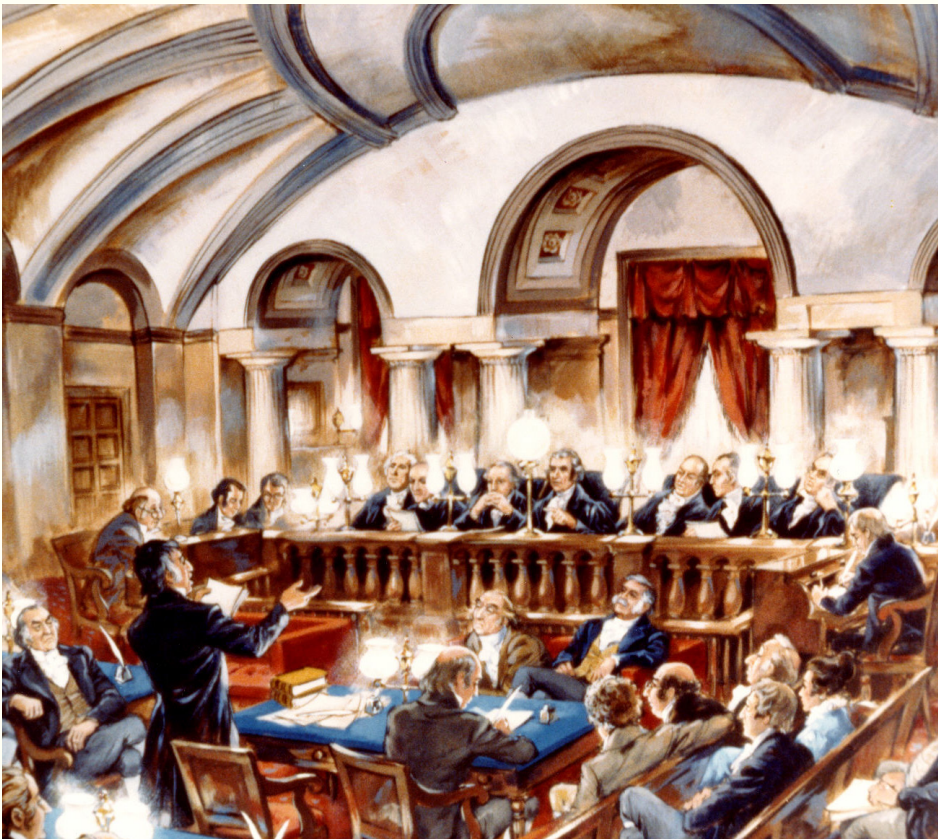
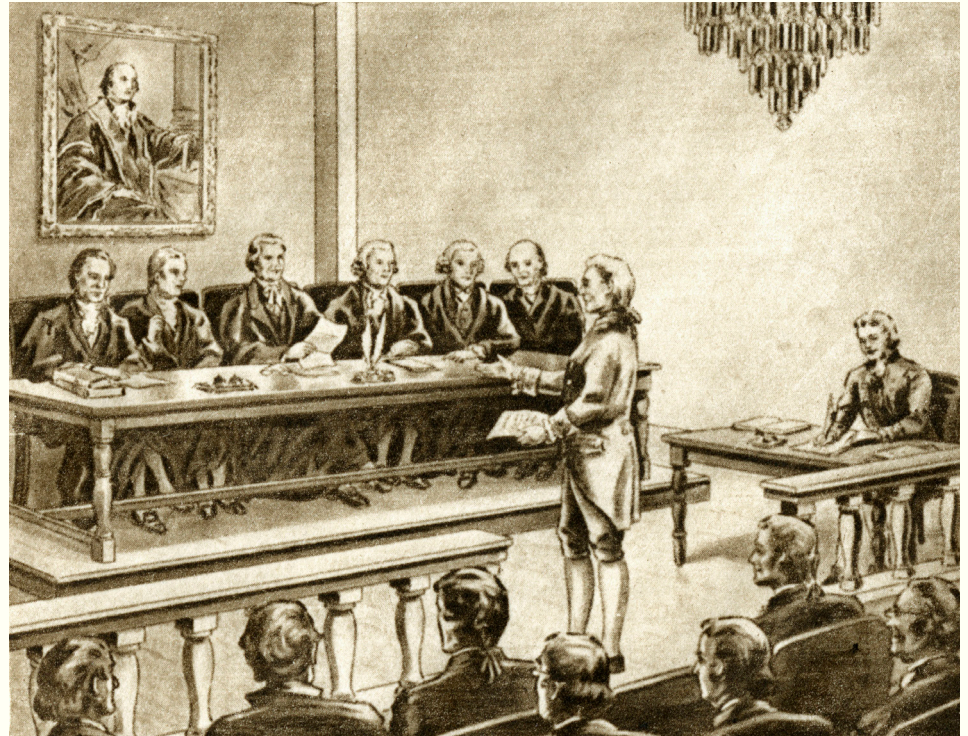


# A Pictorial History of Oral Argument

By Clare Cushman

**1** This conjectural drawing shows an attorney arguing a case in 1801 when the Supreme Court held session in a small Courtroom on the first floor of the Capitol building. As oral advocates were only required to submit brief statements outlining “the material points” of their case, the justices asked few questions while they listened raptly to their arguments.

