

## IN THE SHADOW OF DANIEL WEBSTER: ARGUING APPEALS IN THE TWENTY-FIRST CENTURY

Seth P. Waxman\*

It is natural—I suppose it is expected—for every Solicitor General to hold forth at some point during his tenure with pearls of wisdom on the Twelve Secrets, or Ten Commandments, or Five Essential Rules of effective oral advocacy. I have always been reluctant to do that. Sixty years ago, John W. Davis, a storied Solicitor General and a brilliant appellate star, observed that any lecture on the argument of an appeal should come from a judge, rather than from an advocate. As he explained,

Supposing fishes had the gift of speech. Who would listen to a fisherman's weary discourse on flycasting, the shape and color of the fly, the size of the tackle, the length of the line, the merit of different rod makers, and all the other tiresome stuff that fishermen talk about, if the fish himself could be induced to give his views on the most effective methods of approach. For after all, it is the fish that the angler is after and all his recondite learning is but the hopeful means to that end.<sup>1</sup>

The Solicitor General may be, in the vernacular, the so-called Tenth Justice.<sup>2</sup> But make no mistake: just like Davis, he is a fisherman, not a fish. So let me hasten to finish Davis's point:

[I]t is true, is it not, that in the argument of an appeal the advocate is angling, consciously and deliberately angling, for the judicial mind. Whatever tends to attract judicial

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\*Partner, Wilmer, Cutler & Pickering; Solicitor General of the United States (1997-2001). This essay is based on a keynote address delivered at the Twelfth Annual Judges Appellate Practice Institute on June 2, 2000, and so is a government work in which no copyright may be claimed. The author gratefully acknowledges the assistance of Robyn L. Thiemann.

1. John W. Davis, *The Argument of an Appeal*, 26 ABA J. 895 (Dec. 1940). (The Davis essay is reprinted in this issue at page 745.)

2. Lincoln Caplan, *The Tenth Justice: The Solicitor General and the Rule of Law* 3 (Alfred A. Knopf 1987).

favor to the advocate's claim is useful. Whatever repels it is useless or worse. The whole art of the advocate consists in choosing the one and avoiding the other. Why otherwise have argument at all?<sup>3</sup>

Davis offered his self-effacing remarks at the introduction of a speech in which he proceeded to offer ten rules—a Decalogue—of effective oral advocacy.<sup>4</sup> And so, reluctantly, after years of resistance, I too will unburden myself of a few principles. First, though, I would like to reach back in history for some inspiration by reflecting a bit on Daniel Webster.

### WEBSTER THE ADVOCATE

Born in 1782, Daniel Webster lived the fullest of lives throughout his 70 years.<sup>5</sup> A Congressman, a Senator, and a Secretary of State, he was a towering force in American politics and law. So deep was the mark he left that Webster's influence during the first half of the nineteenth century is hard to overstate. In Stephen Vincent Benet's marvelous classic, *The Devil and Daniel Webster*, the author described him as

the biggest man in the country. He never got to be President, but he was the biggest man. There were thousands that trusted in him right next to G-d Almighty, and they told stories about him . . . that were like the stories of the patriarchs and such. They said, when he stood up to speak, stars and stripes came right out of the sky . . . . They said, when he walked the woods with his fishing rod . . . the trout would jump out of the streams right into his pockets, for they knew it was no use putting up a fight against him;

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3. Davis, *supra* n. 1, at 895.

4. *Id.* at 896-99. Davis's well-regarded speech became the touchstone of an equally well-known and well-regarded lecture delivered a decade later by Justice (and previously Solicitor General) Jackson. See Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 ABA J. 801 (Nov. 1951). Many other articles offer similar lists of rules and similar advice on oral advocacy. See e.g. Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. Rev. 567 (1999); Henry D. Gabriel, *Preparation and Delivery of Oral Argument in Appellate Courts*, 22 Am. J. Tr. Advoc. 571 (1999); Paul R. Michel, *Effective Appellate Advocacy*, 24 Litig. 19 (Summer 1998); Rex E. Lee, *Oral Argument in the Supreme Court*, 72 ABA J. 60 (July 1986).

