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## Introduction

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### The Role of Oral Arguments in the Supreme Court

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THE FEDERAL GOVERNMENT PUTS ON MANY IMPRESSIVE DISPLAYS in Washington, D.C. Every four years, the nation inaugurates a president, and hundreds of thousands of people attend various celebratory events. Once a year, Congress invites the president to give an appraisal of the state of the union in front of all senators and representatives, the cabinet, some (or sometimes all) Supreme Court justices, and various other dignitaries. Any day Congress is in session, visitors may obtain passes to sit in the Senate or House galleries to watch our legislative process in action. People may also watch extensive coverage of both houses on C-SPAN. All of these events are witnessed by thousands, hundreds of thousands, or even millions of people each year. In other words, citizens find it relatively easy to see their elected representatives in action, sometimes in person, sometimes on television, or on the Internet.

In contrast, our third branch of government, the U.S. Supreme Court, appears in the public eye less often than does Congress or the president. In fact, while the Court's proceedings for oral arguments are open to the public, far fewer people see the justices in action than see members of either of the other branches. Two factors contribute to this outcome. First, the courtroom has limited available seating. Even those

who are lucky enough to witness an oral argument usually only glimpse about three minutes of the give-and-take between attorneys and justices. But in most cases, anyone willing to stand in line will be well rewarded. Of course, in highly salient cases, the lines can be extraordinarily long. In fact, the Court anticipates such occurrences. For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) the Court's public information officer, Toni House, sent a memo to the justices detailing seating arrangements for the gallery. Among other things, only one hundred seats were reserved for the public, and the line for those seats officially formed at midnight the night before the arguments.


Second, the Court simply hears very few cases. While as late as 1992, the justices sat for more than one hundred cases per term, today that number averages fewer than eighty. The courtroom, therefore, is inaccessible for most citizens who make the trek to Washington to experience government in action. In addition, as several of the essays in this volume note, the Court does not videotape its oral arguments or opinion announcements. Thus, even if people wanted to see the Court in action, they could not do so on C-SPAN or on other visual media outlets.

While for each case, an audiotape and written transcription are prepared, neither has historically been much more accessible than the live arguments. Yet the Court has tried to alleviate this problem. Indeed, since the 2006 term, it releases the written transcripts of arguments on the same day they are heard. The release of audio takes longer—these materials are released to the National Archives in the October following the term during which the cases were argued. Authorized vendors then makes copies for use by researchers, a process that often requires an additional few months. Since the Court is now recording its sessions digitally, that lag time should drop from a few months to a few weeks.

The Court has taken one other step toward opening itself to the world. Beginning in December 2000, it has made certain cases more accessible to the public. That is, at the behest of the chief justice, the audio of the oral arguments may be released on the day of the proceedings

if heightened public interest warrants such an expedited release. These are not simultaneous (i.e., live) feeds from the courtroom but rather delayed releases within a few hours of the argument. Despite this policy, Chief Justice William H. Rehnquist and Chief Justice John G. Roberts Jr. have taken this action in only a handful of cases, including *Bush v. Gore* (2000), *Boumediene v. Bush* (2008), *Al Odah v. United States* (2008), *Ralph Baze and Thomas C. Bowling, Petitioners v. John D. Rees, Commissioner, Kentucky Department of Corrections, et al.* (2008), *Hamdi v. Rumsfeld* (2004), and *Rumsfeld v. Padilla* (2004).


Despite the fact that far fewer people see the Court in action than watch Congress or the president and despite the slow release of audio recordings of the oral arguments, justices in open court put on a most remarkable—arguably *the* most impressive—display of any of our federal institutions. Even in what the justices themselves might describe as boring or mundane tax cases, the arguments always begin with a bang. At precisely ten o'clock on argument mornings, the justices enter through the red velvet curtains behind the bench, and the marshal rises from his or her station to proclaim:

The honorable, the chief justice and associate justices of the Supreme Court of the United States. Oyez! Oyez! Oyez! All persons having business before the honorable, the Supreme Court of the United States, are admonished to draw near and give their attention, for the Court is now sitting. God save the United States and this honorable court! 

The pomp and circumstance continues as the chief justice gavel the first case to order. And, in some cases, the fireworks continue throughout the hourlong session.