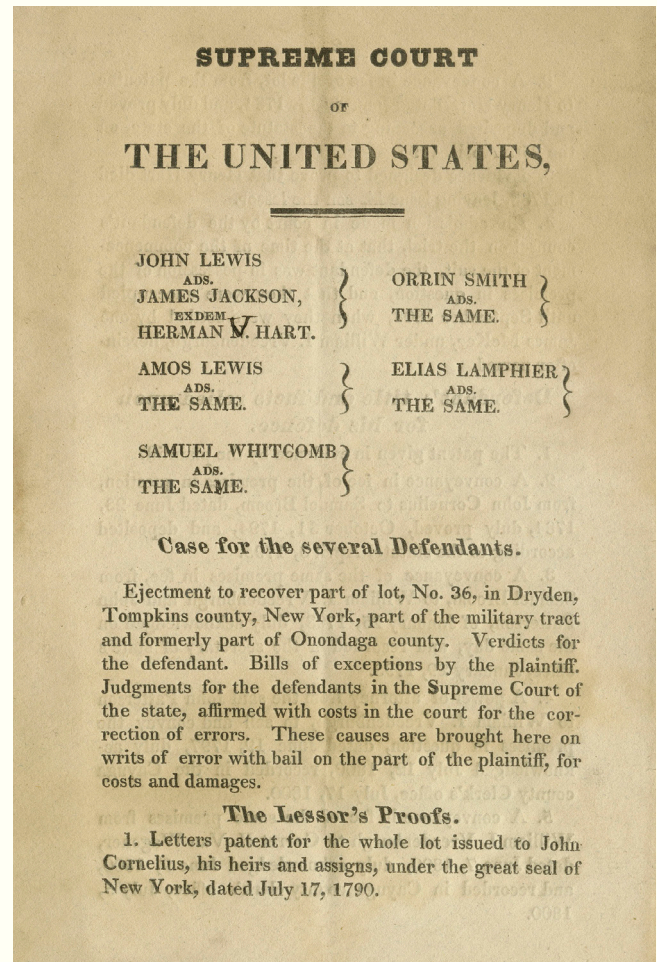


**2** A fictional attorney arguing before the Marshall Court c. 1818-1835, an era when oral argument had no time limit and advocates argued for hours at a stretch. One argument could last longer than a week. Silver-tongued attorneys strayed far from the merits of the case in delivering their stem-winders and embroidered their legal arguments with allusions to the Bible, Roman law and Shakespeare.



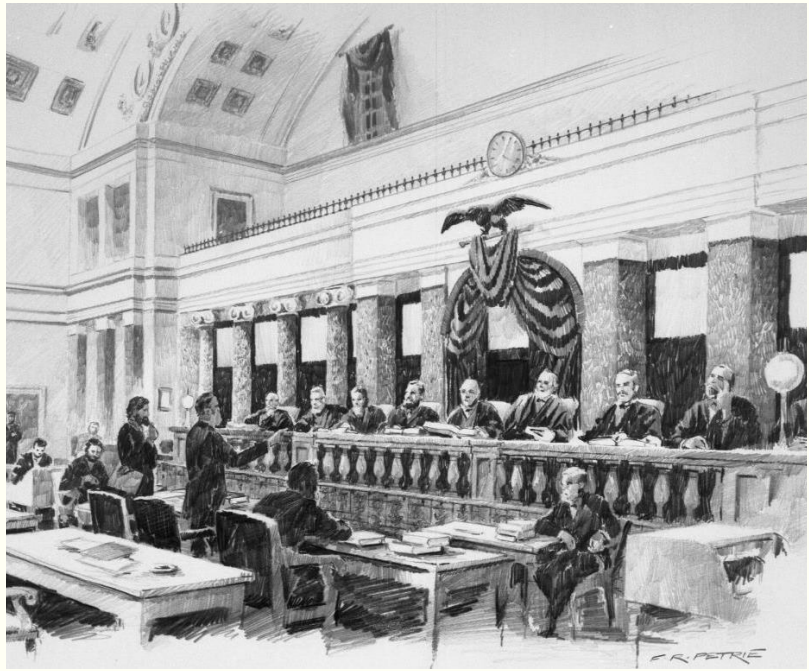


**3** Attorney Daniel Webster argued more than 200 Supreme Court cases, and his oratory drew crowds who considered oral argument the best show in town. “There is a tremendous squeeze, you can scarcely get a case knife in edgeways...” complained a spectator who elbowed his way into Webster’s 1844 argument as “hundreds” of others were turned away for lack of seating space.<sup>1</sup>



