina political scientist Kevin McGuire, who has studied both. Corporations look for Washington-based lobbyists for their expertise on how the executive and legislative branches operate. I don't think folks are aware of the extent to which that happens with the judicial branch, too, McGuire says. And the strategy works. To find out if clients did better when they hired these insiders, McGuire totaled up the number of former clerks who appeared on briefs on both sides in 178 cases heard by the Court. Parties that listed two more former clerks than their adversaries won 83 percent of the time. It doesn't always pay to hire a

Supreme Court specialist. In a recent talk Justice Sandra Day O'Connor recalled a bankruptcy case from last term in which both lawyers were novices, but they did a heck of a good job. Justices are not experts in bankruptcy law, she explained, so it was beneficial to have lawyers before them who practiced bankruptcy law and could answer nuts-and-bolts questions that Washington Supreme Court advocates might not know. O'Connor did not mention names, but the case she referred to was *Hartford Underwriters v. Union Planters Bank*. G. Eric Brunstad, Jr., of the Hartford office of Boston's Bingham Dana, who argued for the underwriters, welcomed O'Connor's comment. There's something to be said for a generalist like Carter Phillips, but when you are asking the justices to delve into an arcane area of the law like bankruptcy, I think it pays to have the bankruptcy experts argue it. Most cases, according to the numbers, are still argued by lawyers who are standing in front of justices for the first or second time. But veterans say the trend is running their way. Clients are more sophisticated, and they are far more likely to look for a specialist than before, says Phillips, whose bill for a Supreme Court case, start to finish, can come close to \$500,000. Clients who don't reach for Phillips may seek out John Roberts, Jr., at Hogan & Hartson, or Gibson, Dunn & Crutcher's Theodore Olson, or Charles Cooper at Cooper Carvin & Rosenthal all former Supreme Court clerks with solid Reagan or Bush administration credentials. Others at the top include Alan Morrison at Public Citizen Litigation Group, Harvard's Laurence Tribe, or Walter Dellinger at O'Melveny & Myers. And then there's Thomas Goldstein, the boldest newcomer on the scene. Daily sweeps of lower court decisions help him spot cases that reflect a split between circuits and that, as a result, might appeal to the Supreme Court for

review. He then calls the lawyer who lost below sometimes being the first to suggest the possibility that a Supreme Court appeal might succeed. Other top firms such as Mayer, Brown & Platt (see *Carving The Niche*, page 86) occasionally call potential clients out of the blue, too but they wait until after the Court has granted review. Tom's method of discerning conflicts among the circuits is ingenious. My hat's off to him, says veteran advocate Charles Cooper of Goldstein. But I am still not comfortable with cold-calling potential clients. We wait for the phone to ring. Adds John Roberts, Jr., of Hogan & Hartson: If I'm going to have heart bypass surgery, I wouldn't go to the surgeon who calls me up. I'd look for the guy who's too busy for that.

Harvard's Laurence Tribe, who has a loose alliance with Goldstein for Supreme Court cases, says, There's a certain amount of hypocrisy in the criticism of Goldstein. If he alerts someone to a circuit split, he is performing a service by giving the Court an opportunity to review an issue of importance.

And Goldstein is getting the last laugh. After taking on his early cases for free, clients are calling Goldstein instead of the other way around, and he is charging for his services though at rates below those of the big firms. Hiring Goldstein to take a case start-to-finish will cost about \$75,000, and some of the fee might be contingent on success. The Supreme Court specialists are a mild-mannered bunch, by and large. Not a Johnnie Cochran or Gerry Spence among them, reflecting the Supreme Court's vast preference for lawyers with nimble minds over lawyers given to grandiloquence. Don't make the jury argument! Justice O'Connor pleaded with practitioners in a recent public appearance. One thing that doesn't work with this Court is a great debating style, says Dellinger, a former

acting solicitor general. A focused but conversational style is what they want. An Arkansas lawyer who brought an apple and a Bible to the Supreme Court as props for his argument in a tax case last term he was arguing that his client had not yet bitten the forbidden fruit flopped badly. A New York lawyer who cracked jokes and answered a Rehnquist question with a cheery Yes, sir, got a dressing-down from Rehnquist: I suggest you adjust your entire demeanor toward this Court. The lawyer won anyway.

