AMERICAN ACADEMY OF APPELLATE LAWYERS
ORAL ARGUMENT TASK FORCE REPORT

INTRODUCTION

The U.S. courts of appeal are allowing oral arguments in a smaller percentage of cases than in years past. This decline raises some profound systemic issues. Accordingly, a task force of the American Academy of Appellate Lawyers studied how our federal appellate courts are using and managing oral argument. This is the task force's initial report. It focuses on today's conditions in the U.S. courts of appeal. Based on the initial results, the Academy expects that improving oral argument will become one of its standing projects, with the thought to expand the project to state appellate courts and the hope that other appellate lawyer groups will become collaborators.

Founded in 1990, the Academy consists of approximately 300 experienced appellate lawyers, former judges, and academicians, representing all but two states. Central to the Academy's mission is the preservation and advancement of the administration of justice on appeal. The board of directors appointed the task force after members identified oral argument as a focus for the Academy's strategic efforts. The task force evaluated oral argument frequency and practices using both published data and interviews with federal appellate judges.

Based on its evaluation, the Academy specifically seeks dialogue at this time with the federal appellate courts about how to improve the quality and

increase the frequency of oral argument. It is our hope that some circuits will establish pilot programs to implement some or all of the Academy's recommendations set forth in this report. The benefits for the administration of justice on appeal and appellate practice would be substantial.

I. THE DECLINE IN APPELLATE ORAL ARGUMENT

Federal Rule of Appellate Procedure 34(b) suggests oral argument is the norm. The rule provides: "[o]ral argument must be allowed in every case unless a panel of three judges who have examined the briefs and record unanimously agree that oral argument is unnecessary for any of the following reasons: (A) the appeal is frivolous; (B) the dispositive issue or issues have been authoritatively decided; or (C) the facts and legal arguments are adequately presented in the briefs and record, and the decisional process would not be significantly aided by oral argument."

In practice, however, oral argument has become the exception. Annual reports from the Administrative Office of the U.S. Courts dating back to the late 1960s show a marked decline in both the percentage of argued cases and the time allotted for each argument. The data are not entirely comparable because of changes in recording and reporting practices, for the reasons explained in the addendum to this report. As further detailed in the addendum to this report, the frequency of oral argument in counseled cases varies from circuit to circuit. That

said, there is no doubt that it is declining almost everywhere. Reducing the frequency of argument impairs both the quality of appellate justice and the connection between citizens and the rule of law. This report addresses the importance and value of oral argument and recommends strategies to increase both the efficacy and the frequency of oral argument.

II. THE IMPORTANCE AND VALUE OF APPELLATE ORAL ARGUMENT

Appellate oral argument is beneficial for many reasons, among them the following four:

1. Oral argument improves the decision-making process by allowing the judges to consider the case collectively, to ask counsel questions, and to give counsel the opportunity to explain, face-to-face, the merits of his or her client's position.

2. Oral argument helps assure the litigants that they have received their "day in court," reflecting the personal attention and investment of the panel hearing the argument.

3. Oral argument provides systemic benefits, connecting citizens to the appellate courts and the process of appellate justice.

4. Oral argument teaches lawyers how appellate judges approach case resolution, improving the quality of appellate advocacy in future cases, over the long term.

1. Oral Argument Improves the Decision-Making Process

American jurisprudence embraces three-judge intermediate appellate courts primarily because collaborative review is more likely than unilateral review to produce correct decisions. A single judge's reversal of another's disposition

may reflect only a difference of perspective or philosophy. In contrast, when three judges join in a reasoned opinion, the deliberative process is more likely to result in a decision that is free from error and improved in its reasoning and rationale.

Federal appellate judges report that oral argument changes their view about the outcome in approximately 10 to 20 percent of argued cases. Judges report that argument influences the rationale or the disposition of subordinate issues more often, but the percentage is difficult to estimate. Further, judges say they cannot identify in advance those cases in which they are likely to change their minds. Judges' reports are exactly what the collaborative-review theory predicts.

When argument starts, a judge does not know if he or she misunderstood an important fact in the record or the text of a key statute or reasoning in an applicable precedent. At oral argument, either an advocate or a fellow jurist can help point the panel toward the correct reasoning and result. Moreover, in traditional internal court operations, the conference immediately following the oral argument presents the best opportunity for one judge to correct another's misunderstanding.

