

FOREWORD

An oral argument before the Supreme Court may well be the most fascinating, almost mystical, aspect of our nation's lawmaking process. Private citizens cannot join the president and the cabinet in the White House when they debate urgent policy matters. Private citizens cannot appear in the well of Congress, admonishing lawmakers to pass needed legislation. But ironically, the most private of our three branches of government offers the public moments with private attorneys representing clients taking center stage.

Perhaps that is why the opportunity to present oral argument before the Court is almost every lawyer's fantasy. To become part of and perhaps even to shape the nation's history through the power of persuasion. To join the ranks of some of the nation's most historic and colorful figures who have also stood at the lectern facing a barrage of questions from the chief justice and associate justices: Daniel Webster, who would literally start his arguments over again if some "ladies" entered late and missed his opening; eight different presidents of the United States, including John Quincy Adams, Abraham Lincoln, and Richard Nixon; and spectacular advocates who went on to join the Court itself, including the nation's most famous chief justice, John Marshall, who is credited with establishing the essential independence of the federal judiciary; Justice Thurgood Marshall, whose brilliant advocacy

culminated in *Brown v. Board of Education*; and the current chief justice, John G. Roberts Jr., widely considered the best advocate of his generation, who argued thirty-nine cases before the Court, more than anyone else who went on to join the Court.

Oral argument before the Court is certainly not for the fainthearted. Several advocates have nevertheless done just that—fainted. Thomas Ewing, a senator from Ohio, fainted while presenting argument in 1869, and his son, General Thomas Ewing, did the same twenty-six years later on the same spot. Another counsel collapsed unconscious to the floor when Justice William O. Douglas demanded to know who had prepared a particular affidavit in the case; after recovering, the attorney stood up and gamely acknowledged that he had. Today's justices are no less demanding in the rigor, persistence, or number of questions. Today's Court is a hot—sometimes even scalding—bench. Chief Justice Roberts recently recalled being asked more than one hundred questions during one of his arguments.

Does oral argument matter? Absolutely. The old adage holds that cases can never be won at oral argument, only lost. The latter is true, but the former is not. Although written briefs constitute the most important aspect of advocacy, the oral argument is where the deal can be closed—or not. It is the first time that the justices talk about the case together; it is almost always the single largest amount of time that they will ever spend discussing the case; and it is when they first learn what the other justices are thinking. Lawyers have the enormous opportunity to participate in that conversation, to learn about individual justices' concerns, and to address those concerns. At oral argument, a justice's outlook often perceptibly shifts as concerns are addressed and misconceptions are erased. The Court's opinion can be influenced in significant ways, as can the Court's judgment.

This book brings to life with written words and accompanying audio recordings the magic of oral argument before the Supreme Court. The chapter authors include the nation's top journalists who cover the Court, a notoriously challenging beat. These reporters combine a sophisticated understanding of the Court with the ability to tell a great story. And the stories they have produced in this book are wonderful.

They are stirring, illuminating, and brutally honest. The stories provide a ready reminder that the justices are not there for show, have difficult issues to decide, and have high expectations of the advocates as “officers of the Court” to answer the questions justices pose.

For those who are prepared to provide such assistance, a Supreme Court argument can truly represent a professional pinnacle. Attorneys can indeed become part of the nation’s history and even play a significant role in shaping that history. But for those who are not, appearing before the Court does not present a pretty picture.

Read, listen, and enjoy.

Richard J. Lazarus