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The Grand Inquisitor

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"Oral arguments are masochistic work," a Chicago lawyer says. "You spend all this time preparing your argument, and then you're lucky if you can get 'Good morning' out of your mouth before you're interrupted."

Especially when the panel of judges includes Richard Posner.

Oral arguments are given by lawyers when cases are appealed to higher courts at both the state and the federal level. Judges consider those arguments, the written briefs that precede them, and the lower court record, then issue a decision, usually several months after the arguments. Long ago, judges would listen silently to arguments that

sometimes lasted days. But courts that review cases have come to rely increasingly on the written briefs. The time allotted for oral arguments has steadily shrunk, and judges now often interrupt lawyers' presentations with numerous questions and comments.

A court whose judges speak up often is known as a "hot" bench. Lawyers don't necessarily mind a hot bench; it usually means the judges have read their briefs and are paying attention. The federal appeals court in downtown Chicago–the Seventh Circuit Court of Appeals, which handles cases from Illinois, Indiana, and Wisconsin–is seen as "hot." And Posner, the court's most prominent member, is usually feverish.

The Seventh Circuit's sprawling courtroom, on the 27th floor of the Dirksen Federal Building, has a regal air, with dark paneling, gilt-framed judicial portraits on the side walls, and maroon carpeting. A half dozen young law clerks watch the arguments attentively from chairs along the right wall. Two deputy clerks sit in a box to the left of the bench, tape-recording the arguments and operating buttons that illuminate small yellow and red lights on the lawyers' podium, alerting the lawyers when they have a minute left and when their time is up.

On a mid-April morning Posner and two other judges sat in high-backed leather chairs behind the long judicial bench. The court's 15 judges usually sit in randomly determined panels of three, hearing arguments around 120 days a year.

The 65-year-old Posner–bespectacled, mostly bald, thin, with rounded shoulders–is hardly an imposing presence when he isn't speaking. That morning the panel heard arguments in six cases. One of them involved a man named Robert Collins, who'd been charged with a federal weapons violation last year after police found five guns in his apartment in Somerset, Indiana. Police officers who were in the vicinity of Collins's apartment in the predawn hours had heard gunshots, and a 911 caller had reported shots, but the officers couldn't pinpoint where in the apartment

complex the shots had been fired. Loud music was coming from Collins's apartment. When the officers asked him to turn it down he allegedly refused, swore at the officers, shoved one of them, then began fighting with him outside his apartment. After Collins was arrested and handcuffed he allegedly tried to kick one of the officers repeatedly, so he was put in ankle restraints. The officers then searched his apartment and found the guns. A federal district judge had deemed the search illegal and had suppressed the evidence against Collins. Prosecutors were appealing that ruling.

Collins's lawyer, H. Jay Stevens, began his argument by stressing that since Collins had been arrested outside his apartment, police had no right to search inside the apartment. Collins had been granted 10 minutes for his pitch–lawyers typically get 10 or 15. After 47 seconds Posner pounced.

"Well, he was arrested outside because he attacked them, right?"

"That's correct," Stevens allowed.

"Well, what are they supposed to do?" Posner asked. "If someone comes charging out of their apartment and attacks them, wouldn't it have been completely irresponsible for them just to walk away and not see what's going on in the apartment?"

Stevens hesitated. "It would be–uh, if, uh, they had been making an arrest in the apartment. At the time, they went–"

"Well, that's what's so ridiculous," Posner said. "The only reason it's not inside the apartment is that he attacks them outside the apartment."

“Well, let’s review–”

“I mean, imagine if someone had been shot, and they just walked away the way you said they should have. Then you’d have a lawsuit by the victim.”

While Posner grilled Stevens, one of the two other judges on the bench scanned the briefs in front of him. The third judge appeared to be scanning the inside of her eyelids.

Stevens, tall and broad shouldered and wearing a rumpled gray suit, tried to regroup. He began rehashing the events preceding the search. He said that just outside the apartment door Collins and the police officers “got into an altercation–”

“What do you mean, ‘Got into an altercation’?” Posner snapped. “He attacked them.”

Stevens and Posner debated the point. Posner won. Then Posner hijacked Stevens’s narrative. The officers were “attacked by this drunken maniac, and they’ve heard gunshots,” he said. “It seems to me that simple prudence requires them to look through the apartment, make sure there’s no one there–either an accomplice with a gun or a victim.”

