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IV. Advocacy

In This Section:

"In the Roberts Court, There's More Room for Argument"

The New York Times
May 3, 2006
Linda Greenhouse

This is the week that the Supreme Court, done with its regular argument sessions, enters the stretch run.

While it is too soon for substantive appraisals of the first year of the Roberts court, it is not too soon for stylistic observations about what is clearly, in the view of lawyers who have appeared there this term, a different court.

"The tone has changed," Prof. Richard J. Lazarus of the Georgetown University Law Center, where he runs the Supreme Court Institute and teaches a course on Supreme Court advocacy, said on Tuesday.

In common with every other Supreme Court specialist contacted for this article, Professor Lazarus listed several obvious changes. "They're not stepping on each other," he said of the justices. "They take longer before someone asks the first question. They give the lawyers more time to answer."

Beth S. Brinkmann, like Professor Lazarus a veteran of the solicitor general's office, who now represents private clients before the court, said of the new courtroom experience: "You sit there and think, 'Whoa, isn't anyone going to ask a question?' "

Carter G. Phillips, one of the most active current practitioners, said the change had been so abrupt as to be a trap for an unwary counsel. "You have to be ready now to make some kind of affirmative presentation" in the opening minutes of an argument, he said.

When former Justice Sandra Day O'Connor was on the court, he recalled, she asked the first question so quickly and so predictably that there was little point in preparing an elegant opening argument. "Now you might get three or four minutes" without interruption, he said.

The question, of course, is how to explain the change. Even assuming that Justice O'Connor's departure in January accounts for quieter opening moments, a different dynamic seems to prevail throughout entire arguments. With justices sitting back and allowing colleagues to ask follow-up questions, and with lawyers given an actual chance to answer, there is a new coherence and civility to the sessions.

Has Chief Justice John G. Roberts Jr., himself the veteran of 39 Supreme Court arguments as a lawyer, shared with his colleagues the perspective from the other side of the bench, or maybe even laid down some new rules?

The latter theory is unlikely; the court's ethos calls for signaling rather than rule-making. To the extent that the new chief justice is leading by example—and there is no doubt that he is in charge of the courtroom—he is offering a model of how to ask questions that are tightly phrased, penetrating and often the last thing a lawyer wants to hear.

"Maybe it's because he has so much experience arguing before the court, but he seems to be able to zero in on the weakest point in a case," said Prof. Pamela S. Karlan of Stanford Law School, where she runs the

Supreme Court Litigation Clinic.

Professor Karlan argued one case this term and sat in on others, noticing to her surprise that justices who inadvertently stepped on another justice's lines held back to allow the colleague to finish, rather than plowing ahead.

Some of the chief justice's questions are deceptively simple. "What is a tributary?" he asked the lawyers in a pair of Clean Water Act cases, seeking a definition that helped to frame the basis of federal jurisdiction. At other times he spins hypothetical questions, difficult to convey out of context; suffice it to say that the traps in these questions are obvious, but the way to avoid them is not.

The chief justice is a more active questioner than his predecessor, Chief Justice William H. Rehnquist, and his style is quite different.

"Rehnquist told you what he thought," Mr. Phillips said. "He wasn't struggling to figure out the case. Roberts doesn't tip his hand as much. He asks hard questions of both sides without communicating his own preference."

As a result, Mr. Phillips said, the arguments have become less predictive of the eventual decisions. He said he had assumed that he won the chief justice's vote after arguing a case in January on the adequacy of the notice that the State of Arkansas gave to a man whose house it sold for unpaid taxes. The two letters the state sent were enough, Mr. Phillips argued, but Chief Justice Roberts disagreed and last week wrote the court's opinion holding that the state had violated the homeowner's constitutional right to due process.

In another distinction between the Roberts and Rehnquist styles, Chief Justice Roberts is reliably said to be presiding over the justices' private after-argument conferences with a lighter hand, not watching the clock as closely and permitting more conversation.

That might account for the changed tone of the arguments, Ms. Brinkmann speculated. "If you know you'll be able to make your point in conference, you don't have to make it on the bench," she said.

