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David R. Cleveland

Steven Wisotsky

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# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

## ARTICLE

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### THE DECLINE OF ORAL ARGUMENT IN THE FEDERAL COURTS OF APPEALS: A MODEST PROPOSAL FOR REFORM

David R. Cleveland\* and Steven Wisotsky\*\*

#### I. INTRODUCTION

Federal appellate practice is not what is used to be. In the 1970s, oral argument was routinely granted and it was generously sized at thirty minutes per side. After a period of dramatic shrinkage in both frequency and length in the 1980s<sup>1</sup> and 1990s, the role of oral argument has been greatly diminished. It is now the exception rather than the rule. In 2011, only one quarter of all federal appeals were orally argued,<sup>2</sup> down

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\*Associate Professor of Law, Valparaiso University Law School.

\*\*Professor of Law, Shepard Broad Law Center, Nova Southeastern University.

1. As long ago as 1983, Justice Rehnquist described the “continuing demise” of oral argument. William H. Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 Mercer L. Rev. 1015, 1016 (1983–84). See Part V, *infra*, for examination of oral argument’s seeming slide toward demise in the federal courts of appeals.

2. Administrative Office of the U.S. Courts, *2011 Annual Report of the Director: Judicial Business of the United States Courts* 36 (2012) (tbl. S-1: “U.S. Courts of Appeals—Appeals Terminated on the Merits after Oral Hearings or Submission on Briefs During the 12-Month Period Ending September 30, 2011”) [hereinafter “*2011 AO Report*”]. The reader should note that these statistics do not include totals for the Federal Circuit. *Id.*

from nearly two-thirds in the early 1980s,<sup>3</sup> and the time allotted in most circuits was limited to fifteen minutes or less.

The drastic reduction in the frequency of oral argument and its length has been driven largely by considerations of efficiency as reflected in the universal adoption of case-screening methods that shunt aside the majority of cases to a summary or non-argument calendar.<sup>4</sup> This separate decisional track involves “a significantly lesser degree of personal attention by judges”<sup>5</sup> by placing “primary reliance for the operation of the screening process on a centrally-organized, parajudicially-supervised group of staff attorneys.”<sup>6</sup>

The federal rule on this issue acknowledges the importance of oral argument, but in practice permits it to be both brief and rare.<sup>7</sup> Procedural efficiency comes with a cost,<sup>8</sup> of course, and the extraordinary reduction in oral argument has diminished its role.<sup>9</sup> The decline of oral argument has been one casualty of the procedural reforms made in response to the crisis of caseload

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3. Administrative Office of the U.S. Courts, *1980 Annual Report of the Director: Judicial Business of the United States Courts* (tbl. S-1: “U.S. Courts of Appeals—Appeals Terminated on the Merits after Oral Hearing or Submission on Briefs During the 12-Month Period Ending September 30, 1980”) [hereinafter “1980 AO Report”].

4. Thomas E. Baker, *Rationing Justice on Appeal*, 108–17 (West 1994).

5. John B. Oakley, *The Screening of Appeals: The Ninth Circuit’s Experience in the Eighties and Innovations for the Nineties*, 1991 BYU L. Rev. 859, 860.

6. *Id.* Screening programs vary somewhat from circuit to circuit, but the majority are based on the prototype pioneered by the Fifth Circuit in the 1970s. *Id.* at 865–66.

7. Fed. R. App. P. 34(a) (Westlaw 2012) (providing that “oral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary”).

8. Mark R. Kravitz, *Words to the Wise*, 5 J. App. Prac. & Process 543, 544 (2003) (asserting that appellate courts, federal and state, have “increasingly sacrificed oral argument on the altar of ‘efficiency’”); Lauren K. Robel, *Caseload and Judging: Judicial Adaptations to Caseload*, 1990 BYU L. Rev. 3, 4 (discussing appellate courts’ “survival responses” to burgeoning dockets); Wade H. McCree, Jr., *Bureaucratic Justice: An Early Warning*, 129 U. Pa. L. Rev. 777, 777–78 (1981) (stating that reforms implemented to increase efficiency in the federal judiciary have led to “significant costs to the quality of justice”); Martha J. Dragich, *Once a Century: Time for a Structural Overhaul of the Federal Courts*, 1996 Wis. L. Rev. 11, 13 (1996) (opining that “[m]easures adopted to cope with rising caseloads have exacerbated the ‘crisis’ by sharply altering time-honored traditions of appellate justice”); Baker, *supra* n. 4, at 114 (arguing that “the design of the system has been compromised, severely and profoundly, and possibly irredeemably, by such proportionally high rates of denial of oral argument”).

9. Baker, *supra* n. 4, at 113 (pointing out that “the [oral argument] denial rate seems to have outgrown the announced justification for denial”).

volumes that began in the 1980s.<sup>10</sup> Reduction in oral argument has been described as a response to pressure, taken almost against the courts' own will.<sup>11</sup>

The result is a more efficient but more paper-driven bureaucratic process of appellate decisionmaking. There is less input from the lawyers. The values implicit in appellate review are weakened or diluted.<sup>12</sup> Moreover, there is a disturbing appearance of correlation between the decline in frequency of oral argument and the decline in reversal rates in both civil and criminal cases. For example, Judge John Godbold cited data in 1994 showing a decline of one half in the overall federal appellate reversal rate from 1982 to 1993, from 19.9 percent to 10.3 percent, with a significant decline in every category of appeal.<sup>13</sup> By 2011, the reversal rate had fallen further, to 8.9 percent overall and 5.8 percent in criminal cases.<sup>14</sup>

Could the decline in reversal rates and the decline in frequency of oral argument be coincidental? They could. Or one might say that better screening procedures have increased the accuracy of appellate decision making to a more "correct" reversal rate than the historic figures. But one might also reasonably suspect that the very same process that shunts the vast majority of cases to the summary calendar is responsible for an institutional readiness to dispose of the cases by affirming the decisions below. Thus, the authors fear, though they are not the first to do so, that "[w]e have lowered our expectations for appellate procedure. We have defined down our appellate

10. Robert J. Martineau, *The Value of Appellate Oral Argument: A Challenge to the Conventional Wisdom*, 72 Iowa L. Rev. 1, 3 (1986).

11. *Id.* at 3–4 ("To most observers of and participants in the appellate process, these restrictions on oral argument are highly regrettable, forced upon the courts by an overwhelming caseload, and adopted only with great reluctance.").

12. Oakley, *supra* n. 5, at 865 (contrasting cases screened off the regular argument calendar with those that remain on it). Professor Oakley identifies four such values under the following rubrics: error correction; institutional impact; a sense of participation; and legitimization of judicial decisions. *Id.* at 869–71. These and other values are discussed below in Part IV.

13. Steven Wisotsky, *Professional Judgment on Appeal: Bringing and Opposing Appeals* 12 (2d ed. Carolina Academic Press 2009) (citing John C. Godbold, *Twenty Pages and Twenty Minutes Revisited* 2 (Rec. J. of the Fla. B. Sec. of App. Prac. & Advoc. Mar. 1994)).

14. 2011 AO Report, *supra* n. 2, at 89 (tbl. B-5: "U.S. Courts of Appeals—Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending September 30, 2011").

values. We all have internalized the postmodern norms of the minimalist procedural paradigm.”<sup>15</sup>

Oral argument is too central to the appellate process and too valuable to sacrifice on the altar of efficiency. We propose a return to a greater role for oral advocacy.<sup>16</sup> Part I of this article briefly outlines the importance of oral presentation in Western culture, modern communication, and traditional common law argument. Part II collects the federal rule of appellate procedure and corresponding local rules and internal operating procedures that govern the grant, or more often the denial, of oral argument. Part III examines the numerous and varied values of appellate justice that are served by oral argument. Part IV demonstrates the dramatic decline of oral argument since 1970. Finally, the authors propose modest reforms for restoring a greater role for oral argument in the federal courts of appeals.

## II. HISTORICAL VALUE OF ORAL DISCOURSE AND ARGUMENT

The power of oral argument was known to the ancient philosophers. “One of the persistent themes of Western thought since Plato is that speech is a superior form of communication to writing.”<sup>17</sup> The Greeks “regarded writing simply as a method of chronicling. Their test was always the spoken word.”<sup>18</sup> Plato, for example, recounts a dialogue between Socrates and Phaedrus expressing the necessity and humanity of oral dialogue and its

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15. Thomas E. Baker, *Applied Freakonomics: Explaining the “Crisis of Volume”* 8 J. App. Prac. & Process 101, 114 (2006).

16. Calls to preserve, restore, or merely value oral argument are certainly not new, but now that the language and rhetoric of the “crisis of volume” have died down, perhaps there is an opportunity to rethink these issues in a new light. See Baker, *supra* n. 4; Paul D. Carrington, et al., *Justice on Appeal* (West 1976); Daniel J. Meador, *Toward Orality and Visibility in the Appellate Process*, 42 Md. L. Rev. 732 (1983); Mark R. Kravitz, *Written and Oral Persuasion in the United States Courts: A District Judge’s Perspective on Their History, Function, and Future*, 10 J. App. Prac. & Process 247 (2009); Martineau, *supra* n. 10, at 1; see also Baker, *supra* n. 15, at 102 (noting that discussion about a court in crisis seems to have vanished, giving way to a perception of “business as usual” in the federal courts of appeals).