Because the Court makes its arguments available to the public but so few citizens are able to see or hear these arguments in person, we have sought to bring them to life through commentary by some of the nation's leading Court reporters. We have also linked these commen-

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To listen to passages from oral arguments indicated with , visit [www.goodquarrel.com](http://www.goodquarrel.com).

taries directly to audio recordings of the arguments (available at [www.goodquarrel.com](http://www.goodquarrel.com)).<sup>1</sup> In short, we provide a way for citizens to take fuller advantage of what the Court offers the public so that those who cannot attend arguments can experience what transpires during these proceedings.

Specifically, we take you inside the U.S. Supreme Court's courtroom for several landmark arguments of the last half of the twentieth century and some of the best (and worst) arguments from 1967 to 2006. To do so, we asked a cadre of the nation's most esteemed Court reporters—including Slate.com's Dahlia Lithwick, National Public Radio's Nina Totenberg, the *Los Angeles Times's* David Savage, and the *Legal Times's* Tony Mauro—to choose and analyze arguments. This volume takes readers into these cases in an entirely new way. By accessing the Internet, readers can listen to an entire argument while reading commentary from these and other reporters. Readers can also navigate on the Web to the specific sections of the oral arguments that the reporters find particularly interesting, noteworthy, or important.

To place this work in some context, we provide a brief overview of what former and current justices have said about the importance of oral arguments. These comments support our contention that these proceedings are not only interesting but also fundamental to the way the Court decides cases. We then preview the commentators' analyses of some of the best, most interesting, and maybe most forgettable arguments of the past forty years.

### *Oral Arguments: The Justices Speak*

Almost universally, past and present Supreme Court justices view the oral arguments as a fundamental part of their decision-making process (see Johnson 2004). While some dissension from this view exists, Justice Robert H. Jackson summed up the general sentiment: "I think the justices would answer unanimously that now, as traditionally, they rely

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1. Jerry Goldman has enabled interested persons to hear thousands of fully digitized oral arguments at <http://www.oyez.org>. Transcripts are also available so that readers can follow along with many of these arguments.

heavily on oral presentations. . . . [I]t always is of the highest, and often of controlling, importance” (1951, 801). Justice Lewis F. Powell Jr. reaffirmed Jackson’s sentiment several decades later: “[T]he fact is, as every judge knows . . . the oral argument . . . does contribute significantly to the development of precedents” (quoted in Stern and Gressman 1993, 571). Other justices agree that these proceedings at times greatly affect decisions (Hughes 1928; White 1982; Rehnquist 2001).

These accounts resemble Justice John Marshall Harlan II’s experience with oral arguments at the Court. When he kept a diary of his postargument impressions of a case, Harlan found that “more times than not, the views which I had at the end of the day’s session jibed with the final views I formed after the more careful study of the briefs” (1955, 7). More recent justices have supported Harlan’s conclusions: Justice William J. Brennan Jr., for example, asserted, “I have had too many occasions when my judgment of a decision has turned on what happened in oral argument” (quoted in Stern and Gressman 1993, 732). He suggested that although this process did not necessarily determine how he voted, it helped him to form his substantive thoughts about a case: “Often my idea of how a case shapes up is changed by oral argument” (quoted in Stern and Gressman 1993, 732). Rehnquist agreed with this assertion and argued that oral advocacy could affect his thoughts about specific cases: “I think that in a significant minority of cases in which I have heard oral argument, I have left the bench feeling different about the case than I did when I came on the bench. The change is seldom a full one-hundred-and-eighty-degree swing” (2001, 243).

Initially, however, not all justices believed that oral arguments were important. Before joining the Court, Justice Antonin G. Scalia, for one, thought them “a dog and pony show”; after almost a decade on the Court, however, he came to believe that “[t]hings can be put in perspective during oral argument in a way that they can’t in a written brief” (quoted in O’Brien 2000, 260). Rehnquist agreed: in his words, a good oral argument “will have something to do with how the case comes out” (2001, 244).

While most justices have positive attitudes about the oral argu-

ments, some have at times been disappointed with the quality of advocacy. As Chief Justice Warren E. Burger once observed, “The quality is far below what it could be” (quoted in Stern and Gressman 1993, 571). In fact, Burger moved the Court away from two hours of argument per case (one hour per side) to one hour per case (half an hour per side).<sup>2</sup> Powell too was disappointed at the level of advocacy he saw after joining the Supreme Court: “I certainly had expected that there would be relatively few mediocre performances before the Court. I regret to say that performance has not measured up to my expectations” (quoted in Stern and Gressman 1993, 571). And the quality of argument may compromise one side’s ability to win its case.