The court has scheduled one final argument for the term on May 18. It is a reargument of a police search case, *Hudson v. Michigan*, that was argued shortly before Justice Samuel A. Alito Jr. joined the court in January. It is safe to assume that without his participation, the court is split 4 to 4. Two cases in a similar posture have already been reargued, although not yet decided.

Despite the disruptions of the term, the court has stayed on track, both in the numbers of opinions issued and new cases accepted. Thirty-nine opinions have been issued so far, typical at this point, with 35 to go. Will most of these come in the familiar helter-skelter June rush, or does Chief Justice Roberts have a trick up his sleeve to make the end of the term as orderly as the rest of it?

Now that would really be something different.

"The Letterman Justice"

Slate Magazine
December 8, 2005
Dahlia Lithwick

It's time.

The chatter is ramping up "as it invariably does, about once a year "that this will be the year TV cameras will finally sail into the Supreme Court. I doubt it. But the chatter is getting louder. The annual reports of Senate bills that would permit the court's oral arguments to be televised are met with heated pro-and-con punditry on the subject. Supreme Court nominee Samuel Alito's opinions on the issue are suddenly in the news. And the low-grade media fever that always follows several sessions of audio-broadcast arguments has left everyone hankering for more access, more often.

The arguments for allowing cameras at the high court are not new "in fact I only recently reheated them myself. Cameras would open up a process that is needlessly and deliberately closed and secretive; they would subject the courts to the public scrutiny endured by the two other branches of government; they would give the work of the court serious public legitimacy at a time when judges are increasingly under attack. The arguments against cameras are similarly familiar: They would encourage posturing and pandering by judges and lawyers; they would violate the justices' privacy; they would allow random sound bites of the court's work to be transmitted without the proper context; they would further politicize and thus undermine the court's legitimacy at a time when judges are increasingly under attack.

The problem with all these arguments is that they don't take into account a sea change that has just taken place at the court; a sea change that renders all the above analysis almost completely moot. Sea change, thy name is John Roberts.

The truth is that you cannot attend oral argument these days without being slapped right in the nose by Roberts' youth. Not only is he significantly and markedly younger than almost all his colleagues, he's also clearly a product of the Age of Letterman. Whereas his predecessor, the late Chief Justice William H. Rehnquist, with near-impunity loomed goofy gold stripes onto the sleeves of his judicial robe and sicced his court marshals on unwitting spectators in inappropriate garb, the new chief is already making it clear that such acts of deluded grandeur are just not his style. Roberts has publicly eschewed the gold bars, agreed to prompt audiocasting of certain early oral arguments this term, and, in a few short weeks on the bench, he has also landed some of the best one-liners of the year.

There is, in short, no way that a man who clearly came of age watching television "a man who is doubtless as quick with the remote control as he is with the punch line "can pretend not to understand that television is more entrenched in American life than baseball or apple pie.

Indeed, one of the reasons Roberts fared so brilliantly at his confirmation hearings this fall was that he is so clearly a product of life after television (unlike, for one, the unfortunate Robert Bork). Roberts' total mastery of the medium "from his subtle

comic timing to his gestures and demeanor "revealed right away that this was a guy raised on mass media, a guy who has watched his fair share of The Tonight Show. And while there is something almost charming in listening to the older members of the court recoil in horror at the evils of that newfangled gizmo called television (one gets the sense that David Souter still tunes in every night to the Andrews Sisters, from a radio perched high above his fireplace), there would simply be something unseemly in hearing about the evils of television from a guy who doubtless spends hours with his children watching Boohbah.

More important, I suspect John Roberts knows that television is no longer the main technology to be feared; the Internet is. Roberts knows that gossipy blogs and parody sites will inexorably conspire to make the court appear more and more ridiculous. The now-password-protected, possibly defunct Web site Underneath Their Robes had a cult following among Washington, D.C., and court insiders precisely because it stripped away all courts' pomposity and puffery. Imitators will follow, and with each one, the Supreme Court's haughty radio silence will look less and less majestic and more and more absurd. If it ever existed in the first place, the era of public disinterest in the doings of the court is over. People want to know what happens in the marble temple: If they aren't allowed in to watch the real thing, they will enter via snarky anonymous blog. If the high court doesn't make at least some concessions to the public, the American people will get to know its justices and their jobs through parody and politics alone.

