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# The Case for Oral Argument in the Supreme Court of Oklahoma

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## THE CASE FOR ORAL ARGUMENT IN THE SUPREME COURT OF OKLAHOMA

JOSEPH T. THAI\* & ANDREW M. COATS\*\*

The Oklahoma Supreme Court rarely permits oral argument in cases it accepts for review. In the last decade alone, our state's highest court (the Court) has decided over a thousand appeals without—and hardly more than a dozen with—oral argument. As a result, for nearly every case the Court deems of sufficient public importance to review, it foregoes a public hearing at which counsel for the parties may address the Court and answer its questions. Instead, the Court relies solely on written submissions.

This practice starkly contrasts with that of the Supreme Court of the United States (Supreme Court), which hears argument in most of its cases. It also pales in comparison to the practice of other state supreme courts, the majority of which hear oral argument regularly. And it is dwarfed by the practice of the Tenth Circuit Court of Appeals, which reviews federal cases from a six-state region including Oklahoma and heard over 4600 arguments in the last decade.

Things were not always so in Oklahoma. Up until 1933, the Oklahoma Supreme Court heard oral argument as a rule rather than an exception. The historical reason for the Court's abandonment of the practice—a crushing mandatory docket—no longer applies. The modern Court has statutory discretion to “cherry pick” the cases it decides. Moreover, considerable reasons counsel for the return of oral argument in the state's highest court.

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The article has improved through the thoughtful comments of friends and colleagues. Its opinions and shortcomings remain our own. We would like to thank Jennifer Gerrish, Joel Wegemer, Darin Fox, Kenton Brice, William Gaskill, and Erin Means for their invaluable research assistance.

As we explain below, oral argument serves several critical functions that a decision based only on written briefs cannot fulfill—no matter how correct that decision may seem. First, based on observations by U.S. Supreme Court justices as well as our own experience, we believe oral argument substantially improves judicial decision-making. At a minimum, it tests preliminary views judges may have about a case. What is more, the crucible of open adversarial deliberation may rectify mistaken reasoning and even change results.

Second, oral argument allows outside participation and lends transparency to an otherwise largely invisible and secretive deliberative process. Giving both sides to a case their day in court, and opening the hearing to the public and media, go a long way toward demystifying the judicial process for lay parties involved and instilling general confidence in the integrity of the outcome.

Third, oral argument benefits attorneys and the people they represent. While lawyers in Oklahoma have ample opportunities to present their cases at the trial level to finders of fact, the reluctance of the Oklahoma Supreme Court as well as other Oklahoma appellate courts to hold hearings deprives the bar of opportunities to practice the art of oral advocacy. This deprivation also works to the detriment of the public, as the prospect of critical questioning from the bench improves the quality and integrity of legal representation.

For these reasons, we conclude that the routine failure of the Oklahoma Supreme Court to permit—indeed, to require—oral argument does a serious disservice to the parties, the bar, the judicial system, and the people of the State of Oklahoma. For the same reasons, we also advocate the regular use of oral argument for the Oklahoma Court of Criminal Appeals and the intermediate Oklahoma Court of Civil Appeals, both of which hear some oral argument but decide most cases solely on the briefs.

### *I. Historical and Comparative Practices*

At the outset, we note that we know each member of the Oklahoma Supreme Court and hold them each in high regard as persons of high intellect, energy and ability, common sense and good judgment, and the highest honor and integrity. However, we believe the Court collectively errs by failing to hold oral argument on a regular basis. An exposure of that error begins with the historical reason for the Court's abandonment of oral argument.

#### *A. Oral History: The Oklahoma Supreme Court*

Prior to 1933, parties enjoyed a right to argue orally before the Supreme Court of Oklahoma. During that period, the rules of the Court instructed

“[a]ttorneys desiring to make oral arguments” to “file notice thereof” with the court clerk.<sup>1</sup> Under this rule, “oral argument existed as a matter of right.”<sup>2</sup>

However, in the decade leading up to 1933, a flood of litigation swamped the Oklahoma Supreme Court. As former Chief Justice Fletcher Riley explained, “There is nothing more productive of litigation than the discovery of oil.”<sup>3</sup> In that decade, more than 10,000 cases were filed in the Court, making litigation in Oklahoma “more voluminous . . . than elsewhere in the Union—in the English speaking world.”<sup>4</sup> As a result, “[j]ustice [was] so delayed by congestion of the dockets” that “a denial of justice was approximated.”<sup>5</sup>

In response, the Court amended its oral argument rule in 1933. The new rule stated that “[n]o oral argument will be granted as a matter of right.”<sup>6</sup> Rather, as Riley explained, it would be granted “in the exercise of discretion, depending on the importance of the case.”<sup>7</sup>

At the time, the Oklahoma Supreme Court recognized that adoption of discretionary oral argument was “revolutionary, but requisite to rationalization of our business.”<sup>8</sup> Nevertheless, assurance came from the Court that oral argument would not be denied “arbitrarily,” that “[n]o request for oral argument is denied without careful consideration, and if there is any question that time should be allowed for argument, the request is granted.”<sup>9</sup> Indeed, as a member of the Court noted, one year after the new rule’s adoption, “[v]ery few, if any” requests for oral argument had been denied.<sup>10</sup>

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1. OKLA. SUP. CT. R. IV (repealed 1933), reprinted in RULES OF PRACTICE FOR THE OKLAHOMA LAWYER IN THE VARIOUS COURTS, BOTH STATE AND FEDERAL BEFORE WHICH HE APPEARS 2 (1917).

2. Fletcher Riley, *Appellate Judicial Methods in Preparation, Conduct and Disposition of Causes, Orally Argued and Necessary for Reform in Methods*, 4 OKLA. ST. B.J. 110, 114 (1933) [hereinafter Riley, *Appellate Judicial Methods*].

3. *Id.* at 112. As an example, Riley noted that “[o]ne may have a perfect title to his farm, and may have lived upon it in peace and security for years, but in the event oil is discovered upon the land or in the vicinity, ipso facto the title is defective.” *Id.* Riley also blamed “[l]egislative experimentation in the field of social and economic science” for “add[ing] to our labors.” *Id.*

4. *Id.* at 111; see also Earl Welch, *Administration of Justice*, 4 OKLA. ST. B.J. 199, 199 (1934) (“[W]e do observe in every decade, if not year by year, that the administration of justice is a growing problem and there is more and more justice to be administered.”).

5. Fletcher Riley, *Solving the Law’s Delay in Oklahoma*, 4 OKLA. ST. B.J. 195, 195 (1934).

6. OKLA. SUP. CT. R. 17 (amended 1997), in 159 OKLA. REP. viii (1932).

7. Riley, *Appellate Judicial Methods*, *supra* note 2, at 114.

8. *Id.*

9. Welch, *supra* note 4, at 201.

10. *Id.* The new rule apparently did discourage requests, however, as the Court saw “a

Over time, the Oklahoma Supreme Court's commitment to granting oral argument as a matter of discretion dropped precipitously. By the 1970s, the Court was hearing argument in only ten to twenty percent of its cases.<sup>11</sup> Even worse, in the last decade, the Court heard barely more than a dozen oral arguments out of more than a thousand published cases.<sup>12</sup>

A telling rule change accompanied this increasingly miserly practice. In 1933, the Oklahoma Supreme Court's oral argument rule instructed attorneys motioning for argument to set forth "the reasons" why it is necessary.<sup>13</sup> Now, after amendment in 1997, the rule requires that attorneys set forth "the exceptional reason" why it is necessary.<sup>14</sup> In light of this more stringent

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sharp decline" in the quantity of oral argument. *Id.* The Court also managed to speed up the waiting period for oral argument. See Fletcher Riley, *Powers of Courts and Vitalization of Judicial Powers in the State of Oklahoma*, 5 OKLA. ST. B.J. 44, 47-48 (1934).