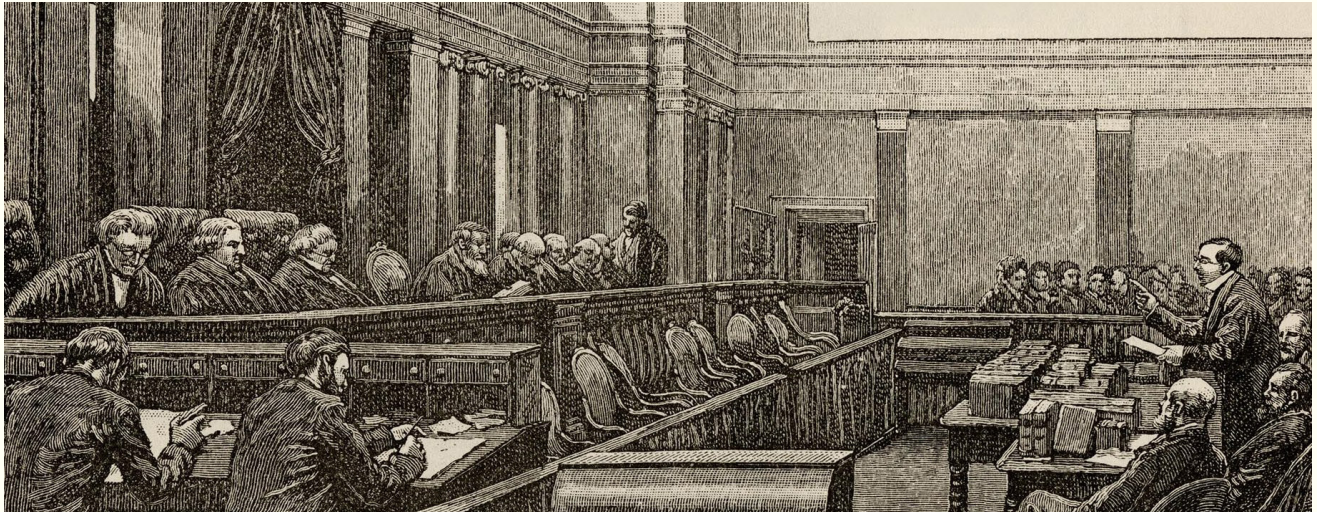
**4** In 1829 the Supreme Court began to require the submission of printed, not handwritten, briefs (pictured is the brief in an 1828 land dispute case.) As they became more familiar with a case before hearing it argued, the justices would ask advocates questions during argument. The Court also ordered that no attorney be permitted to speak for more than two hours: with two counsel allowed per side this reduced oral argument to eight hours total per case.

**5** When the Senate moved to a new wing in 1860, the room it vacated was remodeled into a Courtroom for the justices to hold session. Senators with stellar oratorical skills were often hired to argue cases when Congress was in session as they didn't have to travel far.