Don't get me wrong. Nothing about John Roberts suggests that he is likely to change all that much about the highly ritualized, frequently grandiose daily business of the court. Clarence Thomas won't be live-blogging case conferences anytime soon, and Ruth Bader Ginsburg won't be podcasting from her chambers. But the decades of justices pretending that television is just some passing fad are over as well.

Will you be able to catch next year's oral arguments live on C-SPAN? I doubt it. We are probably still years away. But in only a matter of weeks, and in the subtlest of ways, John Roberts has brought the court into this century. We now have a chief justice who isn't afraid of C-SPAN, and we will soon have an associate justice who knows how to TiVo. It's going to start to look silly when men who own iPods vigorously object to tape recorders in the gallery. And John Roberts is just too sensible to be silly forever.

"2005-06 Supreme Court: The Advocates' View; Court Watch; Four Advocates Weigh the Meaning of Hamdan and the Future of the Roberts Court"

Legal Times
July 31, 2006

[Excerpt]

* * *

[Tony Mauro]: Ted, you've argued both with and against John Roberts. How does it feel to argue in front of him?

[Theodore Olson]: I have the greatest admiration for the man. I've known him for 25 years. An exceedingly bright man.

The first argument I had this term was the second argument of the term. Everybody was sitting there watching: When is he going to ask the first question? So I had my eyes on him. And he leaned forward. He leaned forward as if he was going to ask a question. And Justice Scalia was off on something, and he wasn't going to interrupt Justice Scalia. And then the second time you could see he was about to ask a question, Justice Ginsberg was at it. Or maybe it was Justice Breyer. You weren't going to interrupt either one of those, either. So finally, he got his question in, and he was quite active that day in both of the arguments.

And he's got this gentle wit. During the argument on the Rumsfeld case—the Solomon Amendment, funding for schools, and so forth—the lawyer arguing on the behalf of the schools was saying, The students won't believe our nondiscrimination policy unless we can take the money and continue the nondiscrimination policy. And the chief justice leans forward and says, The reason students don't believe you is because you take the money.

Mauro: How do you fashion an argument for Justice Kennedy now that he's the lone man in the middle?

[Olson]: I went through the list and I counted 23 cases where it was either 5-3, 6-3, or 5-4. He was on the winning side in 17 of those cases. And there were three of them that were 4-1-4 cases where he wrote the concurring.

What we all do is we try to figure out where the justices are going to come out in a particular case. In the Indian taxation case and in the standing/dormant commerce clause case, I had figured out pretty much that I didn't have much to worry about with respect to Justice Kennedy. But in those cases important to him—a death penalty case, the *Lawrence v. Texas* case—in those areas, the lawyers are going to have to pitch their argument to Justice Kennedy.

[Mauro]: Greg, you worked with John Roberts, and now you're arguing in front of him. In your dealings, is he still John, or is he the chief?

[Gregory Garre]: Fortunately, there's something about standing up to argue in the Supreme Court that makes you forget about those past experiences. So that's not really the person who I have in mind.

He's been very active during all the arguments that I've seen this term. We've talked about the higher-profile cases. But in some ways, the most illuminating way of

seeing the Court is in cases we don't read about, where it just comes down to obscure, mundane issues of law. It's really there that it's quite remarkable to see the justices extraordinarily well prepared in all of these cases.

The chief justice certainly has proven himself to be an active and sharp questioner. One of the things that the former chief used to do so well was when one justice began to lean a little bit too hard on an attorney, or two justices went back and forth and did not let the advocate have any questions, the former chief could lean down with a scowl and bring it to a halt. And I think Chief Justice Roberts has gotten a better handle on this. There was one point towards the end of the term where two of the justices were going at it to the point where the advocate was almost meaningless. And the chief kind of leaned forward and said something to the effect of, Well, you can jump in when you want. People broke out in laughter. And it was clear that he was making his point to let the advocate have his say here.

