

*Law School of Harvard University,*

*Cambridge, Mass.*

21st February 1917.

Felix Frankfurter, Esquire,  
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My dear Felix:-

I hear that the judges of the United States Supreme Court are still complaining because of the character of the oral arguments that they have to listen to. Some of them were doing this ten years ago when I had a better acquaintance with a number of the judges than I have now. The same complaints come from the judges of all the State Supreme Courts that I have ever had anything to do with, which means a half a dozen in the northern Mississippi Valley.

The attitude on this matter of the judges of State courts that I have known has been rather curious. It is very like the attitude of the judges of the Appellate Court in Chicago who complain because of a Statute which requires them to write opinions in all cases. They think this is outrageous, and that it should be left to their discretion whether they should write an opinion or not. When you demonstrate to them that such a Statute is unconstitutional, that under the Illinois decisions, the legislature has no power to so interfere with the exercise of the judicial function, they shrug their shoulders and go right on complaining. It is thus apparent that what they want is that the people and the bar should rise up in their might, and demand of the court that it refrain from writing opinions when in its discretion it deems it unnecessary to do so. What the court wants is a change in public sentiment about their writing opinions. Of course they will never get any public sentiment on the subject at all. It may seem a big subject to them, but it is mighty small so far as the great public is concerned. The court has the power to do what it wants to do,

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and what it thinks is best, but they are afraid to do anything. Under the circumstances the court should act or keep still.

I suspect the same situation would be found to exist with regard to the importance of oral arguments before the State courts of last resort. What the situation may be in the United States Supreme Court, I have no means of knowing.

If the United States Supreme Court really wants to do anything it has the power, and a very conservative, almost imperceptible step is open to them. Let them amend Section 2 of the Rules of the Court relating to attorneys and counsellors, by adding the following two sections:

3. All persons who have been admitted to practice as attorneys and counsellors in this court for the period of three years, and who have in any three year period appeared in the argument of not less than five cases, shall be entitled to apply to the court to be placed upon the court's list of advocates, and shall be so placed upon that list, if, in the opinion of a majority of the court their professional skill and attainments as exhibited in all their appearances shall be deemed to warrant such action.

4. The court's list of advocates shall be made up of the names of those entitled to be placed upon it in the order of seniority of admission to practice as attorneys and counsellors in this court, and opposite the name of each shall be placed the number of years he shall have been admitted to practice in this court as an attorney and counsellor, and his professional or office address. This list shall be revised from time to time as the court shall direct and shall be printed as an appendix to all rules of the court and in each volume of the reports of this court, immediately after the page containing the names of the members of the court, the attorney-general, the solicitor general, the marshal, and the clerk.

Before these rules are passed it would be advisable to have the clerk and reporter go over the list of attorneys and counsellors admitted to practice before the court, and make a list of those who would clearly be qualified, and who would probably meet the approval of the court if they applied for a place on such a list. The most eminent of these should be consulted informally as to whether they would apply for a place on the list. With the assurance that they would make

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such application, the success of the list would be assured. The amendment should then be passed, the applications made, and the first list prepared.

Then perhaps nothing would happen. So mild a step might produce no results. I rather suspect, however, that a good many ambitious younger men would make an effort to secure a place on that list. While they were doing it they would have to make a great effort among their lawyer friends to be taken into the argument of cases in the United States Supreme Court, and they would be exceedingly interested to conform to all those canons of conduct in the course of their argument which are important to the effectiveness of their advocacy.

This is what the Supreme Court can do. If it doesn't do it, or if it doesn't take some steps in the same direction we might well have a ground for thinking that the court is only complaining because a great public sentiment does not sweep over the country against boring the court with ineffective oral arguments, and because a public demand does not arise that the court shall have presented to it only pleasing and satisfactory oral arguments. Of course it is absurd to expect any such public sentiment on a matter so entirely beyond the range of thought by all but a very few of a hundred millions of people. The United States Supreme Court certainly ought not to be indulging any such futile hopes. It ought to act or submit.

What do you think about it?

Very truly yours,

Robert M. Kale.