17. Suzanne Ehrenberg, *Embracing the Writing Centered Legal Process*, 89 Iowa L. Rev. 1159, 1161 (2004).

18. Kravitz, *supra* n. 16, at 248 (quoting Oscar Wilde, *The Critic as Artist*, in *Plays, Prose Writings and Poems* 1, 12 (Alfred A. Knopf 1991)).

superiority to writing.<sup>19</sup> As Socrates explains, true knowledge and understanding is hampered by fixing one's thoughts into a writing, which fosters misunderstanding and cannot be questioned further because a writing "produce[s] the same unvarying meaning, over and over again."<sup>20</sup> Communication must be tailored to the speaker and the listener, he argues, and sown not in ink but in the soul.<sup>21</sup>

Socrates urged Phaedrus to tell the speechwriters, including the law-makers,

that if their compositions are based on knowledge of the truth, and they can defend or prove them, when they are put to the test, by spoken arguments, which leave their writings poor in comparison of them, then they are to be called, not only poets, orators, legislators, but are worthy of a higher name, befitting the serious pursuit of their life.<sup>22</sup>

These notions of the humanity, gravity, and interactivity of oral discourse are important in pursuing appellate justice.

An early communications scholar of the modern era, Harold Innis, argued that a balance of oral and written communications promoted the intellectual greatness of ancient Greece.<sup>23</sup> Plato's preservation, in writing, of the dialogues of Socrates, which were oral, captured the strengths of both forms of communication. Professor Innis favored this "use of dialogues, allegories and illustrations" to capture the benefits of spoken language and interaction and fix it for future readers.<sup>24</sup>

Modern American legal practice, particularly at the appellate level, has tilted heavily toward written communication

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19. Plato, *Phaedrus*, in *Selected Dialogues of Plato* (Benjamin Jowett trans., Modern Library 2000); see also Walter J. Ong, *Orality and Literacy: The Technologizing of the Word* (2d ed., Routledge 2002); Marshall McLuhan, *The Gutenberg Galaxy: The Making of Typographic Man* (U. Toronto Press 1962).

20. Plato, *supra* n. 19, at 191.

21. *Id.*; see also *id.* at 194–95 ("only in principles of justice and goodness and nobility taught and communicated orally for the sake of instruction and inscribed on the soul . . . is there clearness and perfection and seriousness").

22. *Id.* at 195.

23. Harold Innis, *Empire and Communications* 53–84 (U. Toronto Press 1972) (chapter 4: "The Oral Tradition and Greek Civilization").

24. *Id.* at 57. Likewise, this perceived balance of written submissions and oral argument was also praised by Professor Martineau in his comparative examination of the English and American appellate systems. See generally Robert J. Martineau, *Appellate Justice in England and the United States: A Comparative Analysis* (W.S. Hein 1990).

and away from oral communication. Advocates present in writing rather than engaging and connecting in person. Chief Justice Rehnquist once recounted a tale of a New York appellate judge who chastised an attorney for reading from his brief in violation of a court rule prohibiting argument in that form.<sup>25</sup> The judge explained the court rule and reasoned that the court had read the brief.<sup>26</sup> Counsel in his own defense proclaimed, "Yes, but you have not heard it with gestures."<sup>27</sup> The point of the story is that there is an important dimension to communication beyond word choice. The power and value of an oral presentation is its potential to engage the decisionmakers. As Chief Justice Rehnquist put it, "the more flesh and blood you can insert into it, as opposed to a dry recitation of principles of law or decided cases, the more interesting and effective that argument can be."<sup>28</sup> What the Chief Justice's comments speak to is the visceral, engaging, and human nature of oral discourse, attributes that are stripped from our justice system in what is, for the vast majority of cases, a desiccated text-only process.

Appeals in the English courts have been largely conducted through oral presentation and argument since the early days of the common law.<sup>29</sup> The same is true in most other common law countries.<sup>30</sup> Professor Ehrenberg has extensively examined the divergence between the English and American systems on the issue of oral argument. As she summarizes, "[o]ral advocacy is the heart of the English legal system."<sup>31</sup> Another extensive study of the English and American appellate processes concluded that "[t]he heart of the English legal system and upon which all major aspects of it are based is the oral tradition."<sup>32</sup>

Traditionally, English barristers did not file lengthy written submissions to the court but orally educated the court on the

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25. Rehnquist, *supra* n. 1, at 1024.

26. *Id.*

27. *Id.*

28. *Id.*

29. Ehrenberg, *supra* n. 17, at 1162.

30. *Id.* at 1162, 1166 n. 20. Interestingly, the other common law nation to emphasize written over oral advocacy is Canada, though even it does not require extensive written briefing in the American style before the intermediate appellate court. *Id.* at 1166, 1166 n. 19.

31. *Id.* at 1166.

32. Martineau, *supra* n. 24, at 101.

facts, law, and argument over the course of hours.<sup>33</sup> In many cases, even the judges' deliberations would be made in open court.<sup>34</sup> Though comparatively time-consuming for judges (though not necessarily for lawyers, who under the system in the United States would devote far more time to the writing of appellate briefs), the system has several benefits. First, it brings the entire process of argument and decisionmaking into public view. It puts the decisionmakers, advocates, and individuals whose lives are affected together in the same room for an extended period of time, emphasizing the gravity and humanity of the task. Second, it makes the entire enterprise interactive, allowing the judges and lawyers to engage in a manner that addresses one another's concerns and to probe the areas of ambiguity in the case. The lawyer gains greater assurance that his points are understood, even if they are ultimately rejected, and the court is better able to interrogate the counsel regarding issues that might be obscured in the written briefing. Oral argument enhances understanding. To dispense with it is a loss like teaching a law school class by reading judicial opinions aloud without discussion or question and answer.

Appellate practice in England was an overwhelmingly oral one from the early common law until the mid-twentieth century.<sup>35</sup> Few written records were produced at trial, typically just the court's record of the pleading and the court's summary of its judgment, and submission of the case on appeal was an oral—not written—process.<sup>36</sup> Litigants aggrieved by a trial court judgment would argue their case, informing the court of the defects in the trial court's judgment and receiving an oral judgment from the court.<sup>37</sup> Every aspect of the case, even the written record from the trial court, was presented orally by the advocates rather than reviewed in chambers by judges before the hearing.<sup>38</sup> Oral argument was less in the manner of modern American argumentation and more of "a continuing discussion of the relevant facts and cases, with both counsel and the judges

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33. Ehrenberg, *supra* n. 17, at 1167.

34. *Id.*

35. *Id.* at 1174.

36. *Id.* at 1174–75.

37. *Id.*

38. *Id.* at 1176.



contributing when appropriate.”<sup>39</sup> This process existed in both the earliest appeals, heard by a panel of trial judges, and in the later era where appeals were heard by an independent appellate judiciary.<sup>40</sup>

Modern English appeals are conducted in a similar, almost entirely oral manner.<sup>41</sup> The appellate courts have quite consciously considered and rejected the writing-centered approach of United States appeals.<sup>42</sup> English courts rejected suggestions that they increase the use of written submissions, and review by judges without the participation of lawyers was rejected throughout the mid-twentieth century.<sup>43</sup> A committee in the 1950s, an experiment in the 1960s, and study in the 1970s all arrived at the same conclusion: The traditional oral appellate process was preferable.<sup>44</sup> In the 1980s, English appeals first permitted, then required, a brief written statement from the parties of the issues on appeal.<sup>45</sup> That statement was intended only to identify the issues, not argue the case.<sup>46</sup> The strengths of this oral-centered process are the assurances that the process of educating the bench was open and interactive and that the process of open deliberation was more publicly accountable and resulted in fewer dissents.<sup>47</sup> By contrast, the written process has been viewed as more time-consuming and costly overall, and especially for litigants.<sup>48</sup>

Appellate cases in the United States in the founding era were conducted in a similar manner, with oral arguments playing a dominant role and taking whatever time was necessary, even when that was several days.<sup>49</sup> The first domestic push to create a body of professional lawyers required putative lawyers to learn by reading the law, especially the reports of Coke and Blackstone, typically at the office of an existing

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39. Martineau, *supra* n. 10, at 7.

40. Ehrenberg, *supra* n. 17, at 1175.

41. *Id.* at 1176.

42. *Id.*

43. *Id.*

44. *Id.* at 1176, 1176 n. 88.

45. *Id.* at 1177.

46. *Id.* at 1177; *see also* Martineau, *supra* n. 24, at 129–30.