Why do the justices believe oral arguments are important? Different justices provide different answers to this question. Rehnquist posited that oral arguments allow justices to evaluate counsel’s “strong and weak points, and to ask . . . some questions” about the case (1984, 1025). Similarly, Justice Byron R. White suggested that during these proceedings, the Court treats lawyers as resources (1982, 383). That is, counsel come to the Court to provide new or clarifying information that enables the justices to gain a clearer picture of the case at hand. Indeed, there may be points about which the justices remain unclear after reading the briefs, and this face-to-face exchange can clarify such matters. As Rehnquist argued, “One can do his level best to digest from the briefs . . . 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” (2001, 245).

Justice William O. Douglas held a somewhat different perspective on oral arguments, contending that these proceedings were meant to teach the justices about the key points of a case: “The purpose of a hearing is that the Court may learn what it does not know. . . . It is the education of the Justices . . . that is the essential function of the appellate lawyer” (quoted in Galloway 1989, 84). Moreover, Harlan claimed that oral arguments are the best mechanism for information gathering:

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2. Prior to 1969, cases on the Court’s summary docket received one hour for arguments (a half hour per side), while regular cases had two hours (one hour per side). Burger permanently abolished the distinction when he took over the Court in 1969 (Rehnquist 2001, 242).

“[T]here is no substitute . . . for the Socratic method of procedure in getting at the real heart of an issue and in finding out where the truth lies” (1955, 7).

As Rehnquist wrote, “Oral argument offers a direct interchange of ideas between court and counsel. . . . Counsel can play a significant role in responding to the concerns of the judges, concerns that counsel won’t always be able to anticipate when preparing briefs” (1984, 1021). Thus, he believed oral argument to be “[p]robably the most important catalyst for generating further thought” (2001, 241). In Rehnquist’s summation, “Justices of the Supreme Court of the United States have almost unanimously agreed that effective oral advocacy is one of the most powerful tools of the professions” (1986, 289). Even a skeptic such as Scalia changed his view after joining the Court.

### *A Sneak Preview of the Book*

Given the significance that current and former Supreme Court justices place on oral arguments, we believe it is important for the public to better understand what transpires during these proceedings. And who better to provide such insight than the commentators and analysts who follow the Court from the first Monday in October each year until the end of the Court’s term the following June? In this volume, eleven of the country’s most respected Supreme Court reporters write about an argument of their choice. Some of them chose to assess landmark cases, while others decided to write about what they view as the best oral arguments they witnessed. Finally, others wrote about arguments that were, simply put, not up to the standards of top-notch appellate advocacy. To put each case in context, we provide a short paragraph at the beginning of each chapter that summarizes the key issues in the case. From there, our authors take over to spin their tales from inside the Court.

The first two reporters provide compelling analyses of important cases and give insight into the oral argument process more generally. Dahlia Lithwick focuses on one of the most difficult situations before the Court: a litigant arguing pro se (on his or her own behalf). This case,

*Elk Grove Unified School District v. Newdow* (2004), takes the reader into Michael Newdow's "rule-breaking" arguments.<sup>3</sup> Specifically, Lithwick shows how in arguing that the justices should strike the words *under God* from the Pledge of Allegiance, Newdow flaunted many of the Court's norms yet still managed to make one of the most effective arguments in years. Lithwick defines the Court's "Ten Commandments of Oral Advocacy," then analyzes how Newdow effectively broke all of them and ultimately lost his case.

Tim O'Brien voyages into the world of white supremacist politics and introduces a litigant who chose to argue even though he had no experience doing so. O'Brien analyzes not only the events preceding the arguments but also the arguments themselves in *Forsyth County, Georgia v. the Nationalist Movement* (1992). While the justices took the Forsyth County attorney to task for defending a law that seemed to quash political speech, the attorney for and chief executive officer of the Nationalist Movement, Richard Barrett, took things to new heights during oral arguments. Whereas Newdow broke almost every courtroom rule and still made a highly effective argument, Barrett's pontification and his sometimes emotional arguments influenced the justices' decision making in ways he did not intend.

Lyle Denniston examines *Planned Parenthood v. Casey* (1992), the controlling precedent in abortion law. He reveals how the interchange of attorneys and justices affected the outcome of this case. In particular, the questions asked by and responses to Justices Sandra Day O'Connor and Anthony M. Kennedy highlight their concerns about undercutting the existing precedent in *Roe v. Wade* (1973) as well as about the standard the Court should set for abortion law in the United States.

