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# WHEN IS ORAL ARGUMENT IMPORTANT? A JUDICIAL CLERK'S VIEW OF THE DEBATE

Michael Duvall\*

## I. INTRODUCTION

To say that oral argument is important seems unremarkable. In truth, however, this statement may be accurate in only a few close cases. In these cases, litigants and courts might benefit from argument sessions that are longer than those typically granted. But in cases that do not meet this standard, oral argument should not be granted at all.

### *A. Surveying the Conventional Wisdom*

The typical analysis of oral argument answers this question: "Does oral argument matter?"<sup>1</sup> It casts the importance of oral argument as an all-or-nothing proposition that matters in every case or does not matter in any case. Faced with this choice, some judges may respond by conceding that oral argument does not matter at all.<sup>2</sup> For example, many observers have concluded that Justice Thomas places minimal, if any, importance on oral

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1. See e.g. William H. Rehnquist, *The Supreme Court* 243 (Knopf 2001); Robert L. Stern et al., *Supreme Court Practice* 670 (8th ed. BNA 2002); Warren D. Wolfson, *Oral Argument: Does It Matter?* 35 Ind. L. Rev. 451 (2002); R. Bruce Beckner, *Advance Sheet—More Than a Paper Shuffle*, 25 Litig. 57 (Fall 1998); Tony Mauro, *What's Wrong with Oral Arguments?* 12 Leg. Times 9 (Apr. 16, 1990); Robert R. Salzman, *Oral Argument: Improving Appellate Advocacy*, 12 Natl. L.J. 15 (Mar. 12, 1990).

2. Wolfson, *supra* n. 1, at 451.

argument. As Supreme Court visitors have observed, he doesn't typically speak or ask questions during oral argument.<sup>3</sup> Justice Thomas has succinctly explained his trademark silence, stating, "[I]f I wanted to talk a lot, I would be on the other side of the bench."<sup>4</sup> He has also stated that oral argument is "not the real meat" of the Supreme Court's role.<sup>5</sup> This view is likely shared by other judges, for as one writer concluded, "most judges will admit . . . an oral argument rarely wins an appellate case."<sup>6</sup>

Many lawyers also believe that oral argument is not important. One author asserts that "[m]ost lawyers can count on the fingers of one hand the number of times oral argument actually seemed to make a difference,"<sup>7</sup> and another states that "[c]onventional wisdom holds that oral argument is less important than in the past."<sup>8</sup>

Lawyers' and judges' belief in the conventional wisdom might result from their exposure to a trend in the federal courts of appeals suggesting that oral argument is unimportant—or less important than in the past: The time allotted for oral argument has consistently decreased over time. In the Supreme Court, oral argument originally could last for days; was restricted to two hours per attorney in 1849; was reduced again to periods consisting of forty-five to ninety minutes per side in 1911; was cut to thirty minutes or an hour per side in 1931; and now stands at thirty minutes per side.<sup>9</sup> Today, federal appeals courts typically limit oral argument to a period of from ten to fifteen minutes per side.<sup>10</sup>

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3. Michael A. Fletcher & Kevin Merida, *Jurist Mum Come Oral Arguments; Reticence on Bench Perplexes Observers*, Wash. Post A11 (Oct. 11, 2004).

4. *Id.* Justice Thomas's silence has also resulted in unrivaled attention when he does speak: "Like E.F. Hutton, when Thomas speaks, everybody listens." David Lehrman, *The New Order: As Alito Takes His Seat, The Justices Get a Change of Scenery*, 29 Leg. Times 60 (Mar. 6, 2006).

5. Tony Mauro, *Courtside—When Planets Collide; Is the Court Above It All? Recent Events Demonstrate a Strong Urge to Go Its Own Way*, 27 Leg. Times 10 (Mar. 29, 2004).

6. Stephen Stark, *Law Schools Must Teach Writing as Discrete Skill*, 6 Leg. Times 14 (Sept 19, 1983).

7. Robert E. Shapiro, *Advance Sheet—No Argument*, 27 Litig. 59, 59 (Summer 2000).

8. Salman, *supra* n. 1, at 15.

9. See Rehnquist, *supra* n. 1, at 242; Nancy Winkelman, *Just a Brief Writer?* 29 Litig. 50, 50-51 (Summer 2003).

10. Winkelman, *supra* n. 9, at 51.

All of this makes it easy to understand why lawyers and judges might ask whether oral argument still matters. But that is the wrong question. The better, if less conventional, question is, "When does oral argument matter?"