11. See Stanford S. McConkie, *Decision-Making in State Supreme Courts*, 59 JUDICATURE 337, 338 (1975-1976).

12. Precise numbers on the work of Oklahoma courts, including the Oklahoma Supreme Court, can be hard to come by. The Court apparently does not keep formal records of the number of oral arguments that it holds. However, if and when oral argument is held, the Court seems to make reference to it in published opinions. Our searches of the Court's opinions in the Westlaw database disclosed fourteen references to oral argument in the past decade. That number is consistent with estimates given to us by personnel in the clerk's office at the Court. According to the Court's Fiscal Year Annual Reports and our Westlaw research, in that period, it decided over one thousand cases by published opinion. See ADMIN. OFFICE OF THE COURTS, SUPREME COURT OF THE STATE OF OKLA., FISCAL YEAR 2007 REPORT (2007); ADMIN. OFFICE OF THE COURTS, SUPREME COURT OF THE STATE OF OKLA., FISCAL YEAR 2006 REPORT (2006); Oklahoma State Courts Network, Index of Available Documents, Oklahoma Supreme Court Cases, Decisions Published in 1998, <http://www.oscn.net/applications/oscn/Index.asp?ftdb=STOKCSSC&year=1998&level=1> (last visited June 9, 2009); Oklahoma State Court Network, Index of Available Documents, Oklahoma Supreme Court Cases, Decisions Published in 1997, <http://www.oscn.net/applications/oscn/Index.asp?ftdb=STOKCSSC&year=1997&level=1> (last visited June 9, 2009).

In all fairness, the Oklahoma Supreme Court does employ four referees who regularly hold hearings (usually three to four a week) on applications for the high court to assume original jurisdiction. Attorneys argue before a referee who then refers the application to the justices with a recommendation and proposed order disposing of the case. Typically, the justices deny the application without hearing the matter themselves. While these hearings may function somewhat like oral argument and deserve commendation, they do not fulfill the essential functions of oral argument that we have outlined in this article. First, oral argument by proxy cannot substitute for the deliberative experience of judges and attorneys directly discussing a case with each other. See *infra* Part II. Second, these delegated hearings do not give litigants a day in court in front of the judges ultimately deciding their fates, and thus fail to realize the full public value of open and accessible judicial deliberation. See *infra* Part III. Finally, given that the bulk of the Oklahoma Supreme Court's docket concerns appellate rather than original matters, these hearings comprise a relatively small part of the tribunal's caseload.

13. OKLA. SUP. CT. R. 17 (amended 1997), in 159 OKLA. REP. at viii (1932).

14. OKLA. SUP. CT. R. 1.9, available at <http://www.oscn.net/applications/oscn/Deliver>

standard, and the modern Court's even stricter application of it, a study of Oklahoma's appellate system by the National Center for the Courts has characterized oral argument as "the rare exception in the state."<sup>15</sup>

The plunge in oral argument at the Oklahoma Supreme Court has persisted even though, since 1968, the Court has enjoyed the discretionary power to pick and choose the cases it reviews.<sup>16</sup> Using that power, the Court has whittled its docket to around a hundred published decisions annually.<sup>17</sup> Yet the Court now seldom hears more than one argument a year. Requests for oral argument "have usually been summarily denied, even where important issues are involved."<sup>18</sup>

### *B. Oral History: The U.S. Supreme Court*

To appreciate the "revolution" of oral argument at the Oklahoma Supreme Court, consider the oral argument history of another tribunal of last resort. From the start, oral argument has been the rule rather than the exception at the Supreme Court of the United States. In fact, early on, the great Chief Justice John Marshall often allowed oral argument in a single case to proceed for days.<sup>19</sup> He and his colleagues spent five days, for instance, hearing argument in the landmark case of *Gibbons v. Ogden*.<sup>20</sup> In modern times, the U.S. Supreme Court has limited oral argument in most cases to an hour, but the importance of oral argument "has not diminished."<sup>21</sup>

When the U.S. Supreme Court confronted its own docket congestion crisis, it did not take the hatchet to oral argument. Instead, its members successfully

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15. MICHAEL J. HUDSON, *THE APPELLATE SYSTEM IN OKLAHOMA* 3 (1980). Authorities on appellate practice within the state concur. See 5 HARVEY D. ELLIS, JR. & CLYDE A. MUCHMORE, *OKLAHOMA APPELLATE PRACTICE* § 1:20, at 22 (2006) ("The [Oklahoma] Supreme Court rarely grants oral argument, and when it does so it is usually in an original action.").

16. See 20 OKLA. STAT. § 30.1 (2001); OKLA. SUP. CT. R. 1.178, available at <http://www.oscn.net/applications/oscn/DeliverDocument.asp?CiteID=73609>.

17. See *supra* note 12 and accompanying text.

18. See ELLIS & MUCHMORE, *supra* note 15, § 14:71, at 452 n.1, § 14:74, at 455.

19. See Charles Fried, *Oral Argument*, in *THE OXFORD GUIDE TO THE SUPREME COURT OF THE UNITED STATES* 710 (Kermit L. Hall ed., 2005); Robert H. Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 A.B.A. J. 801 (1951).

20. 22 U.S. (9 Wheat.) 1 (1824); see WILLIAM H. REHNQUIST, *THE SUPREME COURT* 242 (1987).

21. Jackson, *supra* note 19, at 801. The modern U.S. Supreme Court's allotment of half an hour per side is "about right," according to Chief Justice William Rehnquist, because the Supreme Court usually limits its review to "pure questions of law" rather than evidentiary ones, and because "[a] good lawyer should be able to make his necessary points" in that time. REHNQUIST, *supra* note 20, at 242.

lobbied Congress in 1925 to make a substantial part of its jurisdiction discretionary.<sup>22</sup> At the height of another congestion crisis in the early 1980s, the Supreme Court heard over 250—and sometimes nearly 300—arguments a year<sup>23</sup> before Congress eliminated most of the vestiges of its mandatory jurisdiction in 1988.<sup>24</sup> In the last decade, the Supreme Court has heard argument in most of the cases it has decided on the merits, usually over eighty a year.<sup>25</sup>

As revealing as the quantity of arguments heard by the U.S. Supreme Court are the rules by which it decides to hear them. Prior to 1980, Supreme Court Rule 38.1 stated that the high court was “reluctant to accept the submission of briefs, without oral argument” and that, “[n]otwithstanding any such submission, the Court may require oral argument by the parties.”<sup>26</sup> In 1990, the Supreme Court went further and deleted all references to submission of cases without oral argument.<sup>27</sup> Currently, the provision which addresses oral argument, Supreme Court Rule 28, simply gives instructions for arguing orally. The implication is clear: the U.S. Supreme Court expects oral argument in the cases it accepts for consideration.<sup>28</sup>

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22. See Bennett Boskey & Eugene Gressman, *The Supreme Court Bids Farewell to Mandatory Appeals*, 121 F.R.D. 81, 85-86 (1989).

23. See LEE EPSTEIN ET AL., *THE SUPREME COURT COMPENDIUM: DATA, DECISIONS, AND DEVELOPMENTS* 74 (4th ed. 2007).

24. See Boskey & Gressman, *supra* note 22, at 93-97.

25. See The Statistics, *The Supreme Court*, 113-22 HARV. L. REV. (No. 1) (volumes listing statistics for each Supreme Court term from 1999-2008).

26. EUGENE GRESSMAN ET AL., *SUPREME COURT PRACTICE* 753 (9th ed. 2007) (quoting SUP. CT. R. 38.1 as adopted in 1980 (quotations omitted)).

27. See *id.*

28. While the U.S. Supreme Court generally requires oral argument, and does not allow counsel to request a decision without one, its rules leave open the possibility of “a summary disposition on the merits.” See SUP. CT. R. 16.1, 18.12. The Supreme Court has resorted to “summary disposition” in select cases, mainly mandatory appeals (now rare) that “clearly had been correctly decided below and that otherwise presented no substantial issue warranting the Court’s time and attention.” Boskey & Gressman, *supra* note 22, at 92. However, the Supreme Court has occasionally summarily reversed a case on its discretionary certiorari docket. See *Wyrick v. Fields*, 459 U.S. 42, 50 (1982) (Marshall, J., dissenting) (stating that “summary reversal is an exceptional disposition” and “should be reserved for situations in which the applicable law is settled and stable, the facts are not disputed, and the decision below is clearly in error”).

