

December 2020

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### Recommended Citation

Peter J. Krumholz, The Case for Greater Public Access to Oral Argument Recordings in the Tenth Circuit, 89 Denv. U. L. Rev. 395 (2012).

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# THE CASE FOR GREATER PUBLIC ACCESS TO ORAL ARGUMENT RECORDINGS IN THE TENTH CIRCUIT

PETER J. KRUMHOLZ<sup>†</sup>

## INTRODUCTION

The story of how Peter Irons, a professor of political science at the University of California at San Diego, once incurred the wrath of the United States Supreme Court makes for a riveting narrative. In the early 1990s, Professor Irons directed the Earl Warren Bill of Rights Project, which developed teaching materials for high school and college classes on the Bill of Rights.<sup>1</sup> In that capacity, he obtained access to audiotapes of Supreme Court oral arguments in twenty-three historic cases, including *Roe v. Wade*.<sup>2</sup>

Professor Irons's access to the recordings was conditioned on his signing a document acknowledging that his use of the tapes was limited to "private research and teaching," and that he was prohibited from duplicating or distributing the tapes to the public.<sup>3</sup>

At the time, Professor Irons considered the conditions a violation of the First Amendment.<sup>4</sup> He therefore could challenge the conditions in court—a potentially costly and time-consuming exercise—or sign the document and face any consequences for violating its terms. He chose the latter course, and in 1993, the oral-argument recordings were published by *The New Press* (a nonprofit publisher) together with a companion book entitled *May It Please the Court*.<sup>5</sup>

The Court's reaction was swift. In a press release issued just before the recordings were released to the public, the Court stated that Professor Irons's release of the tapes constituted a breach of contract, and that the

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1. *Cameras in the Courtroom: Hearing Before the S. Judiciary Comm.*, 109th Cong. (2005) [hereinafter Irons Testimony] (statement of Professor Peter Irons, Univ. of Cal., San Diego), available at [http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da10c4fec&wit\\_id=e655f9e2809e5476862f735da10c4fec-3-2](http://www.judiciary.senate.gov/hearings/testimony.cfm?id=e655f9e2809e5476862f735da10c4fec&wit_id=e655f9e2809e5476862f735da10c4fec-3-2).

2. 410 U.S. 113 (1973).

3. Irons Testimony, *supra* note 1.

4. *Id.*

5. *MAY IT PLEASE THE COURT: THE MOST SIGNIFICANT ORAL ARGUMENTS BEFORE THE SUPREME COURT SINCE 1955* (Peter Irons & Stephanie Guitton eds., 1993).

Court was considering “legal remedies” against him.<sup>6</sup> Eventually, the Court backed down, but not before the matter generated national media attention that was overwhelmingly critical of the Court’s position.<sup>7</sup>

Twelve years after his run-in with the Court, Professor Irons testified to the Senate Judiciary Committee that the “resistance to public access to the Court’s proceedings has not only diminished, but has been replaced with [the] understanding that allowing the American people to hear the arguments in its chambers has not damaged the Court in any way.”<sup>8</sup> Five years later, in September 2010, the United States Supreme Court announced that beginning with the October 2010 term, the Court would post to its website audio recordings of all oral arguments, with each recording being posted at the end of the week in which the argument was held.<sup>9</sup> Members of the public can now listen free of charge to every Supreme Court oral argument. Thus, in the span of fifteen years, the Supreme Court went from threatening legal action against Professor Irons for releasing audio of oral arguments from the most important cases of the twentieth century, to embracing a fully transparent policy that allows the public access to oral-argument audio in virtually every case that comes before it.<sup>10</sup>

Bizarrely, despite the enormous strides the United States Supreme Court has made in embracing a more transparent policy on oral-argument recordings,<sup>11</sup> several federal courts of appeal, including the Tenth Circuit, remain stubbornly resistant to allowing public access to oral argument proceedings. Indeed, the Tenth Circuit’s policy is far more consistent with the attitudes reflected by the Supreme Court’s confrontation with Professor Irons in 1993. It is therefore not a stretch to say that the

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6. Joan Biskupic, *Marketer of Court Tapes Risks Supreme Censure*, WASH. POST, Aug. 30, 1993, at A6.

7. Irons Testimony, *supra* note 1.

8. *Id.*

9. Press Release, United States Supreme Court, Supreme Court to Make Available Audio Recordings of All Oral Arguments (Sept. 28, 2010), [http://www.supremecourt.gov/publicinfo/press/viewpressreleases.aspx?FileName=pr\\_09-28-10.html](http://www.supremecourt.gov/publicinfo/press/viewpressreleases.aspx?FileName=pr_09-28-10.html). For several years prior to the Supreme Court’s announcement, the Court had been making transcripts of oral arguments publicly available on its website.