5. Two good sources of biographical information on Webster are Robert V. Remini, *Daniel Webster: The Man and His Time* (W. W. Norton & Co. 1997) and George Ticknor Curtis, *Life of Daniel Webster* (2d ed., D. Appleton & Co. 1870).

and, when he argued a case, he could turn on the harps of the blessed and the shaking of the earth underground. That was the kind of man he was.<sup>6</sup>

I mention Daniel Webster not because of his mastery of American politics, but rather because he is widely regarded as the greatest advocate ever to argue in an American court. *McCulloch v. Maryland*,<sup>7</sup> *Gibbons v. Ogden*,<sup>8</sup> *Luther v. Borden*,<sup>9</sup> the *Charles River Bridge Case*<sup>10</sup>—Webster argued them all.<sup>11</sup> Webster's qualities and accomplishments as an advocate have been extolled so often that the highest praise to which any modern lawyer can aspire is to be deemed "almost as good as Daniel Webster." In the realm of advocacy, Webster doesn't merely sit in the Pantheon: He is Zeus himself.<sup>12</sup>

Just how good was Webster, and what made him so fine an advocate? We are too late to see his gifts in action, but we can glimpse the qualities that contributed to his mastery by studying contemporary accounts of his oral arguments. One example is the argument he made in the celebrated *Dartmouth College* case.<sup>13</sup> Webster represented the college's trustees, who opposed state legislation revising the college's original charter.<sup>14</sup> Opposing him was another great advocate—William Wirt—who was then Attorney General of the United States, but who argued in this case as private counsel for the State of New Hampshire.<sup>15</sup>

6. Stephen Vincent Benet, *The Devil and Daniel Webster* 14-15 (Holt, Rinehart & Winston 1937).

7. 17 U.S. 316 (1819).

8. 22 U.S. 1 (1824).

9. 48 U.S. 1 (1849).

10. 36 U.S. 420 (1837).

11. Maurice G. Baxter, *Daniel Webster and the Supreme Court* 58-64, 119-35, 170-78, 196-207 (U. Mass. Press 1966).

12. It was not always thus. As a young man at Exeter, Webster found himself incapable of public speaking. He recalled in later life that despite extensive rehearsal, he could as a schoolboy never "command sufficient resolution" to perform, and that he often "wept bitter tears of mortification" after his failures. See Daniel Webster, *Autobiography*, in *The Private Correspondence of Daniel Webster*, vol. 1, 9-10 (Fletcher Webster ed., Little, Brown & Co. 1857).

13. *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819).

14. *Id.* at 551-52.

15. See Remini, *supra* n. 5, at 153. Several authors have noted that Wirt was far too overworked to give the *Dartmouth College* case the attention it deserved. *Id.*; Baxter, *supra* n. 11 at 79. Arguments began on March 10, 1818, see Remini, *supra* n. 5, at 154, and Wirt had argued nine cases between February 3 and February 16, *id.* at 153 n. 72.

Webster faced a challenge, and perhaps the best account of his rising to meet it is that of Justice Joseph Story—in John W. Davis’s vernacular, a “fish.” Story took note of the “decorous deference” with which Webster began his presentation, and the “lucid order and elegant arrangement, by which each progressive position sustained and illustrated every other.”<sup>16</sup> Webster began, Story recalled, “by unfolding the facts in that brief but exact manner for which he is so remarkable.” Thereafter, “arriving at the points for which he meant to contend, he first presented them in their general bearing and aspect” and then proceeded “to the more minute analysis,” bringing out “into singular felicity and clearness all the various learning, from juridical authorities, from historical archives, from parliamentary debates, from elementary writers, which could illustrate and fortify his grounds.”<sup>17</sup>