Charles Bierbauer takes a new look at the arguments from possibly the most significant case of the new century, *Bush v. Gore* (2000), analyzing the justices' only public interactions with one another on the matter. Specifically, he points out that the justices spent a good deal of time discussing jurisdictional issues. Bierbauer also highlights a key

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3. The Supreme Court has explicit and implicit guidelines for how attorneys should act when appearing before the Court. All attorneys try to follow these guidelines, and many read Stern, Gressman, and Shapiro 2007, which is regarded as the Bible for advocates appearing before our nation's highest court.



faux pas made by many attorneys—calling justices by the wrong names. Finally, through recent interviews about the arguments, Bierbauer draws out how the attorneys viewed what transpired when they appeared before the justices.

Tony Mauro begins his analysis of *Glickman v. Wileman Brothers and Elliott Inc.* (1997) several months before the argument. He goes behind the scenes of an intense debate about which attorney should represent Wileman Brothers in the oral arguments at the U.S. Supreme Court. The resolution of this debate provides for fascinating reading, and as Mauro concludes, Wileman Brothers was so incensed with the choice of attorneys and with the “raucous” nature of his arguments that the company took drastic action shortly after the Court handed down its final decision.

Greg Stohr focuses on another case remarkable for both its content and its high level of advocacy, *Grutter v. Bollinger* (2003). First, Stohr expounds on the incredible amount of time attorneys spend preparing for the intense questioning they will face from the justices. He also points out how attorneys can dig themselves into holes at the beginning of an argument and how justices will sometimes come to the rescue. This analysis demonstrates the dividends of preparation. Indeed, the better-prepared attorney can often win a case at oral arguments.

As Bierbauer and Mauro note, oral arguments certainly at times do not measure up to the quality justices have come to expect. Nina Totenberg analyzes a “truly wretched” argument in *Chandler v. Miller* (1997). Not only was Chandler torn apart almost from the beginning of his argument, but he was so unprepared for the onslaught of questions that he “had the aura of a sleepwalker.” While other chapters in this volume demonstrate how one or two justices can decimate one side’s argument, this case exemplifies how thoroughly the entire Court, from Justice Scalia to Justice O’Connor to Justice Ruth Bader Ginsburg, can collectively tear an attorney limb from limb. The justices were equally harsh toward Georgia’s assistant attorney general, Patricia Guilday, whom Totenberg describes as having “self-immolate[d].”

David Savage writes about *Rapanos v. United States* (2006), which concerned the federal government’s control of navigable waterways. This case is historic for many reasons, not the least of which is that it

was the first oral argument for newly appointed Associate Justice Samuel A. Alito Jr., who had won confirmation to the Court less than a month earlier. Savage notes that even though Alito was the newest justice, he reached the heart of the problem with *Rapanos's* argument. This chapter more generally highlights how attorneys deal with questions—sometimes difficult and harsh ones—from all members of the bench. Savage also draws out the stark differences in the questioning styles of Justices Scalia and Stevens.

Brent Kendall's analysis of *Randall v. Sorrell* (2006) follows. Using this campaign finance case from Vermont, Kendall demonstrates that the justices often send signals about how they will rule in the case by the frequency of their questions and by asking questions of the attorneys for one side or the other. He notes that Randall's attorney argued for a full three minutes before a justice raised a question, an unusual occurrence because the justices usually dominate the arguments. The second signal was the change in "pace and energy" as Sorrell reached the lectern for his argument—in particular, the questioning by Chief Justice Roberts.

Steve Lash provides insight into *UAAAIWA v. Johnson Controls Inc.* (1991), a case focusing on whether women have the right to choose to work under hazardous conditions even when pregnant. He provides evidence that on some occasions, everything and everyone involved in the case click perfectly. Given the high level of advocacy as well as the high level of engaging questions from the bench, this case offers a quintessential instructional example for civics classes, classes on appellate advocacy, or constitutional law classes.

We close with Fred Graham's analysis of *Time Inc. v. Hill* (1967). This case was significant for the legal standard it set: any story "in the public interest" may be published, even if it concerns private citizens. The case was also interesting because of what transpired nine months before the Court handed down its ruling. Indeed, the oral arguments included soon-to-be presidential candidate Richard M. Nixon. The most intriguing parts of this argument are the interchanges among Nixon, an outspoken conservative, and the liberal wing of the Court, including Justice Abe Fortas and Chief Justice Earl Warren.