The circle of Supreme Court specialists also includes no women or minorities. Among nongovernment lawyers, no woman or minority member has argued more than two cases in the last five terms. Why is this so? I don't know. It's just going to take time, says Maureen Mahoney. A former Rehnquist clerk who heads Latham & Watkins's appellate practice, Mahoney argued one case in the last five terms. I certainly believe all the justices admire effective advocacy from women as much as from men. But they sometimes don't admire what women wear. As an assistant solicitor general, Beth Brinkmann has argued 12 times in the last five terms, more than any other woman. For a 1996 argument, Brinkmann had the temerity to wear a conservative brown business suit. Not long after, her then-boss Walter Dellinger got a note from Rehnquist reporting that the justices, who had apparently conferred about the matter, did not feel that brown was a suitable color. (This from a chief justice who wears gold stripes on each sleeve of his black robe.) Dellinger wrote Rehnquist back, defending Brinkmann and respectfully pointing out that not enough women had been in the SG's office for long enough to establish a sartorial norm. Women in the solicitor general's office were miffed at the episode, which was soon dubbed Bethgate. But they remained

silent, and they acquiesced to the chief's wishes. Defying the chief justice is not a good career move. Now the women of the solicitor general's office wear black.

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High Court Bar's 'Inner Circle'

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Marcia Coyle

Insider know-how provides an edge -- at a price.

After he persuaded the U.S. Supreme Court to hear his client's important forfeiture challenge, Stefan B. Herpel, an Ann Arbor, Mich., sole practitioner, essentially shut down his practice for six months while he prepared for oral argument.

He also incurred about \$ 20,000 in debt that he is still repaying and wrote off a fee that would have exceeded \$ 200,000 -- had his client been able to pay -- for the roughly 2,000 hours he ultimately put into the case.

"I think it's pretty clear that without an attorney willing to do this pro bono, she could not have prosecuted the constitutional claim," he says of Tina Bennis, his client. The Michigan woman brought the thorny issue of the "innocent owner" in forfeitures as part of her suit to reclaim a 1977 Pontiac used by her husband for a liaison with a prostitute.

While Mr. Herpel was toiling after hours in empty University of Michigan law school classrooms, cajoling security guards for a little more time, the Chubb Insurance Co., in a different case, was unhappily seeking a lawyer to handle a Supreme Court challenge involving its insured, the Center for Humanities Inc., in New York.

Veteran high court litigator Theodore B. Olson, of the Washington, D.C., office of Los Angeles' Gibson, Dunn & Crutcher L.L.P., stepped into that case after review

was granted. He faced an accelerated briefing schedule and oral arguments. But after applying his own and the firm's considerable appellate muscle, he won, collecting a fee that was reportedly just \$ 150,000 less than the \$ 450,000 award Chubb's insured was told to pay.

"The fee was disproportionate to what was at stake in the case, but not to what was at stake globally," insists Mr. Olson. Those stakes involved the power of federal appellate courts to review excessive jury verdicts. Intent on tort reform, big business, like the insurance industry, had tagged the case a "must win."

A 'Supreme' Elite

Messrs. Herpel and Olson are members of the Bar of the Supreme Court. But Mr. Olson brought something more, some court observers argue. He is a member of a select cadre of high court stars -- call it the "inner circle" -- to whom parties are increasingly turning because of their familiarity with the ways of the court and their track records.

The choice, however, can be a costly one. For the full range of services, fees and costs can run as high as half a million dollars a case, a price some are willing to pay.

"If you're in the Supreme Court and have \$ 5 million at stake, it's rational to spend that extra \$ 100,000 to have me or Ken Geller thinking about your case," says Andrew L. Frey, of the Washington, D.C.,

office of Chicago's Mayer, Brown & Platt, who, like the firm's Mr. Geller, is a former deputy solicitor general and a member of the inner circle. "The quality of the lawyering makes a tremendous difference."

At the Supreme Court, as in most of life, there is no level playing field, adds Mr. Frey. "In the Supreme Court, the only thing that matters is to get the best lawyer to present your case effectively," he explains. "It's not just money, but knowing who the right people are. And, it is not necessarily true the most expensive are the best."