47. Ehrenberg, *supra* n. 17, at 1176.

48. *Id.*

49. *Id.* at 1179.

lawyer.<sup>50</sup> Training by an English Inn of Court or in the traditional, oral-centered English manner was rare. Much of the colonial era litigation was “conducted by attorneys who lacked the classic education and legal training of the English barrister, and who had no political motive to preserve a system based on oral advocacy.”<sup>51</sup>

Combined with this new type of lawyer was the new type of nation, a very large and expanding one. The written word became an important tool for all branches of government, including the law, to conduct their business over this large land.<sup>52</sup> The importance of writing in early America was also driven by this new nation’s considerable distrust between legislatures and courts, leading to statutory requirements of written opinions as well as increasing courts’ desire to explain their rulings.<sup>53</sup> Moreover, the new American legal system had a need and desire to create its own body of law and precedent, a goal facilitated by greater reliance on writing.<sup>54</sup>

This ascendancy of writing-centered appellate practice can be seen in the United States Supreme Court practice, which by 1795 began to require a statement of the key points at issue, similar to that adopted by the English courts only in the late 1980s.<sup>55</sup> By 1833, parties could submit a brief in lieu of argument and in 1849 the Court set a two-hour per attorney limit on oral argument.<sup>56</sup>

By the end of the nineteenth century, that time was further limited to two hours per side.<sup>57</sup> But “[t]he emphasis on oratory

50. David R. Cleveland, *Overturning the Last Stone*, 10 J. App. Prac. & Process 61, 78–79 (2010); cf. Kravitz, *supra* n. 16, at 249 (noting that American law borrowed from Blackstone and Coke in the early years of the republic).

51. Ehrenberg, *supra* n. 17, at 1180.

52. *Id.*

53. Kravitz, *supra* n. 16, at 255–56; see also Gordon S. Wood, *The Radicalism of the American Revolution* 323–25 (Alfred A. Knopf 1992) (outlining the rise of an independent judiciary and noting that “[t]he desire for an independent expert judiciary was bred by the continuing . . . fears of democratic politics”) (footnote omitted).

54. Kravitz, *supra* n. 16, at 256; Cleveland, *supra* n. 50, at 80–81.

55. Ehrenberg, *supra* n. 17, at 1181.

56. *Id.*

57. Kravitz, *supra* n. 16, at 252–53; see also *A Good Quarrel: America’s Top Legal Reporters Share Stories from Inside the Supreme Court* 6 (Timothy R. Johnson and Jerry Goldman eds., U. Mich. Press 2009) [hereinafter *A Good Quarrel*]. Chief Justice Burger

in the Supreme Court nonetheless continued well into the nineteenth century," as evidenced by the six-day argument in *Gibbons v. Ogden* in 1821 and the eight-day argument in the *Amistad* case in 1841.<sup>58</sup>

The shift from oral hearing to written submission followed a similar pattern in the state courts throughout the nineteenth century.<sup>59</sup> By the early twentieth century, the American practice of oral argument supplementing extensive written briefs had supplanted the English practice of extensive oral hearing supplemented by minimal written documents.<sup>60</sup> While lengthy oral hearing providing a full examination, deliberation, and decision of a case has been replaced by a more succinct and constricted oral argument, oral argument remains a fundamental part of the American appellate tradition.<sup>61</sup>

Oral argument of appeals was a traditional feature of the federal appellate process until relatively recently, accounting for nearly two-thirds of the case dispositions in 1971, 1981, and 1982. As to length of oral argument, in mid-twentieth century most American courts reportedly permitted an hour of oral argument per side, though that time was reduced in many federal courts of appeals by the mid-1970s.<sup>62</sup> Now oral argument is granted in a very small percentage of cases.<sup>63</sup> This decline in the grants of, and time for, oral argument was protested by the American Bar Association.<sup>64</sup> Contemporary scholars expressed similar concerns. Professors Carrington, Meador, and Rosenberg expressed their regret at the trend of diminished oral argument, and they proposed the following as a rule that adequately valued

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later reduced oral argument before the Court to thirty minutes per side. *A Good Quarrel*, *supra* this note, at 6.

58. Kravitz, *supra* n. 16, at 251; see also R. Kirkland Cozine, *The Emergence of Written Appellate Briefs in the Nineteenth-Century United States*, 38 Am. J. Leg. History 482, 488 (1994) (pointing out that in "the first half of the nineteenth century . . . , oral argument was available to counsel in unlimited amount").

59. Ehrenberg, *supra* n. 17, at 1182.

60. *Id.* at 1183.

61. Carrington, *supra* n. 16, at 16-17; Baker, *supra* n. 4, at 109 (asserting that "denying oral argument runs counter to American appellate tradition").

62. Carrington, *supra* n. 16, at 16-17 ("Not many decades ago, the norm in many American appellate courts was to allow an hour to each side.").

63. See Part V, *infra*.

64. Carrington, *supra* n. 16, at 18 n. 4 (pointing out that the ABA's House of Delegates opposed rules eliminating or curtailing oral argument).

and protected oral argument:

Oral argument will be heard in every appeal that is to be decided on its merits if any party or any member of the court requests it. In any case in which oral argument has been requested by a party, the court may in the prescribed manner invite, but may not require, all parties to waive it. The length of the argument will be determined by the court with due regard for the opportunity of each party to make an adequate presentation.<sup>65</sup>

In 1983, Professor Meador made a much broader call for greater orality in appeals.<sup>66</sup> His proposal was to reduce the written filings to identifying the issues and allow for oral argument and conference in the unlimited English tradition, at least for some cases.<sup>67</sup> Such a practice would be a better balance of written and oral communication, reduce the duplication caused by both extensive written briefing and lengthy oral arguments, and preserve the value of the appellate advocate in the process.<sup>68</sup> This proposal found support from the ABA and others, but its particulars were deemed impractical in the high-volume, geographically dispersed, and efficiency-minded modern American appellate system.<sup>69</sup>

In an attempt to set a national minimum, the Hruska Commission had reported even earlier that

[b]ecause conditions vary substantially from circuit to circuit, each court of appeals should have the authority to establish its own standards, so long as the national minimum is satisfied, and to provide procedures for implementation which are particularly suited to local needs,<sup>70</sup>

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65. *Id.* at 18.

66. Meador, *supra* n. 16, at 749 (suggesting an oral-argument procedure based on the English model that would be "an amalgam of counsel's presentation of argument and authority, the judges' probing of counsel, and the judges' conferring among themselves").

67. *Id.*

68. Baker, *supra* n. 4, at 165-66 (quoting American Bar Association, Action Commission to Reduce Court Costs and Delay, *Attacking Litigation Costs and Delay* 26-27 (ABA 1984)).

69. *Id.* (citing several state experiments with such a practice and a 1984 ABA commission report calling for "curtailing briefs, while preserving oral argument").

70. Commission on Revision of the Federal Court Appellate System, *Structure and Internal Procedures: Recommendations for Change*, 67 F.R.D. 195, 201 (1975) [hereinafter *Hruska Commission Report*].

and proposed what is now embodied in Rule 34(a).<sup>71</sup> The proposed national minimum was intended as a check on some local rules that permitted denial of oral argument whenever the court felt the case was of such a character that it did not justify oral argument.<sup>72</sup> In reality, it was an equally vague and subjective standard, now promulgated on a nationwide scale,<sup>73</sup> and it led to the present state of oral argument in the federal courts, making it a rare and fleeting occurrence.

### III. CURRENT ORAL ARGUMENT RULES OF THE FEDERAL COURTS OF APPEALS

Rule 34 governs the grant or denial of oral argument in the federal courts of appeals.<sup>74</sup>

The standard for oral argument set by Rule 34(2) is to allow for oral argument “in every case unless a panel of three judges who have examined the briefs and record unanimously agrees that oral argument is unnecessary,” and sets out the following reasons to guide the panel in making that decision:

- A. the appeal is frivolous;
- B. the dispositive issue or issues have been authoritatively decided; or
- C. the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument.<sup>75</sup>

This text certainly seems to favor oral argument, as indeed it

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71. *Id.*

72. Baker, *supra* n. 4, at 108–09 (quoting Charles R. Haworth, *Circuit Splitting and the “New” National Court of Appeals: Can the Mouse Roar?* 30 Sw. L.J. 839, 866 (1976)).

73. See Fed R. App. P. 34; see also Part III, *infra* (discussing circularity and inefficacy of rule).

74. Fed R. App. P. 34. That rule is supplemented by local rules and internal operating procedures in the circuits to govern local practices. See D.C. Cir. R. 34 & D.C. Cir. I.O.P. XI; 1st Cir. R. 34.0 & 1st Cir. I.O.P. VIII; 2d Cir. R. 34.1–34.2; 3d Cir. R. 34.1–34.3 & 3d Cir. I.O.P. 2.1–2.5; 4th Cir. R. 34(a)–(e) & 4th Cir. I.O.P. 34.1–34.3; 5th Cir. R. 34.1–34.13 & 5th Cir. I.O.P. 34; 6th Cir. R. 34(a)–(g) & 6th Cir. I.O.P. 34 (a)–(d); 7th Cir. R. 34(a)–(h) & 7th Cir. O.P. 1(c)(7) (characterizing any order issued pursuant to Fed. R. App. P. 34 as “nonroutine”); 8th Cir. R. 34A, 34B & 8th Cir. I.O.P. I(D)(1)–(2) (describing argument and hearing panels), III(K); 9th Cir. R. 34(1)–(3) & advisory comm. n. 2; 10th Cir. R. 34.1; 11th Cir. R. 34(1)–(4) & 11th Cir. I.O.P. 1–16 (pertaining to 11th Cir. R. 34).

