



## SUPREME COURT

### Committee Guide

By Evan O'Brien

#### Introduction

Welcome to the Supreme Court, the nation's highest body of judicial decision-making. You will serve both as counsel and as judge, arguing legal principles and ruling on constitutional matters.

In the federal court system, nearly all cases begin with a trial in the federal district court. Decisions of federal district courts can be appealed to federal courts of appeal and from there to the United States Supreme Court. For the most part, the Supreme Court can decide whether or not to hear these appeals. At HMCE, you will work with three cases that have been decided by district courts, appealed to courts of appeal, and appealed again to the Supreme Court, which has agreed to hear and rule on those appeals. This is where you and your teammate will factor in. As counsel, you will always work with a partner, who will almost always be from your school. For each case, we will give you the decision of the lower court. These rulings will outline the facts of each case and describe the legal issues at stake. Before the conference, you will prepare arguments for both sides of each case. At the conference, you will act as counsel for the petitioner, as counsel for the respondent, and as associate justices. As counsel, you will give oral argument and answer justices' questions. As associate justices, you will hear oral argument and ask questions of counsel.

#### Your Responsibilities

*Before the conference:*

- 1) Carefully read the appeals court cases and updates.
- 2) Prepare a list of ten questions you would ask as an associate justice for each case.
- 3) Prepare oral arguments for both sides of all three cases.
- 4) Think carefully about the constitutional questions that are raised by each case and what **precedents** are most applicable to each case.
- 5) Be prepared to debate the merits of each of the cases and the questions that are raised by each case in a special round called a **cert case**.

**Precedents**—a court decision that serves as an example for or is used to justify subsequent decisions.

**Cert case**—hearing to determine the validity of considering the case.

*At the conference you will rotate between three roles:*

- 1) **Petitioner:** Presents twenty minutes of oral arguments to convince the Supreme Court to overturn the appeal court's decision.
- 2) **Respondent:** Presents a twenty minute oral argument to convince the Supreme Court to agree with the previous court's decision.
- 3) **Associate Justice:** Asks questions of petitioners and respondents during oral arguments and later deliberates with other associate justices and votes to determine the opinion of the Court.

## **Serving as Counsel**

Your job as counsel, whether for the petitioner or the respondent, is to convince the court that the law is on your side. Doing this requires both great performance at the conference and, more importantly, effective preparation before the conference. The road to good lawyering begins with a solid and thorough understanding of the facts of the case, the legal issues involved, and the relevant precedent cases. Beyond that, you will need to develop your own arguments, tying the facts and precedents together to illustrate why your side is right and, more challengingly, why the other side is wrong. Your ability to perform well at the conference will, in large part, be a product of how well prepared you are at the conference's outset.

### *Preparation as Counsel*

When formulating your case and arguments, be certain to adequately research the topic you will be discussing. It is worthwhile for you to research each of the cases mentioned as precedent and to understand the **implications** of each of these cases. Research these cases on academic websites or through other resources that are available to you. As you prepare your argument, keep in mind that you should be able to present numerous reasons as to why the law is on your side.

First, you should present a coherent philosophy of government which the Supreme Court ought to enforce. For example, you can discuss the Constitution from the strict **constitutionalist standpoint** or the loose **interpretive standpoint**. Before the conference begins, you should be familiar with the various viewpoints held when interpreting the Constitution. Make use of online resources for more specific details about the court. Before you begin your argument, you should understand why each particular case is important when pondering the larger questions of democracy.

Second, you should present a clear historical argument on behalf of your case. Look up the precedents listed in the case and determine why they are in your favor or against you. Have this information nearby

**Implication**—*lasting consequence.*

**Constitutionalist standpoint**—*method of constitutional interpretation asserting that analysis should be based on the constitution's actual text.*

**Interpretive standpoint**—*method of constitutional interpretation asserting that analysis can extend beyond the actual text of the document.*

while you make your arguments, and be ready to actively cite any past precedent that works to your advantage.

Third, consider the arguments the opposition counsel will probably use, and prepare and present a counterargument for their case. If the opposition is able to present an argument which you did not properly defeat during your oral argument, it could be the reason why you lose a case. Be certain that a well-placed question by a justice does not catch you off guard and defeat your strategy. Answer all questions, but be certain to continue to drive home the key points of your case without being distracted.

### *Oral Argument as Counsel*

At the conference, we operate two courts at the same time, each with its own set of justices. The procedure for court sessions is straightforward. The Chief Justice of each court is a Harvard staff member who directs the proceedings. Each side is given twenty minutes, during most of which justices can ask questions. Generally at HMCE, the justices are not allowed to ask questions for the first or last minute of oral arguments. This allows counsel some time to introduce and conclude their arguments without interruption. Counsel for the petitioner argues first and may reserve up to five of their twenty minutes for **rebuttal** after argument by the respondent's counsel.