The U.S. Supreme Court’s practice of summarily disposing of a case on the merits has been controversial and infrequent, although its numbers rose in the decades prior to the 1988 elimination of most of its mandatory jurisdiction. See *Montana v. Hall*, 481 U.S. 400, 405 (1987) (Marshall, J., dissenting) (noting objections registered by justices to summary dispositions); *Florida v. Meyers*, 466 U.S. 380, 386 (1984) (Stevens, J., dissenting) (observing that, since 1981, the Supreme Court had decided nineteen cases summarily, “[a]ll 19 were



### C. Comparative Practices

In stark contrast to the Oklahoma Supreme Court, the U.S. Supreme Court presumes and generally requires oral argument. Like a tale of two cities, it is the best of times and the worst of times for oral argument. Through dockets thick and thin, the U.S. Supreme Court has stuck with oral argument as a matter of practice. In the last decade alone, it has heard over 800 arguments.<sup>29</sup> On the other hand, though the primary reason for elimination of oral argument as a matter of right has itself been eliminated, the Oklahoma Supreme Court still routinely—if not reflexively—denies oral argument. It has heard little more than a dozen over the last ten years.<sup>30</sup>

This dearth of oral argument cannot be distinguished on the basis of some federal-state difference. For at least decades now, the high courts of a large majority of states have held oral argument regularly.<sup>31</sup> That has been the case with the supreme courts in our neighboring states, all of which routinely hear many more arguments than the Oklahoma Supreme Court.<sup>32</sup> For example, on the low end, Arkansas hears argument in about twenty percent of its cases.<sup>33</sup> On the high end, Missouri and Kansas hear argument in almost 100 percent of their cases.<sup>34</sup> Just last year, the Kansas Supreme Court heard more than 160

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decided on the petition of the warden or prosecutor, and in all he was successful in obtaining reversal of a decision upholding a claim of constitutional right.”); Ernest J. Brown, *Foreword: Process of Law*, 72 HARV. L. REV. 77 (1958). Nevertheless, the Supreme Court continues to dispose of the great majority of its cases only after full briefing and oral argument. During its 2007-2008 term, for example, the Supreme Court decided a total of seventy-three cases by written opinion, only three of them without oral argument. See Supreme Court of the United States, 2007 Term Opinions of the Court, <http://www.supremecourtus.gov/opinions/07slip/opinion.html> (last visited June 9, 2009) (counting per curiam opinions without argument dates to be summary dispositions).

29. See *supra* note 25.

30. See *supra* note 12.

31. See Nat’l Center for State Courts, Appellate Court Oral Arguments Online, <http://www.ncsconline.org/WC/CourTopics/StateLinks.asp?id=39&topic=AppMan> (last visited June 9, 2009); see also CAROL R. FLANGO & DAVID B. ROTTMAN, *APPELLATE COURT PROCEDURES* 126-32 (1998), available at <http://contentdm.ncsconline.org/cgi-bin/showfile.exe?CISOROOT=/appellate&CISOPTR=57>; McConkie, *supra* note 11, at 338. As with the Supreme Court of Oklahoma, precise figures for oral argument in other state supreme courts are hard to come by. Many do not keep an official tally, and neither does the National Center for State Courts. Nevertheless, the above sources provide links, general statistics, and estimates from individual state sources that support our conclusions.

32. See FLANGO & ROTTMAN, *supra* note 31, at 126-32; Nat’l Center for State Courts, *supra* note 31.

33. See FLANGO & ROTTMAN, *supra* note 31, at 126.

34. See *id.* at 128, 130.

oral arguments.<sup>35</sup> In fact, in some months, it heard more than double the total number of arguments that the Oklahoma Supreme Court has heard in the last ten years.<sup>36</sup>

The practice of Oklahoma's high court also pales in comparison to that of the Tenth Circuit Court of Appeals, the intermediate federal appellate tribunal that reviews cases from a six-state region including Oklahoma. Over the previous decade, the Tenth Circuit decided more than 15,000 cases. It heard oral argument in over 4600 of them.<sup>37</sup>

Like the Tenth Circuit, the other federal courts of appeals have mandatory rather than discretionary appellate jurisdiction.<sup>38</sup> They must take whatever comes to them from the federal district courts, which is quite a lot. In the last decade, the twelve circuit courts<sup>39</sup> together decided over 280,000 cases. During that period, they heroically managed to hold oral argument in approximately a third of those appeals, for a total of over 90,000 hearings.<sup>40</sup>

The Oklahoma Supreme Court's failure to hear oral argument in most cases is not merely a comparative anomaly of academic interest. As we discuss below, it is a failure that imposes real and substantial costs on the judicial system, the litigants and lawyers, and the general public.

## *II. Deliberation*

In his history of the U.S. Supreme Court, the late Chief Justice William Rehnquist related often being asked if "oral argument 'really makes a difference,'" frequently "with an undertone of skepticism, if not cynicism."<sup>41</sup> Indeed, a common justification for deciding cases solely by written submissions is that oral argument is a "vestigial formality" that adds little to the deliberative process while taxing the already overburdened time of appellate judges.<sup>42</sup> That view, however, is profoundly mistaken. Testimonials

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35. See Kansas Judicial Branch, Kansas Supreme Court Live and Archived Oral Arguments, <http://www.kscourts.org/Cases-and-Opinions/SC-Oral-Arguments/default.asp> (last visited June 9, 2009).

36. See *id.*

37. See U.S. Courts, United States Courts of Appeals, <http://www.uscourts.gov/courts/ofappeals.html> (last visited June 9, 2009) (statistics cited derived from table S-1 of the Annual Reports of the Director for the years 1999-2008).

38. See 28 U.S.C. § 1291 (2006).

39. We exclude the Court of Appeals for the Federal Circuit, which has a unique docket. See United States Court of Appeals for the Federal Circuit, About the Court, <http://www.cafc.uscourts.gov/about.html> (last visited Feb. 20, 2009).

40. See U.S. Courts, *supra* note 37.

41. See REHNQUIST, *supra* note 20, at 243.

42. Jackson, *supra* note 19, at 801 (noting questioning by lawyers on the value of oral argument, and "whether it is not a vestigial formality with little effect on the result"); see also

from members of the nation's highest court as well as our own experience attest to the invaluable and irreplaceable role that oral argument plays in the deliberative process of an appellate court.

### A. Supreme Perspectives

No greater advocates of oral argument can be found than among the justices of the U.S. Supreme Court. As noted, early in the Supreme Court's existence, Chief Justice John Marshall "was solicitous to hear arguments, and not to decide causes without [hearing] them."<sup>43</sup> Indeed, Marshall not only "courted argument, nay, he demanded it,"<sup>44</sup> and he famously allowed some arguments to go on for days.<sup>45</sup> According to his colleague, Justice Joseph Story, arguments could be "excessively prolix and tedious," but the justices endured them because, by the end, "the subject is exhausted, and it is not very difficult to perceive . . . where the press of the argument and of the law lies."<sup>46</sup>

Other justices past and present have shared the Marshall Court's estimation of the value of oral argument. Chief among them was Rehnquist himself, a veteran of thousands of oral arguments over the course of more than three decades on the U.S. Supreme Court.<sup>47</sup> In preparation for argument, Rehnquist would read the briefs and relevant precedents, discuss the issues with his law clerks, and allow each case to "percolate" in his mind.<sup>48</sup> Nevertheless, the Chief Justice reported that he had "left the bench feeling differently about a case than [he] did when [he] came on the bench" in "a significant minority" of cases.<sup>49</sup>

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Fried, *supra* note 19, at 710 (noting that "it is often said that oral argument never changes any minds and is therefore useless"); John M. Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal*, 41 CORNELL L.Q. 6, 10-11 (1955) (noting "the increasing tendency to regard the oral argument as being of little importance in the decision of appeals"); William Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 MERCER L. REV. 1015, 1019 (1984) (referencing 1975 survey in which more than half of federal circuit and district judges agreed that "[m]ost lawyers can prepare a brief which is comprehensive and persuasive enough to obviate the need for oral argument." (quotations omitted)).

43. Joseph Story, *A Discourse Upon the Life, Character, and Services of the Honorable John Marshall*, in 3 JOHN MARSHALL: LIFE, CHARACTER AND JUDICIAL SERVICES 377 (John F. Dillon ed., 1903).

44. *Id.*

45. See *supra* notes 19-20 and accompanying text.

46. 1 LIFE AND LETTERS OF JOSEPH STORY 215 (William Story ed., 1851).

47. During Rehnquist's tenure from January 1972 to September 2005, the Supreme Court heard over 5000 oral arguments. See EPSTEIN ET AL., *supra* note 23, at 74-75.

48. REHNQUIST, *supra* note 20, at 240-41 (quotations omitted).

49. *Id.* at 243. This estimate by the former chief justice comports with Professor Thai's empirical observations as a law clerk on the deliberative impact of oral argument at both the U.S. Supreme Court and the Tenth Circuit Court of Appeals.