75. Fed R. App. P. 34(a)(2)(A)–(C).

was so intended.<sup>76</sup> But the exceptions listed in parts A, B, and C are so broad that they effectively swallow the rule. The traditional default position in favor of oral argument for appeals has given way, even under the rule of this “minimum standard,” to a default of no argument.<sup>77</sup>

Part A seems a suitably narrow and reasonable exception. No oral argument is needed in a case that is frivolous on its face. “Frivolous” as a legal standard is an exceptionally low bar and is traditionally examined at the outset of a proceeding.<sup>78</sup> Part B, “when the dispositive issue or issues have been authoritatively decided,” is merely a type of frivolous appeal.<sup>79</sup> Finally, Part C is the catch-all provision, which institutionalizes the very local rule formulations that Rule 34 was supposed to counter. Rule 34(a)(1)(C) grants the court the authority to deny oral argument whenever its members think oral argument is unnecessary (that is, when the “decisional process would not be significantly aided by oral argument.”)<sup>80</sup> This provision begs the question. The conclusion reached, that oral argument is unnecessary, is justified by the conclusion that oral argument is unnecessary. As federal court expert Thomas E. Baker explains: “This is not a standard at all.”<sup>81</sup>

The local rules and internal operating procedures in almost every circuit do not alter or supplement the test for granting or denying oral argument set out in the Federal Rules of Appellate Procedure.<sup>82</sup> Several are entirely silent on the standard or merely

76. *Hruska Commission Report*, 67 F.R.D. at 200–01.

77. See Part V, *infra* (detailing the decline and present rarity of oral argument).

78. Steven Wisotsky, *Professional Judgment on Appeal: Bringing and Opposing Appeals* 242 (2d. ed. Carolina Academic P. 2009).

79. Fed. R. App. P. 34(a)(2)(B).

80. Fed. R. App. P. 34(a)(1)(C).

81. Baker, *supra* n. 4, at 109.

82. Fed. Cir. I.O.P. 7(2) (restating the text of Fed. R. App. P. 34(a)(2)); 1st Cir. R. 34.0 & 1st Cir. I.O.P. VIII (relying on standard of grant/denial of oral argument in Fed. R. App. P. 34(a)(2)); 3d Cir. R. 34.1(a) (restating the requirement of unanimity stated in Fed. R. App. P. 34(a)(2)); 4th Cir. R. 34(a)(2) (providing that the standard to be applied will be the same as found in Fed. R. App. P. 34(a)(2)); 5th Cir. R. 34 (referring briefly to Fed. R. App. P. 34(a)(2) as the governing standard); 6th Cir. R. 34 (relying *sub silentio* on Fed. R. App. P. 34(a)(2) standard for grant or denial of oral argument); 7th Cir. R. 34(4) (mentioning only briefly that the standards of Fed. R. App. P. 34(a) are controlling); 8th Cir. R. 34A & 8th Cir. I.O.P. I(D) (relying *sub silentio* on standard of grant/denial of oral argument in Fed. R. App. P. 34(a)(2), and referring to the federal rule in a cross-reference); 10th Cir. R. 34.1(G) (allowing “[s]ubmission on briefs,” and providing that “[e]xcept in pro se appeals

restate or refer to Rule 34.<sup>83</sup> By contrast, the Third Circuit offers additional guidelines to suggest when oral argument is more likely to be granted.<sup>84</sup> It also offers language suggesting that oral argument is the default. The internal operating procedures of the Third Circuit explain:

IOP 2.4.1 Experience discloses that judges usually find oral argument unnecessary when:

- (a) The issue is tightly constrained, not novel, and the briefs adequately cover the arguments;
- (b) The outcome of the appeal is clearly controlled by a decision of the Supreme Court or this court; or
- (c) The state of the record will determine the outcome and the sole issue is either sufficiency of the evidence, the adequacy of jury instructions, or rulings as to admissibility of evidence, and the briefs adequately refer to the record.

IOP 2.4.2 Experience discloses that judges usually vote for oral argument when:

- (a) The appeal presents a substantial and novel legal issue;
- (b) The resolution of an issue presented by the appeal will be of institutional or precedential value;
- (c) A judge has questions to ask counsel to clarify an important legal, factual, or procedural point;
- (d) A decision, legislation, or an event subsequent to the filing of the last brief may significantly bear on the case; or
- (e) An important public interest may be affected.<sup>85</sup>

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or when both parties have waived oral argument, the court will advise the parties when a panel decides that oral argument is not necessary"); 11th Cir. R. 34-3(b) (expressly stating that standard to be applied will be the minimum standard found in Fed. R. App. P. 34(a)(2)).

83. See generally n. 82, *supra*.

84. 3d Cir. I.O.P. 2.4 ("Suggested Criteria for Oral Argument").

85. *Id.*

These guidelines certainly provide a greater basis for examining the suitability of a case for oral argument. They are not binding on a panel, however, because the criteria set out in them “shall not be construed to limit any judge’s discretion in voting for oral argument.”<sup>86</sup> This particular set of guidelines as well as the phrasing of IOP 2.4.3 certainly seems both to favor oral argument and to provide a more rational basis for sorting cases into argument and non-argument categories. The Fifth Circuit does not alter the standard in any substantive way, but it does suggest that the parties’ preference for oral argument be given “due, but not controlling, weight.”<sup>87</sup> Even such a mild suggestion about the importance of the parties’ wishes or about oral argument itself is largely absent from the local rules and procedures of most circuits. Regardless of the intention of the Hruska Commission report or the seeming value of oral argument in the text of Rule 34(a)(2) itself, the written standard has been unsuccessful at preserving oral argument or providing a meaningful basis for judging when oral argument is important.<sup>88</sup>

The problem extends beyond merely the written standard, however. The rule as written requires a unanimous decision by the “panel of three judges who have examined the briefs and record” to deny oral argument.<sup>89</sup> This type of review does not occur in cases sent to a non-argument calendar based on the category or type of appeal. For example, the Second Circuit automatically denies argument in several types of immigration

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86. 3d Cir. I.O.P. 2.4.3.

87. 5th Cir. R. 28.2.3.

88. See Part V, *infra* (describing the numerical and durational decline of oral argument in the federal appellate courts). This decline stands in striking parallel to the federal appellate courts’ rules and practices on unpublished opinions. While the local rules often set forth a basis for issuing opinions as published or unpublished, with a stated preference for traditional publication, the actual practice has been a steadily declining rate of publication such that only a small fraction of court dispositions are issued as fully recognized published opinions. See David R. Cleveland, *Local Rules in the Wake of Federal Rule of Appellate Procedure 32.1*, 11 J. App. Prac. & Process 19, 27–42 (2011).

89. Fed. R. App. P. 34(a)(2).



appeals.<sup>90</sup> It also leaves open the possibility that other classes of cases, in addition to individual cases, might be deemed not worthy of oral argument and, as a class, shunted to the non-argument calendar.<sup>91</sup> This seems incompatible with the Rule 34 requirement that all cases be given oral argument unless a three-judge panel, having reviewed the brief and record, rules otherwise.<sup>92</sup>

But categorical denial of oral argument is not the only troubling practice. Even where each case is looked at individually, the question of who is making the decision to grant or deny oral argument, both practically and technically, is an issue in some circuits. Most circuits have a three-judge panel make the decision on whether to grant oral argument, consistent with Rule 34.<sup>93</sup> But some circuits, at least based upon their local rules and procedures as written, seem to allow the staff to make the initial screening decision, which is then implicitly or explicitly reversible by the hearing panel. The Eighth Circuit's local rules, for example, permit a clerk or senior staff attorney to screen cases into argument and non-argument categories, though the case can be reclassified by the hearing panel.<sup>94</sup> The Ninth Circuit also seems to permit the clerk's office and staff attorneys to determine whether a case is "eligible for submission without oral argument under Rule 34(a)," and to place that case on the

90. See 2d Cir. R. 34.2(a)(1):

(1) Immigration. An appeal or petition for review, and any related motion, in which a party seeks review of the denial of:

- (A) a claim for asylum under the Immigration and Nationality Act (INA);
- (B) a claim for withholding of removal under the INA;
- (C) a claim for withholding or deferral of removal under the Convention Against Torture; or
- (D) a motion to reopen or reconsider an order involving one of the claims listed above.

*Id.*

91. 2d Cir. R. 34.2(a)(2) (allowing use of the non-argument calendar as the default for "[a]ny other class of cases that the court identifies as appropriate for the [Non-Argument Calendar]").

92. Fed. R. App. P. 34(a).

93. For example, in the Eleventh Circuit, it seems clear that a panel of judges is doing the screening. 11th Cir. R. 34-3(b) ("When a panel of judges of the court unanimously determines, after an examination of the briefs and records, that an appeal of a party falls within one of the three categories of Fed. R. App. P. 34(a)(2) . . . that appeal will be placed on the non-argument calendar for submission and decision without oral argument.").

94. 8th Cir. R. 34A(a), (c).

non-argument calendar.<sup>95</sup> Overruling the staff's placement of the appeal on the non-argument ("screening") calendar, can be done by the judges after hearing the staff's presentation about the case.<sup>96</sup>

Though other circuits' rules describe the role of staff in screening cases for argument, and doubtless some have procedures not explicated in the local rules, they tend to describe the staff's role as more advisory and less determinative. For example, a Sixth Circuit IOP once explained that "[t]he staff attorney section reviews this court's docket to identify cases which offer the possibility of decision without oral argument," and that while the staff attorneys provide the hearing panel with a memorandum explaining the case and the possibility of decision without argument, the panel of judges makes the decision.<sup>97</sup> Similarly, the Eleventh Circuit IOP describes a process by which a staff recommendation is sent first to a single judge and then to two additional judges, and oral argument is rejected only upon unanimity of all three judges.<sup>98</sup> This seems more appropriate and consistent with Rule 34 than a system that allows non-judicial determination subject to judicial reversal.<sup>99</sup>

Of course, there are some innovations in the local rules that increase the opportunity for oral argument or add small consolation procedures in recognition of the loss occasioned by denial of argument. For example, the Sixth Circuit's local rule

95. 9th Cir. Gen. Ord. VI. 6.5(a), (b) (Nov. 1, 2011).