Once court is adjourned, the justices deliberate and come to a decision; after reading this decision aloud, the justices and attorneys discuss the case informally. The justices will answer your questions and give you pointers for your next case. It is important that the counsel use this time to ask the justices why they decided as they did and which of the discussed arguments they found the most compelling.

Oral argument is your chance to present your key arguments without the restraint of the formal structure of a brief, to respond to arguments of your opponents, and to speak to the court's concerns. Remember that in the Supreme Court, the facts of the case are generally **undisputed**, and the justices are already familiar with the case by the time oral arguments occur. As such, do not spend too much time reviewing facts just for the sake of review. Everything you say should advance your case or undermine the case of opposing counsel.

Presenting an oral argument in the Supreme Court is not like delivering an entirely prepared speech. Remember that you will be interrupted frequently by the justices with questions. A good lawyer will know the points that he or she wants to get across but will be flexible in their order, adapting to answer the questions of the justices.

**Rebuttal**—an argument that counters another argument that has been made.

**Undisputed**—not questioned; agreed upon by all.

You should introduce yourself by saying:

“May it please the Court, my name is \_\_\_\_\_; my partner’s name is \_\_\_\_\_. We represent the petitioner (or respondent) in this action.”

When you represent the petitioners, you should decide in advance how much time you want to reserve for rebuttal and express this after you have introduced yourself. After you introduce yourselves, go right into your argument, and show the judges why your side is right. Remember, though, that after your first minute, the justices may occasionally interrupt you with questions.

Do not look at questions as unwanted interruptions. See them instead as opportunities to shine. When justices ask questions, you have the chance to show them why you are right. When justices are not asking questions, you have no way of knowing what they are thinking. Have they already decided that they agree with what you are saying? Or have they already made up their minds that they disagree? You will want to inspire questions with your argument. Rather than asking for questions directly, you should present your arguments in a bold and perhaps controversial way, which will spark the justices to ask questions. When justices do ask questions, listen carefully and answer directly and immediately. Do not tell justices that you will get to their questions later in your presentation. Again, let your arguments be guided by what the justices want to hear.

Furthermore, the highest level of **decorum** is maintained in court proceedings. There is a way to be extremely assertive without being disrespectful. For instance, you may say that you “respectfully disagree” with a justice who has challenged your argument and then proceed to vigorously counter the justice’s objection, but you may not say something like, “I think you are wrong.” It is also completely appropriate during this time to **confer** with your partner if you are unsure about a probing question posed to you. In such cases, you may discuss such a question before responding, though be careful not to expend all of your debate time planning what you will say; you should be aware of the facts of the case before you begin speaking.

You and your partner will share the floor during oral argument. Only one person may speak at a time. You must both participate, but how you split your twenty minutes is up to you. When you address the court, you must be standing, though if you are not speaking, you do not need to remain standing.

Oral argument allows attorneys and justices to discuss the legal principles involved in the case and the arguments presented by the counsel in their briefs. The format is less structured but no less demanding for the justices, who must ask questions, or attorneys, who must answer them.

**Decorum**—the understood conventions for polite conduct and good behavior.

**Confer**—to compare views; to discuss.

## Serving as Associate Justice

Your role as associate justice is every bit as important as your role as counsel. As counsel, your job is to pick a side and put the facts in a legal light favorable to one side. As associate justice, your job is different. You must overcome personal bias towards one side or another and determine what is constitutionally correct. You will find that in many ways, being an associate justice demands more of you than being counsel does.

An associate justice must have a thorough command of the facts and legal precedents relevant to a case. During oral arguments, associate justices must ask probing questions to resolve the legal issues. Listen to the arguments and answers the counsel presents. After arguments, the justices will debate the issues and vote, deciding how the court will rule.

Remember that justices have the advantage of not having to re-interview for their job. Because of this, they are free to make decisions based on whatever logic or precedent they feel is appropriate. Often a judge will cite an old and perhaps seemingly **moot** case as support for his or her opinion. Do not prepare to simply ask biting questions of the counsel. Come prepared to ask questions about justice and the way in which a court system works and makes decisions based on the Constitution.