10. Indeed, as Professor Irons noted, by 2005 the Supreme Court’s bookstore sold a digital video disc, or DVD, entitled *The Supreme Court’s Greatest Hits*, containing sixty-two oral arguments, along with pictures and text. Irons Testimony, *supra* note 1.

11. The next step in the United States Supreme Court’s evolving attitude on transparency—broadcasting video of oral arguments—is likely still years away. See Robert L. Brown, *Just a Matter of Time? Video Cameras at the United States Supreme Court and the State Supreme Courts*, 9 J. APP. PRAC. & PROCESS 1, 3 (2007) (“Despite the hopes of some—the media in particular—that a new Chief Justice would lead the Supreme Court into an age of televised oral arguments, this has not proven to be the case.”); see also *Access to the Court: Televising the Supreme Court: Hearing Before the Subcomm. on Admin. Oversight and the Courts of the S. Comm. on the Judiciary*, 112th Cong. 6 (2011) (statement of Anthony J. Scirica, C.J. of the Third Cir.) (“A congressional mandate that the Supreme Court televise its proceedings likely raises a significant constitutional issue.”), available at <http://www.judiciary.senate.gov/pdf/11-12-6SciricaTestimony.pdf>. This Article will focus on the availability of audio recordings of oral arguments.

policies of the Tenth Circuit, and the other circuits with similar policies, are twenty years out-of-date.

This Article will survey the policies of all the federal courts of appeal concerning oral-argument recordings in order to place the Tenth Circuit's policy in context. It will then analyze the Tenth Circuit's local rule concerning public access to oral arguments, which appears to be entirely standardless and gives the court unconstrained discretion as to whether and to whom it will release oral-argument recordings. Finally, this Article will consider the underlying policy arguments for and against allowing greater public access to oral arguments. There are arguments to be made for the Tenth Circuit's current policy, but none of them is convincing. The Tenth Circuit should follow the lead of the United States Supreme Court, and the majority of its sister circuits, and make oral-argument recordings easily accessible to the public.

## I. THE FEDERAL APPELLATE COURTS' POLICIES

Of the thirteen federal courts of appeal, eight circuits have aligned themselves with the United States Supreme Court and have made audio recordings of oral arguments readily accessible to the public through their respective websites.<sup>12</sup> Indeed, some of those circuits have put in place policies that exceed the Supreme Court in terms of accessibility. In contrast, the Tenth Circuit is solidly in the minority of circuits in terms of its begrudging approach to transparency.

### A. *The Progressives*

#### First Circuit

The First Circuit's policy is to make oral-argument recordings available to the public on the court's website via an RSS feed.<sup>13</sup> Although the arguments are not streamed live, they typically are made available by 4:00 p.m. on the same day the arguments are held.<sup>14</sup> However, the court provides only the most recent oral-argument recordings; it stores audio recordings of oral arguments only from the past thirty days. This thirty-day policy may be driven by how much data the court's servers can hold, but the upshot is that the recording for any oral argument held more than thirty days ago is simply not available. Thus, the court's thirty-day archive may be useful to litigants currently before the court, or

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12. First, Third, Fourth, Fifth, Seventh, Eighth, Ninth, and Federal Circuits.

13. See *First Circuit Oral Arguments*, U.S. CT. OF APPEALS FOR THE FIRST CIRCUIT, <http://www.ca1.uscourts.gov/files/audio/audiors.php> (last visited Jul. 2, 2012). "RSS," or Really Simple Syndication, is a formatted web feed used to publish frequently updated works, such as blog entries, news headlines, or, in the case of courts, new opinions or oral arguments. See *Seventh Circuit RSS*, U.S. CT. OF APPEALS FOR THE SEVENTH CIRCUIT, [http://www.ca7.uscourts.gov/ca7\\_rss.htm](http://www.ca7.uscourts.gov/ca7_rss.htm) (last visited Jul. 2, 2012). The First Circuit's website page containing the RSS links is difficult, though not impossible, to find from the Court's home page.

14. *First Circuit Oral Arguments*, *supra* note 13.

in high-profile cases in which oral argument is covered by the media. But for most lawyers and individuals whose use of oral-argument recordings is research-based, they inevitably will come across court decisions long after the thirty-day window has closed; for those cases, oral-argument recordings will not be available.