96. 9th Cir. R. 34; 9th Cir. Gen. Ord. VI. 6.5(b)(i) ("The staff attorneys shall orally present the proposed dispositions to the screening panels . . . , the panel members discuss the proposed disposition and make any necessary revisions," and "if the three panel members unanimously agree," the staff attorney's proposed disposition is certified); 9th Cir. Gen. Ord. VI. 6.5(b) (ii) ("All three judges must agree that the case is suitable for the screening program before a case is disposed of by a screening panel. Any one judge may reject a case from screening.").

97. 6th Cir. I.O.P. 34(e) (no longer in force; superseded in revisions of Aug. 16, 2012, by I.O.P. that does not include this provision); *see also* D.C. Cir. I.O.P. II(C)(2) (providing that "'Rule 34(j)' cases" may be decided without oral argument); D.C. Cir. I.O.P. IX(C)(1) (noting that cases can be marked by staff attorney for potential decision without oral argument and describing process by which a single judge may grant oral argument but only the entire panel may deny it; and also noting that case may be moved from the list of "'Regular Merits' case[s]" to the list of cases to be decided without oral argument).

98. 11th Cir. I.O.P. 34.1 (pertaining to 11th Cir. R. 34).

99. *See* Fed. R. App. P. 34(a)(2) (providing that decision about necessity of oral argument is to be made by three-judge panel).

permits a teleconference argument to be ordered by the court.<sup>100</sup> Similarly, the Third Circuit's local rule expressly provides for the possibility of a video-conference argument at the request of a party.<sup>101</sup> Such rules allow for greater oral advocacy and overcome the travel-time-and-cost argument often advanced as a reason for denial of oral argument. While they do not preserve all the benefits of live appellate oral argument, these technologically enabled arguments are certainly an improvement over a brief-only submission to the court. Alternatively, the Federal Circuit provides no similar opportunity, but it does offer a written substitute for oral argument: an additional opportunity to file a reply brief.<sup>102</sup> In addition, some circuits require that appeals denied oral argument be unanimous on the merits, presumably as a safeguard against denying argument on truly close or sharply contested legal issues.<sup>103</sup>

The modern rule structure, taking into account the national rule and local rules and procedures, reveals a system in which oral argument is deemed important and is the default position, overcome only by a unanimous judgment of the court. But the operational reality is that very few appeals are set for oral argument. Even when granted, oral argument is much shorter than in the past, a quarter of the time allotted a century ago.<sup>104</sup> There is a tension within the circuits between the appellate ideal and the practical considerations in processing cases to disposition. Oral argument remains the ideal, but perhaps an ideal viewed as no longer attainable.<sup>105</sup>

The diminished number of oral arguments has so devalued the practice in the minds of some that it has led to a legislative call for even further reduction.<sup>106</sup> Others have expressed regret

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100. 6th Cir. R. 34(g)(3).

101. 3d Cir. R. 34.1(e) ("A party may request oral argument by video-conference.").

102. Fed. Cir. R. 34(a) (captioned "Reply Brief Instead of Oral Argument" and permitting appellant who neglected to file a reply brief in anticipation of oral argument to file one if the case is not set for oral argument).

103. 4th Cir. I.O.P. 34.2; 11th Cir. R. 34-3(b)(3).

104. See Part V, *infra*.

105. Baker, *supra* n. 4, at 116-17.

106. Senate Committee on the Judiciary, Subcommittee on Administrative Oversight and the Courts, *Chairman's Report on the Appropriate Allocation of Judgeships in the United States Courts of Appeals* 10 (Mar. 1999) ("Courts with permissive standards for granting oral argument, or which grant oral argument every time it is requested, should seriously consider modifying their policies so that the deciding judges might exercise

over this diminishment, and offered alternative rules or procedures to preserve oral argument.<sup>107</sup> Perhaps now the federal appellate courts can consider rebalancing their procedures in a manner that restores the traditional practice of oral argument.<sup>108</sup>

#### IV. VALUE OF ORAL ARGUMENT

Oral argument benefits all stakeholders in the appellate system from the public, to the litigants and their counsel, to the judges and the court itself. Courts in crisis, or perceiving themselves to be in crisis, have developed non-argument procedures and reduced the rate of, and time for, oral argument.<sup>109</sup> The values implicit in appellate review are weakened or diluted.<sup>110</sup>

The modern appellate courts have been described as a decision factory: “briefs go in one end . . . and opinions come out the other end, without any chance for the public or the parties to understand who really decided the case and whether the decisionmakers truly understood the parties’ concerns.”<sup>111</sup> It has been suggested that courts have “severely,” “profoundly,” and “possibly irredeemably” compromised the appellate system “by such proportionately high rates of denial of oral argument.”<sup>112</sup> We hope not irredeemably so. Now that the crisis atmosphere of the late twentieth century has passed, perhaps a

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increased discretion not to hear cases they do not believe warrant oral argument.”); see also Kravitz, *supra* n. 16, at 255 (quoting *Chairman’s Report*, *supra* this note).

107. Carrington, *supra* n. 16, at 17–18 (expressing regret over the trend of fewer and briefer oral arguments and suggesting a process of invited waiver); Baker, *supra* n. 4, at 116 (finding the federal courts’ presumption against oral argument contrary to the written presumption underlying Rule 34 to be “rather Orwellian”); Martineau, *supra* n. 10, at 30–32 (describing a revised oral argument form that is less formal and more interactive).

108. See Baker, *supra* n. 15, at 113–14 (describing the federal courts’ trade-off of appellate justice for greater efficiency).

109. Joe S. Cecil & Donna Stienstra, *Deciding Cases without Argument: A Description of Procedures in the Courts of Appeals* (Fed. Jud. Ctr. 1985) (discussing screening procedures in federal courts of appeals, many instituted in connection with the increasing number of appeals filed in the 1980s).

110. Oakley, *supra* n. 5, at 865. Professor Oakley identifies four such values under the following rubrics: error correction; institutional impact; a sense of participation; and legitimization of judicial decisions.

111. Kravitz, *supra* n. 16, at 263.

112. Baker, *supra* n. 4, at 114.

careful re-evaluation of the costs and benefits of oral argument will lead to some revival of oral advocacy.

Oral argument serves an important institutional and public function that is not provided by written submissions. Oral argument provides public visibility and institutional legitimacy, which is critically important:

Positive public perception of the judiciary's role in American political life is indispensable to the effectiveness of the judicial branch. Indeed, this collective perception is the very source of judicial legitimacy, the *sine qua non* of our common law system. The concept of judicial legitimacy resides at the center of the constitutional doctrine of an independent judiciary and is the primary reason why people respect and obey the law.<sup>113</sup>

This visibility and public accountability is more important than ever. What was once perceived as the "weakest" branch is now perceived as increasingly powerful, and by some, as too powerful.<sup>114</sup> Calls for greater judicial accountability and transparency are likewise on the rise. Scholars continue to express concern about the bureaucratization and efficiency-driven reforms of the federal courts.<sup>115</sup> If the public trust is to be

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113. Gregory C. Pingree, *Where Lies the Emperor's Robe? An Inquiry into the Problem of Judicial Legitimacy*, 86 Or. L. Rev. 1095, 1102 (2007) (collecting authorities).

114. Compare *The Federalist* No. LXXVIII at 99 (Alexander Hamilton) in *The Federalist: A Commentary on the Constitution of the United States* vol. 2 (Central L.J. Co. 1914) (characterizing the judiciary as the branch of government "least dangerous to the political rights of the Constitution" because it "has no influence over either the sword or the purse," and asserting that "the judiciary is beyond comparison the weakest of the three departments of power") (footnote omitted) with Kathleen Hall Jamieson & Michael Hennessy, *Public Understanding of and Support for the Courts: Survey Results*, 95 Geo. L.J. 899, 901 (2007) (citing data from two national surveys indicating that twenty-eight percent of Americans polled believed that the Supreme Court "has too much power"); see also e.g. Jonah Goldberg, *Senate "Show Trial" is Product of a Too-Powerful Court*, USA Today 11A (Jan. 11, 2006) (taking position that Senate's rigorous examination of nominees for Supreme Court is justified by significant power invested in Justices, here likened to "unelected monarchs"); Lance Eric Neff, *Keys to the Kingdom: Interpretive Power and Societal Influence During Two Ages*, 7 Fla. Coastal L. Rev. 697, 700-02 & 701 n. 19 (2006) (noting that the judiciary is commonly perceived as too powerful and relatively unaccountable).