Story maintained that no written summary of Webster’s argument could convey “the form and impress, the manner and expression, glowing zeal, the brilliant terms of diction, the spontaneous bursts of rebuke . . . , the sparkling eye, the quivering lip, the speaking gesture, the ever changing, and ever moving tones of the voice, which add such strength and pathos, and captivating enchantment to the orator as his words flow rapidly on during actual delivery.”<sup>18</sup> As Webster continued, he

kindled into more energetic action, and . . . scintillated at every step . . . . At times his voice rose almost into startling impetuosity. It was the struggle of the giant to relieve the incumbent pressure of his thoughts, to deliver over the strong workings of his soul, and to uproot the very foundations of the opposing argument . . . . It was a relief even to gain in his momentary pauses some short interval of repose from the intense stretch of thought, by which the mind was irresistibly driven.”<sup>19</sup>

Obviously impressed, Story goes on and on. But this is how he concludes his account:

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16. Everett Pepperell Wheeler, *Daniel Webster: The Expounder of the Constitution* 29 (G.P. Putnam’s Sons 1905) (reprinting excerpts from unsigned, undated documents in Joseph Story’s handwriting contained in the Webster Papers, Library of Congress).

17. *Id.*

18. *Id.*

19. *Id.* at 29-30.

There was a painful anxiety towards the close. The whole audience had been wrought up to the highest excitement; many were dissolved in tears; many betrayed the most agitating mental struggles; many were sinking under exhausting efforts to conceal their own emotion. When Mr. Webster ceased to speak, it was some minutes before anyone seemed inclined to break the silence. The whole seemed but an agonizing dream, from which the audience was slowly and almost unconsciously awakening.<sup>20</sup>

Those of us who labor at Webster's craft today can only dream that an account like that could ever be made of one of our own efforts. But Story's appreciation raises in my mind a fundamental question: Was it reason or rhetoric that made Webster's advocacy so memorable? Webster himself always emphasized the former and downplayed the latter. In fact, when he published the transcript of his argument in the *Dartmouth College* case, he excised most of what he called "peroration" because it embarrassed him.<sup>21</sup> Chauncey Goodrich, who attended the argument, asserted that it was "pure reason" rather than eloquence that marked Webster's speech, finding in it "a tone of earnest conversation which ran throughout the great body of the speech."<sup>22</sup> And yet consider Goodrich's quotation of Webster's concluding remarks:

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20. *Id.* at 30-31. One may question whether Story was a completely neutral observer. Webster and Story shared a close friendship and spent much time together. *See* Baxter, *supra* n. 11, at 21-23; Gerald T. Dunne, *Justice Joseph Story and the Rise of the Supreme Court* 179 (Simon & Schuster 1970) (observing that "the association of Congressman Daniel Webster and Mr. Justice Story, which had been in effect since 1813 on matters ranging from federal judicial jurisdiction to bankruptcy . . . amounted almost to a partnership"). And while each man was always quick to praise the other, Story once went so far as to write an anonymous article in the *New England Magazine* exalting and defending Webster. *See* Baxter, *supra*, n. 11 at 21-22; *see also* R. Kent Newmyer, *Supreme Court Justice Joseph Story: Statesman of the Old Republic* 177 (U. N.C. Press 1985).

21. In a letter to Jeremiah Mason, who had represented the trustees in the Superior Court, *see* Remini, *supra* n. 5, at 151, Webster wrote,

Since I came home, a young man in my office has assisted me to copy my minutes, and I have been foolish enough to print three or four copies . . . They are hastily written off, with much abbreviation, and contain little else than quotation from the cases. All the nonsense is left out . . . These precautions were taken to avoid the indecorum of publishing the creature.

Letter from Daniel Webster to Jeremiah Mason (Apr. 23, 1818), in Webster, *supra* n. 12, at 281.