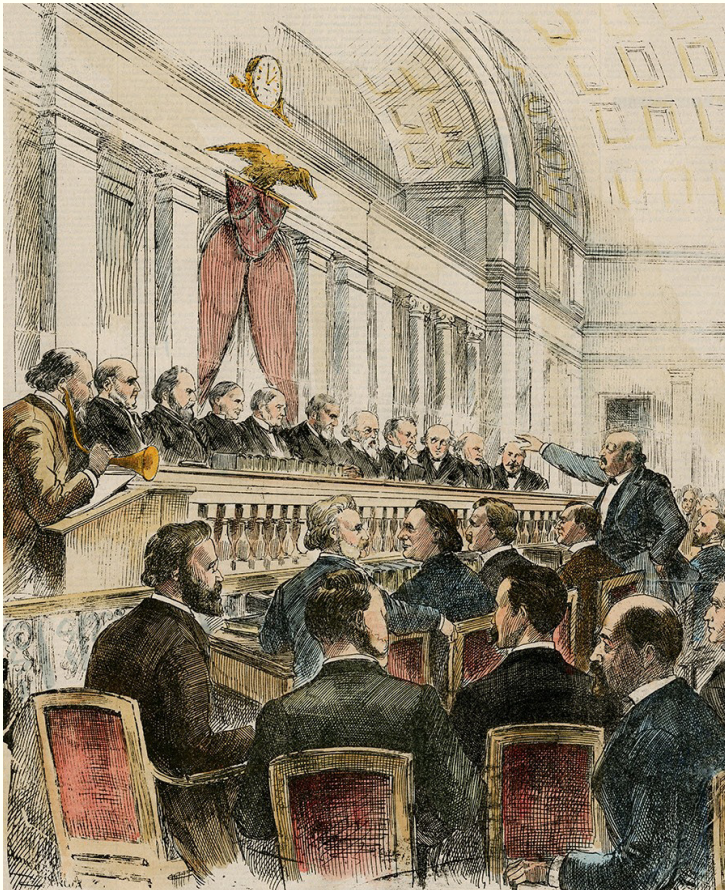


**6** Attorney General Henry Stanbery (standing with book) argued against attorney William L. Sharkey (arm extended) in April 1867 before the Court presided over by Chief Justice Salmon P. Chase. Sharkey represented his home state of Mississippi in asking the Supreme Court for an injunction to prevent President Andrew Johnson from enforcing the Reconstruction acts passed by Congress; Stanbery represented the United States. The Court would rule unanimously that it could not constitutionally issue an injunction directed against the president in this case.



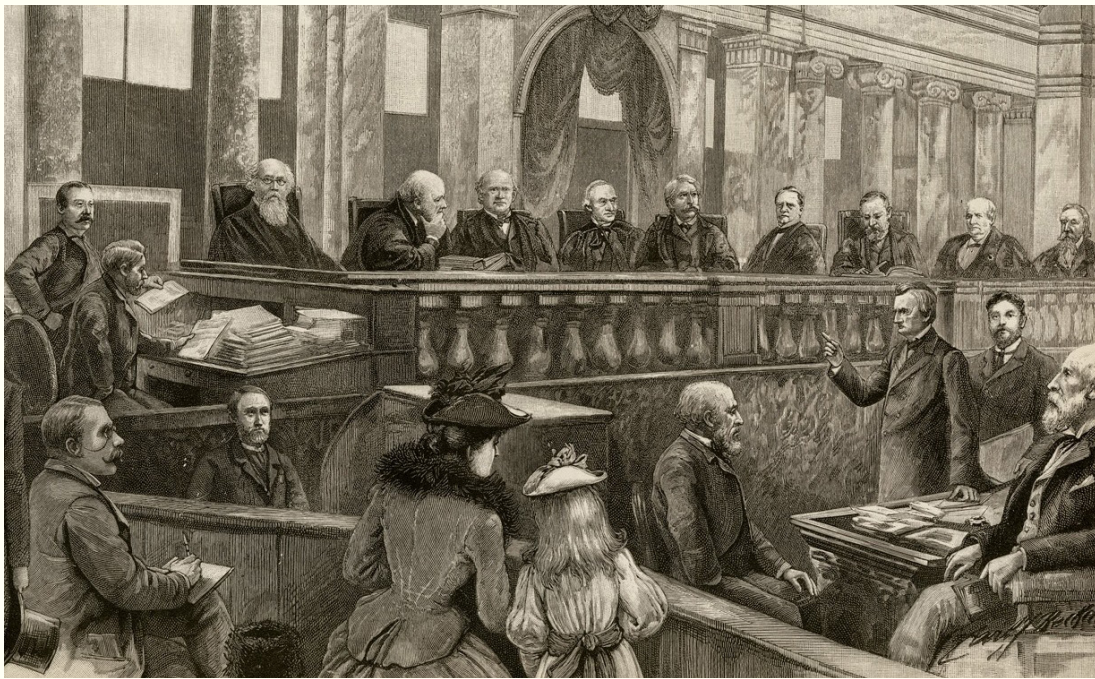


**7** Argument time was cut to two hours per side in 1871 and the justices began questioning advocates more aggressively to get straight to the essentials. Used to making speeches, attorneys were unprepared for interruptions and some were “frightened... by being pulled up by the court to know this or that before they had time to tell anything of it, and when they were getting ready to tell.”<sup>2</sup>



**8** In 1887 Benjamin F. Butler argued on behalf of August Spies, one of the anarchists in Chicago found guilty of conspiracy to commit murder following a bomb attack on police during a labor demonstration agitating for an 8-hour workday. The unanimous decision by the Court to deny the writ of error from the Illinois Supreme Court was issued by only eight justices as there was a vacant seat: this image erroneously shows nine hearing the case argued. Clerk of Court James H. McKenney is seated at left (with ear trumpet); at the far right is John Nicolay, the Marshal.