* * *

"A Supreme Court Conversation
The Breakfast Table: An E-Mail Conversation About the News of the Day."

Slate.com
June 29, 2006
Walter Dellinger

* * *

There is still a lot to learn about John Roberts as the court's leader. However, I can't help but thinking that over the decades to come, he will be a chief justice of very great influence. There is, of course, his sheer brain power: Advocates before the court have remarked all term that his questioning is extraordinarily sharp and focused on the heart of the case. Insufficiently noted, however, is how unusually prepared he was to become chief.

Most modern justices have never themselves argued a case before the Supreme Court, and very few were experienced advocates. Ruth Ginsburg argued a few major women's rights cases, and Thurgood Marshall had extensive experience before the court. The former Justice Robert Jackson was noted for his skill as a Supreme Court advocate. But that's about it—and none of them have served as chief justice.

John Roberts is the first chief justice whose entire career was essentially spent as a Supreme Court advocate. And, in my view, there was no one better at it then he was. The point is this—John Roberts comes to his role as chief having spent his professional lifetime honing the skill of persuading five justices to agree with his position. Supreme Court advocacy at the level at which Roberts practiced it consists of more than making a convincing case. One has to find ways to conceptualize the issue at stake and propose a resolution that a majority of the court, comprised of members with disparate views, can agree upon. Roberts comes to the court better equipped to accomplish that task than anyone before him.

Time will tell how he uses that gift.

Talk to you again shortly,
Walter

"Numbers That Don't Befit the Court"

The Washington Post
July 11, 2006
Margaret Cordray and Richard Cordray

Each June, as its term ends, the Supreme Court issues blockbuster opinions in highly sensitive, politically controversial cases. These decisions dominate the headlines, and in their wake the country debates whether the Supreme Court is too active. But this flurry masks a surprising trend at the court: It is, in fact, accepting fewer cases each term and deciding as little as possible in many of them. This newfound modesty results in significantly less guidance to the lower courts.

During the term just concluded, the court issued a grand total of 71 plenary decisions (in cases with full argument)—its lowest output since the Civil War. This continues a steady decline that has been underway since 1990. Over the past decade, the court has decided only half the number of cases each term that it decided in the 1970s and '80s, when it regularly issued about 150 decisions per term. That is so even though thousands more cases are being filed.

At the same time the Supreme Court is doing less with more, the new chief justice and many commentators are calling upon the court to decide as little as possible in those few cases it does have before it for full review. In a law school commencement address, Chief Justice John Roberts stated: "If it is not necessary to decide more to dispose of a case, then in my view it is necessary not to decide more." He suggested that such restraint would foster consensus, commenting that "the broader the agreement among the justices, the more likely it is that the decision is on the narrowest possible grounds."

But if the court is deciding considerably fewer cases, and if it is determined to settle as little controversy as possible in each case, then it is exerting only the most minimal supervisory control over the lower courts. Rather than "one supreme Court" being in charge of the judicial branch, as the Constitution provides, the hundreds of lower court appellate judges and thousands of lower court trial judges are increasingly on their own to do as they see fit in broad areas of commercial, criminal and constitutional law. Perhaps some would applaud the resulting decentralization of our judiciary, but it is dramatically inconsistent with any recognizable notion of judicial hierarchy.

Changes in the Supreme Court's docket are rarely undertaken with conscious intent, and they tend, above all, to result from changes in personnel. The court's rulings on applications for review are made in secret, establish no precedent and occur with almost no collegial deliberation. As a result, the justices' decision making about whether to grant review in individual cases is highly atomistic, and, after the votes have been cast and tallied, the overall pattern of the court's docket often comes as a surprise even to the justices themselves.

These matters are too important to leave to happenstance. The justices need to engage in a more self-conscious re-flection and discussion about whether the shape of their docket is what it should be to govern the complex legal affairs of this large and diverse nation. For more than a century, the court successfully fought for unfettered control of its own docket, and with rare

exceptions the justices now determine not only which but how many cases they will decide each term. As cases continue to flood the already swollen dockets of the lower federal and state courts, the justices need to question whether they have become too stingy in exercising their discretion to grant review.

