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# To the Editors of Constitutional Commentary

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## TO THE EDITORS OF *CONSTITUTIONAL COMMENTARY*:

Professor Kevin McGuire's intriguing and imaginative article in the Fall issue dealing with expertise in the Supreme Court Bar makes out a persuasive if not compelling case for the proposition that lawyers who have had experience in practice before the U.S. Supreme Court are more likely to have their petitions for writs of certiorari granted. The article, however, does not purport to deal with the question whether the quality of advocacy in the Supreme Court makes a difference in the result.

Justice Brennan in his 1983 dissent in *Jones v. Barnes* said that although "excellent presentation of the issues, especially at the briefing stage, certainly serves the client's best interests," nevertheless, "at the appellate level, . . . truly skillful advocacy [makes] a difference only in a handful of cases." He added in a footnote that the handful "may well include many cases that shape the law." *Jones v. Barnes*, 463 U.S. 745 at 762 (1983).

I have discussed this question over the last ten years with several appellate judges. One on the D.C. Circuit believes that oral argument is very important, as do several on the 8th Circuit. Indeed, Judge Bright has written that oral argument "changed his perception on the outcome of the appeal" in about a third of the cases argued before him during a ten-month period. (See Bright and Arnold, *Oral Argument? It may be Crucial*, 70 A.B.A. Journal 68 (1984).) On the other hand, a Justice on the Minnesota Supreme Court believes that oral argument, while helpful, is not essential. This Justice thinks that the main justification for oral argument is to "make the appellate process more visible to the public" and that if oral argument were eliminated, it would result in hiding the Justices from the public and "seriously erode the legitimacy that the appellate process enjoys."

The attitude of the U.S. Supreme Court Justices is reflected in the declining time the Court permits for oral argument. In the 1940s, the *Hartford Empire* case was argued for a week before the Court: three full days (four hours each day) in 1943 and two more days in reargument the next year. See *Hartford-Empire v. United States*, 323 U.S. 386 (1945). Today an hour per case is the time typically allotted for oral argument. Note that the Court is

hearing fewer cases than it did in the 1940s; accordingly, lack of time to hear long arguments cannot be the explanation. While it could be that shortening the time for argument causes the advocates to concentrate their fire and thus improve the quality of their advocacy, I wonder.

My own view, formed over a period of thirty years and after arguing three cases in the Supreme Court and several more in federal courts of appeal, is that Justice Brennan was right; briefing is quite important but oral argument rarely changes the result. This is not to say that oral argument is not helpful; on occasion, counsel's response to questions will clarify a judge's thinking and help the judge to write an opinion even if oral argument doesn't change the result.

Thus, while I think the late great Hugh Cox, Bruce Bromley and Whitney North Seymour and, among the living, Larry Tribe, gave the best arguments I have heard in the U.S. Supreme Court, like Justice Brennan I don't think they changed the results very often.

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