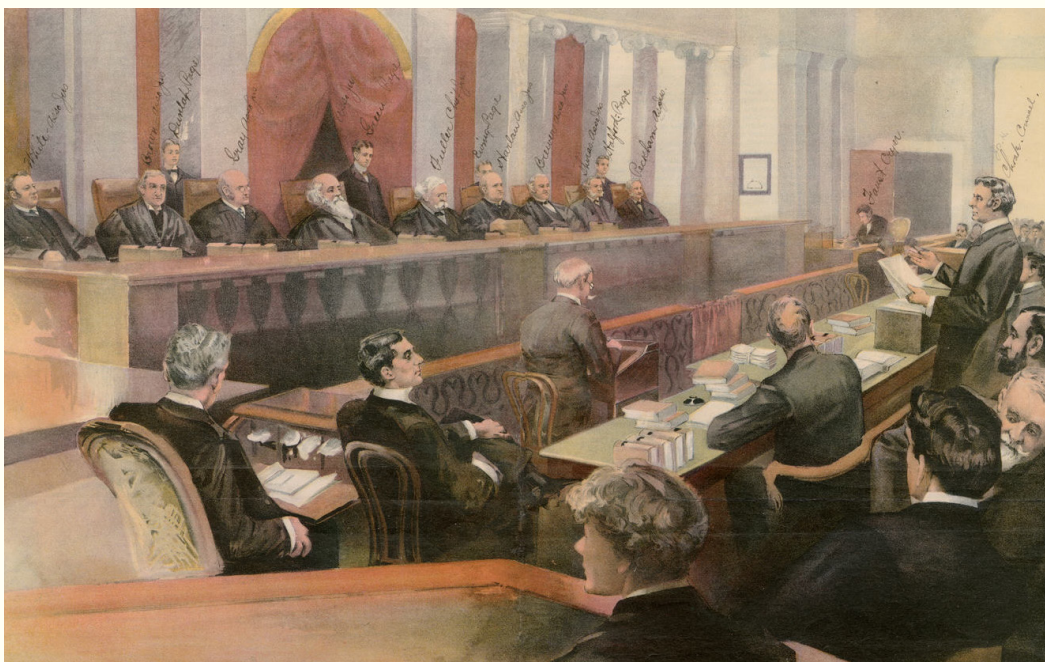
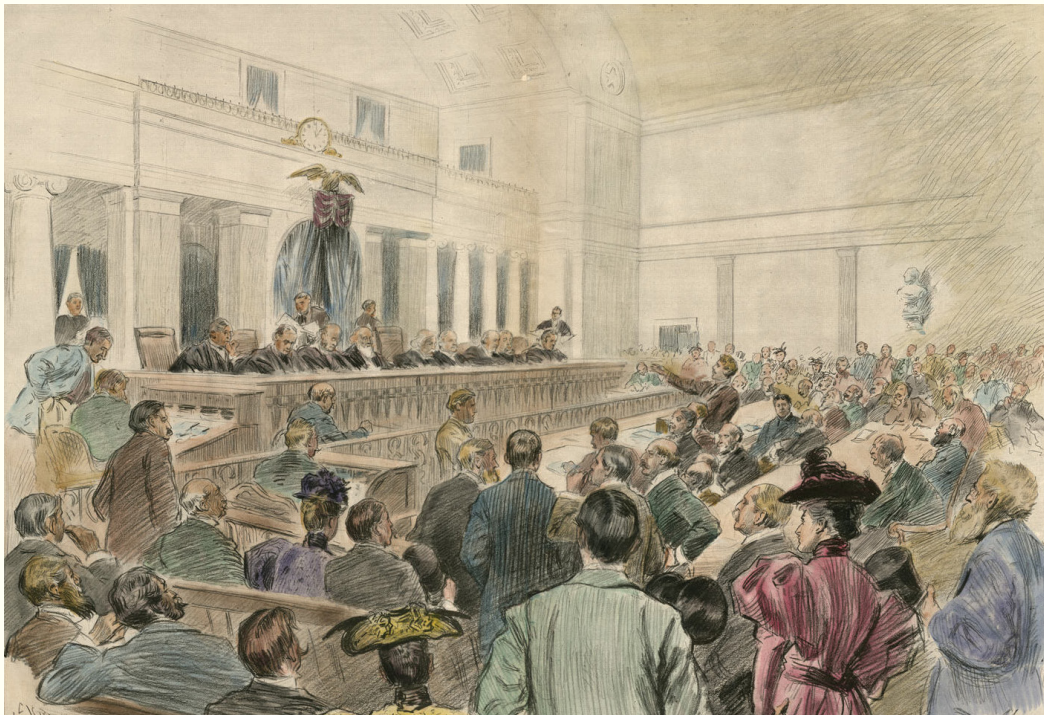


**9** William M. Evarts (pointing finger), former Secretary of State, Attorney General, and New York Senator, argued *Ex Parte Cooper* in November, 1891. The case involved a British Schooner captured illegally hunting seals in the Bering Sea and was on appeal from the district court of Alaska. (The justices are not depicted in the order in which they actually would have been sitting according to seniority.)



**10** Court attendants, including a young page, stood behind the bench awaiting the justices' arrival for oral argument in 1903. Well-dressed society women (pictured in the gallery at back) had arrived early to secure limited seats. White porcelain spittoons were placed on the floor beneath counsel tables (left, facing bench) for the convenience of those attorneys who chewed tobacco to keep up their energy during arguments.