22. Curtis, *supra* n. 5, at 170 (reprinting reminiscence of Goodrich).

Sir, you may destroy this little institution; it is weak, it is in your hands! I know it is one of the lesser lights in the literary horizon of our country. You may put it out! But if you do, you must carry through your work! You must extinguish, one after another, all these great lights of science which for more than a century have thrown their radiance over our land! It is, Sir, as I have said, a small college. And yet there are those who love it!<sup>23</sup>

That, fellow anglers, is not reason alone. It is a sublime union of reason and rhetoric.

### WEBSTER THE EXAMPLE

Reading about Webster brings to mind the sad truth that, as Mark Twain put it, “few things are harder to put up with than the annoyance of a good example.”<sup>24</sup> Inspiring though it is to recall Webster’s towering achievements, we might as well admit that we could never equal them. That is true not only because few mortals can claim the blessing of Webster’s gifts. It is also true because no advocate today will ever have the opportunity to perform in the arena Webster commanded. The days of oral advocacy as declamation, of unlimited time and no page limits, are over. Can anyone now imagine the luxury of an oral argument stretching for hours, or even for days, without interruption by questions? For Webster, though, that was routine: the *Dartmouth College* argument spanned three days,<sup>25</sup> and that in *McCullough v. Maryland*, four.<sup>26</sup> Appellate argument is so different today that one commentator has observed that “[t]he modern practitioner bears the same relationship to Daniel Webster as an airline pilot bears to Ponce de Leon.”<sup>27</sup>

Yet, although “the romance is largely gone, the speed has increased incomprehensibly, [and] the margin for error has narrowed to approximately zero,” we, like the lawyers of Webster’s day, find ourselves on our own at oral argument.<sup>28</sup>

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23. *Id.*

24. Mark Twain, *The Tragedy of Pudd'nhead Wilson* 120 (Harper & Row 1966).

25. Remini, *supra* n. 5, at 154-59.

26. *Id.* at 164.

27. Steven D. Merryday, *Oral Argument*, Fla. App. Prac. Handbook §17.9, at 16-17 (1998).

28. *Id.*

And while we no longer live in a world that otherwise much resembles Webster's, the principles evident in the Master's work apply with equal force today.

### *Passion*

This first principle is the most fundamental. If you want to be a great oral advocate, you must care passionately about your work. Justice Story recalled Webster's "earnestness of manner, and a depth of research, and a potency of phrase, which at once convinced you that his whole soul was in the cause."<sup>29</sup> That wasn't theater; Webster did put his whole soul into the cause he was arguing. You need only read Webster's published letters to understand that he saw complete dedication as the key to his work—dedication to his client, to his craft, and to the principles to which he believed his profession should aspire.<sup>30</sup> As Chief Justice Fuller once observed, "It is impossible to overestimate the support the Court derives from the bar, and in Mr. Webster's arguments fidelity to the Court is as conspicuous as fidelity to his client. It is not the client first and the conscience afterwards, but duty to both together, one and inseparable."<sup>31</sup>

That passionate devotion to duty has continued to resonate with judges and lawyers from generation to generation. Fifty years ago, Justice Robert Jackson, another great Solicitor General, wrote his own article about oral advocacy,<sup>32</sup> closing with a parable about stone masons who might have been lawyers. In Justice Jackson's story, the first mason, asked what he was doing, answered, "Earning my living"; the second replied, "I am shaping this stone to pattern"; but the third lifted

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29. See Wheeler, *supra* n. 16, at 30.

30. See e.g. letter from Daniel Webster to James H. Bingham (May 18, 1802) in Webster, *supra* n. 12, at 111 ("If I prosecute the profession, I pray God to fortify me against its temptations. To the winds I dismiss those light hopes of eminence which ambition inspired and vanity fostered. To be 'honest, to be capable, to be faithful' to my client and my conscience, I earnestly hope will be my first endeavor."); letter from Daniel Webster to James H. Bingham (Jan. 19, 1806) in *id.* at 222 ("Our profession is good if practiced in the spirit of it; it is damnable fraud and iniquity, when its true spirit is supplied by a spirit of mischief-making and money-catching.").