### *B. Answering a Less Conventional Question*

Oral argument significantly impacts the outcomes of only very close cases. Of course, the likelihood that a case is close increases at each appellate level, as parties should be less inclined over time to pursue arguments that have little chance of success, and controlling precedent is less likely to exist as the case survives various levels of appellate review.<sup>11</sup> It follows that oral argument is almost always necessary in the Supreme Court, as any case in which certiorari is granted presumably presents a close question with no clear answer.<sup>12</sup> In fact, Chief Justice Rehnquist once admitted that "[i]n a significant minority of the cases in which I have heard oral argument, I have left the bench feeling different about a case than I did when I came on the bench."<sup>13</sup> Justice Scalia has also recognized the importance of oral argument, stating that if a lawyer satisfies one or two critical questions during oral argument, that attorney will have his vote.<sup>14</sup> And at least one study of oral argument in the Supreme Court concluded that oral argument is "at times determinative of the outcome."<sup>15</sup>

11. See Richard A. Posner, *From the Bench—Convincing a Federal Court of Appeals*, 25 Litig. 3, 4 (Winter 1999) (noting of most civil appeals that "there probably is no dispositive precedent—otherwise the case would probably not have gotten to the point of an orally argued appeal").

12. Last term, the Supreme Court received 8,521 certiorari petitions. The Court has been issuing approximately seventy-five signed opinions in recent terms. Tony Mauro, *After a Year on the Court, Alito Holds Forth*, 30 Leg. Times 12 (Feb. 12, 2007).

13. Rehnquist, *supra* n. 1, at 243.

14. Jeffrey Cole, *Discovery: An Interview with Steve Shapiro*, 23 Litig. 19, 24 (Winter 1997).

15. Stephen L. Wasby et al., *The Supreme Court's Use of Per Curiam Dispositions: The Connection to Oral Argument*, 13 N. Ill. U. L. Rev. 1, 30 (1992); cf. Tony Mauro, *Courtside—Doubting Roberts*, 30 Leg. Times 10 (July 9, 2007) (indicating that the Chief Justice tended during the 2007 Term to ask more questions of attorneys for the eventual losing parties, and referring to both the Chief Justice's own earlier study of the more-questions-to-the-loser phenomenon and that reported in Sarah Levien Shullman, *The Illusion of Devil's Advocacy: How the Justices of the Supreme Court Foreshadow Their Decisions During Oral Argument*, 6 J. App. Prac. & Process 271 (2005)).

In comparison, in the vast majority of cases heard in appellate courts other than the Supreme Court, the conclusions that judges reach after consulting only the briefs will not be swayed by oral argument.<sup>16</sup> This suggests that most cases, even in the federal courts of appeals, are not particularly close, as oral argument would not affect their outcomes. But while oral argument may not matter in most cases, this corollary is also true: When oral argument does matter—that is, when it is held in truly close cases—it really matters.

### *C. Oral Argument in Close Cases*<sup>17</sup>

It is important to note at the beginning of this discussion that although this article emphasizes oral argument's effect on the outcome of close cases, oral argument can also be important as an institutional matter. Allowing the parties their day in court before a judicial panel furthers their conviction that they have received the opportunity to be heard that is guaranteed by due process. And judges do enjoy the collegiality that is inevitably built over the course of scheduled argument weeks. Even considering these significant effects of oral argument, its real importance can be seen through its effect on the outcomes of close cases.

Oral argument can affect the outcome in a close case for several reasons. One is that, as Judge Posner has admitted, judges are sometimes “very badly in need of the advocates’ help” at oral argument, owing to a combination of the lawyers’ superior familiarity with their cases and appellate judges’ generalist nature.<sup>18</sup> Conversely, lawyers can be aided by questions from the bench, as a judge may identify an angle that the lawyers have overlooked or have not fully developed.<sup>19</sup> Additionally, just as a jury evaluates the credibility of witnesses

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16. See Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* 294 (rev. 1st ed., Natl. Inst. for Trial Advocacy 1996); Ruggero J. Aldisert, *The Appellate Bar: Professional Responsibility and Professional Competence—A View from the Jaundiced Eye of One Appellate Judge*, 11 Cap. U. L. Rev. 445, 456 (1982); Shapiro, *supra* n. 7, at 59; Stark, *supra* n. 6, at 14; see also *infra* notes 38-43 and accompanying text.