Stevens countered that in certain similar cases, reviewing courts had ruled police searches improper.

Unlike many appellate judges, Posner is rarely impressed when a lawyer leans on precedent. "Lawyers often start off by saying, 'In X vs. Y, the court said thus and such,'" he told me later. "I'll say, 'Don't throw cases at us. The cases are in your brief. You explain why it is that you have a sensible position.'" If he thinks the position is sensible he'll see if the law has "enough play in the joints to permit it."

"What are we trying to protect here?" Posner asked Stevens. "The sanctity of the home?"

"That's precisely what we're trying to protect, Your Honor," Stevens said. "And that's what–"

"You think this fella is entitled to have his home sanctified?" Posner said, smiling coldly.

"Had the arrest taken place inside the apartment–"

"Right, right," Posner said. "So it's wonderfully formalistic, right? If he's six inches to one side of the door rather than the other, then they can search the apartment." He chuckled, adding that this might be "a new formula for criminals. If police come to their door, charge out at them, barge into them"–the suspect probably would get arrested, but police wouldn't be able to search his home.

After 19 interruptions by the panel–18 of them by Posner–a weary Stevens sat down.

Another case concerned an Indiana woman, Agnes Conder, who lost $350,000 to a Ponzi scheme. Conder was appealing a lower court's dismissal of her suit against the bank into which her money had been deposited before the schemers made off with it. The suit alleged that the bank had been negligent in accepting unendorsed checks for deposit. Posner interrupted Conder's lawyer, Scott Gilchrist, 40 seconds into his argument and kept nipping at his heels throughout his allotted 15 minutes. "You don't want to have a situation where someone is suckered by one of

these Ponzi schemes and then runs around looking for a deep pocket," Posner said. His 33 interruptions trimmed Gilchrist's actual speaking time to seven minutes and six seconds–he never spoke more than 43 seconds without Posner interrupting.

In a third case Iowa dentist Mark Bell was appealing a lower court's dismissal of his suit against a Wisconsin Department of Natural Resources official who'd rejected his application to build a pier behind his summer home in Door County. Bell's lawyer, Jeff Olson, contended in his brief that the official had displayed prejudice against Bell in part by keeping him waiting in her office for a half hour while she was engaged in a personal phone call, her feet propped up on a windowsill.

Posner chuckled at that idea. The official had certainly shown a "lack of refinement," he said, but not necessarily "personal antipathy."

Olson insisted that the official's bias against Bell was evident "from the fact that she behaved in this fashion that most of us have been taught is rude, and–"

"But a lot of government officials are rude," Posner interrupted. "Even judges are rude, right? We don't want to be sued by people who say we're rude."

Posner graduated first in his class at Harvard Law School, then clerked for Supreme Court justice William Brennan in 1962. Once he misunderstood Brennan's directions and drafted an opinion arguing the opposite of what the justices had decided. Brennan was so swayed by the draft of his 23-year-old clerk that he persuaded a majority of justices to decide the case the other way.

Posner worked for the Federal Trade Commission and the solicitor general, arguing nine cases before the Supreme Court, and winning six, before moving into private practice and specializing in antitrust law. In 1969, at age 30, he became the youngest tenured professor in the history of the University of Chicago Law School. He was appointed to the Seventh Circuit by Ronald Reagan in 1981. He's written 35 books, hundreds of law-review articles, and more than 2,100 judicial opinions. Almost all federal judges let their law clerks write their opinions, but Posner writes his own. He also still lectures at the U. of C.

Posner has been cited in the judicial opinions of other federal circuit judges far more often than any circuit judge in the nation. He's "unquestionably one of the most influential legal thinkers in the country," said a 1994 review of the Seventh Circuit by the Chicago Council of Lawyers.

He's best known as one of the principal advocates of relying heavily on economics when making legal decisions. He maintains that people are "rational maximizers of their satisfactions," that much of their behavior can be expressed mathematically, and that mathematical formulas can illuminate many social issues. He's devised mathematical models for a range of controversial topics. He's written, for instance, that an individual will choose a homosexual act over a heterosexual one if (B1-C1) > (B2-C2), and (B1-C1) > 0, where B1 and B2 are the benefits of the homosexual and the heterosexual act, respectively, to the individual, and C1 and C2 are the respective costs to him or her.