31. Wheeler, *supra* n. 16, at 3 n. 1 (quoting Chief Justice Fuller's remarks at the Webster Centennial).

32. Jackson, *supra* n. 4, at 801.

his eyes and said, “I am building a Cathedral.”<sup>33</sup> And so it is, said Justice Jackson,

with the men of the law at labor before the Court. The attitude and preparation of some show that they have no conception of their effort higher than to make a living. Others are dutiful but uninspired in trying to shape their little cases to a winning pattern. But it lifts up the heart of a judge when an advocate stands at the bar who knows that he is building a Cathedral.<sup>34</sup>

### *Preparation*

The second principle that Webster’s work exemplifies builds on the first. Webster acknowledged, as we all know we should, the absolute importance of comprehensive preparation. Lawyers who are merely earning a living or shaping stones will prepare enough to get by, and if they are lucky they will perform well. But lawyers like Daniel Webster, who know they are building cathedrals, will prepare for each argument as if constructing a monument. Things may not—indeed, they will not—always turn out precisely as we hope, but for lawyers like Webster, it will not be for lack of effort. For lawyers building a cathedral, every argument demands what others might deride as over-preparation. “Accuracy and diligence,” Webster said, “are much more necessary to a lawyer than great comprehension of mind, or brilliancy of talent.”<sup>35</sup> To be a great lawyer, he recognized, one “must first consent to be only a great drudge.”<sup>36</sup> The night before his grand performance in *Gibbons v. Ogden*, Webster worked for eleven straight hours, pausing only to

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33. *Id.* at 864.

34. *Id.*

35. Letter from Daniel Webster to Thomas Merrill (Nov. 11, 1803), in *The Writings and Speeches of Daniel Webster*, vol. 17, 148-49 (Fletcher Webster ed. 1903).

36. *Id.*; see also letter from Daniel Webster to James H. Bingham (Jan. 19, 1806) in Webster, *supra* n. 12, at 222 (“Study is truly the grand requisite for a lawyer. Men may be born poets, and leap from their cradles painters; nature may have made them musicians, and called upon them only to exercise, and not to acquire, ability. But law is artificial. It is a human science to be learnt, not inspired. Let there be a genius for whom nature has done so much as apparently to have left nothing for application, yet to make a lawyer, application must do as much as if nature had done nothing.”).



shave, eat, and read the morning paper before appearing at the Court.<sup>37</sup>

As Webster understood, the goal of preparation is simply this: When you walk into the courtroom to make your oral argument, you should know every aspect of the case better than anyone else does. Certainly you should know it far better than any judge. You must know the entire factual record. You must comfortably understand all of the relevant law, whatever its source. And finally you must do something else that is far more difficult—you must understand the implications of every principle upon which your case depends.

Every advocate follows his own path, but I generally try to do this in two ways. First, I think about questions. I attempt to identify every question a judge could reasonably ask.<sup>38</sup> I think as hard as I can about what the best possible answer is. And finally I consider what further questions might follow from that answer, and what the answers to *those* questions should be. This is, for me at least, hard, hard work. It is generally easy to think of a few difficult questions; it is impossible to think of them all. How far down the list of conceivable questions you get, though, is a pretty good indicator of how well prepared you are.

The other thing I often do is to try to explain the case to a non-lawyer. This may seem peculiar, since judges, after all, are lawyers. But I find that explaining the case to someone who is not a lawyer helps me to discern whether there is a basic flaw in my reasoning, and whether I am really able to distinguish what is fundamental about my case from what is not. Preparing to answer all sorts of doctrinally tricky questions is essential, but it may also obscure the forest for the trees. You must be able to see both very clearly when you stand up to argue.

### *Planting the Kernel*

My third and final point relates to the argument itself. Because oral argument is now so very different from what it was

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37. Curtis, *supra* n. 5, at 217 (reprinting reminiscence of George Ticknor).