Courts of appeals have evolved many ways to decide non-argued cases. Some of these threaten the efficacy of collaborative review. At least one circuit assigns drafting memorandum opinions in many *pro se* cases to staff attorneys. The staff attorney then circulates the draft to the panel, and defends the

opinion to the panel. Judges and staff attorneys who participate in this process say that the defense session is at least as rigorous as oral argument in counseled cases. Much recommends that model in *pro se* cases, but staff attorneys should not substitute for appellate lawyers in counseled cases.

Another approach is to assign drafting memorandum opinions in non-argued cases to a lead judge. When the draft is prepared by that judge, it is circulated with the case file serially to the other two panelists. Discussion occurs only if the second or third panel member requests it. Even in the best of circumstances, circulating a draft risks forfeiting the value of collaborative review; in the worst, the value is obliterated.

Applying technology to judicial decision-making can further weaken the collaborative process. In theory, paper copies of the draft opinion and case file are unnecessary in the circulating-draft method of deciding non-argued cases. The lead chambers could send only an email with attachments, file paths, or hyperlinks. Courts' capacity for electronic circulation will grow even without designing court-specific software. More than circulating a physical file, electronic circulation may invite a moral peril: a judge engaged in other matters may sign off on a trusted colleague's draft without engaging with the case. And the third judge, unaware that the second judge did not engage, is at even greater risk to fail to engage after a draft has two votes.

Judges explain that the reduction in the number of oral arguments is based primarily on the premise that oral argument is time-consuming and not helpful. That is, many judges think they can be more efficient if they do not spend time preparing for and conducting oral argument. If output were the sole criterion to evaluate appellate court performance, the point would have persuasive force. But oral argument has never been justified by its efficiency. Rather, in an adversary model, oral argument provides the best foundation for securing collaborative review of each case. Further, courts can improve argument efficiency, just as lawyers can improve how they present cases. The Academy's vision of oral argument is not of a Mount Rushmore panel enduring a long-winded speech, but of a hot bench posing critical questions and effectively engaging with counsel throughout. This sort of directed "Q&A" keeps arguments focused and makes them more productive.

Some judges express concern about the cost of oral argument to parties. The Academy understands this concern. But the Academy believes it may be overstated. In our experience, having decided to pursue the case to the appellate level (at least as to the appellant/petitioner), what the client wants is the best result (or at least a fair hearing), with the additional incremental expense of oral argument a relatively minor consideration.

2. Oral Argument Assures Litigants Their "Day in Court"

One English formulation of due process is that it "is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." *Rex v. Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256, [1923] All ER Rep. 233 (Hewart, L.C.J). This is an elegant way of saying how important it is for each litigant to feel he or she got her day in court. The party who feels fairly treated tends to feel better about even an adverse result, and leaves the appellate system with a sense of dignity and respect for the rule of law.

The question, then, is how a party in an appeal is to gain a sense of being fairly treated. In trial courts, most of the action happens in a courtroom that, by constitutional law, must be open to the litigants and the public. But in appellate courts, a great deal happens behind closed doors. When a case is not argued, ***all*** of the action occurs in private, with only the result made public.

Oral argument cuts through this, and shows the parties that the judges are informed and engaged. It shines a light on the process. In this and other ways, oral argument confers credibility critical to the appellate judicial function.

3. Oral Argument Performs a Critical Civics Function

The Academy agrees with scholars and public figures, including Justice Sandra Day O'Connor, that civics education and knowledge have declined in recent years. The judicial branch is the least understood branch of government,

with intermediate appellate courts the least understood among the judicial branch's sectors. The Academy believes ignorance of the judicial function threatens not just budgets, but also respect for the rule of law. Courts and lawyers cannot count on schools alone to imbue citizens with knowledge and respect for what we do.

Oral argument provides courts a forum for citizens to engage with the appellate process. Intermediate appellate courts use all the following strategies, and more, to teach civics by showing people what courts do: free website access to the dockets for cases of popular interest; live streaming arguments in *en banc* cases and cases of popular interest; making recordings of arguments available free on their website; "riding circuit" so that citizens can see the court in action without having to travel to its primary seat; hearing arguments at law schools and other locations of easy access to people already interested in the appellate process, as well as on college campuses or at public buildings compatible with class study by high school students. In some state courts, arguments of great public note are made available to community and even are broadcast on network or cable television. Just as parties should see justice done in their cases, so the public should see justice being done in appellate courts generally.