Emerging Bar

When he and former Solicitor General Rex E. Lee decided to build a Supreme Court practice in 1985 at the Washington, D.C., office of Chicago's Sidley & Austin, recalls Carter G. Phillips, "there were a couple of practitioners who were repeat practitioners before the court, but there was no real systematic effort to develop Supreme Court practices. We started from Day One thinking about how to develop a genuine Supreme Court practice."

In 1985, the high court had 175 cases on its docket, and "Rex and I were just about the only game in town," says Mr. Phillips, a former assistant to the solicitor general and high court clerk. In 1995, the court had a docket of about 80 cases, and "just about every firm in town has a Supreme Court practice," he chuckles ruefully.

As the public has grown more aware of the existence of specialized Supreme Court practices, Mr. Phillips says, "there's much greater receptivity or even an activist approach by general counsel, attorneys general or others in the position of hiring outside counsel to think, when they have a case in the Supreme Court,

maybe they should hire someone experienced."

Today's inner circle, whose members are based primarily in Washington, D.C., represents something of a resurgence of the "elite community of lawyers" that dominated Supreme Court practice about 200 years ago, Duke University Prof. Kevin T. McGuire wrote in his 1993 book, "The Supreme Court Bar: Legal Elites in the Washington Community."

Many of the current members are former high court clerks or former attorneys in the Office of the Solicitor General, he and others say. And through their repeated appearances before the justices and their insiders' understanding of the institution, they too act as gatekeepers for the high court, shaping petitions for certiorari, marshaling amicus brief support and arguing their views of doctrine.

A rough survey of groups active in the high court, such as the Washington Legal Foundation, and Supreme Court practitioners themselves as to who are the best in town produces a relatively consistent list of names. They include Messrs. Olson, Frey, Geller and Phillips, as well as Bruce Ennis, Donald Verilli and Paul Smith, of the D.C. office of Chicago's Jenner & Block; Bartow Farr and Richard Taranto, of D.C.'s Farr & Taranto; Alan Morrison, of Public Citizen Litigation Group; Kirkland & Ellis' Kenneth W. Starr; and Timothy B. Dyk, of Jones, Day, Reavis & Pogue. Named as "up and comers" are Hogan & Hartson's John Roberts, Gibson Dunn's Thomas Hungar and Latham & Watkins' Maureen Mahoney.

Because the high court has a limited universe of cases, every case gets close review by justices and clerks, says David Vladeck, litigation director of Public Citizen Litigation Group and a Supreme Court practitioner for nearly 20 years.

"While good lawyering can be a real plus, bad lawyering is not necessarily the death knell it is in other courts," he says.

By and large, he adds, the lawyers in the inner circle "have well-deserved reputations. They produce a very high-quality product, and they're generally quite on target in terms of trying to tailor their arguments to what the court may be prepared to do."

The Tab

The cost of Supreme Court work can vary tremendously, most high court regulars agree. It depends on everything from the complexity of the issue raised to whether the client is petitioning for or opposing review to demands placed on counsel by media attention.

Flexible Fees

Most bill hourly, although some say they would consider a flat fee in the appropriate case. Others, such as Mayer Brown's Mr. Frey, are willing to negotiate a budget with a client. He did for automaker BMW in last term's major punitive damages challenge, *BMW of North America v. Gore*, 116 S. Ct. 1589 (1996).

But there are ranges, says Mr. Phillips. Petitions for certiorari generally run \$ 25,000-\$ 40,000. "The more cert-worthy your issue," he says, "frankly the less expensive it is. If you have a square conflict in the circuits, you don't have to gild the lily; just say it."

Amicus briefs at the cert stage usually run about \$ 10,000 at his shop; a brief in opposition to certiorari, \$ 5,000-\$ 10,000; reply briefs, particularly at the cert stage, when there is very little time to complete them, about \$ 5,000; and oral arguments, \$ 10,000-\$ 20,000.

The more expensive variables come into play at the merits stage. Amicus briefs should be less than \$ 50,000, he says. But for a party's brief, he adds, "the range is just all over the lot. Sometimes it's as little as \$ 75,000 or as much as a couple of hundred thousand dollars."