### Third Circuit

The Third Circuit posts audio recordings of oral arguments dating back to 2007 and, like the First Circuit, provides an RSS feed.<sup>15</sup> Its recordings are easily accessible from the court's home page.<sup>16</sup> Although the oral-argument files are not searchable, they are serially listed by case number.<sup>17</sup>

### Fourth Circuit

In May 2011, the Fourth Circuit began posting oral-argument recordings to its website two days following argument.<sup>18</sup> The court's list of available oral-argument recordings includes a helpful chart, listing not only the case name and number, but also the names of the judges on each panel and the attorneys presenting argument.<sup>19</sup> The Fourth Circuit also provides an RSS feed for the most recent oral-argument recordings. The court reminds attorneys that, in light of this new policy, they "should not include in their arguments any sensitive personal information . . . or sealed criminal information."<sup>20</sup> In recognition of the potentially sensitive nature of the facts in some cases, the court further provides that a party may move to seal argument in accordance with Fourth Circuit Local Rule 25(c)(2).<sup>21</sup> The Fourth Circuit has not posted oral-argument recordings for any oral arguments that occurred before May 2011. Those recordings are available on compact disc from the clerk's office, but a \$30 fee applies to each request.<sup>22</sup>

### Fifth Circuit

The Fifth Circuit allows public access to oral-argument recordings released from May 21, 2008, to the present, and provides a searchable database that allows users to search by date, docket number, case name,

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15. See *Oral Argument Files and RSS Feed*, THIRD JUD. CIRCUIT, <http://www.ca3.uscourts.gov/oralargument/OralArg.htm> (last visited Jul. 2, 2012).

16. THIRD JUD. CIRCUIT, <http://www.ca3.uscourts.gov> (last visited Jul. 2, 2012).

17. See *All Oral Argument Files*, THIRD JUD. CIRCUIT, <http://www.ca3.uscourts.gov/oralargument/ListArgumentsAll.aspx> (last visited Jul. 2, 2012).

18. See 4th Cir. Internal Operating Proc. 34.3, available at *Local Rules of the Fourth Circuit, Internal Operating Procedures*, U.S. CT. OF APPEALS FOR THE FOURTH CIRCUIT, <http://www.ca4.uscourts.gov/pdf/rules.pdf> (last visited Jul. 2, 2012).

19. *Fourth Circuit Oral Argument Audio Files*, U.S. CT. OF APPEALS FOR THE FOURTH CIRCUIT, <http://www.ca4.uscourts.gov/OAarchive/OAList.asp> (last visited Jul. 2, 2012).

20. *Id.*

21. 4th Cir. Internal Operating Proc. 34.3; see also 4th Cir. R. 25(c)(2).

22. See *Fourth Circuit Oral Argument Audio Files*, *supra* note 19.

and attorney name.<sup>23</sup> It also provides an RSS feed, which returns the most recently released day's worth of oral-argument recordings.<sup>24</sup> Recordings are released on the same day as oral argument, usually within a few hours.

#### Seventh Circuit

Oral-argument audio, dating back to May 2008, is posted to the Seventh Circuit's website.<sup>25</sup> Recordings are made available on the same day arguments are held. The court's audio files are searchable by case number. The court provides an RSS feed returning the previous week's worth of oral arguments, as well as an iTunes podcast to which listeners can subscribe.<sup>26</sup> In addition, the court provides a website link for handheld devices so that members of the public can hear oral-argument recordings on their cell phones.<sup>27</sup> Like most circuits with progressive oral-argument audio policies, the Seventh Circuit does not appear to have a written policy concerning oral-argument audio; rather, the public is left to glean the court's policy from what can be found on the court's website.

#### Eighth Circuit

The Eighth Circuit provides public access to oral-argument recordings via an iTunes podcast.<sup>28</sup> As of early July 2012, the court had 281 oral-argument recordings, dating back to December 13, 2011, posted to iTunes. The court also posts its oral-argument recordings to its website, in a searchable database.<sup>29</sup> The court's database includes oral arguments from as early as January 2000.<sup>30</sup> Generally, the court posts oral-argument recordings within a few hours of the arguments.

#### Ninth Circuit

Alone among all federal appellate courts, the Ninth Circuit not only provides oral-argument audio for every case in a searchable database, but

23. *Oral Arguments Recording Page*, U.S. CT. OF APPEALS FOR THE FIFTH CIRCUIT, <http://www.ca5.uscourts.gov/OralArgumentRecordings.aspx> (last visited Jul. 2, 2012).

24. *RSS Feeds*, U.S. CT. OF APPEALS FOR THE FIFTH CIRCUIT, <http://www.ca5.uscourts.gov/RssFeeds.aspx> (last visited Jul. 2, 2012).

25. Telephone Interview with Staff Member, Clerk's Office of the U.S. Ct. of Appeals for the Seventh Circuit (Nov. 2011).