The confidential aspect of deciding appeals conflicts with popular demands for transparency in the political branches. But oral arguments and reasoned opinions ensure that justice manifestly and undoubtedly is seen to be

done. Without changing their internal processes, appellate courts can display oral argument as an essential feature of the judicial process—and display it proudly. Further, increasing the frequency of oral argument allows lawyers and public observers to better advocate for, and defend, the appellate system in a public forum, including when it comes to court funding. Litigants and citizens who have seen the intermediate appellate system work can better vouch for its place in our system. Shutting people out, by comparison, can lead to misperceptions and disaffection.

4. Oral Argument Provides A Critical Teaching Function

Oral argument teaches lawyers how to practice appellate law. An active appellate panel teaches lawyers how judges approach cases. This is a function simply of the panel doing its business: asking about the issues the judges have identified as most important to the disposition of the case and about the elements of the record and the law most relevant to those issues. Even listening to argument in cases in which the lawyer has not been involved helps lawyers understand what is important to judges.

If judges want better work product from lawyers, judges need to show lawyers how they can produce better work. The best investment is giving feedback; oral argument is one of the few permissible windows through which lawyers can observe how appellate judges judge.

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In summary, denying oral argument may appear to provide an immediate benefit by making judicial time more efficient, yet it ultimately threatens the appellate decision-making process, the litigants' confidence in that process, public confidence in the rule of law, and the quality of appellate legal services. We encourage courts not only to set more cases for oral argument, but to do so in ways that intentionally serve and benefit from the interests in preserving collaborative review, promoting engagement with appellate courts, seeing justice done, and educating appellate advocates. Some specific recommendations follow.

III. RECOMMENDATIONS TO IMPROVE THE QUALITY AND INCREASE THE FREQUENCY OF ORAL ARGUMENT

Many steps can be taken among the stakeholders to improve the quality and increase the frequency of appellate oral argument. Here are some, set forth in quasi-chronological order (in terms of the life of an appeal).

1. Establish *Pro Bono* Programs And Other Opportunities For Oral Argument

Appellate courts should implement programs to assign *pro bono* lawyers to brief and argue appropriately screened cases either as counsel for *pro se* litigants or as an *amicus*. Some appellate courts have these programs today. *See*,

e.g., Ninth Circuit General Order 3.8.[1] These programs thrive on effective screening so that the *pro bono* lawyer has a legitimate argument to brief and the court has a significant issue to decide. The programs enable financially-eligible clients to have effective appellate representation. They deliver high-quality briefs to the merits panel. In these basics, the programs benefit litigants with worthy cases, appellate courts, and society as a whole.

The icing on the cake is a promise that the court will grant oral argument in *pro bono* program appeals. *See, e.g.*, Ninth Circuit General Order 3.8. The oral argument promise is an important incentive for junior lawyers (and their firms) to take *pro bono* cases. Allowing argument provides all the benefits we have discussed, in addition to those specific to the *pro bono* program. We recommend that every court of appeals adopt a *pro bono* program with an argument promise similar to that of the Ninth Circuit.

In addition, even aside from such *pro bono* programs, both the bench and the bar should consider how less experienced lawyers can get more

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[1] Under the Ninth Circuit's General Order 3.8: "If an appeal has been selected for inclusion in the court's *Pro Bono* Representation Project and *pro bono* counsel has been appointed, the panel shall not submit the case on the briefs, but shall hear oral argument unless *pro bono* counsel withdraws or consents in writing to submission on the briefs."

opportunities for oral argument (for example, in cases in which oral argument would not otherwise be granted). Some states that certify appellate lawyers require a minimum number of oral arguments; carving out arguments for junior lawyers will enable them to more readily meet those requirements and promote appellate specialization. This, too, will provide a quality enhancement.

2. Consider Parties' Requests for Oral Argument

In those circuits that don't hold oral argument in most counseled civil cases (and these are most of the circuits), courts should be receptive to the litigants' requests to argue cases. These requests should be made after the close of briefing and should identify the specific aspects of the appeal for which argument would be helpful. Today, in most courts, requests for oral argument are made early in the appeal process and are often *pro forma*: *e.g.*, "this case is complex and involves novel issues of great importance." Our recommendation focuses both counsel and the court on the case as briefed.

3. Issue More Focus Letters

Some appellate courts issue orders or letters in appropriate cases, specifying which issues counsel should be prepared to argue orally. This procedure is positive and productive: it ensures that the issues of greatest concern to the court will be addressed, and it reduces counsel's investment in preparing for other issues. We encourage more use of focus letters, particularly where the court

is allowing only brief argument times. Further, panels should always give notice when a judge intends to introduce issues that were not briefed or that the parties treated summarily, as sometimes occurs with respect to issues involving subject matter or appellate jurisdiction.