Rehnquist identified several ways in which oral argument adds “considerable” value to the decisional process of an appellate court. First, oral argument can make up for the “shortcomings” of deliberating over briefs and other readings necessary to a decision but not responsive to the questions they may raise in a judge’s mind.<sup>50</sup> At oral argument, lawyers can clarify missing or finer points about the facts and governing law. They should, after all, have greater familiarity with the particulars of their case than judges who must spread their attention across many cases at time.<sup>51</sup>

More fundamentally, oral argument allows counsel to respond to concerns that judges may have about their positions—concerns that even the most prescient counsel may not always anticipate or choose to address in his brief. Professor Charles Fried, former Solicitor General of the United States, has remarked that “[i]n his brief a lawyer can avoid or try to obscure weaknesses in his case,” and “it is during oral argument that there is no avoiding a direct question by one of the justices.”<sup>52</sup> Furthermore, lawyers may lack the imagination or incentive to address hypothetical questions. As Justice Ruth Bader Ginsburg has noted, an attorney may not reckon a hypothetical relates to his case, but a judge may pose it to “test the limits of an argument” that may become law.<sup>53</sup>

Other justices have shared Rehnquist’s regard for the critical dialogue that oral argument enables. Affirming the difference that “full argument and deliberation” can make, Rehnquist’s colleague John Paul Stevens has concluded that “a judge’s pre-argument predictions” about the proper outcome of a case “are inherently unreliable.”<sup>54</sup> The esteemed John Marshall Harlan II has also rejected the “greatly mistaken” view that oral argument is “little more than a traditionally tolerated part of the appellate process”—one that does not “count” when it comes to “the hard business of decision.”<sup>55</sup> Harlan explained:

[T]he job of courts is not merely one of an umpire in disputes between litigants. Their job is to search out the truth, both as to the facts and the law, and that is ultimately the job of the lawyers, too. And in that joint effort, the oral argument gives an opportunity for interchange between court and counsel which the briefs do not

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50. *Id.* at 245.

51. *Id.* at 244-45.

52. Fried, *supra* note 19, at 710; *see also* Rehnquist, *supra* note 42, at 1021 (stating that, at oral argument, “[c]ounsel can 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”).

53. Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 569-70 (1999).

54. John Paul Stevens, *Learning on the Job*, 74 FORDHAM L. REV. 1561, 1563 (2006).

55. Harlan, *supra* note 42, at 6.

give. For my part, there is no substitute, even within the time limits afforded by the busy calendars of modern appellate courts, for the Socratic method of procedure in getting at the real heart of an issue and in finding out where the truth lies.<sup>56</sup>

A second and more subtle way in which oral argument benefits appellate decision-making is that it provides a forum for judges to engage—and influence—each other. Rehnquist once confessed that “judges’ questions, although nominally directed to the attorney arguing the case, may in fact be for the benefit of their colleagues.”<sup>57</sup> Those colleagues do listen. As Chief Justice John Roberts, Rehnquist’s former law clerk and successor, has stated, it is “just as important” to hear a colleague’s question as to listen to an attorney’s answers, because the former gives “a sense of what your colleagues think of the case.”<sup>58</sup>

The indirect but incisive judicial dialogue that can occur at oral argument rarely takes place in written memos and conference discussions among judges. Those more static forums do not foster the fluid back-and-forth dynamic of a good argument. Judges may understandably pause before grilling colleagues as they would counsel on the strengths and weaknesses of espoused positions.<sup>59</sup> Oral argument thus gives judges, in Justice Anthony Kennedy’s estimation, a valuable “way of using the attorney to have a conversation with ourselves.”<sup>60</sup>

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56. *Id.* at 7; see also *Proceedings in Honor of Mr. Justice Brennan*, HARV. L. SCH. OCCASIONAL PAMPHLET No. 9, at 23 (1967) (quoting Justice William Brennan that “[o]ral argument with us is a Socratic dialogue between Justices and counsel”).

57. REHNQUIST, *supra* note 20, at 244; see also Ginsburg, *supra* note 53, at 569 (observing that “[s]ometimes we ask questions with persuasion of our colleagues in mind”).

58. John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68, 70 (2005).

59. Indeed, as chief justice, Rehnquist generally ran post-argument conferences as brief meetings where the justices, in descending order of seniority, stated their positions and votes rather than arguing their views. In addition to making conferences efficient, this practice accorded respect for the consideration each justice presumably has given each case. In Rehnquist’s words, conference “is not a bull session in which off-the-cuff reactions are traded, but instead a discussion in which considered views are stated.” REHNQUIST, *supra* note 20, at 254-55. This practice contrasts with the less favorably received efforts of Rehnquist’s predecessor, Chief Justice Warren Burger, to lobby his position during lengthy conferences and beyond. See generally BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* (Simon & Schuster, Inc. 2005) (1979).

60. Tony Mauro, *Kennedy Makes Plea for Higher Judicial Salaries and No Cameras at the Supreme Court*, LEGALTIMES.COM, Feb. 14, 2007, <http://www.law.com/jsp/dc/PubArticleDC.jsp?id=900005473969> (last visited Feb. 1, 2009) (login required); see also Rehnquist, *supra* note 42, at 1025 (characterizing oral argument as “an essentially collegial function” for judges); Fried, *supra* note 19, at 710-11 (stating that “[t]he questioning by the justices at oral argument

A third way in which oral argument aids judicial deliberation arises from its pivotal position between review of the written submissions and final decision. As Roberts has described it, oral argument is “the organizing point for the entire judicial process,” and therefore “terribly, terribly important.”<sup>61</sup> Not only do “ideas that have been percolating” from prior consideration “begin to crystallize” in the face of questions and answers.<sup>62</sup> “[D]oors begin to close” on potential outcomes just as “the luxury of skepticism will have to yield to the necessity of decision.”<sup>63</sup>

Given these attested benefits of oral argument, it is no wonder that Justice Potter Stewart once observed that “he would never know more about a case than when he left the bench after hearing it orally argued.”<sup>64</sup>

### *B. Pedagogical Perspectives*

Our teaching experience reinforces our view that oral argument can supply invaluable information and insight. As law professors, our work in the classroom bears a striking resemblance to that of appellate judges at oral argument.<sup>65</sup> We each employ the Socratic method in service of related goals. Appellate judges question attorneys to “get[] at the real heart of an issue and find[] out where the truth lies.”<sup>66</sup> Law professors question students to better understand and evaluate the law, including the decisions of appellate judges. In both contexts, Socratic dialogue can expose and contest assumptions, develop and test arguments, and grapple with real and hypothetical problems.

Such a robust exchange of ideas at least refines—and sometimes refutes—tentative as well as deep-seated views. The outcome of a good Socratic session is not simply a better answer but, even more valuable, a better

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also allows them a means of convincing, or at least arguing with, each other before their vote on a case is reached in their private conference”).

61. Roberts, *supra* note 58, at 69-70. For his part, Rehnquist has stated that oral argument is “[p]robably the most important catalyst for generating further thought” about a case after he has familiarized himself with the written materials. REHNQUIST, *supra* note 20, at 241

62. Roberts, *supra* note 58, at 70.

63. *Id.* Relatedly, Chief Justice Charles Evans Hughes wrote that, “aside from cases of exceptional difficulty, the impression that a judge has at the close of a full oral argument accords with the conviction which controls his final vote.” CHARLES EVANS HUGHES, *THE SUPREME COURT OF THE UNITED STATES* 61 (Columbia University Press 1966) (1927). And according to Justice Jackson, most of his colleagues would “form at least a tentative conclusion from it in a large percentage of the cases.” Jackson, *supra* note 19, at 801.

64. REHNQUIST, *supra* note 20, at 252 (paraphrasing from personal conversation with Justice Stewart). Rehnquist, not surprisingly, agreed with Stewart. *Id.*

65. See Ginsburg, *supra* note 53, at 567 (endorsing the observation that “[l]aw teaching and appellate judging are more alike than any other two ways of working at the law”).

66. Harlan, *supra* note 42, at 7.

understanding of that answer.<sup>67</sup> Conversely, as English poet and philosopher John Milton wrote almost four centuries ago, wisdom rarely comes from a “fugitive and cloistered” knowledge, “unexercised and unbreathed, that never sallies out and sees her adversary.”<sup>68</sup>

Of course, judges can play devil’s advocate with themselves, each other, and their law clerks. However, our experience clerking for appellate judges and arguing before appellate courts,<sup>69</sup> on top of our experience in the classroom, convinces us that such role-playing cannot substitute for the crucible of a live confrontation with true advocates of opposing viewpoints. Like the smashing of atoms in a particle accelerator, the collision of contraries at oral argument has the powerful potential to confirm prior views or produce unpredicted results. In the words of Professor Fried, “oral argument provides a useful test of the soundness of an argument” given “relentless and sometimes even sadistic questioning by the justices.”<sup>70</sup>

### *III. Process Values*

In addition to conferring considerable benefits on judicial deliberation, oral argument serves a less tangible but equally vital function in the administration of justice. A hearing for litigants, open and accessible to the public, advances a sense of participation, transparency, and confidence in judicial proceedings that is essential in a democratic society and consistent with the spirit of due process.