Appellate lawyers in Chicago say Posner's aggressiveness during oral arguments is another of his prominent traits– though not one for which he's widely admired.

The sheer frequency of his interruptions is striking. On that mid-April morning the other two judges on the panel interrupted the lawyers a total of 26 times during the six cases. Posner interrupted 149 times. (I counted only the times a judge interrupted a lawyer who was already speaking.) The disparity was less marked during a panel in early April, though Posner still interrupted more often than his two colleagues combined. It seemed clear from these two

sessions that Posner interrupts if Bp > Cp, where Bp is the benefit to him of interrupting and Cp is the cost. Of course Bp is almost certain to be greater than Cp because Cp = 0.

It’s not just the frequency of Posner interruptions that irks many lawyers. It’s also his condescending tenor. “I don’t get the logic of it,” he’ll often tell a lawyer, in a tone implying that there isn’t any logic to be got.

“He wants to let everyone know he’s smarter than them,” says one appellate lawyer.

“He is smarter than most of us, but it takes so much more than intelligence to be a good judge,” says another, adding, “You have no chance of persuading someone who isn’t listening.”

Another appellate lawyer, Thomas Peters, has found Posner to be “extremely fair,” if undeniably challenging, during argument. “Because his knowledge is much greater than that of most attorneys, he can take you by surprise,” he says. “Then if you’re rigid and just try to stick to your text, you’re going down the tubes.”

Posner says he realizes he’s “kind of harsh” to lawyers during their arguments, though he thinks he’s “a little less impatient and aggressive” than he used to be. But he insists his style doesn’t stem from arrogance. “It’s not that I think I don’t have to listen to these people because I’m smarter,” he says, pointing out that he’s also impatient with his intellectual equals. He often gets “antsy” when he’s listening to an argument. “If I’m sitting there and I’m listening to someone drone on, I will have the impulse to jump in. If you see where the lawyer is going you don’t want to wait, because that’s a waste of time. I don’t feel it’s a productive use of my time to be listening just for the sake of politeness.” He adds, “Interruptions are rude, there’s no question about it,” but sometimes they’re necessary. And the “aggressive oral inquisition” of lawyers “will sometimes reveal things which are very significant and illuminating. I think I ask questions that expose real problems with a lawyer’s case.”

Posner says the need to cut to the chase in oral arguments has been heightened by the declining amount of time allotted to them. When he became a judge lawyers got twice as long as they do today. One reason for the reduction is that judges named to the court used to move to Chicago if they didn't already live here, but in the 80s, some out-of-towners decided to start commuting instead. Panels used to hear four cases before lunch and two after. To accommodate the out-of-towners who wanted to head home in the afternoon, the Seventh Circuit began squeezing all six cases in before lunch.

Posner wouldn't like more time allotted. He says the quality of most arguments doesn't merit it. While researching one of his books he read briefs submitted in appellate cases in New York in the 1920s that were written "with a kind of loving care for language," and he assumes the oral arguments of that era were similarly eloquent. Since then, he says, Americans have become "extraordinarily inarticulate." He includes himself, saying, "I can write all right, but I don't speak well." He finds little eloquence in either the briefs he reads or the arguments he hears. Yet he concedes that the decline in quality of oral arguments may be in part a self-fulfilling prophecy, since lawyers have little reason to polish an argument they doubt they'll be allowed to give.

Despite the slide in quality, Posner says he still enjoys the arguments. "It does give one the opportunity to ask questions and try out ideas." He laughs. "And sometimes you can be entertained by a bad lawyer." But the arguments rarely sway him: "After one has been a judge for more than 20 years, you've made up your mind about a number of issues." He says lawyers who stand up confidently to his grilling occasionally score points with him, "but sometimes you think, 'Only a fool could be confident of such a weak position.'"

He faults himself for forgetting at times that the lawyers are just doing their jobs. "This is ridiculous–it's something you should get over in your first year of law school," he says. "But I'll get annoyed at the lawyer because I'm forgetting that what he is saying with such conviction is not necessarily anything he is foolish enough to believe. It's the best argument he can make for his client, and it's not his fault that it's a bad argument."