4. Develop a Hot-Court Oral Argument Culture

Courts should develop a hot-but-courteous oral argument culture. A judge should challenge a lawyer to respond to the primary reasons the judge thinks the lawyer should lose an issue. A judge can also focus the lawyer on concerns about the scope and impact of a particular resolution. In a hot-court culture, the court can set argument time case-by-case, based on the complexity of issues. Courts should allow at least 10 minutes per side in the simplest cases, with increasing levels for increasing complexity. A "hot" argument not only will most benefit the court, but also will best serve the goals set forth above.

5. Use Technology to a Fuller Extent

The Academy recommends that all circuits develop easy docket access, live streaming, downloadable recordings, and outreach programs. Each circuit should have a committee of judges, with appropriate staff support, to implement well-established civics functions and to generate and execute new programs appropriate to the circuit's geography and operations.

Another technology-related recommendation is that courts conduct some arguments by video-conference, especially when judges' chambers and lawyers' offices are located far from the argument venue. The dynamics of a teleconference are inferior to personal appearance, but argument via video is better than no argument at all. Video-conferencing also makes oral argument more affordable for parties of modest means and in smaller cases.

6. Thoughts on the Role of Appellate Lawyers

We are well aware that for some appellate judges, the problem with oral argument is the poor quality of the lawyers' work. We know that appellate courts could be more efficient if they received a better average quality of advocacy in both briefs and oral argument.

It's not as if inexperienced lawyers don't have opportunities to get training in appellate advocacy. At the national level, commercial providers, the Council of Appellate Lawyers in the ABA Judicial Division, DRI-the Voice of the Defense Bar, and others have produced excellent programs. Some circuits have bar associations that produce regional programs; some local bar associations also sponsor excellent programs. States that have certified appellate specialization produce and certify training and education.

But there is a critical problem: one-time appellate advocates usually do not prepare themselves for the possibility of an appeal. Many of them get no

help from the training system in delivering work product useful to appellate courts. We are working on concepts, like short, just-in-time video courses that can teach the basics at the time one-time users most need training. That work is outside the scope of this report, but it is part of the dialogue we hope to open with the courts of appeals about improving oral advocacy.

CONCLUSION

The Academy looks forward to discussions with the appellate courts, and to input from the courts on the Academy's recommendations for improving the quality and increasing the frequency of oral argument. As noted at the outset of this report, we stand ready and eager to work with the courts of appeal to develop pilot programs to begin to implement some or all of the recommendations set forth in this report.

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ADDENDUM: ANALYSIS OF THE NUMBERS

On the federal level, there are annual reports from the Administrative Office of US Courts ("AO") that include tables that show the number of oral arguments for each circuit by category (type) of case and type of termination. These reports go back to the late 1960s, but comparisons are at best rough measures for several reasons. (1) The number of cases in the appeals courts have increased dramatically since then, and so have the number of appellate judges, including senior judges. Thus, any comparison would have to factor in those changes, as well as significant unfilled vacancies. (2) There are many kinds of appeals that were rare if not unknown 50 or even 30 years ago. For example, on the criminal side, there have been significant increases in prisoner cases (both habeas and prison condition complaints), and appeals from federal sentences were virtually non-existent before the Sentencing Reform Act of 1984. Many of the current prisoner cases are brought *pro se*, by incarcerated individuals, which almost always precludes oral arguments. (3) Other changes include a major influx of immigration cases (discussed below), appeals in complex class action cases, including on issues of class certification and settlement approval, and the vast increase in complicated administrative appeals involving multiple parties and multiple claims, many of which are decided in the D.C. Circuit. (4) In 1979, the Appellate Rules were changed to require that the clerk of the district court transmit the notice of appeal

upon filing, which opened a new case on appeal. The prior practice was to hold the case until the record had been prepared, during which time many appeals were abandoned, particularly by appellants who filed protective notices of appeal and then did not proceed. This change increased the number of appellate filings but had no impact on the work of the judges. In addition, there have been several lesser changes in the statistical reporting methods, which further complicates comparisons with prior years.

Nonetheless, although we are not able to present a precise conclusion on the extent of the reduction in oral argument, there is no real dispute that the change is very real, both in terms of the percentage of cases that receive oral argument and the amount of time allocated to each argument. As a result of our study, we concluded that doing further breakdowns of existing data, rather than trying to make more refined efforts at comparisons with prior years, is a more fruitful way to examine the problem and look for solutions that would improve the situation for the courts, the parties, and their advocates. Moreover, there are areas where further breakdowns of data would enable courts to refine their consideration of what changes might be made in deciding which cases should be granted oral argument and how argument might be made more useful for the court and the parties.