The justices as a body should frankly consider whether 71 plenary decisions in a given year are really enough to carry out the court's constitutional function of ensuring the supremacy and uniformity of federal law. Reasonable people differ over whether the court takes too many blockbuster cases or decides too much in those cases. Regardless, there is surely scope for the justices to provide useful guidance to lower court judges in many of the less sexy cases it increasingly turns away. Remarkably, the court is on track to hear even fewer cases next term. But if the justices choose to do so, it is within their power to change course.

Margaret Cordray is a professor at Capital University Law School. Richard Cordray clerked for Justices Byron R. White and Anthony M. Kennedy.

"Fewer grants for next Term"

SCOTUSBlog.com
May 11, 2006
Lyle Denniston

The comparisons may change in coming weeks, but so far the Supreme Court has taken fewer cases for review in the new Term that opens Monday, Oct. 2 than in the recent past, statistics released this week show. As of May 10, the Court had agreed to hear 13 cases next Term (because of multiples in two grants, that will result in 11 hours of argument). At this time last Term, the Court had agreed to hear 22 cases (21 hours of argument) for the following Term, and, in the Term before that, 25 cases in advance grants (21 hours). The ebb and flow of grants and denials can and does vary throughout a Term, and there are seven or eight more orders days on which the Court very likely will add to its workload for next fall.

As of now, the Court has filled its argument calendar for October, and has a start on the November calendar.

The list of cases so far granted for review for next Term can be found here. That list includes only docket numbers, titles, and dates on which review was granted. To find the questions presented, go to the Court's website, click on Docket, then enter the docket number in the search window; a link will be provided on the docket sheet to the questions to be reviewed in the case.

The next opportunity for grants is next Monday, May 15.

The Court's pace of deciding argued cases this Term is about the same as in the two prior Terms. So far, it has issued 38 signed opinions, compared to 39 in each of the two preceding Terms. In the balance of the current Term, the Court is expected to issue 34 signed opinions. (Those numbers do not include signed concurrences or dissents.)

The next chance for release of decisions in argued cases is next Monday — the only decision day likely in that week.

"Roberts Dips Toe Into Cert Pool"

Legal Times
October 21, 2005
Tony Mauro

Chief Justice John Roberts Jr. has decided to jump in the pool—at least for now. That's the so-called cert pool, the group of justices whose law clerks divvy up incoming petitions for certiorari to produce a single memo about each case.

In one of his first major decisions about how he will operate as a justice, Roberts, when asked about the pool this week said through the Court public information office that he was joining it for at least his first year. That qualifier went unexplained, but it at least suggests the possibility that once Roberts gets settled in, he will take another look.

With eight justices—all except John Paul Stevens—participating, the pool has come in for criticism for giving individual clerks too much power to determine the fate of cases. Even Stevens does not read all the incoming petitions, which means that most are never seen by any justice.

Back when Roberts was a practitioner who had to explain to clients why clerks were the only ones reading his work product, Roberts himself said in a speech that he found the pool "a little disquieting." So when he took the reins of the Court Oct. 3, it seemed possible that Roberts might stay out of the pool or, as he suggested in 1997, create "parallel pools" so that each petition would be looked at by at least two pool clerks.

But Roberts opted instead to go with the flow for now. The pooling arrangement for this term was already well underway by the time he arrived, with his predecessor William Rehnquist's clerks participating. Three of Rehnquist's clerks have stayed on with Roberts—Mark Mosier, Ann O'Connell, and Michael Passaportis—joined by Dan Kearney and Kosta Stojilkovic, two of Roberts' D.C. Circuit clerks from last term.

"This is a major issue for the Court, whether they will put more checks in place" on the pool system, said Northern Illinois University political science professor Artemus Ward, author of a book on Supreme Court law clerks due out next year. The need is especially great, Ward said, if Stevens, the last holdout, departs in the next few years.