17. Wolfson, *supra* n. 1, at 454.

18. Posner, *supra* n. 11, at 3.

19. Jeffrey Cole, *My Afternoon with Alex: An Interview with Judge Kozinski*, 30 Litig. 6, 18 (Summer 2004).

at trial, judges gain a sense of attorneys' credibility based on the candid nature of oral argument.<sup>20</sup> Another reason for oral argument's outcome-determinative nature in close cases is that, as Justice Ginsburg has noted, judges use oral argument to persuade one another.<sup>21</sup> For example, during a recent oral argument, Justices Scalia and Souter sparred with each other to the point that the attorney who argued the case later quipped, "I almost sat down."<sup>22</sup> Observers speculated that each Justice was attempting to persuade Justice Alito, who was not on the Court the first time the case had been argued.<sup>23</sup>

Another significant impact of oral argument in the close case is that it encourages judicial conferencing in a face-to-face setting immediately after the argument is heard.<sup>24</sup> While judges can and do discuss cases long after argument through the exchange of memoranda, the undivided focus of a conferencing panel—undeterred by the potential distractions in the chambers—has a certain intrinsic value that cannot otherwise be duplicated.<sup>25</sup>

And while these functions are all certainly important, the ultimate impact of oral argument is that it focuses the court's attention on the "real" issues in the case—i.e., those whose resolution will determine the outcome. Too often, the time and energy of judges (and their clerks) are devoted to resolving issues that are not dispositive of a case. Oral argument can prompt the judges to "zero in" on the precise turning point in an important case, which helps both the courts and litigants achieve a thorough, correct, and timely decision. In a "fifty/fifty," "fifty-one/forty-nine," or even a "sixty/forty" case, the importance of this impact cannot be overstated.

20. *A Practitioner's-Eye View of the Court: Five Lawyers Who Argued Cases Before the Supreme Court This Term Offer Post-Game Assessments and Prognostications*, 25 Leg. Times 12 (Aug. 12, 2002) (quoting Supreme Court advocate Carter G. Phillips); Salmon, *supra* n. 1, at 15.

21. Ruth Bader Ginsburg, *Appellate Advocacy: Remarks on Appellate Advocacy*, 50 S.C. L. Rev. 567, 569 (1999); *see also* Wolfson, *supra* n. 1, at 454.

22. Matt Stearns, *High Court Hears Kansas Death Penalty Case*, Kansas City Star A1 (Apr. 25, 2006) (describing oral argument in *Kan. v. Marsh*, \_\_\_ U.S. \_\_\_, 126 S. Ct. 2516 (2006)).

23. *Id.*

24. *See* Myron H. Bright & Richard S. Arnold, *Oral Argument? It May Be Crucial!* 70 ABA J. 68, 69 (1984).

25. *See* Aldisert, *Winning on Appeal*, *supra* n. 16, at 295.

Therefore, to say that oral argument is unimportant because it rarely matters or because it only matters in a few cases misses the point. In the few cases in which oral argument matters, it is critical. Observations about the diminishing importance of oral argument fail, then, to focus on its proper role. While it is appropriate only in a small number of cases, its impact in those cases can be the difference between winning and losing. In other words, in truly close cases, oral argument is vital.

## II. THE CASE FOR LONGER ARGUMENTS

### *A. Aiding the Court*

Frequently, oral argument forces an attorney to explain a complex case in a simple form. Appellate judges (and their clerks) sometimes know little or nothing about the cases before them—even after reading the briefs.<sup>26</sup> This is not surprising, considering the amount of time that attorneys spend entrenched in the law and facts of their cases, while appellate judges do not enter the fray until much later. Moreover, the lawyers arguing a particular case are often specialists in the field at issue such as ERISA, tax, antitrust, or patent law, while judges (even those in federal courts of limited jurisdiction) are generalists who are probably unfamiliar with every nuance of that particular area of the law. As a result, an attorney must sometimes use oral argument to provide background information and establish context. In a ten or fifteen minute argument, however, this contextual information must often be dispensed with to accommodate the more important legal argument.<sup>27</sup> These time constraints often seem to make attorneys feel that they must jump full speed into the middle of the key issue without effectively leading the court down the coherent path of background detail that would help the judges understand the nature of the matters at issue. Additional argument time would

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26. Posner, *supra* n. 11, at 3; *see generally* Bright & Arnold, *supra* n. 24.