38. These questions necessarily will vary depending on the nature of the case. A good catalogue of the sorts of questions to think about is provided by Judge Frank Coffin in his useful book about appellate practice. See Frank M. Coffin, *On Appeal: Courts, Lawyering, and Judging* 140-43 (W.W. Norton & Co. 1994).

in Webster's day, it is difficult to translate the principles for appellate advocacy that might have been used in his time into precepts that will apply today. In all but the rarest of modern appellate courtrooms, for example, we litigate in an environment of interruption, not oration. But even in this very different world, there is a fundamental principle from Webster's day that still prevails, and it is this: When you stand up to present your oral argument, facts and law at your command and head crammed with answers to every conceivable question, something else must be at the forefront of your mind. Daniel Webster certainly had it in clearly in focus when he stood up to argue. It is the kernel of the case—the one, two, or at the very most, three points that you must impress upon the court before you sit down.

These points may or may not be those you emphasized in your briefs. Sometimes, in fact, the thorough preparation you make for oral argument leads you to see the fundamentals of your case in a different way. I once came to reconceptualize a case on the very night before oral argument, because, although I had conducted two moot courts in the case, each using a different theme, neither had worked to my satisfaction. My last-minute change worked beautifully in that case, but I would never counsel brinksmanship like this for its own sake, for it is fraught with risk. But my own experience in this unusual case does demonstrate, I think, that however difficult the kernel may be to discern, and however late it reveals itself, you must have it in mind when you appear before the court.

Once you have found the kernel, polish and refine it into its purest, simplest form. And consider carefully how best to present it to the court. Webster understood this precept well, demanding of himself “the greatest effort of power in the tersest and fewest words.”<sup>39</sup> In Webster's day the kernel was often planted only after hours spent carefully tilling the judicial mind. Nowadays, the best strategy before a fully prepared court may be to make your point, pellucidly, as soon as you begin. But however you plan to do it, you must be absolutely clear in your mind about what the essentials are, and you must also be confident that when you sit down, the judges will understand

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39. Remini, *supra* n. 5, at 55.

both what they are and why they are important. On this point, another of Webster's admonitions comes to mind: "Depend upon it," he said, "it is with our thoughts as with our persons—their intrinsic value is mostly undervalued, unless outwardly expressed in an attractive garb."<sup>40</sup>

Questions will come—in the Supreme Court they come in a torrent. You should welcome and embrace questions, not be annoyed by them. An oral argument punctuated by questions may not be as transiently satisfying as a perfectly declaimed speech. Almost certainly, it will not be studied with admiration through the generations. But if those are your objectives, stick to giving speeches or lectures. The oral advocate's job is to convince judges, and questions provide the clearest window of insight into what will accomplish that. Treat each question as a sincere effort to understand your point—even if that might not be the judge's true reason for asking. And answer every question frankly, respectfully, and directly. If you are sufficiently well-prepared, you will often see how a judge's question can lead you to a point you need to make in order to help the court understand the kernel of your case. Fish are more assertive today than they were in Webster's time; they will not simply jump into your pocket at the sight of your fishing rod. But once judges start to nibble with questions, with direct and thoughtful answers you can still hope to reel them in.

#### A CONCLUDING THOUGHT FROM ADMIRAL NELSON

Before I drown you in metaphor, I will close with one further thought: In modern oral argument, the very best strategy, whether answering questions or making your essential affirmative point, may be to heed the advice with which the great Admiral Nelson admonished his captains: "Never mind maneuvers," he used to say, "always go at 'em."<sup>41</sup> In his own way, in his own time, that is just what Daniel Webster did.

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40. *Conversations with Lanman*, in *The Writings and Speeches of Daniel Webster*, vol. XIII (National ed., Boston 1903), quoted in Remini, *supra* n. 5, at 56.

41. Patrick O'Brian, *Master and Commander* 115 (W.W. Norton & Co. 1970)