**Moot**—*lacking practical significance.*

### *Preparation as Associate Justice*

A good associate justice is very familiar with case facts and with precedent case law. Reading and understanding the given materials is one important aspect of your preparation. However, the most important part of being an associate justice is not just knowing the facts and cases but instead asking questions to understand how the facts and cases should be interpreted. You will prepare for the conference by creating a list of ten questions for each case (for a total of three lists, and thirty total questions). These should be the questions you intend to ask when you serve as an associate justice.

There are different types of questions. Some are straightforward and deal with facts. You might use these to force counsel to focus on an event or circumstance that is particularly important. Other questions ask about the relevance of precedents. The third type of question is the hypothetical; ask counsel how the case might be different if some of the facts were changed or how a certain precedent might apply in a different situation.

Another good method for preparation is to think in advance of the types of arguments that will be made by both sides and to formulate questions based on what you anticipate each side saying. Remember that

cases do not necessarily have to hinge on a broad question regarding the philosophy of government; sometimes a case can be decided based on a seemingly minor detail. This is why thorough preparation is so critically important; it will be difficult to make the right decision if you are still learning about the facts of the case while it is being debated.

### *Oral Argument as Associate Justice*

This is the time for you to confront counsel about the arguments they made in their briefs. Be assertive in asking the questions you have prepared, but do not ask questions just for the sake of asking questions. Instead, use this questioning as a means to better understand the case and develop a constitutionally correct ruling. Do not ask questions to be mean. Listen to the arguments counsel makes, and listen to their answers when you interrupt them. Find the right balance between being **antagonistic** as an associate justice and being too soft. You want to keep counsel on their toes but not knock them over.

**Antagonistic**—*overly argumentative; actively expressing opposition, often in a hostile man-*

After arguments, you and the other associate justices will talk about the case with the Chief Justice. You will vote on the case and assign justices to write the majority opinion. If you agree with the majority decision but want to qualify your support or explain your reasoning separately, you can write a concurring opinion instead of contributing to the majority opinion. If you disagree with the majority decision, you can write a dissenting opinion that is contrary to the logic and conclusion reached by the majority.

It is important to recognize the differences between the HMCE Supreme Court and the real Supreme Court. At HMCE, the immediate decision made about the case is probably the most pressing matter on your mind. In the real Supreme Court, the precedent set by a case is the most important part of the case. Chief Justice Warren Burger used to switch his vote in order to ensure that he would be a part of the majority. This allowed him to decide who could write the opinion of the court—and he often took on this responsibility himself. By controlling who wrote the decision, he could heavily influence the precedent that resulted from a case; this enabled Burger to assert more power as Chief Justice and make a lasting impression on the future decisions of the Supreme Court.

It is important to realize that the opinions resulting from a case are a key component of the real Supreme Court. Opinions explain justices' reasoning and give them an opportunity to assess the arguments given in briefs and in oral argument. Just as attorneys do, justices reason through legal principles and cite precedents to support their decisions. The chief justices know the cases thoroughly and can answer your questions as you write opinions.

## Research Tools

There are many tools and resources that can be helpful in preparing for the conference. This section provides information about online sources, explains how laws and cases are cited, and offers advice on writing briefs.

### *Online Resources*

You can find extensive information on the Supreme Court at the following website: <http://www.supremecourtus.gov/>. If you have access to the LexisNexis service or to a law library, you can find Supreme Court decisions there. Supreme Court decisions are also available in their entirety for free on the Internet at this website in the “For Legal Professionals” section: <http://www.findlaw.com/>. This site includes a feature called a citator that allows you to look up all subsequent Supreme Court opinions that cite any given decision. The citator helps you to see how the Court itself has used the precedents referred to in the court of appeals opinions.

### *Citations*

There are standard formats for citing statutes and case law to ensure that everyone will be able to find the authorities to which attorneys and legal scholars refer. This information should help you identify rulings you might come across during your research.

### *Federal Statutes*

Federal laws are published in the United States Code. The Code organizes laws into titles and sections. For example, 42 U.S.C. § 1983 refers to Title 42, Section 1983 of the United States Code. This statute reads in part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage...subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges, or **immunities** secured by the Constitution...shall be liable to the party injured in an action at law....

**Immunities**—the exemption from obligation, service, duty, or liability to taxation .

You might quote a particular phrase; for instance:

“[A]ny citizen of the United States” is protected. 42 U.S.C. § 1983.

### *Decisions of the Supreme Court*

Supreme Court decisions are collected and cited in volumes that are published by the federal government. Citations may come after the sentence or be set off by commas within a sentence. For instance:

The Court has “departed from the rule...that all government aid that directly assists the education function of religious schools is invalid.” *Agostini v. Felton*, 521 U.S. 203, 225 (1997).