Posner has an economic rationale for why some federal judges might not treat lawyers well: they don't have to. State court judges, who are elected in Illinois, are beholden to the bar groups that give them recommendations and the lawyers who give them money. But federal judges are appointed for life. "These lawyers are not our customers," he says. "If we were selling a service we would be very nice–the way all people in service are."

Angela Colmenero, a student at the University of Notre Dame Law School, represented the final appellant on that mid-April morning. Her professor sat at the appellant's table. Her client, Randall Mataya, was doing life in a Wisconsin prison for murder. The key witness against Mataya at his trial, a man named Donald Hertel, had testified that Mataya had confessed to him that he'd committed the murder. Hertel also told the jury details of the killing he said Mataya had told him. When Hertel was asked by the defense if he was getting anything for his testimony he said no. Two years after the trial, lawyers for Mataya learned that the state had agreed before the trial to drop four burglary cases against Hertel in exchange for his testimony. But state appellate courts and a federal district judge had rebuffed Mataya's request for a new trial.

Posner let Colmenero, a small young woman in a black dress suit, drone on for almost a full minute before he got too antsy. "How could Hertel have made up this story?" he asked. "The facts that he gave were the facts of the crime, and they weren't publicly known."

Colmenero responded that Hertel "had every incentive to lie or fabricate–"

"You're not engaging with my question," Posner barked. "How could he have fabricated these facts…when they're all facts that only the murderer–or someone the murderer spoke to–would know?"

“Well, Your Honor, honestly we don’t know if he fabricated the facts,” Colmenero said, “because at trial he never–”

“You don’t follow me,” Posner said. “If you haven’t talked to the murderer, or someone the murderer has confessed to, how on earth would you know these details?”

Colmenero conceded that Mataya had probably talked to Hertel about the crime. “But that does not–”

“Precisely. So how could there be any harm here?”

“Well, because it doesn’t erase the fact that the prosecution never disclosed–”

“It doesn’t matter.”

Colmenero was shaking her head, biting her lip, and smiling sheepishly when, after 17 interruptions by Posner and none by the other two judges, she sat down.

Lawyers arguing in front of Posner aren’t his only prey. A venomous pen complements his acid tongue. In a 1995 law-review article on the writing style of judges, he ridiculed the “embarrassing” opinions of Supreme Court justice Harry Blackmun, who was retired at the time. Posner dismissed one after another of Blackmun’s noted opinions, deeming them “melodramatic,” “narcissistic,” “sophomoric,” and “gratuitously indecorous.” In the same article Posner dissected an opinion written by an esteemed circuit judge in Washington, D.C., Patricia Wald, offering it as an

example of how not to write an opinion. (In a reply article, Judge Wald lamented Posner’s “kamikaze style of discourse.”)

Posner wishes people weren’t so touchy. He says he’s often been on the receiving end of criticism and is the better for it. When he came to the University of Chicago in 1969 the school was renowned for the scorn senior faculty members heaped on younger colleagues. Posner recalls economics professor George Stigler, a future Nobel Prize winner, ridiculing a paper Posner presented at a Stigler workshop. Stigler phoned Posner afterward, said people at the workshop had told him he’d been too harsh, and “apologized, grudgingly, for excessive brutality.” But Posner says the criticism “didn’t bother me at all. I knew it was a good paper, and his criticisms were helpful.” Indeed, Posner’s law-and-economics philosophy was largely inspired by Stigler.

Posner regrets that the style of “frank, brutal criticism” has waned at the university. “You knew where you stood,” he says. “When people don’t criticize you, it doesn’t mean they think well of you. It just means they’re letting you stew in your own juices.” During oral arguments and in his writing, “I may err on the side of candor, but I think it’s useful. If you have excessive politeness you live in a kind of fool’s paradise.”

Criticism also frequently shows respect, in Posner’s view: “People don’t bother to criticize an enemy they consider negligible.”

He adds, “And if you’re not thin-skinned, you can actually benefit from criticism. You can say, ‘This sonovabitch really blasted me. I’d like to kill him. But on the other hand, these are pretty good points–so maybe I really do have to change course somewhat.'”

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