#### *A. Participation, Transparency, and Public Confidence*

Oral argument gives parties to an appeal their proverbial day in court. In an otherwise invisible, impersonal, and at times impenetrable appellate process, a public opportunity for litigants to be present as well as heard through counsel by the judges deciding their fates affords a sense of

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67. See JOHN STUART MILL, ON LIBERTY (Bartleby.com 1999) (1869), <http://www.bartleby.com/130/2.html> (arguing that if a censored opinion is right, then mankind is “deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error”).

68. JOHN MILTON, AREOPAGETICA (Gutenberg Ebook 2006) (1644), <http://www.gutenberg.org/dirs/6/0/608/608-h/608-h.htm>.

69. Thai has served as a law clerk to Justices John Paul Stevens and Byron R. White of the Supreme Court and Judge David M. Ebel of the Tenth Circuit Court of Appeals. Collectively, he and Dean Coats have argued cases before many appellate courts, including, in the latter’s case, the U.S. Supreme Court.

70. Fried, *supra* note 19, at 710.

participation and instills a sense of confidence in the court system that cannot be overvalued.

To begin, consider the average appellants in the Oklahoma judicial system. They initially go to the courts, or are haled into them, to resolve an important dispute. Usually they hire lawyers, often at significant expense. Sometimes a trial court dismisses their case quickly, but more often they endure lengthy and combative discovery, motions, hearings, and perhaps trial before a judge or jury decides their cause.

After considerable time, money, and involvement for both sides, the losing party appeals. From the prevailing party's viewpoint, the appeal consists simply of briefs filed by the lawyers, long and in language not easily understood by a layperson. Then, after a lengthy and mysterious period of silence, a decision comes down. In one fell swoop, judges whom the individual has never seen, in whose court he has never stepped, and who, as far as he knows, has never listened to anyone explain his case, may reverse the hard-fought victory he had won before a flesh-and-blood tribunal. He has lost by the faceless decree of some Force from On High. His efforts and expenses are wasted. His faith in the judicial system is badly shaken.

This story is not fanciful. It happens every day in our state. It has happened every day for decades since the Oklahoma Supreme Court essentially stopped hearing oral argument. And it should not happen.

Even if oral argument were a mere "formality," the value of its public function alone justifies its use. No less a figure than the late Chief Justice William Rehnquist appreciated this fact. Even though—or perhaps because—he was the highest judicial officer in the land, Rehnquist understood the importance of appearances to the ordinary litigant. He wrote that "over and above its usefulness in adding to the presentation of the briefs," oral argument "has the value that any public ceremony has."<sup>71</sup> In short, Rehnquist explained, "[i]t forces the judges who are going to decide the case and the lawyers who represent the clients whose fates will be affected by the outcome of the decision to look at one another for an hour, and talk back and forth about how that case should be decided."<sup>72</sup>

Additionally, dialogue at oral argument often brings discussion of law down to earth, from the formal and technical language of legal writing to the more colloquial medium of oral conversation. For laypersons in attendance, oral argument can make appellate deliberation more intelligible than either the briefs preceding it or the written judicial opinion following it.<sup>73</sup>

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71. Rehnquist, *supra* note 42, at 1022.

72. REHNQUIST, *supra* note 20, at 244.

73. One need only listen to oral argument in some of the most legally technical U.S. Supreme Court cases, and compare those hearings to the written materials, to appreciate this



While the addition of oral argument likely would not make a litigant feel any better about losing, it can help make the result easier to accept by giving the litigant a sense that his case has been fully and fairly heard. As social scientists have found, litigants generally perceive that they have had a fair shake when they have had a meaningful opportunity to state their case before a neutral decisionmaker.<sup>74</sup> And oral argument is the one place where litigants may see that “the justices do indeed attend to the cases before them and that no argument will prevail that is not submitted to an open challenge.”<sup>75</sup>

Furthermore, regardless of whether a litigant attends oral argument, its very occurrence promotes public confidence in the integrity of the appellate process. A hearing at which judges and lawyers discuss the merits of a case provides visible evidence of a court listening to the parties’ arguments and deliberating over them. That open forum lends a sense of public participation and judicial transparency to decision-making that otherwise occurs behind closed doors.

Nowhere is public confidence in the judicial process more critical than in a court of final resort like the Oklahoma Supreme Court. This is so, as one scholar has written, because such a court holds a “position as exemplar to lower tribunals” and is the “head of the only nonrepresentative and non-responsive branch” of government.<sup>76</sup>

Consequently, the failure of the Oklahoma Supreme Court to hold oral argument can undermine the public’s confidence in the entire judicial edifice of the state by raising the specter of secretive and summary justice at the top. We by no means endorse such an erroneous perception. But as the Court recently learned from its widely criticized attempt to curtail public access to

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point. *See, e.g.,* Oyez, *Boumediene v. Bush: Case Summary & Oral Argument*, [http://www.oyez.org/cases/2000-2009/2007/2007\\_06\\_1195](http://www.oyez.org/cases/2000-2009/2007/2007_06_1195) (last visited Apr. 20, 2009) (links to oral argument and opinion in *Boumediene v. Bush*, 128 S. Ct. 2229 (2008), concerning extraterritorial applicability of constitutional habeas guarantee to alien detainees at Guantanamo Bay Naval Base, Cuba); Oyez, *KSR International Co. v. Teleflex: Case Summary & Oral Argument*, [http://www.oyez.org/cases/2000-2009/2006/2006\\_04\\_1350](http://www.oyez.org/cases/2000-2009/2006/2006_04_1350) (last visited Apr. 20, 2009) (links to oral argument, briefs, and opinion in *KSR International Co. v. Teleflex, Inc.*, 550 U.S. 398 (2007), concerning the Federal Circuit Court of Appeal’s “teaching-suggestion-motivation test” for determining patent “obviousness”).

74. *See* E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* 219-20 (1988).

75. Fried, *supra* note 19, at 710; *see also* Brown, *supra* note 28, at 77 (arguing that “[m]eticulous care to give adequate hearing is consistent with—though it may not prove—the open mind usually thought appropriate for judicial authority,” while summary procedure “suggests—though possibly it does not prove—the predetermined purpose, the assured if not tendentious mind”).

76. Brown, *supra* note 28, at 77.

its records, confidence in judicial work cannot be taken for granted and is in some measure correlated with the transparency of the decisional process.<sup>77</sup>

Some may nonetheless say that oral argument is too fleeting or remote an occurrence to generate the process benefits that we identify. After all, not many will have the time or ability to attend. Even so, in our view, general knowledge of regular public hearings will instill a certain perception of judicial openness and integrity. Consider by contrast the infamy attached even today to Star Chamber proceedings of centuries ago. That tribunal's continuing notoriety derives in no small part from the secrecy of its sessions.<sup>78</sup>

In any event, oral arguments need not be ephemeral events limited to the actual physical courtroom encounter. Currently, over a dozen state supreme courts offer live webcasts of their oral arguments.<sup>79</sup> Moreover, many courts, including the U.S. Supreme Court and the majority of state supreme courts, make available online audio—and in some cases video—archives of their arguments.<sup>80</sup> The actions of these numerous high courts speak louder than our words can about the value of open and accessible judicial proceedings to a twenty-first century citizenry.

### *B. Due Process*

Our view of the public value of oral argument finds support in the U.S. Supreme Court's foundational teachings on due process of law. That tribunal has long recognized that a "fundamental requisite of due process" is an "opportunity to be heard" in a meaningful manner.<sup>81</sup> The Oklahoma Supreme Court likewise has affirmed that "[t]he Constitution inexorably commands that

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77. By order earlier last year, without public consultation, the Oklahoma Supreme Court required redaction of personal data in court filings and cut off all Internet access to court filings and records except dockets. See *In re: Privacy and Public Access to Court Documents*, 2008 OK 23, 79 OKLA. BAR J. 645, *withdrawn*, 2008 OK 23, 79 OKLA. BAR J. 719. In response to the firestorm of public criticism that immediately followed, the Court revoked the order before it could go into effect "to give the issue further study and consideration." John Greiner, *High Court Backs Off Secrecy Rules*, THE OKLAHOMAN (Oklahoma City), Mar. 26, 2008, at 1A, available at <http://newsok.com/article/3220553>.