Mr. Phillips says none of his firm's 65 cases has produced a bill in excess of \$ 1 million. But Mayer Brown's Mr. Frey says that with some high court practitioners billing \$ 300-\$ 400 per hour, a \$ 500,000 tab is not unreachable or unreasonable. "It really does depend enormously on the complexity of the case and the degree to which the lawyers already know the substantive law," he says. "You may have huge areas to be researched and if the case is big enough, it's worth doing."

Gibson Dunn's Mr. Olson says last term's *Gasparini v. The Center for Humanities*, 116 S. Ct. 2211 (1996), was big enough and worth doing. That constitutional challenge led advocates back into common-law history to answer the question of whether the Seventh Amendment bars federal appellate courts from reviewing allegedly excessive jury awards.

Two major factors contributed to his large fee, he explains: an accelerated briefing schedule -- "The work had to be done in a relatively compressed period, which [rather than keeping costs down] means you have to scramble and put more people to work" -- and a complex constitutional question, which required much historical research.

"We did an enormous amount of research into 17th century cases, which are hard to find and understand," he recalls. "I must have read the appropriate material in *Blackstone* dozens of times. This was not a run-of-the-mill case."

Mr. Olson's opponent, Jonathan S. Abady, of New York's Beldock Levine & Hoffman L.L.P., had never made an appellate argument and had litigated the case with major assistance from his cousin, Samuel Abady, of New York's Law Offices of Samuel Abady. He was working on contingency because his client, a photojournalist, was not financially prepared to take a case to the U.S. Supreme Court.

After the high court granted review, Samuel Abady had to leave the country to handle some international litigation, and Jonathan Abady turned to three close law school friends for help.

"Between us and Sam's office, we put in hundreds of thousands of dollars worth of essentially uncompensated time," he recalls.

That degree of effort is required in the Supreme Court, according to Mr. Abady and veteran high court practitioners. "This is the end of line," says Mr. Olson, "and the only way to do it is in the very best way you can, which means a lot of preparation and very carefully written briefs."

Being Prepared

And there is the need to be prepared for any tangent taken by a justice. For example, two terms ago in *Coors Brewing Co. v. Rubin*, 115 S. Ct. 1585 (1995), Jenner & Block's Bruce Ennis was asked to explain the brewing process for different kinds of beer -- hardly central to his First Amendment argument, but something he was able to do.

As Mr. Abady and most newcomers to the high court soon discover, there are numerous lawyers eager to help them carefully prepare -- but generally for a fee.

"When I took my case to the district court, no one cared, and when I took it to the 10th Circuit, no one cared, but when I got to the Supreme Court, we had numerous letters from D.C. firms and the surrounding area offering to do the argument for \$ 48,000 -- \$ 50,000," recalls Linda D. King, a sole practitioner from Wichita, Kan., who argued this term's *O'Gilvie v. U.S.* 95 -- 96, involving the taxability of certain punitive damages awards.

Unless a client is independently wealthy, Mr. Abady believes, he or she has very little chance of being able to pay for the efforts necessary for a Supreme Court case, in which, as Ms. King discovered, printing costs alone can top \$ 7,000. "It's extremely difficult to level the playing field against these huge corporations that have almost unlimited funds."

Pro Bono Help

But help is available. Mr. Abady got it from a group of leading constitutional and civil procedure scholars, such as Harvard's Arthur Miller, and from the Supreme Court Project of Public Citizen Litigation Group.

"We got a lot of support because we had a burning constitutional issue," says Mr. Abady. "But many cases -- in fact, a high percentage at the Supreme Court -- are not as interesting as ours, and, depending on the issue, it might be difficult to get that kind of support."

Through its own cases and its Supreme Court Project, Public Citizen is an important institutional counterweight to the resources of corporate litigants at the high court. Public Citizen has a lawyer who reads every civil petition filed and summarizes them for its senior lawyers, who select cases they think deserve their assistance.

The project is time-consuming and costly, says Mr. Vladeck, "but we do it because we observe time and again that important questions are presented to the court by lawyers who either are not particularly skilled or didn't quite get it."

Mr. Abady, Ms. King and Mr. Herpel, who handled Tina Bennis' car forfeiture case, all accepted uncompensated help from Public Citizen and called it invaluable.