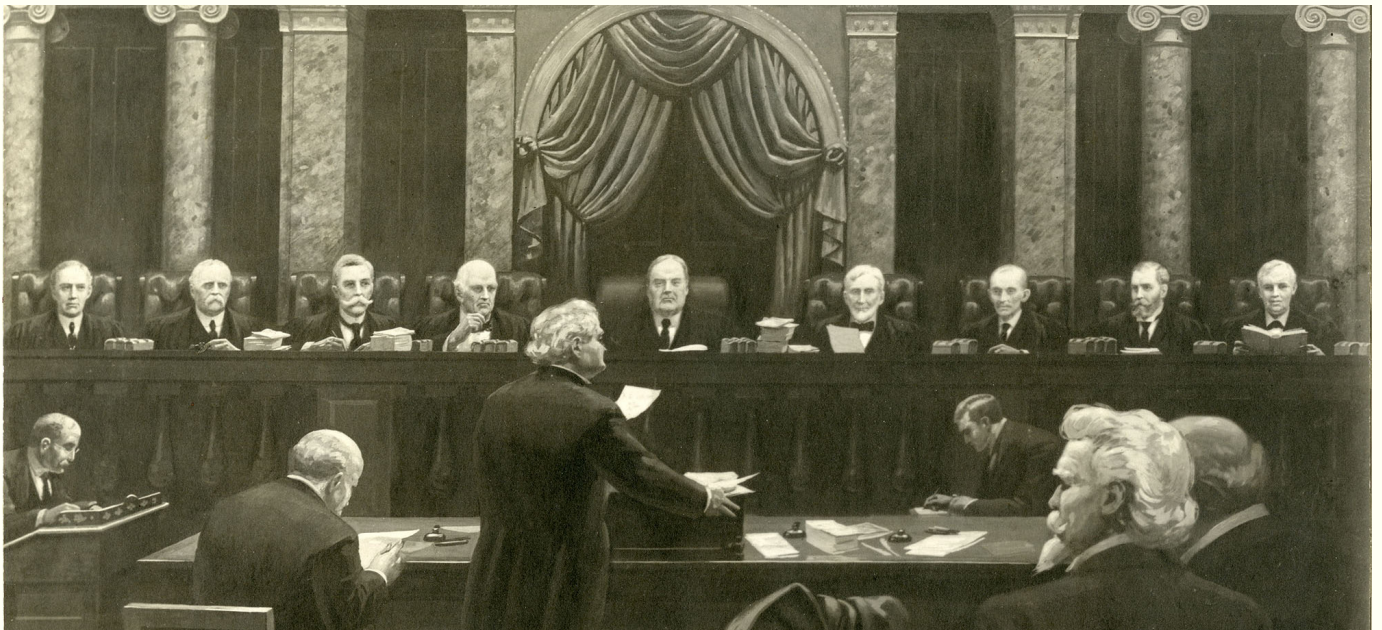




**11 & 12** Two scenes of Joseph H. Choate arguing the landmark income tax case, *Pollock v. Farmer's Loan and Trust Company*, in 1895. A national income tax approved by Congress was unconstitutional, Choate argued, for being an un-apportioned direct tax. In a 5-4 vote, the Court agreed: the United States did not institute an income tax until the Sixteenth Amendment was ratified in 1913.