78. See *Estes v. Texas*, 381 U.S. 532, 539 (1965) ("The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*").

79. See National Center for State Courts, *supra* note 31.

80. See *id.*; Oyez: U.S. Supreme Court Media, <http://www.oyez.org> (last visited June 9, 2009).

81. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914); see also *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." (internal quotations omitted)); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (quoting *Grannis*, 234 U.S. at 394).

no one's rights are to be adversely affected by judicial process that takes place in the absence of notice and a full and fair opportunity to be heard."<sup>82</sup>

Of course, we do not suggest that the letter of the Due Process Clause of the U.S. Constitution or its Oklahoma analogue requires oral argument.<sup>83</sup> We believe the practice of the Oklahoma Supreme Court in deciding most cases solely on the briefs fully comports with its constitutional obligations. We do feel, however, that the spirit of due process favors oral argument.

The demands of due process advance two core judicial values, both of which oral argument furthers. The first is truth. As Justice Felix Frankfurter observed during the McCarthy Era, "[n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."<sup>84</sup> We have already explained how oral argument aids truth-finding on appeal.<sup>85</sup>

The second due process value advanced by oral argument is participation, having one's proverbial "day in court." The provision of a day in court to those over whom a court exercises power to curtail life, liberty, or property is a "deep-rooted historic tradition,"<sup>86</sup> "a rule as old as the law."<sup>87</sup> It is "basic in our system of jurisprudence,"<sup>88</sup> preserving "both the appearance and the reality of fairness" by allowing those to be bound by a court's judgment to have their say before it.<sup>89</sup>

Having one's say in writing may meet the requirements of due process on appeal, but the addition of oral argument—the literal incarnation of a "day in

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82. *Patel v. OMH Med. Ctr., Inc.*, 1999 OK 33, ¶41, 987 P.2d 1185, 1201. The Oklahoma Supreme Court has recognized such a right under the due process provisions of the state constitution as well. *See Okla. Oncology & Hematology P.C. v. US Oncology, Inc.*, 2007 OK 12, ¶ 36 n.31, 160 P.3d 936, 950 n.31 (stating that "[p]rocedural due process requires a meaningful opportunity to be heard" and citing OKLA. CONST. art. 2, §§ 6-7).

83. *See* U.S. CONST. amend. XIV, § 1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law."); OKLA. CONST. art. 2, § 7 ("No person shall be deprived of life, liberty, or property, without due process of law.").

84. *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring).

85. *See supra* Part II.

86. CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE & PROCEDURE* § 4449, at 346-47 (2d ed. 2002).

87. *Galpin v. Page*, 85 U.S. 350, 368 (1873); *see* *Barrett v. Bd. of Comm'rs of Tulsa County*, 1939 OK 68, ¶ 32, 90 P.2d 442, 449 (quoting *Galpin*, 85 U.S. at 365).

88. *Faretta v. California*, 422 U.S. 806, 838 (1975) (Burger, C.J., dissenting) (quoting *In re Oliver*, 333 U.S. 257, 273 (1948)).

89. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980); *see also* *Wade v. Padberg*, 1955 OK 116, ¶ 7, 283 P.2d 201, 203 (declaring that "[o]ur judicial system is based upon the fair and just theory that every party to a lawsuit should be given an opportunity to be heard" and that "[e]very litigant is entitled to his day in court.").

court”—surely makes the opportunity to be heard fuller and fairer.<sup>90</sup> Indeed, the fact that the U.S. Supreme Court for over two centuries has given litigants their literal day in court speaks volumes to the constitutional value that the highest court in the land has long attached to this form of “public ceremony.”<sup>91</sup>

Finally, our focus on the healthy sense of participation, transparency, and public confidence that oral argument instills should not obscure another benefit to having judges meet face-to-face with lawyers if not also litigants. Appellate judges, more so than their trial brethren, live a monastic judicial existence.<sup>92</sup> They have no personal contact with those whose cases they decide in the closed confines of chambers unless oral argument is held. Conscious of the “aloof and solitary professional life” of appellate judging, Rehnquist commended oral argument as a “means of giving judges a continuing awareness of their relationship and dependence on others.”<sup>93</sup> By reminding judges that their cases are as much about the actual people in front of them as about the abstract legal principles in briefs and law books, oral argument helps keep judges grounded.

We thus believe oral argument confers substantial public benefit on top of its value in aiding judicial deliberation. If, as Justice Stevens has written, “[i]t is confidence in the men and women who administer the judicial system that is the true backbone of the rule of law,”<sup>94</sup> then oral argument adds strength to that backbone one case at a time.

#### IV. Advocacy

In an age of ubiquitous lawyer jokes, we do not expect many outside the legal profession to consider a proposal that benefits attorneys to be one that benefits the general public as well. Yet we believe the Oklahoma Supreme Court would serve the bar of this state and the broader public better by

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90. See *supra* Part III.A.

91. Rehnquist, *supra* note 42, at 1022. The Supreme Court’s practice of hearing oral argument over the years, in cases mundane as well as momentous, calls to mind Justice Louis Brandeis recognition that “[o]ur government,” including our judiciary, “is the potent, the omnipresent teacher” who “teaches the whole people by its example.” *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting), *overruled by* *Katz v. United States*, 389 U.S. 347 (1967) and *Berger v. New York*, 388 U.S. 41 (1967).

92. As if reading from the same script, many appellate judges whom we know, and countless others whom we do not, have described the isolation of their professional lives as “monastic.” See, e.g., Lisa Provence, *Judge Not—Unless You’re J. Harvie Wilkinson*, THE HOOK, Apr. 2, 2008, <http://www.readthehook.com/blog/index.php/2008/04/02/judge-not-unless-youre-j-harvie-wilkinson>.

93. Rehnquist, *supra* note 42, at 1022.

94. *Bush v. Gore*, 531 U.S. 98, 128 (2000) (Stevens, J., dissenting).

providing regular opportunities for appellate advocacy, which we think would improve the quality of lawyering statewide.

*A. Oral Advocacy in the U.S. Supreme Court*

To appreciate the professional benefits of appellate advocacy to the bar and broader public, we turn again to the U.S. Supreme Court. If there was ever a “Golden Age” of appellate advocacy in this country, it was during the reign of Chief Justice John Marshall, when larger-than-life figures such as Daniel Webster argued before the Supreme Court. Webster himself provided a memorable account of the opening of one such argument, in *Gibbons v. Ogden*,<sup>95</sup> which gives us a sense of the interest and emotions on both sides of the bench:

I can see the Chief Justice as he looked at that moment. Chief Justice Marshall always wrote with a quill. He never adopted the barbarous invention of steel pens. . . . And always, before counsel began to argue, the Chief Justice would nib his pen; and then, when everything was ready, pulling up the sleeves of his gown, he would nod to the counsel who was to address him, as much as to say “I am ready; now you may go on.” I think I never experienced more intellectual pleasure than in arguing that novel question to a great man who could appreciate it, and take it in; and he did take it in, as a baby takes in its mother’s milk.<sup>96</sup>

While giants like Webster may no longer occupy the U.S. Supreme Court’s lectern, the quality of advocacy remains high. Many members of the bar have developed a specialized Supreme Court practice. Several states have created solicitor general’s offices like that of the federal government dedicated to Supreme Court practice. Public and private advocacy programs, such as those developed by the National Association of Attorneys General and The Georgetown University Supreme Court Institute, have assisted attorneys appearing before the Supreme Court for the first time.<sup>97</sup> The result, according

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95. 22 U.S. (9 Wheat.) 1 (1824).

96. 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 603 (1926). Ever the advocate, one senses some bias in Webster’s view of his own abilities and his effect on Marshall. But perhaps the bias is not unwarranted. For example, contemporaries reported that, at the close of Webster’s argument in *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819)—which he famously wrapped up with the words, “It is a small college . . . and yet there are those who love it”—many in the room were moved to tears, and Marshall himself was visibly touched. See Fried, *supra* note 19, at 710.