We began our examination of the frequency of oral argument with the publicly available Table B-1 issued by the AO as of September 30th of each year, which includes data from all circuits except the Federal Circuit. We used the Table that ended on September 30, 2014. It reported that there were 6,646 appeals terminated after oral argument out of a total of 55,216 terminations, which would mean that only 12% of the cases received oral argument. But digging deeper into the numbers, with a significant assist from staff at the D.C. Circuit who answered many of our questions, we concluded that 12% is not a fair number. Therefore, we examined the data in greater detail in order to make further refinements with the goal of eliminating cases in which there was likely to be little reasonable basis for having oral argument and thus to focus on cases in which reasonable people could differ on whether to grant oral argument. This examination also led us to seek and obtain from the Federal Judicial Center additional data on *Pro Se* and Immigration (Board of Immigration Appeals) appeals that are not included in the public tables. Our study also revealed that there are substantial differences in the rates of oral argument across the circuits, both overall and within specific case categories, and so we decided to break down our refined data by circuits to reflect those differences. Before turning to the four Tables that are appended to the end of this report, we offer an explanation about the categories of cases on Table B-1 and why we made certain exclusions in the attached Tables.

"Procedural" Terminations and "Merits" Terminations

Case terminations are divided into procedural and merits terminations, with the former comprising about one third of all terminations in 2014. In the procedural category, about 72% were terminated by staff, for reasons such as voluntary dismissals, settlement, failure to file a brief, and other instances in which no judge was involved. Plainly, those cases are not candidates for oral argument.

There were also 4,935 procedural terminations decided by "Judge," which could mean a single judge or a panel, but either way the termination was for some procedural reason, probably with an opposition. Those reasons could include an untimely notice of appeal, or filing in the wrong court, but could also include terminations for lack of standing, *etc*.

There are two ways that a procedural termination could arise: by motion or after full briefing and perhaps argument. Under Federal Appellate Rule 27(d)(2), motions and responses are limited to 20 pages each, whereas full briefing currently allows 14,000 words (about 60 pages, depending on formatting). In addition, Rule 27(e) excludes oral argument on motions "unless the court orders otherwise." Many appellees seek to short-circuit the full briefing process (thereby saving time and money) and thus file motions for summary affirmance, which could be on a procedural ground, or on the merits.

A motion might also be brought on a ground such as non-compliance with the Antiterrorism and Effective Death Penalty Act of 1996, which sets limits on bringing some habeas corpus cases, and where non-compliance could be considered either procedural or on the merits. We have inquired, and have been advised, that the AO does not have statistics that break out whether a termination – either procedural or merits – was based on a motion, with shorter page limits and probably no oral argument, or after full briefing, in which case oral argument may or may not have been given.

In trying to determine an appropriate "denominator" against which to compare the actual number of oral arguments, we had to decide whether to include Procedural Terminations (Judge), knowing that some cases in that category will have received oral argument. Similarly, we also know that some merits terminations will be based on motions that did not receive oral argument. Although we have no way of knowing how many there are in each category, we do know that the motions terminations fall into both categories and will partially offset each other. Based on our experience, and our preference to understate the problem of reduced oral argument in cases of doubt, we decided to take out all procedural terminations in calculating our denominator.

Our examination also led us to suggest that the AO begin requiring the circuit courts to include on all terminations whether they were pursuant to a motion or after full briefing. That determination can be made very simply and requires no judgment at all. Indeed, the AO might also consider abandoning the procedural/merits line because it does require judgment and does not seem responsive to any particular need for data in the effective and fair administration of the federal courts of appeals. Changing the judge category to motions would also enable us and others to further refine the base of cases fully briefed against which the number of oral arguments could be assessed.

Consolidated Cases

The next category of adjustments relates to consolidated cases, of which there were 2,737 among the merits terminations in 2014 (7%), which is equal to about 41% of the total number of oral arguments nationwide (6,646). Within consolidations, there are several kinds of cases: criminal cases with several defendants (about 30% of all consolidations are in direct criminal appeals); administrative agency appeals direct to the courts of appeals (about 10%), which may involve multiple parties with some, but not total overlap of issues, including both claims that an agency rule went too far and did not go far enough; and private civil cases (about 35%), in which there could be cross-appeals or cases with more

than one plaintiff or defendant, with an indeterminable degree of overlap in the issues.