115. See generally Penelope Pether, *Sorcerers, Not Apprentices: How Judicial Clerks and Staff Attorneys Impoverish U.S. Law*, 39 Ariz. St. L.J. 1 (2007); see also Marin K. Levy, *The Mechanics of Federal Appeals: Uniformity and Case Management in the Circuit Courts*, 61 Duke L.J. 315 (2011); Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 Stan. L. Rev. 1435 (2004).

maintained, courts in the modern era must use transparent and reassuring procedures. Public visibility and accountability are especially important for the federal courts of appeals, the venue for the one and only appeal as of right in civil and criminal cases.<sup>116</sup> Procedural shortcuts such as “dispositions on motion, an enlarged central staff, disposition without opinion, and unpublished opinions” make disposition without oral argument especially weighty.<sup>117</sup> The federal courts better serve their function by not only doing justice but showing justice being done. It is a principle “deeply rooted in the common law, that ‘justice must satisfy the appearance of justice.’”<sup>118</sup>

Institutional legitimacy is negatively “affected by procedural shortcuts such as the elimination of oral argument.”<sup>119</sup> Oral argument provides numerous benefits for litigants and their counsel. First, there is a value for the parties in facing the decisionmaker. The opportunity to physically see and interact with the federal government officials deciding one’s case increases confidence in the system and the outcome.<sup>120</sup> Oral argument provides a sense of participation in a mutual, if adversarial, endeavor that is fundamental to the common law system.<sup>121</sup> It also “gives to litigants the assurance that judges themselves are making the decisions,”<sup>122</sup> an assurance that is increasingly important in a staff-driven, bureaucratic, decision-factory system.

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116. In 2010 and 2011, of the 282,895 cases filed in federal district courts, 55,992 appeals were taken to the courts of appeals (twenty percent), and only 170—eighty-six for full argument and eighty-four for decision without argument—were taken by the Supreme Court (.06 percent) during the 2010 Term. See *2011 AO Report*, *supra* n. 2, at 58, 59, 119 (tbl. A-1: “Supreme Court of the United States—Cases on Docket, Disposed of, and Remaining on Docket at Conclusion of October Terms, 2006 Through 2010”; tbl. B: “U.S. Courts of Appeals—Appeals Commenced, Terminated, and Pending During the 12-Month Periods Ending September 30, 2010 and 2011”; tbl. C: “U.S. District Courts—Civil Cases Commenced, Terminated, and Pending During the 12-Month Periods Ending September 30, 2010 and 2011”).

117. Martineau, *supra* n. 10, at 13.

118. *Levine v. U.S.*, 362 U.S. 610, 616 (1960) (quoting *Offutt v. U.S.*, 348 U.S. 11, 14 (1954)).

119. Jerry Goldman, *Appellate Justice Economized: Screening and Its Effect on Outcomes and Legitimacy in Restructuring Justice: The Innovations of the Ninth Circuit and the Future of the Federal Courts* 140 (Arthur D. Hellman ed., Cornell U. Press 1990).

120. Carrington, *supra* n. 16, at 17–18.

121. *Id.*

122. *Id.* at 17; see generally Pether, *Sorcerers*, *supra* n. 115.

Second, oral argument provides an interactive opportunity for parties to focus the panel's collective attention on the case's most important points, to respond to the court's issues of greatest concern, and to address issue that arise out of the consideration of the case that were not apparent during the briefing.<sup>123</sup> Unlike written submissions, which, as Socrates bemoaned, cannot address the varied questions and values of the reader, oral argument allows a party a fuller, more meaningful interaction.<sup>124</sup> Third, the most direct benefit is the opportunity to influence the outcome.<sup>125</sup> Judges have certainly given the indication that oral argument does affect their decisions.<sup>126</sup> When asked about the importance of oral argument Justice Jackson stated that "the justices would answer unanimously that now, as traditionally, they rely heavily on oral presentations," and added that "it always is of the highest, and often of controlling, importance."<sup>127</sup> If potentially a quarter of all cases come to a different conclusion with oral argument than they would have without it, oral argument has a significant ability to affect the outcome of cases and the course of precedent.<sup>128</sup>

Additionally, oral argument provides an opportunity to influence the nature of the opinion.<sup>129</sup> Even in some cases where the outcome itself is unchanged, broadening or narrowing the breadth of the court's opinion may result from oral argument.<sup>130</sup> For a case sent back for retrial or rehearing, the details of the

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123. Martineau, *supra* n. 10, at 17-18.

124. Plato, *supra* n. 19, at 191 (noting that written words "do not know to whom they should or should not speak; and if they are mistreated or unjustly slandered, they always require the creator of their being to rescue them").

125. Martineau, *supra* n. 10, at 17.

126. Myron R. Bright & Richard S. Arnold, *Oral Argument? It May Be Crucial!* 70 A.B.A. J. 68, 70 (Sept. 1984) (reporting that in a ten-month study, Judge Bright found oral argument changed his mind in thirty-one percent of cases and Judge Arnold found that oral argument changed his mind in seventeen percent); John M. Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?* 41 Cornell L.Q. 6, 6 (1955) (asserting that "the lawyer who depreciates the oral argument as an effective instrument of appellate advocacy, and stakes all on his brief, is making a great mistake").

127. *A Good Quarrel*, *supra* n. 57, at 4-5.

128. Rex E. Lee, *Oral Argument in the Supreme Court*, 72 A.B.A. J. 60, 60 (Supp. June 15, 1986) (noting that "there are cases in which the oral argument can change some votes, and you cannot assume that your case will not be one of them").

129. *Id.*

130. *Id.*

court's opinion may have a significant effect on the later proceedings.

Judges also benefit from oral argument. They benefit from greater institutional legitimacy and the accountability that comes with visible judicial involvement. But holding oral argument also provides other advantages. First, the interactivity benefits judges in their understanding of the cases before them.<sup>131</sup> It allows judges to probe issues omitted from the briefs, whether those omissions are intentional or inadvertent.<sup>132</sup> Oral argument can serve an important role in clarifying the matter at hand.<sup>133</sup> Litigants often speak past each other in their briefs, owing to their different perspectives on the case, and oral argument allows judges to focus the opposing positions. Another ambiguity or omission that may occur in appellate briefs is the effect of a proposed ruling on the body of precedent. This is an issue that the parties may not have raised for tactical reasons or simply because they do not view it as sufficiently important. At oral argument, a court can pose hypotheticals examining how each party's proposed holding would affect future cases.<sup>134</sup>

Finally, there are professional benefits to conducting oral arguments. A robust oral argument practice can help to avoid judicial isolation, increase each judge's interactions with the fellow judges, including visiting judges and those sitting by designation. Oral argument can impress upon judges the humanity, gravity, and importance of their work, which may in turn improve both the quality of judicial decisions and judicial job satisfaction.

Arrayed against these important values, the diminution in the frequency and length of oral argument is a dubious trade for efficiency in case disposition. Because of its importance to

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131. Stanley Mosk, *In Defense of Oral Argument*, 1 J. App. Prac. & Process 25, 27 (1999).

132. *Id.*; see also Rehnquist, *supra* n. 1, at 1021 (noting that lawyers can at oral argument "play a significant role in responding to the concerns of the judges, concerns that counsel won't always be able to anticipate in preparing the briefs").

133. Bright & Arnold, *supra* n. 126, at 68–69.

134. See Myron H. Bright, *The Changing Nature of the Federal Appeals Process in the 1970s: A Challenge to the Bar*, 65 F.R.D. 496, 506 (1975) (noting that oral argument "allows the judges to ask questions to clear up any doubts that court might have about the case or the lawyer's approach to it"); Irving R. Kaufman, *Appellate Advocacy in the Federal Courts*, 79 F.R.D. 165, 171–72 (1979) (discussing importance of answers to questions posed by judges at oral argument).



appellate justice, oral argument should be more common and of greater length, and should offer sufficient opportunity for litigants to clarify, persuade, and have their day in court.

## V. DIMINISHED ORAL ARGUMENT IN THE FEDERAL COURTS

In the Golden Age of oral argument, it was available for the asking and reportedly time was generously allocated at up to one hour per side.<sup>135</sup> Beginning in the 1980s, oral argument began to decline in frequency, and its length was shortened for most cases in the federal courts to twenty minutes per side. By 2011, the incidence of oral argument in the Eleventh Circuit had declined to a mere sixteen percent of cases,<sup>136</sup> a third of what it had been in the Fifth Circuit during the early 1980s,<sup>137</sup> and the presumptive time allotted was reduced to fifteen minutes per side.<sup>138</sup>

This decline is not unusual or atypical; there has been a roughly comparable nationwide decline in the frequency and length of oral argument throughout the federal courts of appeals.<sup>139</sup> In 2011, only one quarter of all cases was orally argued,<sup>140</sup> down from nearly two-thirds in the early 1980s,<sup>141</sup> and the time allotted in most circuits was limited to “about fifteen minutes.”<sup>142</sup> The different methods appellate courts

135. Carrington, *supra* n. 16, at 16–17.

136. 2011 AO Report, *supra* n. 2.

137. 1980 AO Report, *supra* n. 3, at tbl. S-1. The Eleventh Circuit was split off from the Fifth Circuit in 1980. See generally Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1994 (1980).

138. Telephone Interview by Daniel Drazen, Research Asst. to Profs. Cleveland & Wisotsky, with Tresa Patterson, Deputy Clerk, Off. of the Clerk, U.S. Ct. of App. for the 11th Cir. (July 3, 2012).