97. See Roberts, *supra* note 58, at 77-78.

to many observers, is a modern renaissance in oral advocacy before the nation's high court.<sup>98</sup>

### *B. Oral Advocacy in Oklahoma*

While oral advocacy has been experiencing a renaissance in the U.S. Supreme Court, the Oklahoma Supreme Court has been driving the practice into extinction in our state. In Oklahoma, a lawyer currently has very few opportunities for appellate argument. On the federal side, the majority of cases end up settling, and oral argument occurs in only a third of the cases decided and appealed.<sup>99</sup> On the state side, cases not settled before appeal end up being decided by one of three tribunals.

Criminal appeals go to the Oklahoma Court of Criminal Appeals.<sup>100</sup> The tribunal hears oral argument in capital cases, accelerated cases, and little else.<sup>101</sup> That leaves lawyers in typical criminal appeals in the same boat as civil practitioners before the Oklahoma Supreme Court.

Civil appeals may be (and in most cases are) assigned by the Oklahoma Supreme Court to the intermediate Oklahoma Court of Civil Appeals.<sup>102</sup> The four divisions of that court operate under the same stringent standard for

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98. See *id.*; Tom Goldstein, The Expansion of the "Supreme Court Bar," Mar. 2, 2006, <http://www.scotusblog.com/wp/the-expansion-of-the-supreme-court-bar/>.

99. See JAMES C. DUFF, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 46 (2008), available at <http://www.uscourts.gov/judbus2007/contents.html>; Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 136 (2002).

100. See OKLA. CONST. art. 7, § 4; 20 OKLA. STAT. § 40 (2001).

101. State law confers a "right" in capital cases "to present oral argument" on direct appeal to the Oklahoma Court of Criminal Appeals. See 21 OKLA. STAT. § 701.13(D) (2001); see also OKLA. CT. CRIM. APP. R. 3.8, 9.3(F). That right does not extend to post-conviction applications. See OKLA. CT. CRIM. APP. R. 9.7(F)(8). The Court of Criminal Appeals also hears argument as a matter of course in cases assigned to its accelerated docket. See *id.* at 3.8. Those special appeals involve youth and juvenile offenders as well as rulings against the state by magistrates. See *id.* at 3.8, 11.2. In fairness, oral argument in this limited class of appeals occurs on regular basis—usually a few cases a few times a month.

However, the typical non-capital, non-accelerated case may be decided without oral argument by order of the presiding judge. Oral argument may be held "if, in the opinion of the judges, oral argument is beneficial or necessary for a determination of the issues presented." *Id.* at 3.8. The judges apparently do not hold that opinion too often. According to our Westlaw research, excluding accelerated cases, the court heard around ninety oral arguments in the last decade. Of those, at least sixty were capital cases. See *supra* note 12.

102. See 20 OKLA. STAT. § 30.1. In the past ten years, the Oklahoma Court of Civil Appeals rendered over 8000 decisions, over 1500 of which were by published opinions. See *supra* note 12.

granting oral argument as the Oklahoma Supreme Court.<sup>103</sup> They hear a handful of arguments a year.<sup>104</sup>

Finally, as we have noted, the Oklahoma Supreme Court has the discretion to review cases by writ of certiorari.<sup>105</sup> It bears repeating that, of more than a thousand cases that the Court has decided in the past decade, it has heard argument in hardly more than a dozen.<sup>106</sup>

Given the rarity of oral argument opportunities in Oklahoma, a typical member of the state bar will likely have had her best, most, and only oral arguments in law school. There, by contrast, opportunities for competition in appellate advocacy abound.<sup>107</sup> This irony is a sad one. Having clerked at and argued before the U.S. Supreme Court,<sup>108</sup> we can say without exaggeration that a number of our students have argued at a level matching the typical advocate before our nation's highest court. Yet after law students in our state graduate, they will likely never have an opportunity to practice an art that, as Rehnquist put it, falls within "the finest tradition of our profession."<sup>109</sup>

### *C. Professional and Public Benefits*

We believe that increasing the opportunities for oral argument would have a positive effect on the quality of the bar throughout the state. Inexperienced lawyers may not appreciate questions from the bench that interrupt the oral presentation of their "brief with gestures."<sup>110</sup> But if given sufficient opportunities, attorneys sooner or later should grasp that oral argument is a valuable forum for addressing concerns that judges might have after reading the briefs, and that they otherwise "might puzzle over in chambers, and resolve less satisfactorily without counsel's aid."<sup>111</sup>

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103. See OKLA. SUP. CT. R. 1.9 (prescribing "exceptional reason" standard for both Oklahoma Supreme Court and Oklahoma Court of Civil Appeals).

104. Indeed, in many years, the Court of Civil Appeals has heard no argument. However, recently, the court has shown willingness to hold at least a few oral arguments annually, and commendably, to do so at local law schools. Our information comes from observations of current and former court personnel, as well as our own acquaintance with the court's practices. To our knowledge, the court does not keep official statistics on the number oral arguments that it holds.

105. See *supra* note 16 and accompanying text.

106. See *supra* note 12.

107. As faculty members at the University of Oklahoma College of Law, we have coached, mooted, and judged countless student appellate arguments for internal and external moot court competitions.

108. See *supra* note 69.

109. Rehnquist, *supra* note 42, at 1028.

110. *Id.* at 1024 (quotations omitted).

111. Ginsburg, *supra* note 53, at 569; see also HUGHES, *supra* note 63, at 62 ("Well-prepared and experienced counsel . . . do not object to inquiries from the bench . . . as they would much

That appreciation, if not the fear of facing the ire of black-robed inquisitors on the bench, should make lawyers think twice about stretching facts or law, making specious arguments, or including baseless accusations in their briefs. The moment of opportunity and accountability that is oral argument forces attorneys to be more selective and civil not just in person, but also on paper. That makes them better lawyers, to the benefit of clients whom they directly serve, less experienced lawyers whom they train, and a broader public interested in the sound and civil administration of justice.<sup>112</sup>

### *V. Proposal*

As we have argued, reasons for regularly holding oral argument abound. It tests, refines, and furthers the deliberative process. It increases the sense of participation in, and transparency of, the appellate process. It instills in litigants and the public at large greater confidence in the administration of justice. It furthers the quality and integrity of legal representation in the state.

On the other hand, the Oklahoma Supreme Court's original reason for changing oral argument from a matter of right to one of grace has fallen into obsolescence. The Court no longer labors under a crushing docket beyond its power to control. With its discretionary authority, it currently decides around one hundred cases a year by published opinion—substantially less than the U.S. Supreme Court's annual decision of several hundred *with* oral argument just a few decades ago.<sup>113</sup>

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prefer to have the opportunity of knowing the difficulties in the minds of the court and of attempting to meet them rather than to have them concealed and presented in conference when counsel are not present.”); REHNQUIST, *supra* note 20, at 246 (“An oral advocate should welcome questions from the bench, because a question shows that at least one judge is inviting him to say what he thinks about a particular aspect of the case.”); Roberts, *supra* note 58, at 75 (generally agreeing with seasoned U.S. Supreme Court advocate John W. Davis that an attorney should “[r]ejoice when the Court asks questions,” but noting that “apparently too much rejoicing can be a bad thing,” as recent studies have suggested that the losing side at the Supreme Court usually was asked more questions (quotations omitted)).

112. Although we are well aware that personal anecdotes—at least on authority no greater than ours—do not prove a scholarly point, it is worth relating a practice that arose in the Tenth Circuit Court of Appeals, at least when Thai clerked for Judge Ebel. During one oral argument, counsel supplemented the traditional opening line, “May it please the Court,” with, “and counsel,” accompanied by a respectful nod to the opposing attorney. Judge Ebel then interrupted counsel to tell him how delighted he was at that uncommon and civil gesture. Not surprisingly, every attorney who argued after him that day repeated the amended opening, and the practice cropped up during the rest of Thai's clerkship, no doubt by word of mouth among attorneys.

113. See *supra* note 23 and accompanying text. Currently, as discussed, the U.S. Supreme Court typically decides over eighty cases a year, most with oral argument. See *supra* note 25 and accompanying text.



In any event, it is not entirely clear that forsaking oral argument on the whole saves time. Chief Justice Charles Evans Hughes of the U.S. Supreme Court wrote that “[i]t is a great saving of time of the court, in the examination of extended records and briefs, to obtain the grasp of the case that is made possible by oral discussion and to be able more quickly to separate the wheat from the chaff.”<sup>114</sup> But even if oral argument takes up more time than it saves, we agree with the Oklahoma Court of Civil Appeals that “[c]rowded dockets and administrative efficiency do not serve as excuses to deprive the litigants of their day in court.”<sup>115</sup>

For all these reasons, we urge the Oklahoma Supreme Court, like the U.S. Supreme Court, to require oral argument as a rule rather than allow it as a rare exception. To that end, we offer two proposals for consideration. We aim for feasibility rather than novelty. Accordingly, we turn to the tested approaches of the U.S. Supreme Court and the federal courts of appeals.