Again, we were faced with a binary choice: to take out all cases reported terminated by consolidation or leave them in. We decided to take them out, not just because the numbers were very large, but because the circuits differed widely in the impact of including them and measuring oral arguments in that category of cases. Thus, on the one extreme was the D.C. Circuit, in which there were more than 35% more terminations by consolidation of administrative appeals, than there were oral arguments of agency appeals. Most circuits had the reverse: several times the number of oral arguments as consolidation terminations, with one circuit (10^{th}) where the ratio of oral arguments to consolidations was more than 10 to 1. We recognized that a consolidation of a massive EPA rulemaking appeal, for example, is not the same as an immigration appeal or a routine NLRB unfair labor practice ruling. We nonetheless concluded that leaving in all consolidated cases would create the opposite error, by understating the percentage of cases in which oral argument was a realistic possibility of being provided.

Prisoner Petitions

There are two categories of cases in which there are a large, but indeterminable number in which one side (almost always the plaintiff/petitioner) is not represented by counsel. These are U.S. Prisoner Petitions and Private Prisoner

Petitions, where the term "Private" refers to prisoners held by state and local, not U.S., authorities. These cases include habeas corpus proceedings and their federal equivalent under 28 U.S.C. § 2255, where the petitioner is seeking release from prison or other substantive reduction or change of sentence. In some number of these cases, the prisoner is represented by counsel, but we decided not to seek to break down prisoner petitions by *pro se* or counseled cases but instead decided to break out *pro se* cases on a separate table. Some of these cases receive oral argument, but only if the prisoner is represented by counsel. Some present important issues of law, while others are fairly routine. Another significant group within these categories are complaints about prison conditions, which include class actions seeking injunctive relief, as well as individual claims seeking damages from prison guards or doctors for violations of the prisoner's constitutional rights. Many, perhaps most, of these cases are filed *pro se*, and there is a wide range regarding the difficulty and/or importance of the issues presented.

Again, we had to decide whether to include these cases as part of our denominator. After excluding procedural terminations and consolidations, there were 3,485 cases in the US prisoner category and 6,368 in the Private group. Of those 163 and 465 received oral argument, or about 5 and 7 %, respectively, which is hardly surprising given the large number of these case brought *pro se*. As a

result, we decided to have a separate table that shows the impact of eliminating all pro se cases.

Agency Appeals, Including Immigration Appeals

The category of Agency Appeals includes only those cases that come directly from an administrative agency (and the Tax Court) and do not go through the district court. For some agencies, there is direct review in the courts of appeals for all of their cases involving their substantive laws (NLRB and FCC are two examples); others, such as FDA, have only limited direct review, with most of its cases going to district court first. In addition, all Title VII and FOIA cases against all agencies go to district court, where they are treated on appeal as US cases.

The Tables that are publicly available do not have breakdowns by agency for Agency Appeals, but we obtained a breakdown from the Judicial Conference for the largest category of such appeals: immigration cases coming from the Board of Immigration Appeals. In 2014, BIA appeals represented 68% of all direct agency cases after excluding consolidated cases and more than 10% of all terminations in all categories of cases. Of the 2,374 BIA cases terminated on the merits, 372 (16%) had oral argument, with a wide variation among the circuits as to the percentage of BIA cases that had oral argument.

The largest numbers of immigration cases are in the Second (417) and Ninth (1,503) Circuits, which are considerable reductions from 2012 (1,582 and 2,860). There are significant numbers of BIA cases in all of the other circuits, except the D.C. Circuit, which had none in 2014. In every other circuit except the 10th, there were more BIA cases than those from all other agencies combined. Two points on oral argument in BIA cases in the Second and Ninth Circuits bear noting. In the Second Circuit, under Local Rule 34.2, the court maintains a non-argument calendar for immigration cases claiming asylum or seeking to withhold removal. In the Ninth Circuit, although oral argument is also limited, the court appoints counsel in prescreened cases, including immigration cases, "presenting issues of first impression or some complexity, or cases otherwise warranting further briefing and oral argument." See http://cdn.ca9.uscourts.gov/datastore/uploads/probono/Pro%20Bono%20Program%20Handbook.pdf

In the end, we decided to leave BIA cases in the basic tables, but to do a separate table showing, among agency appeals, the relative percentages of BIA and other agency appeal cases that received oral argument.