26. See *U.S. 7th Judicial Circuit: New Oral Arguments*, iTUNES, <http://itunes.apple.com/podcast/us-7th-judicial-circuit-new/id171536311> (last visited Jul. 2, 2012).

27. See *7th Circuit Mobile*, SEVENTH CIRCUIT CT. OF APPEALS, <http://www.ca7.uscourts.gov/mobile.htm> (last visited Jul. 2, 2012).

28. *Oral Arguments from the Eighth Circuit U.S. Court of Appeals*, iTUNES, <http://itunes.apple.com/podcast/oral-arguments-from-eighth/id274752609> (last visited Jul. 2, 2012).

29. *Eighth Circuit Court of Appeals and Bankruptcy Appellate Panel Oral Arguments Search*, U.S. CT. OF APPEALS FOR THE EIGHTH CIRCUIT, <http://www.ca8.uscourts.gov/oralargs/oaFrame.html> (last visited Jul. 2, 2012).

30. *Id.*

it also provides video of oral arguments in select cases.<sup>31</sup> The court provides live streaming audio for internal court use and posts audio of oral arguments for public consumption one day after arguments are held.<sup>32</sup> The court's database of oral-argument audio dates back approximately five years.<sup>33</sup> The Ninth Circuit is easily the most progressive of the federal circuits in the area of transparency. Indeed, in December 2009, the Ninth Circuit Judicial Council approved experimental use of cameras in the federal district courts within the circuit.<sup>34</sup> It is commendable, and somewhat ironic, that the circuit court whose decisions are most often the subject of controversy and criticism<sup>35</sup> is also the circuit whose policy is the most transparent in terms of allowing public access to an important aspect of its deliberative process.

### Federal Circuit

The Federal Circuit posts audio recordings of oral arguments by close of business on the same day that argument is held.<sup>36</sup> The court's website contains a search page that allows the public to search for oral-argument recordings using case name, appellate case number, or argument date.<sup>37</sup> The database of recordings includes oral arguments presented as far back as 2006.<sup>38</sup>

### B. *The Laggards*

#### Second Circuit

An undated "Notice to the Bar" posted on the Second Circuit's website advises that "[a]n audio tape" of an oral argument "may be purchased for \$26 per tape by written request to the Clerk."<sup>39</sup> The use of the phrase "audio tape" suggests that the notice is somewhat dated. Other than this apparently outdated notice, the court does not address the issue

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31. *Audio and Video*, U.S. CTS. FOR THE NINTH CIRCUIT, <http://www.ca9.uscourts.gov/media/> (last visited Jul. 2, 2012). By contrast, nearly half of all state supreme courts offer live video webcasts of their oral arguments. See Brown, *supra* note 11, at 2.

32. Diarmuid F. O'Scannlain, *Some Reflections on Cameras in the Appellate Courtroom*, 9 J. APP. PRAC. & PROCESS 323, 324 (2007).

33. *Audio and Video*, *supra* note 31, at archive p. 179.

34. Steven M. Ellis, *Ninth Circuit Approves Experimental Use of Cameras in District Courts*, METROPOLITAN NEWS-ENTERPRISE (L.A.), Dec. 21, 2009, at 3, <http://www.metnews.com/articles/2009/came122109.htm>; Press Release, Ninth Circuit Judicial Council Approves Experimental Use of Cameras in District Courts (Dec. 17, 2009).

35. See, e.g., Jerome Farris, *Judges on Judging: The Ninth Circuit—Most Maligned Circuit in the Country—Fact or Fiction?*, 58 OHIO ST. L.J. 1465, 1472 (1997) (Ninth Circuit judge arguing that the circuit's reversal rate is not because its judges are too "liberal," but because of its willingness to take on controversial issues); Kevin M. Scott, *Supreme Court Reversals of the Ninth Circuit*, 48 ARIZ. L. REV. 341, 341 (2006) (discussing Ninth Circuit's reversal rate).

36. *Oral Argument Search*, U.S. CT. OF APPEALS FOR THE FED. CIRCUIT, <http://www.cafc.uscourts.gov/oral-argument-recordings/search/audio.html> (last visited Jul. 2, 2012).

37. *Id.*

38. *Id.*

39. *Notice to the Bar*, U.S. CT. OF APPEALS FOR THE SECOND CIRCUIT, <http://www.ca2.uscourts.gov/Docs/News/Notice%20to%20the%20bar.pdf> (last visited Jul. 2, 2012).

of public availability of oral-argument recordings in its local rules or internal operating procedures.<sup>40</sup>

#### Sixth Circuit

Oral-argument recordings are not made available on the Sixth Circuit's website, but the court advises attorneys on its website that audio recordings of oral arguments are available for \$26 "per tape."<sup>41</sup> None of the court's local rules or internal operating procedures addresses the issue.