139. Levy, *supra* n. 115, at 320–25 (finding a decline in oral arguments relative to the caseload as a whole to be a direct effect of the pressure on the judicial economy). This decline may also be a delayed result of the Supreme Court’s ruling in *FCC v. WJR, the Goodwill Station, Inc.*, 337 U.S. 265, 275–76 (1949) (“[D]ue process of law has never been a term of fixed and invariable content. This is as true with reference to oral argument as with respect to other elements of procedural due process. For this Court has held in some situations that such argument is essential to a fair hearing, in others that argument submitted in writing is sufficient.”).

140. 2011 AO Report, *supra* n. 2.

141. 1980 AO Report, *supra* n. 3, at tbl. S-1.

142. Administrative Office of the U.S. Courts, *How the Federal Courts Work, The Appeals Process*, <http://www.uscourts.gov/FederalCourts/UnderstandingtheFederalCourts/>

implement in reviewing their caseloads may have a significant impact on whether a case will receive oral argument.<sup>143</sup> In the Eleventh Circuit, the percentage of oral argument cases in 2011 was strikingly low at 15.8 percent,<sup>144</sup> while in the D.C. Circuit, 43.4 percent of cases received oral argument.<sup>145</sup>

In interpreting the data, the difference between civil and criminal cases must be noted. In 1989, criminal appeals nationwide were argued 55.3 percent of the time, while civil appeals were argued 46.1 percent of the time.<sup>146</sup> In the 1997–98 court year, the percentages were approximately equal at just over forty percent each.<sup>147</sup> By 2011, the ratio of criminal appeals receiving oral argument had fallen to 23.1 percent, while civil appeals held higher at 36.4 percent.<sup>148</sup> For whatever reason or reasons, the screening process filters out more criminal appeals and favors civil appeals for oral argument.

Is there a hole in the data? The analysis set forth here isolates the percentage of cases, civil and criminal, as the measurable variable. The implicit assumption is that the percentages reflect the screening processes and not some other variable. We cannot rule out the possibility that some other factor may be at work, perhaps, for example, a decline in the percentage of appellate attorneys requesting that oral argument be set. This is not an impossible explanation, but one that is extremely unlikely. There is a compelling litigation presumption that a party who has lost in the trial court and seeks reversal on appeal should as a matter of course request oral argument. It is a

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HowCourtsWork/TheAppealsProcess.aspx (accessed Sept. 21, 2012; copy on file with Journal of Appellate Practice and Process) [hereinafter *The Appeals Process*].

143. Levy, *supra* n. 115, at 317.

144. 2011 AO Report, *supra* n. 2

145. *Id.*

146. Administrative Office of the U.S. Courts, 1989 *Annual Report of the Director: Judicial Business of the United States Courts*, at tbl. B-1A.

147. Administrative Office of the U.S. Courts, 1998 *Annual Report of the Director: Judicial Business of the United States Courts* 95 (tbl. B1-A: “U.S. Courts of Appeals—Appeals Commenced, Terminated, and Pending, by Nature of Suit or Offense, in Appeals Arising From the U.S. District Courts During the Twelve-Month Period Ended September 30, 1998”).

148. 2011 AO Report, *supra* n. 2, at 65 (tbl. B-1A: “U.S. Courts of Appeals—Appeals Commenced, Terminated, and Pending, by Nature of Suit or Offense, in Appeals Arising from the U.S. District Courts During the 12-Month Period Ending September 30, 2011”).

protocol of good appellate practice.<sup>149</sup> Malpractice considerations also militate in favor of such requests, lest an attorney who waives oral argument be deemed negligent. And attorneys who bill by the hour as private counsel or under the CJA have a financial incentive to do what is in their clients' best interests anyway. Although it cannot be proved on the records kept by the clerks of court, which do not systematically report on such requests, a dramatic fall-off in the percentage of appellate counsel requesting oral argument is not a reasonable or sensible inference. Common sense strongly suggests that the operative variable is the courts' screening out an increasing proportion of cases for oral argument because they think it is not particularly valuable.

## VI. A PROPOSAL FOR THE RETURN TO A GREATER ROLE FOR ORAL ADVOCACY

### *A. Better Screening*

Better and more timely input from the attorneys could go a long way toward restoring a higher proportion of oral argument cases. Federal Rule of Appellate Procedure 34(a)(1) states: "Any party may file, or a court may require by local rule, a statement explaining why oral argument should, or need not, be permitted."<sup>150</sup> The Fifth, Tenth, and Eleventh Circuits all require a statement regarding oral argument be included in both parties' initial briefs.<sup>151</sup> The Second Circuit requires an oral argument statement form, from both parties, within fourteen days of the filing of the appellee's last brief.<sup>152</sup> The First, Third, Fourth, Sixth, and Seventh Circuits have rules stating that a party "may" include a statement regarding oral argument.<sup>153</sup> Such a statement

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149. See e.g. Carole C. Berry, *Effective Appellate Advocacy: Brief Writing and Oral Argument* 125 (2d ed., West 2003) ("never ever waive oral argument") (emphasis in original).

150. Fed. R. App. P. 34(a)(1).

151. 5th Cir. R. 28.2.3; 10th Cir. R. 28.2(C)(4); 11th Cir. R. 28-1(c).

152. 2d Cir. R. 34.1(a) (providing in addition that "[f]ailure to timely file the Oral Argument Statement Form signifies that the party does not seek oral argument").

153. 1st Cir. R. 34.0(a); 3d Cir. R. 34(b) (providing that "Any party . . . has the right to file a statement with the court setting forth the reasons why . . . oral argument should be heard"); 4th Cir. R. 34(a); 6th Cir. R. 34(a) (providing that "[a] party desiring oral argument

should be required in all courts in all cases, as it surely provides information relevant to the decision whether to grant oral argument and to allocate an appropriate amount of time for it if granted. Presently, the statements submitted by counsel are often boilerplate of the aid-the-decisional-process-of-the-court type. Attorneys should be required to actually argue the need for oral argument, briefly, by giving an overview of the case: How many issues? How complex? Is there a novel question, one of first impression, or an ambiguity as to the applicable rule because of panel inconsistency? To what extent are the parties agreed on the facts and the applicable rules? Is it a summary judgment appeal or a full-record appeal from a jury verdict?

Arguably, staff attorneys engage in some of these inquiries, but theirs is not the perspective of an advocate.<sup>154</sup> Staff attorneys in the D.C. Circuit, for example, may also rate a case they have recommended for oral argument as either complex, regular, or regular/plus based on its level of complexity.<sup>155</sup> But this method further exemplifies a flaw in the process because their knowledge of the case is not comparable to that of appellate counsel; staff attorneys have not lived with the case and have not read the record. And the forms that get filed by counsel early

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must include a statement in the brief explaining why the court should hear oral argument”); 7th Cir. R. 34 (f).

154. D.C. Cir. R. 34(j) (stating that staff attorneys screen new appeals to determine what treatment is appropriate); 1st Cir. I.O.P. VI(A) (stating “[i]nitially, the staff attorney reviews the briefs” and consults with a panel of three judges to decide if the case warrants oral argument); 3d Cir. I.O.P. 2.1 (stating that a panel “determines whether there will be oral argument and the amount of time allocated”); 4th Cir. R. 34(a) (stating “[i]f all of the judges of the panel to which a pending appeal has been referred conclude that oral argument is not to be allowed, they may make any appropriate decision without oral argument including, but not limited to, affirmance or reversal”); 5th Cir. I.O.P. (A) (pertaining to 5th Cir. R. 34 and stating that judges screen cases with assistance from the staff attorney); 6th Cir. I.O.P. 34(a)(4) (stating that “[p]anels determine which of the cases assigned to them will receive oral argument and which do not require oral argument”); 6th Cir. I.O.P. 202(c)(3) (stating that the staff attorney’s office “provides legal support to the court as a whole, rather than to individual judges by making dispositional recommendations in those cases that the court has decided do not require oral argument under Fed. R. App. P. 34(a)(2)”); 8th Cir. R. 34A (a) (stating that the chief judge appoints either a clerk, senior staff attorney, or panel of judges to screen cases); 10th Cir. Practitioner’s Guide VIII(B) (stating that “[i]n screening, the judges review each case to determine whether it should be directed to the oral argument calendar, assigned to a separate calendar without oral argument, or whether the screening panel should dispose of the matter”); 11th Cir. R. 34-3(e) (stating that panels of three judges screen appeals to determine if they warrant oral argument).

155. Levy, *supra* n. 115, at 335.

on as docketing statements or appeal information statements are quite limited and in some cases superficial. They are also timed too early to be really informative. The optimum timing for the statements of counsel regarding oral argument is the date when the reply brief is filed or could have been filed. At that point, the issues between the parties are joined, the conflicting positions are clear, and the nuances known.

An example of a form with some depth is that used by the Second Circuit as its Civil Pre-Argument Statement (Form C).<sup>156</sup> It requires an addendum including a brief description of the nature of the action; the result below; a copy of the notice of appeal and the lower court docket sheet; and copies of all relevant opinions and orders forming the basis for the appeal. A second required addendum must list “the issues proposed to be raised on appeal, as well as the applicable appellate standard of review for each proposed issue.”<sup>157</sup> The problem is that the required disclosures come too soon, only fourteen days from filing the notice of appeal. Appellate counsel coming into the case anew would have little of substance to say before reading the trial transcript, which, absent daily copy, would not generally be available to him or her in time to be read and analyzed. Even where the appellate lawyer was also trial counsel, he or she will rarely be able to specify all issues to be raised. The only safe answer to the form at the fourteen-day mark is something general like “Appellant proposes to raise all issues supported by the record on appeal after he has received and read it.”