U.S. Civil, Other Private Civil, and Bankruptcy

Three categories – Other U.S. Civil, Other Private Civil, and Bankruptcy – do not have any apparent needs for adjustments beyond eliminating procedural terminations and those based on consolidations, which apply to every category of cases. By way of background, the first category is for those cases in which the United States, a federal agency, or a federal official is either a plaintiff or a defendant, the case was initially brought in a district court, and the appeal is from a judgment of that court. The second is comprised of all other non-bankruptcy civil appeals from district court judgments. They are mainly federal question and diversity cases, and both extend to a wide range of subjects. Although labeled "private civil," it also includes suits by and against states, municipalities, and their officers and employees. Third is the relatively small group of bankruptcy cases. The United States or one of its agencies is a party to many such cases (especially those that are appealed), but the presence of the US does not take the case out of this category.

Original Proceedings

The final category of cases is Original Proceedings, which is comprised mainly of writs of mandamus or prohibition, most of which are filed by pro se parties. In 2014, there were 5,145 terminations in this category of which only 35 received oral argument (0.7% after eliminating consolidations). All of the circuits

had a significant number of those proceedings, but no circuit had an overwhelming number. No circuit had more than nine oral arguments among these cases, and several had none. For these reasons, this category will be excluded from our basic denominator.

Description and Highlights of Attached Tables

Table I includes only percentages and not numbers of terminations. It is divided into circuits and type of case (eliminating only the Original category). It also eliminates procedural terminations and cases that were consolidated. The overall average percentages of oral arguments run from the mid-teens (3rd, 4th, 6th & 11th), to a group in the low 30s (1st, 2nd & 10th), with the 7th & DC Circuits at 45 and 55%, respectively. A similar pattern followed for direct criminal appeals, whereas for US prisoner petitions, DC stood out at 35%, although it had only 52 after consolidations. Private (state) prisoner cases were also rarely argued, except in the 1st Circuit (31%, out of 41 cases). Civil appeals in US, private, and bankruptcy cases were more often given oral argument, and there were fewer wide-spread differences among the circuits in these categories (although no circuit had a higher percentage in any of these categories than the 7th). Finally, on agency appeals, the 7th and DC Circuits heard 72% (after consolidation), followed by the

10th at 38%, the 5th & 7th at 23 & 24%, with four in the teens and four in single digits.

Table II takes out all 9,610 prisoner cases (US & private/state) from the cases terminated on the merits on Table I (29,212). It shows the actual numbers of cases (same basis as Table I), prisoner cases, and non-prisoner cases. Direct criminal appeals, which usually have counsel, are not treated as prisoner cases for this Table. The right column shows the percentage of orally argued cases by circuit when prisoner cases are removed. The increase in percentage of oral arguments is less than 10% *(i.e., 14-21 = 7%)* for every circuit except the 7th (increase from 45 to 65%) and the 10th (increase from 30 to 41st).

Table III starts with the basic cases & percentages in Table I and shows the number and percentages of oral arguments for pro se and then counseled cases on the merits, after consolidations and original cases are removed. If the appellee is the only pro se, the cases are counted as counseled cases. The contrast in orally argued cases is quite dramatic: overall = 23%; pro se = 3%; and counseled cases = 40%. Of the circuits, five had less than 1% of their pro se cases argued, seven had between 3 & 6% argued, and DC led the pack with just 10%. For counseled cases, three had 25% (3rd, 4th, and 11th), eight between 31 & 51%, and DC and the 7th on top at 77 & 86%, respectively.

Last, Table IV shows the impact of immigration (BIA) appeals on the percentage of oral arguments among agency appeals only (merits cases, after eliminating consolidations). First, BIA cases are more than twice the number of other agency appeals, although they are not all as complex and many agency rulemaking challenges are often filed in the DC Circuit (which had no BIA cases in 2014). Second, while overall there were fewer oral arguments in BIA than in non BIA cases (16 vs 22%), the disparity was much less that for pro se vs counseled cases (Table III). Third, at the top of BIA argued cases was the 7th, with 77% of its BIA cases argued (and only 57% of its other agency appeals), followed by the 9th tied with the 8th (at 19%), even though the 9th decided 1026 BIA cases on the merits. Fourth, for non-BIA appeals, three circuits had appreciably higher percentages (DC/72, 10th/62 & 7th/57), with three circuits below 10% (1st, 2nd & 3rd), four in the teens (4th, 6th, 9th & 8th), and the others between 22 & 36%.