#### Tenth Circuit

The Tenth Circuit is the only federal appellate court that requires the formal filing of a motion to obtain access to oral-argument recordings. Tenth Circuit Local Rule 34.1(E) states that oral-argument recordings are for the court's use, but that "parties or others" may file a motion seeking access to an oral-argument recording.<sup>42</sup> If the motion is granted, the oral-argument recording will be e-mailed to the movant at no cost.<sup>43</sup> The Tenth Circuit's rule on access to oral-argument recordings is fraught with problems, which are discussed in further detail in Part II.

#### Eleventh Circuit

Even among the least progressive circuits, the Eleventh Circuit is a curious outlier in terms of its unwillingness to embrace a transparent policy. Eleventh Circuit Local Rule 34-4(g) provides:

Oral argument is recorded for exclusive use of the court. Neither the recording nor a transcript thereof will be made available to counsel or the parties. With advance approval of the court, however, counsel may arrange and pay for a qualified court reporter to be present to record and transcribe the oral argument for counsel's personal use. Recording of court proceedings by anyone other than the court is prohibited.<sup>44</sup>

One must almost admire the steadfastness with which the Eleventh Circuit has adhered to this rule despite its demonstrated absurdity and the

40. On a somewhat incongruous note, however, the Second Circuit has been commended for its policy of allowing oral arguments to be televised by news media and educational institutions. See 2d Cir. R. App. at pt. B (adopted Mar. 27, 1996), available at *Local Rules Appendix Part B: Second Circuit Guidelines Concerning Cameras in the Courtroom*, U.S. CT. OF APPEALS FOR THE SECOND CIRCUIT, [http://www.ca2.uscourts.gov/clerk/Rules/LR/Appendix\\_B.htm](http://www.ca2.uscourts.gov/clerk/Rules/LR/Appendix_B.htm) (last visited Jul. 2, 2012); Brown, *supra* note 11, at 5-6.

41. *Oral Argument Frequently Asked Questions*, U.S. CT. OF APPEALS FOR THE SIXTH CIRCUIT, [http://www.ca6.uscourts.gov/internet/court\\_calendars/pdf/oralargfaqs.pdf](http://www.ca6.uscourts.gov/internet/court_calendars/pdf/oralargfaqs.pdf) (last visited Jul. 2, 2012).

42. 10th Cir. R. 34.1(E).

43. *Id.*

44. 11th Cir. R. 34-4(g).



pointed criticism it has received.<sup>45</sup> For example, in 2006, the Eleventh Circuit reversed and remanded a case to a federal district judge in Florida, and when the district judge subsequently requested a copy of the oral-argument recording, the Eleventh Circuit denied the judge's request.<sup>46</sup> Even more absurdly, in 2007, the Eleventh Circuit considered amending its rule to provide that it would release recordings to the United States Supreme Court if requested, but ultimately opted not to do so.<sup>47</sup>

#### District of Columbia Circuit

The D.C. Circuit adopted its policy regarding oral-argument recordings more than fifteen years ago.<sup>48</sup> It provides that only "an attorney or litigant in the case may *listen* to oral-argument tapes."<sup>49</sup> However, the policy does allow "any person" to request that a transcript be made of oral argument at his or her own expense, using a court reporter specified by the court.<sup>50</sup> Inexplicably, the court specifies that "[t]he cost will include the expense of preparing one copy of the transcript for the requester and four copies for the Court."<sup>51</sup> The policy further provides that any person may request a copy of an oral-argument recording "after the case has been completely closed," and clarifies that "[t]his means that all appeals, remands, or other additional proceedings must be concluded before the tape will be reproduced."<sup>52</sup> The circuit charges \$30 for an oral-argument recording. Finally, the D.C. Circuit's policy provides that "[t]he Court will consider requests for a waiver" of its policy upon a

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45. E.g., Howard Bashman, *At 11th Circuit, What Happens at Oral Argument Stays at Oral Argument*, LAW.COM, (Sept. 3, 2007), <http://www.law.com/jsp/article.jsp?id=1188550954340&slreturn=1>; Allison Torres Burtka, *Court Policies on Sealed and Secret Information Diverge*, TRIAL, Feb. 2008, at 62, 62.