There are other counterweights to inexperience and lack of resources in the high court. Most members of the inner circle have discounted Supreme Court work and taken cases pro bono. Several of the big firms regularly put together moot courts for outsiders making their first high court appearances. And some organizations, such as the National Association of Criminal Defense Lawyers, the Institute for Justice and the Association of Trial Lawyers of America, help with brief-writing and moot courts.

Last term, the NACDL organized moot courts for Mr. Herpel and Ann German, a sole practitioner from Libby, Mont., a former logging town of about 2,500 people in the state's northwest corner. Ms. German represented convicted murderer James Egelhoff in *Montana v. Egelhoff*, 95-210.

After Montana won high court review, Ms. German -- like Mr. Herpel -- basically told her paying clients to go away and come back in three months. Unlike Mr. Herpel, she says, she was able to do that because she was a court-appointed attorney, earning \$ 40 per hour for out-of-court work and \$ 50 per hour for in-court work.

Both she and Mr. Herpel said they were able to shoulder the financial burden only because they had either no dependents or few economic demands of any other kind.

"Someone in my situation with many financial demands just couldn't do it," Ms. German insists.

The economic hardship is why Ms. German was "annoyed as hell" that Montana's attorney general, with all of his inhouse appellate talent, hired Sidley & Austin to assist him. Asst. Federal Public Defender Daniel Donovan in Great Falls found it curious, too, and asked why in a letter to Attorney General Joseph P. Mazurek.

Since he and his staff "carried the laboring oars" in the appeal, Mr. Mazurek responded, he initially didn't intend to put the names of Sidley's attorneys on his brief. "However, we were advised by several experienced Supreme Court advocates that including the names of the Sidley & Austin attorneys on the brief would probably catch the attention of the Court and provide further evidence that our case was a serious one," he wrote.

Montana paid Sidley \$ 11,794 for its input and name -- almost half what Ms. German received for her high court work.

Fate of the Court-Appointed

The high court playing field is perhaps least level in criminal cases, where an inexperienced, court-appointed attorney comes up against the Office of Solicitor General, says Mayer Brown's Mr. Frey. "In those instances, the defendant is at a tremendous disadvantage," the former deputy solicitor general says.

To counter that imbalance, the Administrative Office of the U.S. Courts several years ago approached Sidley & Austin's Mr. Phillips for advice on improving the high court advocacy skills of federal public defenders. Today, whenever a public defender has a high court case, Mr. Phillips gets a call from the public defender in Houston telling him

who needs help, and he offers the "gamut of services," from brief writing to moot courts.

"I have 16 former Supreme Court clerks and 30-40 people who spend time thinking about appellate issues," says Mr. Phillips. "On a regular basis, criminal law is not a big-ticket item in a corporate firm. This provides an opportunity for our people. It made sense to me."

Surprisingly, several members of the "outer circle" who decided against giving their cases to inner circle members, and who ultimately lost, voice no regrets about the decision and the personal cost of going it alone.

"I don't think we lost because the other side had more resources than we did," says Mr. Herpel. "While there are obviously some extremely able Supreme Court practitioners, I don't think it's essential to have one. But you really do need a committed advocate and someone who really knows the case."

Andrew W. Bolt II, of Birmingham, Ala., does have lingering regrets, but for the opposite reason. He and his co-counsel in last term's BMW punitive damages case hired veteran Supreme Court advocate Michael Gottesman, of Georgetown University Law Center, and two other attorneys -- "for well over six figures" -- to defend their \$ 2 million punitive award against BMW, which was represented by Mayer Brown's Mr. Frey.

"We felt we didn't have much choice because the other side seemed to have half the lawyers on the East Coast working for them," recalls Mr. Bolt. "Gottesman and the other guys were as good as anybody could want to find; they are as smart as they come. But I'm not sure there's ever a lawyer who knows a case like the one who tried it, and I don't know that they brought the same level of

passion as those toiling out in the field these many years."

But a lot of cases that get to the Supreme Court are "incredibly difficult," notes Public Citizen's Mr. Vladeck, "and it would be wrong to suggest that . . . knowing the justices' positions intuitively, as a handful of these practitioners does, doesn't help. "This is not easy stuff. If you talk to people who follow the Supreme Court, I think it is very difficult to see with anything approaching clarity where the court is headed. These lawyers are called on to do that, and each has won."

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