TABLE I

PERCENTAGE OF ORAL ARGUMENTS IN CASES DECIDED ON THE MERITS U.S. COURTS OF APPEALS 2014 BY CIRCUIT & BY CASE CATEGORY[1]

	All	Criminal	US Prison	US Civil	Private Prison	Private Civil	Bank	Agency
All	23	22	5	38	7	46	51	18
DC	55	65	35	53	0	47	50	72
1st	32	29	4	34	31	57	44	4
2nd	32	37	5	51	9	55	56	9
3rd	12	12	5	19	4	23	39	9
4th	11	12	2	24	2	26	38	16
5th	22	14	7	56	5	54	75	23
6th	18	14	6	21	7	39	50	7
7th	45	60	5	61	13	68	75	72
8th	22	18	6	34	7	50	37	24
9th	24	30	5	49	10	53	47	16
10th	30	41	2	26	7	43	59	38
11th	14	12	3	17	5	35	35	15

[1] Source: Administrative Office, Table B-1 for 12 months ending September 20, 2014. This table does not include cases from the Federal Circuit, and it excludes procedural terminations, consolidated cases, and cases in the original proceedings category.

TABLE II

PERCENTAGE OF ORAL ARGUMENTS
IN CASES DECIDED ON MERITS
US COURTS OF APPEALS 2014
BY CIRCUIT WITH PRISONER ADJUSTMENT[2]

	Cases Table I	Oral % Table I	Prisoner Cases	Cases Minus Prisoners	Oral Non-Prisoners	Oral % Non-Prisoners
All	29212	23	9610	19602	5983	31
DC	426	55	51	375	219	58
1st	770	32	125	645	227	35
2nd	2522	32	458	2064	780	38
3rd	1782	12	581	1201	206	17
4th	3081	11	1276	1805	315	17
5th	3645	22	985	2660	749	28
6th	2720	22	950	1770	413	23
7th	1506	45	526	980	633	65
8th	1881	22	717	1164	363	31
9th	6439	24	2406	4033	1306	32
10th	1303	30	358	945	383	41
11th	3137	14	1227	1910	393	21

[2] Prisoner cases include both US and Private (state) prisoners. They are excluded from the total cases and their oral arguments are also excluded.

TABLE III

PERCENTAGE OF ORAL ARGUMENTS
IN CASES DECIDED ON MERITS
US COURTS OF APPEALS 2014
BY CIRCUIT WITH *PRO SE* ADJUSTMENT[3]

	Cases Table I	Oral % Table I	*Pro Se* Cases	% Oral in *Pro Se* Cases	Counseled Cases	% Oral Counseled Cases
All	29212	23	13790	3	15422	40
DC	426	55	138	10	288	77
1st	770	32	234	0.8	534	46
2nd	2522	32	1016	6	1506	50
3rd	1782	12	538	0.2	944	25
4th	3081	11	1731	0.2	1350	25
5th	3645	22	1904	5	1741	41
6th	2720	22	1303	3	1417	31
7th	1506	45	744	3	762	86
8th	1881	22	901	3	980	39
9th	6439	24	3065	6	3374	40
10th	1303	30	534	0.6	769	51
11th	3137	14	1380	0.5	1757	25

[3] *Pro se* cases include only cases with no counseled party and *pro se* is appellant; if *pro se* is appellee, case is treated as counseled case. *Pro se* cases obtained by special FJC report 7/15/15.

TABLE IV

PERCENTAGE OF ORAL ARGUMENTS
IN AGENCY CASES DECIDED ON MERITS
US COURTS OF APPEALS 2014 BY CIRCUIT
WITH AND WITHOUT IMMIGRATION (BIA) ADJUSTMENT[4]

	Agency Cases Table I	Agency Oral % Table I	BIA Cases	% Oral BIA Cases	Non BIA Cases	% Oral Non-BIA Cases
All	3514	18	2374	16	1140	22
DC	100	72	0	0	100	72
1st	92	4	79	4	16	6
2nd	552	9	417	10	135	8
3rd	195	9	120	8	75	9
4th	167	16	110	16	57	18
5th	202	23	140	19	62	33
6th	257	7	190	4	67	15
7th	81	72	60	77	21	57
8th	92	24	64	19	28	36
9th	1503	16	1026	19	477	11
10th	112	38	49	6	63	62
11th	158	15	119	13	39	18

[4] Agency cases from Table B-1, after excluding procedural and consolidated terminations. BIA case information obtained by special FJC report 7/15/15.