46. *United States v. Williams*, 481 F. Supp. 2d 1298, 1305 n.9 (M.D. Fla. 2007) ("It is difficult to understand how or why the Court of Appeals concluded that the sentencing rationale I set out was mere subterfuge. I thought perhaps something was said during oral argument on appeal that influenced the panel's judgment. So I requested a copy of the transcript from the Court of Appeals. My request was denied. Unlike the United States Supreme Court and most of the other courts of appeal, the United States Court of Appeals for the Eleventh Circuit maintains the transcripts of these public hearings in secret.")

47. Burtka, *supra* note 45, at 62.

48. *Court Policy on Recordings & Transcripts of Oral Arguments*, U.S. CT. OF APPEALS, D.C. CIRCUIT (Nov. 2011), [http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Public%20Access%20ordering%20Transcripts/\\$FILE/argTapesPolicy\\_Nov2011.pdf](http://www.cadc.uscourts.gov/internet/home.nsf/Content/VL%20-%20RPP%20-%20Public%20Access%20ordering%20Transcripts/$FILE/argTapesPolicy_Nov2011.pdf).

49. *Id.* ¶ 1.

50. *Id.* ¶ 3.

51. *Id.*

52. *Id.* ¶ 4. This aspect of the court's policy is especially puzzling in light of the frequency with which the D.C. Circuit's written opinions cite to statements made by counsel in oral argument. A Westlaw search of D.C. Circuit decisions for the words "recording" or "tape" within five words of the phrase "oral argument" turned up sixty-eight such instances. See, e.g., *Artis v. Bermanke*, 630 F.3d 1031 (D.C. Cir. 2011). In *Artis*, the court cited to the oral-argument recording to support the harsh conclusion that counsel for the Board of Governors of the Federal Reserve System made a misrepresentation to the court. *Id.* at 1038. Yet, because the decision resulted in a remand for further proceedings before the district court, and the case is still pending, there is no way for anyone but the litigants themselves to verify the court's citation without incurring the time and expense of hiring a company to generate a transcript of the argument.

showing of good cause.<sup>53</sup> There does not, however, appear to be any guidance from the court on what constitutes “good cause” for purposes of obtaining a waiver of the court’s policy.

## II. CRITIQUE OF THE TENTH CIRCUIT RULE 34.1(E)(1)

The Tenth Circuit’s newly adopted policy on oral-argument recordings is at least a tentative step in the right direction. But it simply is not enough, especially by comparison to the policies adopted by a majority of the federal appellate courts. Moreover, an examination of the text of the Tenth Circuit’s Rule 34.1(E)(1) on its face shows it to be completely standardless. The rule states:

Oral arguments are recorded electronically for the use of the court. Parties or others seeking access to the recordings may, however, file a motion to obtain a copy. The motion must state the reason or reasons access is sought. Upon issuance of an order from the hearing panel granting the request, the clerk will be directed to forward the mp3 recording via email.<sup>54</sup>

The first sentence of the rule makes clear that the Tenth Circuit’s policy is that oral-argument recordings are for the court’s, not the public’s, use. The Tenth Circuit will, however, permit members of the public to request access to the recordings,<sup>55</sup> and the court may grant such access under circumstances that remain entirely unspecified.

This latter point is especially troubling: the rule provides members of the public with no notice of the standard that they must meet in order for a request to be approved by the court. The court requires the public to state the reason or reasons for the request without knowing what sorts of reasons the court will find satisfactory. It is ironic that a federal appellate court—which justifiably will not abide the exercise of standardless and unconstrained discretion in other branches of government when presented with such cases<sup>56</sup>—would enact its own standardless rule that allows unconstrained discretion in its application.

As a matter of practice, it appears to be the case that since May 2010, when the Tenth Circuit implemented the current rule,<sup>57</sup> the court

53. *Court Policy on Recordings & Transcripts of Oral Arguments*, *supra* note 48, ¶ 5.

54. 10th Cir. R. 34.1(E)(1).

55. *Id.*

56. *Cf. Giaccio v. Pennsylvania*, 382 U.S. 399, 402–03 (1966) (“It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits . . . .”); *Sumnum v. Callaghan*, 130 F.3d 906, 920 (10th Cir. 1997) (“Allowing government officials to make decisions as to who may speak on county property, without any criteria or guidelines to circumscribe their power, strongly suggests the potential for unconstitutional conduct . . . .”).

57. The court implemented its current policy on an interim basis in May 2010. *See in re Release of Oral Argument Recordings*, U.S. CT. OF APP. 10TH CIR. add. V, 28 U.S.C.A. (2010). The court formally adopted Tenth Circuit Local Rule 34.1(E)(1) effective January 1, 2012. *See* 10th Cir. R. 34.1(E)(1).

has granted all or nearly all motions that have been filed pursuant to Rule 34.1(E)(1). But if this is the case, it would appear that the Tenth Circuit's requirement of filing a motion to obtain oral-argument recordings is nothing more than a procedural hoop designed to deter members of the public—the vast majority of whom lacks access to counsel, the resources to hire counsel, or the sophistication to file a motion pro se—from ever bothering to seek access to oral-argument recordings.