#### *A. U.S. Supreme Court Approach*

As we have noted, the approach of the U.S. Supreme Court is simply to assume—by absence of a rule for parties to request otherwise—that oral argument will be held in every case granted for consideration on the merits.<sup>116</sup> On occasion, as the Supreme Court did three times out of seventy-three during its 2008-2009 term, it may summarily dispose of a case *sua sponte* without argument, typically where “the applicable law is settled and stable, the facts are not disputed, and the decision below is clearly in error.”<sup>117</sup>

We think the U.S. Supreme Court’s model for oral argument would well suit the Oklahoma Supreme Court. Both tribunals can rely on intermediate appellate courts to carry out the grueling and often mundane day-to-day review of trial court decisions. As courts of last resort with discretionary dockets, both the U.S. Supreme Court and the Oklahoma Supreme Court select for consideration only those cases of sufficient importance within their respective jurisdictions.<sup>118</sup>

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114. HUGHES, *supra* note 63, at 63; *see also* Harlan, *supra* note 42, at 7 (stating that “there is no substitute, even within the limits afforded by the busy calendars of modern appellate courts, for the Socratic method of procedure in getting at the real heart of an issue and in finding out where the truth lies”); Jackson, *supra* note 19, at 801 (stating that his colleagues on the Supreme Court “would answer unanimously that now, as traditionally, they rely heavily on oral presentations”).

115. *Ingram v. Ingram*, 2005 OK CIV APP 87, ¶ 18, 125 P.3d 694, 698.

116. *See supra* notes 27-28 and accompanying text.

117. *Wyrick v. Fields*, 459 U.S. 42, 50 (1982) (Marshall, J., dissenting); *see supra* note 28.

118. U.S. Supreme Court Rule 10 specifies under all its criteria for certiorari, including conflicts among lower courts, that the question involved be “an important federal question.” SUP. CT. R. 10. The criterion that a petition requesting review by the Oklahoma Supreme Court

Moreover, the cases that these high courts select are likely to be doubtful in outcome. This uncertainty is probable because the certiorari criteria of both the U.S. Supreme Court and the Oklahoma Supreme Court emphasize the existence of "conflict" among the lower courts or with its own decisions on an "important" question.<sup>119</sup> Furthermore, as Chief Justice William Rehnquist explained, the "genuinely doubtful" character of a case granted certiorari by a high court also springs from the fact that, while on the one hand, those voting to review a case likely question the correctness of the decision below, on the other hand, the case below was decided by a presumably reasonable, unbiased, and competent tribunal.<sup>120</sup> As a result, the regular addition of oral argument would add deliberative value to cases that are not only important but also uncertain.

Of course, we do not advocate a rigid requirement for oral argument in every case. We believe that the justices of the Oklahoma Supreme Court, whose judgment we respect, will be able to spot and summarily dispose of those few cases that it decides to review that are of genuinely undoubtful character and of little moment. We trust that the Oklahoma Supreme Court, like the U.S. Supreme Court, would not waste its scarce judicial resources on many such cases.<sup>121</sup> As for cases of genuinely undoubtful character but of typical importance for the Oklahoma Supreme Court, we believe that they deserve oral argument, for the public value of an open forum if for nothing else.<sup>122</sup>

### *B. Federal Courts of Appeals Approach*

If the Oklahoma Supreme Court is not inclined to go "whole hog," then we advocate the oral argument model of the federal courts of appeals as the next best alternative. The match of model to court is not nearly as close this time. Unlike the Oklahoma Supreme Court, the federal courts of appeals have

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raise an important state question is embodied in the Court's certiorari standards, which specifies that a petition "will be granted only when there are special and important reasons," and which requires a vote of "a majority of the justices." OKLA. SUP. CT. R. 1.178(a). In fact, the majority requirement is a higher threshold than the U.S. Supreme Court's "rule of four," which allows a minority of justices (four out of nine) to grant certiorari. See John Paul Stevens, *The Life Span of a Judge-Made Rule*, 58 N.Y.U. L. REV. 1, 10 (1983).

119. SUP. CT. R. 10; OKLA. SUP. CT. R. 1.178. It appears that the latter rule is partly based on the former.

120. Rehnquist, *supra* note 42, at 1027.

121. Cf. *Anderson v. Harless*, 459 U.S. 4, 12 (1982) (Stevens, J., dissenting) (arguing that "[i]t is not appropriate for this Court to expend its scarce resources crafting [per curiam] opinions that correct technical errors in cases of only local importance where the correction in no way promotes the development of the law").

122. See *supra* Part III.

mandatory rather than discretionary appellate jurisdiction.<sup>123</sup>

Federal Rule of Appellate Procedure 34 provides the standards for having oral argument in the courts of appeals. It states that “[o]ral argument must be allowed in every case” unless a panel of three judges (the standard decisional unit for the courts of appeals) “unanimously agrees that oral argument is unnecessary” because (1) “the appeal is frivolous”; (2) “the dispositive issue or issues have been authoritatively decided”; or (3) the written submissions and record “adequately” present the issues, and “the decisional process would not be significantly aided by oral argument.”<sup>124</sup>

We would adapt these rules to require unanimity among the entire Oklahoma Supreme Court (its standard decisional unit) to dispense with oral argument. After all, if one of its nine justices believes that oral argument is warranted, respect for that member’s considered judgment should allow it.<sup>125</sup>

Furthermore, we would modify these rules by striking the first and third criteria. The first is unnecessary, as the Oklahoma Supreme Court has no business reviewing frivolous appeals. The third may be a necessary docket control measure for courts with mandatory jurisdiction, but is generally neither necessary nor desirable for the Oklahoma Supreme Court. As discussed above, the public value of holding oral argument makes it worth it in cases that the Oklahoma Supreme Court deems of sufficient importance for it to review.

Adoption of the federal courts of appeals model for having oral argument, as amended above, would certainly lead to far more hearings than at present. However, oral argument would unlikely be as routine as at the U.S. Supreme Court. It all depends how loosely or stringently the members of the Oklahoma Supreme Court apply the criterion that “the dispositive issue or issues have been authoritatively decided.”<sup>126</sup> Whichever way, a marked improvement in the quantity of oral argument would surely materialize.

As for the quality of arguments that the Oklahoma Supreme Court would hear under either of our proposals, a parting word is warranted. We harbor no illusions that some—perhaps many—may be bad, at least initially. But the bar surely cannot be blamed given the dearth of arguments over many decades. Based on our experience training the bright and talented future lawyers of this

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123. See *supra* note 38 and accompanying text.

124. FED. R. APP. P. 34(a).

125. There is precedent for this rationale, not only in the unanimous panel required of Rule 34(a), but also in the U.S. Supreme Court’s practice of allowing a justice who does not believe certiorari warranted nonetheless to vote to “join 3” of his colleagues in favor of granting a case. See David M. O’Brien, *Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court’s Shrinking Plenary Docket*, 789 J.L. & POL’Y 779, 789 (1997). This join-3 vote accords respect to the colleagues who believe a case merits the Supreme Court’s review. See generally *id.*

126. FED. R. APP. P. 34(a).

state, and the experience of the U.S. Supreme Court with a revitalized bar,<sup>127</sup> we believe that if the Oklahoma Supreme Court reinstitutes oral argument on a more regular if not required basis, the chicken will lay the egg.

### *VI. Conclusion*

Oliver Wendell Holmes, Jr., famously stated that “[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.”<sup>128</sup> He continued that “[i]t is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”<sup>129</sup> The original reason for abandoning routine oral argument at the Oklahoma Supreme Court has long since vanished, and compelling reasons exist for its return. We therefore urge the Oklahoma Supreme Court to readopt this venerable practice. We further hope that the high court’s example would lead the Oklahoma Court of Civil Appeals and the Oklahoma Court of Criminal Appeals to follow suit. But if any of our arguments are in doubt, we would gladly entertain questions from the bench. Orally, of course.

Respectfully submitted,  
Joseph T. Thai  
Andrew M. Coats

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127. See *supra* notes 97-98 and accompanying text.

128. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

129. *Id.*