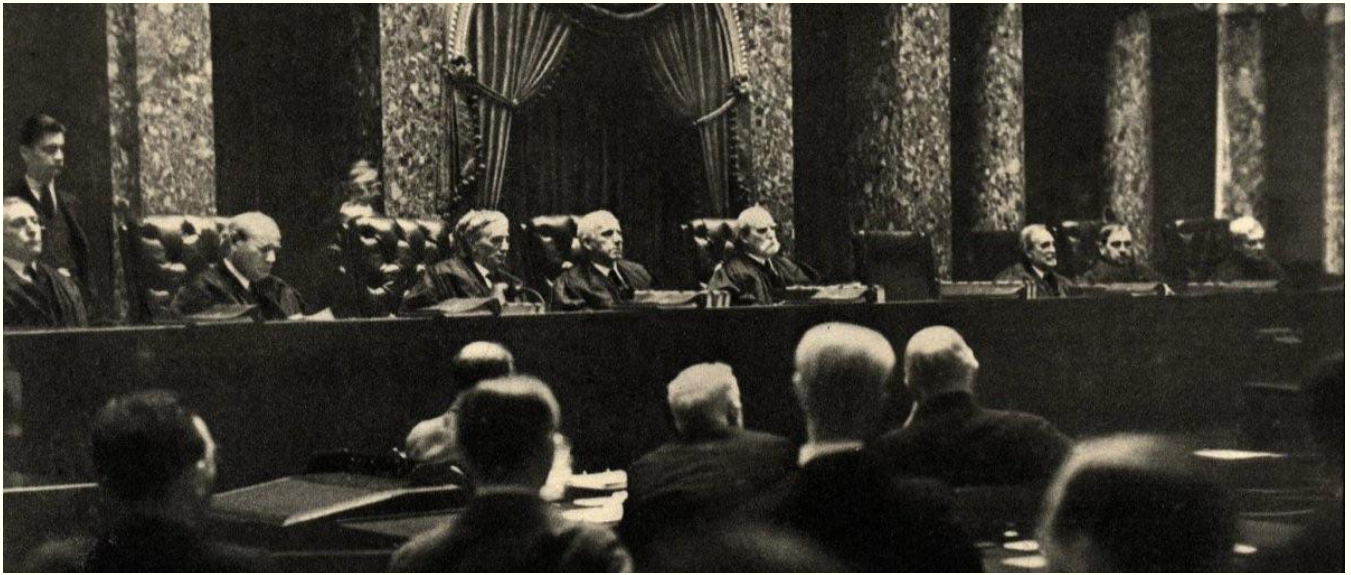


**13** President Theodore Roosevelt handpicked trust-busting prosecutor Frank B. Kellogg (pictured with arm outstretched) to argue the government's case in *Standard Oil Co. of New Jersey v. United States* (1911). The Court unanimously found that Standard Oil violated the Sherman Antitrust Act, a decision which led to the monopoly being divided into 34 separate companies.

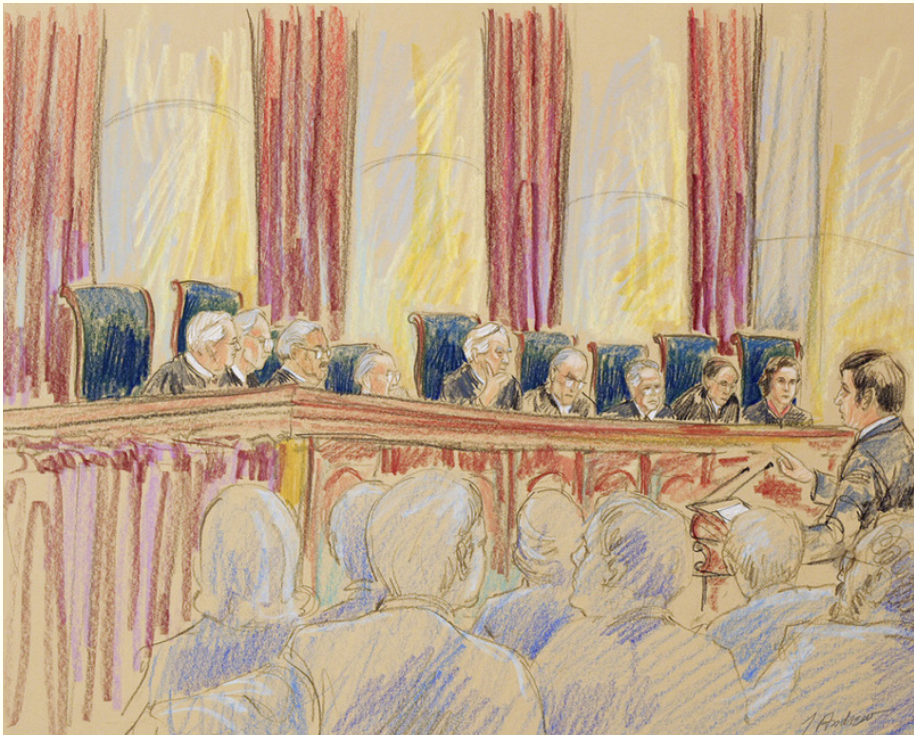


**14** When oral argument was reduced to one hour per side in 1918 many advocates had a hard time jettisoning their prepared speeches and nimbly responding to questioning by justices who wanted to get to the crux of the case quickly. Some attorneys tried simply to ignore the questions, at their peril. This painting shows an argument circa 1911, when each side still had two hours to present its case.





**15** This 1932 photo of the Court sitting for oral argument was taken by a spectator who illegally snuck in a camera by faking a broken arm. Chief Justice Charles Evans Hughes sits at center; the empty chair belongs to Justice James C. McReynolds, who was absent that day.