This citation refers to the Court’s decision in *Agostini v. Felton*, which was decided in 1997 and published in volume 521. The decision begins on page 203 of that volume and the quotation is taken from page 225.

### *Decisions of the US Courts of Appeals*

Federal appeals court decisions are published in the Federal Reporter. A sample citation reads: *Kohl v. Woodhaven Learning Center*, 865 F. 2d 930 (8th Cir. 1989). This citation indicates that the decision was issued by the Eighth Circuit of the US Court of Appeals in 1989. The decision can be found in volume 865 of the second series of the reporter on page 930.

### *Decisions of the US District Courts*

District court rulings are published in the Federal Supplement of the US District Court Reporter. They may be cited as follows: *Thomas v. Atascadero Unified School District*, 662 F. Supp. 376 (C.D. Cal. 1989). This citation indicates a case decided by the District Court for the Central District of California in 1987. The case begins on page 376 of volume 662.

### *Writing Briefs*

Writing briefs is a good way to prepare to serve as counsel. You will not know which role you will play for each case until the conference, so you need to study every case and write comprehensive briefs for both sides. Work with your partner as you write: you can bounce ideas off each other and develop a sound team dynamic. If you are thoroughly prepared, you will have more fun at the conference and feel more successful as an attorney and a justice.

Briefs should be **systematic** statements of your arguments to the Court. Briefs begin with accurate, precise facts. They assert strong general principles and develop clear, focused arguments. They should provide appropriate, relevant legal authorities, and above all, briefs should be persuasive.

Your job is to cast the case in a light that favors your client and showcases the issues supporting your side. Characterize every fact,

**Systematic**—*methodical; following a logical procedure or plan.*

every argument, and every precedent with one goal in mind — that of supporting your case.

When you write the petitioner’s brief, you are writing for the side that lost in the court of appeals. You are petitioning the Supreme Court to reverse the appeals court ruling. When you write the respondent’s brief, you are writing for the party that won on appeal. You are asking the Court to affirm the appeals court ruling.

Use language economically and precisely and try to avoid **convoluted** language that sounds “lawyerly.” Such language can often complicate the issue without adding meaning to the argument.

**Convoluted**—*overly complicated; confusing.*

### *Statement of Legal Questions*

Begin your brief by stating each legal question that the Supreme Court is called on to decide. Each question should be stated in one sentence and correspond to a separate, numbered paragraph in the body of your argument. This is your opening shot at convincing the Court: state the questions accurately, but leave no doubt that these questions should be decided in your favor. Introduce your arguments and dazzle the court with your analysis.

### *Statement of Facts*

By the time a case is presented to the US Supreme Court, the facts are generally not disputed. Recite the facts **succinctly**. Use accurate facts that do not blatantly distort the situation, but characterize those facts in a way that persuades the Court that you are right. Emphasize important facts that favor your side. The story you tell here will be the basis for your arguments.

**Succinctly**—*short and to the point; brief.*

At some point in your statement of facts, you will need to give the procedural history of the case, which might read: “Party A filed this discrimination action against Party B. The District Court entered summary judgment for Party A. Party B appealed. The Court of Appeals reversed and ordered that summary judgment be entered for Party B. Party A filed the appeal now before this Court.”

### *Arguments*

Consider each legal principle and offer solid, well-structured arguments that support your stance on the case. Do not **dilute** the quality of your strong arguments by adding weak ones just for the sake of including more points. Support every argument with statutes and case law. Explain why the precedents you cite are relevant and why they favor your side.

**Dilute**—*to reduce the strength or potency of.*

Feel free to use ideas you find in the decision of the court of appeals, but do not restrict yourself to these arguments. Read the Supreme Court decisions cited in the court of appeals opinions and develop your own analysis of what the decisions say and how they apply to the cases

at hand. Often there will be concurring opinions that the appeals court decisions do not cite that may be more relevant for your argument. Dissenting opinions may help you to discredit the other side's use of certain precedents.

### *Conclusion*

Although it comes at the end of your argument, the conclusion should not be **drab**. Be concise, convincing, and creative. Finally, conclude your brief with the phrase "respectfully submitted" and date it.

**Drab**—*boring; uninteresting.*

## **Conclusion**

If you have any questions about your briefs or about the court procedures, the Harvard Model Congress Europe staff is available throughout the year; this year's Supreme Court chairs are Evan O'Brien (ejobrien@fas.harvard.edu) and Tyler Hall (thall@fas.harvard.edu). Please do not hesitate to email us or to have your faculty advisor contact us. Remember, the more preparation you do beforehand, the more rewarding the conference will be. We look forward to meeting you in the spring!