"I am not surprised that the chief justice joined the pool," said veteran advocate Carter Phillips, a partner at Sidley Austin Brown & Wood in D.C., who is also a critic of the cert pool. "He was arriving just as the term began and that's the easiest way to get integrated into the business of the Court. I know he has misgivings about the pool, and it will be easier to recommend changes after he has some experience with it from the inside."

"Commentary: The Court's Caseload"

SCOTUSblog.com
October 21, 2005
Lyle Denniston

For years, close observers of the Supreme Court's work have speculated about the reasons why the Justices decide so few cases each Term. No one has been able to say, with certainty, why the Court has shaved its caseload down to half of its size of a quarter-century ago.

One reason often given—though with no foundation beneath it—was that the Justices were simply satisfied that lower courts were getting their decisions right more often, so there was less need for the Justices to step in as often. Another suggestion, equally unsupported, was that the Justices simply found comparatively little that interested them in what the lower courts were doing, so they held back. Still another, quite fanciful, idea was that the Justices actually liked working fewer hours, including having afernoons off on hearing days.

The issue of the shrunken caseload is getting some new attention, with the arrival of Chief Justice John G. Roberts, Jr. During his nomination hearings, he told the Senate Judiciary Committee that the Court could be granting more cases, and perhaps should be. It was an idea he seemed prepared to explore once he got on the bench.

Looking into the issue, Roberts almost certainly would not credit any of the reasons given above. But another explanation has been advanced, and it is the most credible one. That is that the declining grants are due to the functioning of the Court's "cert pool"—more formally, the "certiorari pool." That idea has been embraced by more informed observers, such as former law clerks who know well how that "pool" operates. Its most salient characteristic: recommending against granting review.

The "pool" has been operating for years. At one time or another, many of the Justices decided to take part. During the years of the "Rehnquist Court," the pool became the favored option: eight of the nine Justices relied on the pool (all but Justice John Paul Stevens). It thus has been at its peak of use.

Here is how it works: instead of each Justice's chambers examining every new petition to decide whether to vote to grant or deny, petitions are handed first to the "cert pool," leading to a single memo, written by a single clerk, recommending for or against a grant of cert. That single memo goes to every chambers represented in the pool. The Justices still exercise the voting power, of course, but the memoes have constituted their first, and most comprehensive, look at a case's worthiness for review. Undoubtedly, that saved a lot of time, but the pool has developed defects.

What pool memoes lacked, of course, was particularized advice to a single Justice. Examining clerk's cert memoes from the days before the pool, one could find suggestions that fit well into an individual Justice's view of the law, or past writings. The memo was not homogenized, as it would have to be if it had gone to several different audiences.

From the "cert pool," however, a memo does become homogenized, to a substantial degree. And that has been particularly true since the pool has grown so popular: a memo written for an audience of eight thus reads very differently from one aimed at an audience of one. It turns the certiorari process into a collective, not an individual, practice.

Former law clerks have said there is another characteristic that the pool has developed. A culture has grown up around it, they say, in which a grant of review is recommended only if it is practically an obvious grant. Recommending a grant, and then having the Court deny review, has become an embarrassing thing for the clerk involved. As a result, the tendency is to put the emphasis on the negative. As everyone who reads more than a few cert petitions knows well, almost any petition could contain within it good reasons to deny review. Generally speaking, there are few, if any, sure grants. Thus, it is easy to suggest, plausibly, that cert be denied, and that is what has happened.

The "cert pool," however, seems deeply embedded in the Court's current practices, so breaking it up is not a realistic option. The new Chief Justice, as Supreme Court reporter Tony Mauro points out in an article that can be found here, has been somewhat skeptical of the pool's operation and, as Tony further notes, has expressed some ideas for changing it.

But, for the time being, there will be no change. Supreme Court public information officer Kathleen L. Arberg, asked by reporters Friday what the Chief Justice would do regarding the pool, responded this way: "The Chief Justice is participating in the cert pool, at least for the first year."

While there was no expansion on that statement, it sounds like an experiment. When the 2006 Term opens next October, the Chief Justice will have seen how the pool operates, will be in a position to test the thesis that it is a factor in the shrunken caseload, and can come up with alternative approaches.