### III. THE COMPETING POLICIES

There are, to be sure, policy concerns that might, taken by themselves, favor the minority position concerning public access to oral-argument recordings. Those concerns are far outweighed, however, by the persuasive policy reasons for the more transparent approach adopted by the United States Supreme Court and the majority of federal appellate courts.

#### *A. The Policy Concerns Underlying a Less Transparent Approach*

One of the concerns most frequently raised concerning the broadcasting of oral arguments is the danger that it will lead to “grandstanding” by appellate counsel (or, for that matter, the judges). For example, at the time of the controversy caused by Professor Irons, some noted scholars, including Professor Charles Fried of Harvard, dismissed the distribution of the tapes as “pure entertainment” that would “encourage grandstanding.”<sup>58</sup>

Grandstanding is one aspect of a broader concern. As Chief Justice Roberts has observed, “[O]ral argument helps appellate judges learn about a particular case in a particular way”—it is a “valuable tool” that has served appellate courts well.<sup>59</sup> Broadcasting oral arguments, either in audio or visual form, may alter the dynamics of the arguments in a way that makes them less useful to the court.<sup>60</sup>

This concern, while not one that should be lightly dismissed, has not been borne out by the experiences of the many appellate courts that have been broadcasting oral arguments, either live or on a delayed basis, for the past several years.<sup>61</sup> Indeed, even in the case of televised broadcasts of oral arguments, federal appellate judges have observed that grandstanding has not been an issue. As Judge O’Scannlain of the Ninth Circuit has observed, “My personal experience . . . has been that as a general rule my colleagues and practitioners have acted with the civility and de-

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58. Biskupic, *supra* note 6.

59. Brown, *supra* note 11, at 3–4 (quoting John G. Roberts Jr., C.J., U.S. Supreme Court, Remarks at the Ninth Circuit Judicial Conference (July 13, 2006)).

60. See Daniel Stepniak, *Technology and Public Access to Audio-Visual Coverage and Recordings of Court Proceedings: Implications for Common Law Jurisdictions*, 12 WM. & MARY BILL RTS. J. 791, 808 (2004).

61. *Id.* at 802.

corum appropriate to a federal appellate courtroom, by and large resisting the temptation to play to the television audience.”<sup>62</sup> Given that televised broadcasts have not resulted in a grandstanding problem, it seems even less likely that audio broadcasting—which uses equipment that is far less intrusive and noticeable in the courtroom—will result in grandstanding by either counsel or the judges.

A second concern is that easy public access to oral-argument recordings might result in the kind of public pressure that politicizes the process of appellate decision making.<sup>63</sup> While this might be a legitimate concern for those jurisdictions whose judges are elected, it is not (or at least should not be) a concern for federal appellate judges who have the benefit of life tenure.<sup>64</sup> In addition, the measured and deliberate nature of appellate decision making further insulates federal appellate judges from whatever public pressure might be created by the broadcast of oral arguments. If they were expected to issue a decision immediately upon the conclusion of oral arguments, or even very soon thereafter, such public pressure might arguably play a role. But this is not the case, as appellate lawyers—who invariably find themselves having to explain to clients “why it’s taking so long”—know all too well.<sup>65</sup>

Finally, a third concern is that a question posed by a judge could be taken out of context and misused to create an inaccurate impression of what federal appellate judges do. This might be a legitimate concern given the kinds of hypothetical questions sometimes posed to probe the limits of a party’s legal position. The remedy, however, for potential public misunderstandings concerning the workings of federal appellate courts is not to continue keeping the public in the dark, but rather to give the public greater access, which ultimately will lead to more informed public commentary on the courts’ deliberative process. The opposing view “appears to reveal an undesirable elitism and the existence of a concern, similar to that expressed in the early twentieth century, that the lay public

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62. O’Scannlain, *supra* note 32, at 327.

63. *Id.*

64. U.S. CONST., art. III, § 1 (“The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour . . .”).

65. On a related note, Judge O’Scannlain provides a final, somewhat cynical, reason why the “public pressure” concern should not be a problem:

[A] normal day in the appellate courtroom rarely includes cases on the order of Hepting or Al-Haramain, and it becomes clear that our docket is hardly the stuff that provides the storylines for *Law & Order*. While every case is interesting and important in its own right, especially to the parties, most cases are unlikely to engender a great deal of emotion from spectators or from the public at large.