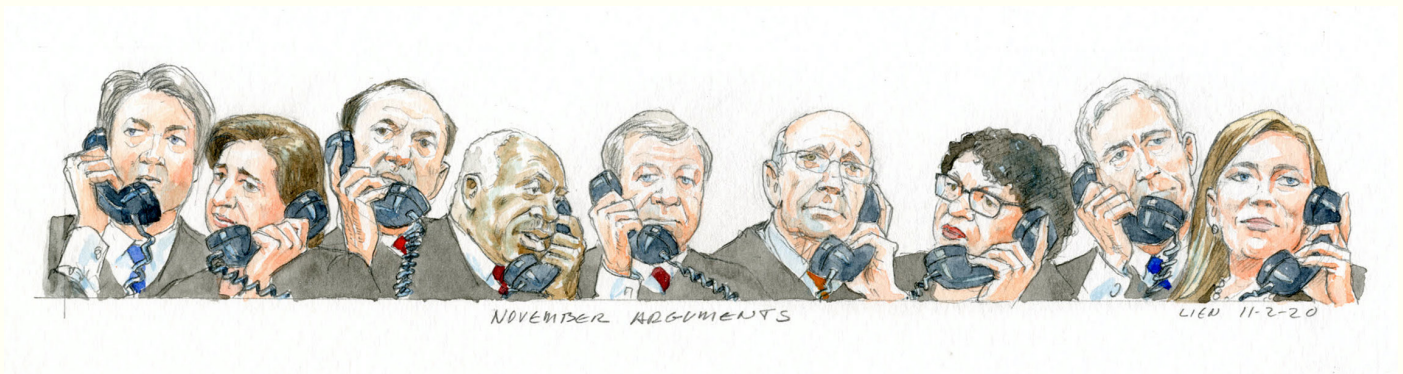


**16** When Warren E. Burger (center, pictured with the 1992 Court) became chief justice in 1969, he and his colleagues decided to reduce standard oral argument time to 30 minutes per side for the following Term.





**17** Having read briefs by counsel, briefs by amicus curiae, “bench memos” written by clerks, the justices peppered oral advocates with questions to help them understand the difficult issue at the heart of each case. Anthony G. Amsterdam successfully argued in *Woodson v. North Carolina* (1976) that a state law mandating the death penalty for first degree murder was unconstitutional.



**18** During the Covid-19 pandemic, Chief Justice John G. Roberts (center) decided to protect the health of Court staff and oral advocates by switching oral argument to the telephone in May 2020. In this temporary emergency format, the chief gives each justice a turn to ask questions for three minutes without interruption. This fanciful drawing shows the justices in the order in which they would be seated on the bench instead of by seniority, and thus does not reflect the order in which Chief Justice Roberts called on them to question counsel. Senior Associate Justice Clarence Thomas (fourth from left) began the questioning and Amy Coney Barrett (right), as the newest appointee, went last.





**19** Seasoned oral advocate Kannon K. Shanmugan pivoted from appearing in-person in the Courtroom to making oral arguments by telephone from his law firm office. He has presented four cases during the pandemic, answering the justices' questions over the phone.



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# Credits

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All images are from the Collection of the Supreme Court of the United States  
except as noted below.

1. U.S. Postal Service, 1950 drawing of 1801 Court
2. Watercolor by Betty Wells of fictional Marshall Court session
3. Joseph Andrews engraving after painting by Chester Harding, 1851, Library of Congress
4. Collection of the Supreme Court of the United States
5. Pencil drawing by F. R. Petrie of the Old Senate Chamber
6. Illustration by Andrew McCallum, *Harper's Weekly*, April 27, 1867
7. Image from *Harper's New Monthly Magazine*, March 1881, page 555
8. Illustration by James Henry Moser titled "The Supreme Court Room During Arguments in 'Ex Parte: In the Matter of August Spies, et.al.' (the Chicago Haymarket Case)," published in *The Daily Graphic*, November 1, 1887
9. Illustration by Carl J. Becker, titles "The Behring Sea Question—A Sitting of the Supreme Court in Washington," *Black and White* [magazine], November 21, 1891
10. Stereoview by Underwood & Underwood of the Old Senate Chamber, April 17, 1903
11. Drawing by C.S. Reinhardt from a sketch by H.G. Dart titled "Scenes from the Reopening of the Income Tax Case Monday May 6, 1895," published in *Harper's Weekly*, May 6, 1895
12. "The Supreme Court Men Who Know the Law" *Truth* magazine, May 9, 1896, designed by American Lithographic Company
13. Illustration by Thure de Thulstrup, *Harper's Weekly*, May 27, 1911
14. Copy photograph of a painting by William Bengough of the White Court circa 1911
15. Photograph by Erich Salomon, published in *Fortune* magazine, June 1932, Erich Salomon Archive, Berlin
16. Sketch by Joan Andrew, 1982
17. Sketch by Aggie Whelan Kenny, March 31, 1973
18. Sketch by Art Lien, 2020
19. Photograph by Jennifer Peters, 2021

## Notes:

1. From *New York Herald*, Feb. 6, 1844.
2. Augustus H. Garland, *Experience in the Supreme Court of the United States with Some Reflection as to that Tribunal* (1898) 40-41.