27. Establishing the necessary background should normally be accomplished in the brief. But for those cases in which the oral argument is truly necessary, emphasizing the relevant background details at oral argument can become critical, because a case may turn on one key fact.

allow attorneys in these cases to present their key points more effectively after orienting the court with the necessary background information.

The obvious danger is that background details can, of course, be superfluous and boring rather than helpful. The line between an efficient, informative argument and a confusing soliloquy is indeed fine; attorneys can spend too much time summarizing the case, chronicling its history, stating background facts, or describing evidence.<sup>28</sup> But when the factual background of the case matters, it usually matters a great deal. Lawyers should have the opportunity to provide the court with the detailed information it needs in these fact-intensive cases, even though this will often require longer oral arguments.

### *B. Protecting the Integrity of the Argument*

Another reason for courts to consider allowing additional argument time is that some judges can hijack an argument. For example, a commentator once contended that the dominance of the Rehnquist Court's "conservative wing" over oral argument negatively impacted its overall quality.<sup>29</sup> It has since become common knowledge that Justice Scalia alone can dominate an argument.<sup>30</sup> And judicial hijackers are not necessarily all conservatives. Justice Ginsburg, like Justice Scalia, has been described as "overeager,"<sup>31</sup> and Justice Breyer has been known to ask long-winded hypothetical questions that cause lawyers to lament the loss of their argument time.<sup>32</sup> Expanding oral argument could protect attorneys against the worst effects of hijacking by allowing them sufficient time both to respond to the judges' questions and return to their arguments. On the other hand, however, additional argument time could simply extend the hijacking.

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28. Paul R. Michel, *Effective Appellate Advocacy*, 24 Litig. 19, 21 (Summer 1998).

29. Mauro, *supra* n. 1, at 9.

30. Tony Mauro, *Pledge Challenger Faces the Justices: Hearing Suggests Court Unlikely to Speak with One Voice when Ruling on the Constitutionality of Phrase "Under God,"* 27 Leg. Times 9 (Mar. 29, 2004).

31. Tony Mauro, *Awaiting Roberts' New Rules: As Term Begins, All Eyes Turn to the Incoming Chief*, 28 Leg. Times 1 (Oct. 3, 2005).

32. Lehrman, *supra* n. 4, at 60.



### *C. The Caveats*

The dangers associated with expanded time must be guarded against by effective self-policing. This proposal to expand the length of certain oral arguments is not an encouragement for attorneys to argue more points or to provide needless details; rather, attorneys should argue fewer points and always strive for brevity. Simply put, lawyers must always feel comfortable to “sit down.”<sup>33</sup>

Even if they knew that longer arguments would be available only in the most important cases, it is doubtful that many judges would, at first blush, agree that attorneys should be given more time to speak. After all, some believe that attorneys have too much time as it is. For example, Judge Kozinski of the Ninth Circuit believes that lawyers simply “don’t have much to say” during oral argument.<sup>34</sup>

On balance, though, oral argument would benefit more from expanded time than it would be harmed. Of course, no court will be receptive to a proposal that simply increases the time allotted for all arguments, as that would create a heavy burden for the judges and their staff. In order to implement this proposal to expand the time for arguments in close cases, courts must also reduce the number of cases in which they grant argument at all.

### III. ORAL ARGUMENT SHOULD BE HEARD IN FEWER CASES

If courts can continue to reduce the overall number of cases in which argument is granted,<sup>35</sup> they can correspondingly

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33. Cole, *supra* n. 19, at 18; see also John W. Davis, *The Argument of an Appeal*, 3 J. App. Prac. & Process 745, 756 (2001) (reprint of 26 ABA J. 895 (Dec. 1940)). Indeed, given the studies indicating that judges tend to ask more questions of the losing party, see *supra* n. 15, attorneys should feel especially confident about sitting down when the bench appears cold.