### *B. One Size Does Not Fit All.*

Cases assigned to the oral argument track are typically slotted in at standard length, for that circuit, most commonly fifteen minutes.<sup>158</sup> It appears from our survey of the local rules and IOPs that most courts do not give systematic attention to or

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156. See United States Court of Appeals for the Second Circuit, Clerk's Office, *Civil Appeal Pre-Argument Statement (Form C)*, [http://www.ca2.uscourts.gov/clerk/Forms\\_and\\_instructions/pdf/Form%20C%20revised%203-11.pdf](http://www.ca2.uscourts.gov/clerk/Forms_and_instructions/pdf/Form%20C%20revised%203-11.pdf).

157. *Id.*

158. *The Appeals Process*, *supra* n. 142.

differential weight in calendaring a case for oral argument to a multi-party appeal. Probably, this is due to the fact that many multi-party appeals involve the same issue for more than one party, so there is no distinct analysis required by the “extra” party’s presence in the appeal.

But this is often not true. Criminal appeals in particular have the potential to present co-appellants who were all defendants below arguing very different points on appeal. Take, for example, a conspiracy case in which the “kingpin” defendant is convicted upon the testimony of cooperating witnesses with direct knowledge of his crimes; his issues on appeal are not insufficiency of the evidence but may arise from improper restrictions on cross examination, or improper admission of prior crimes evidence under Rule 404(b), or other procedural issues. By contrast, a secondary co-conspirator may have grounds to argue that the evidence of his or her role in the conspiracy was so slight that Rule 29 judgment of acquittal should have been granted. A third defendant may or may not have appellate issues to challenge the conviction but may argue that the sentence imposed under the advisory guidelines was unreasonable in length or involved an incorrect application of a particular guideline.

In this scenario (drawn from our own real-life experience), you have three defendants with three distinct legal issues on appeal who have very little overlap in their cases except as co-conspirators under the indictment. And the time allowed for this oral argument was fifteen minutes to be divided among the three appellants. Recall that the case was deemed substantial enough to warrant oral argument in the first place. But the allocation of fifteen minutes dilutes or undermines that initial judgment. Of course, under the rules, a motion to extend or enlarge the oral argument was permitted,<sup>159</sup> and was made. It was denied. The result? The first party argued for seven minutes, the second argued for four minutes, the third argued for two, and the remaining two minutes were reserved for rebuttal. This is hardly consistent with the grand tradition of oral advocacy that prevailed in the federal courts not so long ago.

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159. See 11th Cir. I.O.P. to 11th Cir. R. 34-4, at 11.

## VII. CONCLUSION

Oral argument is, as Chief Justice Rehnquist has described it, "a three dimensional experience," in which the litigants, counsel, and the court engage in a public, interactive, collegial, adversarial, serious, and immediate experience that cannot be duplicated by exclusive reliance on written briefs.<sup>160</sup> It is an unparalleled opportunity for litigants, through counsel, to face those who will decide their fate, for lawyers to make certain that their arguments are understood, and for judges to understand the facts, legal arguments, and human dimensions of the case to be decided. Appellate oral argument, at its best, is vital to a three-dimensional decisionmaking process. We do not endeavor to argue that speech has primacy over writing in communicative or persuasive value, nor that courts in the United States should revert to an exclusively oral legal practice. We believe, however, that there is significantly greater value in oral argument than presently recognized by federal appellate court rules and practice. We recommend that this value be more fully appreciated and that the federal appellate courts make greater use of oral argument.

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160. Rehnquist, *supra* n. 1, at 1022.

## APPENDIX

<b>Table 1</b> <b>Time Allotted Each Side for Oral Argument*</b>	
<b>Circuit</b>	<b>Time Allotment</b>
First Circuit	Normally no more than 15 minutes
Second Circuit	Generally 10 minutes or less
Third Circuit	Usually 15 minutes
Fourth Circuit	Normally 20 minutes
Fifth Circuit	Most cases are allowed 20 minutes
Sixth Circuit	15 minutes
Seventh Circuit	Many cases get 10 to 20 minutes
Eighth Circuit	Usually 10, 15, or 20 minutes
Ninth Circuit	Generally 10 to 20 minutes
Tenth Circuit	15 minutes
Eleventh Circuit	Typically 15 minutes
D.C. Circuit	15 minutes is most common
Federal Circuit	Ordinarily 15 minutes

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\* See 1st Cir. R. 34 (c)(1); United States Court of Appeals for the Second Circuit, Clerk's Office, *Oral Argument*, [http://www.ca2.uscourts.gov/clerk\\_Forms\\_and\\_instructions/How\\_to\\_appeal/Civil\\_case/Oral\\_argument.htm](http://www.ca2.uscourts.gov/clerk_Forms_and_instructions/How_to_appeal/Civil_case/Oral_argument.htm) (accessed Oct. 16, 2012; copy on file with Journal of Appellate Practice and Process); 3d Cir. IOP 2.1; 4th Cir. R. 34(d); 5th Cir. R. 34.11; 6th Cir. R. 34(f)(1); 7th Cir. Practitioner's Guide, XXVII(B); 8th Cir. R. 34A(b); 9th Cir. Court Structure and Procedures, E(7); 10th Cir. Practitioner's Guide, VIII(C)(1); Telephone Interview by Daniel Drazen, Research Asst. to Prof. Wisotsky, with Tresa Patterson, Deputy Clerk, Off. of the Clerk, U.S. Ct. of App. for the 11th Cir. (July 3, 2012); D.C. Cir. IOP XI(C)(1).



<b>Table 2</b> <b>Percentage of Appeals Terminated on the Merits, by Category</b> <b>(All Circuits)*</b>				
<b>Year</b>	<b>Criminal (Oral Argument)</b>	<b>Criminal (Submitted on Briefs)</b>	<b>Civil (Oral Argument)</b>	<b>Civil (Submitted on Briefs)</b>
1989	55.3	44.7	46.1	53.9
1990	53.3	46.7	41.9	58.1
1991	50.8	49.2	41.8	58.2
1992	50.1	49.9	41.8	58.2
1993	47.0	53.0	36.6	63.4
1994	48.4	51.6	37.4	62.6
1995	48.2	51.8	36.6	63.4
1996	44.8	55.2	36.2	63.8
1997	40.4	59.6	40.6	59.4
1998	41.2	58.8	41.9	58.1
1999	39.5	60.5	40.6	59.4
2000	36.2	63.8	40.4	59.6
2001	33.7	66.3	39.5	60.5
2002	30.2	69.8	40.1	59.9
2003	30.1	69.9	39.6	60.4
2004	31.0	69.0	41.6	58.4
2005	28.3	71.7	41.8	58.2
2006	25.3	74.7	40.3	59.7
2007	26.3	73.7	39.7	60.3
2008	29.4	70.6	41.3	58.7
2009	24.3	75.7	41.2	58.8
2010	24.6	75.4	37.9	62.1
2011	23.1	76.9	36.4	63.6

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\* See Administrative Office of the U.S. Courts, *1989–2011 Annual Reports of the Director: Judicial Business of the United States Courts* (tbl. B-1A).

**Table 3**  
**Average Percentage of Appeals Terminated on the Merits**  
**after Oral Argument or Submission on Briefs**  
**(All Circuits)\***

<b>Year</b>	<b>Oral Argument</b>	<b>Submission on Briefs</b>
1971	65.8	34.2
1972	52.6	47.4
1973	59.4	40.6
1974	61.2	38.8
1975	61.5	38.5
1976	60.5	39.5
1977	54.8	45.2
1978	59.2	40.8
1979	61.3	38.7
1980	62.9	37.1
1981	69.2	30.8
1982	66.9	33.1
1983	63.9	36.1
1984	60.8	39.2
1985	56.3	43.7
1986	53.8	46.2
1987	50.7	49.3
1988	51.2	48.8
1989	48.4	51.6
1990	45.1	54.9
1991	44.4	55.6
1992	43.9	56.1
1993	39.7	60.3
1994	40.6	59.4
1995	39.9	60.1

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\* See Administrative Office of the U.S. Courts, *1971–2011 Annual Reports of the Director: Judicial Business of the United States Courts* (tbl. S-1).

<b>Table 3 (continued)</b> <b>Average Percentage of Appeals Terminated on the Merits</b> <b>after Oral Argument or Submission on Briefs</b> <b>(All Circuits)</b>		
<b>Year</b>	<b>Oral Argument</b>	<b>Submission on Briefs</b>
1996	38.7	61.3
1997	40.1	59.9
1998	41.0	59.0
1999	37.1	62.9
2000	35.4	64.6
2001	32.3	67.7
2002	32.9	67.1
2003	32.5	67.5
2004	31.5	68.5
2005	30.1	69.9
2006	25.9	74.1
2007	27.3	72.7
2008	30.3	69.7
2009	28.5	71.5
2010	26.4	73.6
2011	25.1	74.9