34. Cole, *supra* n. 19, at 18.

35. According to the records of the Administrative Office of the United States Courts, over a twelve-month period between 2004 and 2005, approximately seventy percent of federal appeals, excluding cases in the Federal Circuit, were decided without oral argument, while between 2001 and 2002, just over sixty-seven percent of federal appeals were decided without oral argument. See Admin. Off. of the U.S. Cts., *2005 Annual Report of the Director: Judicial Business of the United States Courts* 40 tbl. S-1 (U.S. Govt. Printing Off. 2005) (“U.S. Courts of Appeals—Appeals Terminated on the Merits After

increase the allotted argument time in each remaining case without overextending their scarce resources. Studies examining the tendencies of judges to change their positions after oral argument show that oral argument is only necessary in a small percentage of cases. When compared to the percentage of cases in which oral argument is currently granted (even in the most restrictive jurisdictions), it seems that the number of arguments can be reduced.

Judge Richard Arnold of the Eighth Circuit concluded that oral argument changed his mind in seventeen percent of the cases that he considered over a ten-month period.<sup>36</sup> In another study, Judge Dubina of the Eleventh Circuit estimated that oral argument has changed his mind in no more than ten percent of the cases that he heard.<sup>37</sup> Judge Michel of the Federal Circuit estimated that he reached a “firm inclination” based on the briefs alone in eighty percent of all cases, and that oral argument failed to “flip” him in eighty percent of those appeals.<sup>38</sup>

These statistics suggest that it would be very generous to assume that oral argument can change a judge’s mind in even twenty percent of cases,<sup>39</sup> and that it might be more accurate to assume that it can change a judge’s mind in no more than ten percent of cases.<sup>40</sup> Whichever set of statistics is more accurate, it seems reasonable to conclude that the number of cases in which oral argument is granted (approximately thirty percent<sup>41</sup>) exceeds the number of cases in which oral argument actually matters.

Justice Ginsburg has offered an observation that amplifies the need to reduce the number of oral arguments: “Oral

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Oral Hearings or Submission on Briefs during the 12-Month Period ending September 30, 2005,” showing totals calculated without data for Federal Circuit); Admin. Off. of the U.S. Cts., *2002 Annual Report of the Director: Judicial Business of the United States Courts* 37 tbl. S-1 (U.S. Govt. Printing Off. 2002) (“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, 2002,” showing totals calculated without data for Federal Circuit).

36. Bright & Arnold, *supra* n. 24, at 69.

37. Joel F. Dubina, *How to Litigate Successfully in the United States Court of Appeals for the Eleventh Circuit*, 29 Cumb. L. Rev. 1, 8 (1998).

38. Michel, *supra* n. 28, at 21.

39. See e.g. Wolfson, *supra* n. 1, at 453.

40. *Id.* at 454.

41. As the Annual Reports cited in note 35 indicate, this thirty-percent figure has remained relatively constant for the past several years.

argument is fleeting—here today, it may be forgotten tomorrow, after the court has heard perhaps six or seven subsequent arguments.”<sup>42</sup> While modern arguments are indeed recorded for later review, the practical reality is that many oral arguments are simply forgettable. Granting fewer oral arguments would better allow for a lasting impact in truly close cases.

Although some judges might embrace a movement to reduce the number of oral arguments, not all would agree with this proposal. In fact, some judges believe that oral argument should be “freely permitted on all matters of substance” and on those matters that are “dispositive.”<sup>43</sup> As they see it, there is always the potential to change the judges’ minds as well as the additional opportunity to focus the issues with oral argument.<sup>44</sup> The fact is, however, that oral argument will simply have no determinative impact in the vast majority of cases.

#### IV. CONCLUSION

Oral argument can be critical, but only in a very small percentage of cases. This suggests both that oral argument should be granted in fewer cases, and that the important cases in which oral argument is granted should receive additional time.

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42. Ginsburg, *supra* n. 21, at 567-68.

43. J. Thomas Greene, *From the Bench—Oral Argument in the District Court*, 26 Litig. 3, 3 (Spring 2000) (acknowledging, however, that “about half of all federal appeals . . . are now decided solely on the briefs”).

44. *Id.* at 3 (citations omitted).