O’Scannlain, *supra* note 32, at 327. Unfortunately, I have discovered from my own personal experience that Judge O’Scannlain’s observations are all too true. When I have presented oral argument to the Colorado state appellate courts, which do make oral-argument recordings available for public access, members of my own family have found the arguments too dry to listen to the entire argument.

ought not to be permitted to become too involved or interested in judicial matters.”<sup>66</sup>

### *B. The Policies Supporting the Majority Position*

Purely as a matter of logic, the most obvious reason why the federal appellate courts should make oral-argument recordings publicly available is that the oral arguments themselves are open to the public. As Professor Laurence Tribe noted at the time of the Irons controversy, “We are not talking about secrets and leaks. These [oral-argument tapes and transcripts] are clearly public documents. . . . Why access should be limited to the few who are lucky enough to sit in the courtroom is beyond me.”<sup>67</sup> Moreover, if a reporter can attend oral arguments and produce a news report based on his or her furiously scribbled but invariably incomplete notes, it is difficult to see how the court would not benefit from allowing that same reporter access to the oral-argument recording so that questions and answers can be accurately transcribed.

This is not to say that the issue should be framed in terms of media rights or providing broader access to the press, especially in an age in which citizens increasingly have the ability to become informed and arrive at their own conclusions without the filtering lens of the news media. Rather, the real value of greater access to oral-argument recordings is in its potential to help shape the public’s perception of the work done by the appellate courts. As Judge O’Scannlain observed, “I suspect that many Americans may not understand the multi-tiered review that is provided by our judicial system, and I believe that it would improve confidence in the judiciary as a whole if ordinary citizens were able to see [or at least hear] appellate judges performing their daily job.”<sup>68</sup> Numerous surveys have borne out Judge O’Scannlain’s suspicion.<sup>69</sup>

The Tenth Circuit itself, from time to time, holds oral arguments in settings other than the courthouse in order to give certain audiences—a large group of law students, for example<sup>70</sup>—exposure to appellate oral arguments and a glimpse into an important aspect of appellate decision making.<sup>71</sup> There does not appear to be any principled distinction between

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66. Stepniak, *supra* note 60, at 809.

67. Biskupic, *supra* note 6.

68. O’Scannlain, *supra* note 32, at 328.

69. See Stepniak, *supra* note 60, at 806 (“Surveys of public perception of the judicial process carried out in common law countries have revealed low levels of public understanding of the role of courts and of judicial processes, and correspondingly low levels of confidence in the judiciary.”).

70. *Events: U.S. Court of Appeals—Tenth Circuit*, UNIV. OF DENVER STURM C. OF LAW (MAR. 10, 2011), <http://law.du.edu/index.php/events/u.s.-court-of-appeals-tenth-circuit>.

71. The Colorado appellate courts have been engaged in a similar educational outreach effort for the last twenty-five years. As part of the “Courts in the Community Program,” the Colorado Supreme Court and Court of Appeals have traveled to high schools throughout the state to hold oral arguments in interesting and often high-profile cases. As the courts’ website explains, the program “gives high school students hands-on experience in how the Colorado judicial system actually works and illustrates how disputes are resolved in a democratic society.” *Courts in the Community*,

those efforts and the efforts most federal appellate courts currently make to give the public broader access to oral-argument recordings.

The value of a more transparent policy on the availability of oral arguments is not just about educating the public, but about lending the courts greater legitimacy as the public comes to understand the deliberate, careful, and reasoned manner in which appellate courts go about the decision-making process. Having personally witnessed more than one hundred Tenth Circuit oral arguments over the years, I am confident that no member of the public, if given the opportunity to listen to the Tenth Circuit's oral arguments, would reach a conclusion other than that its judges are "competent, careful and well-intentioned protectors of the ideals of an independent judiciary."<sup>72</sup>

### CONCLUSION

More than a decade ago, I was privileged to present oral argument to a Tenth Circuit panel in *Schroder v. Bush*,<sup>73</sup> in which a group of farmers had asserted claims against the President of the United States, the Secretary of Agriculture, and the Secretary of the Treasury, seeking an order requiring the defendants and their agents to maintain market conditions favorable to small farmers. The case was without merit, at least as a legal matter, and the district court dismissed the claim in a three-sentence order based on the political question doctrine.

The oral argument was held in the Tenth Circuit's ceremonial courtroom, and the room was packed with more than a hundred intensely interested small farmers and their families, who had come to watch the argument from all over the rural areas of the Tenth Circuit, including Kansas and the eastern plains of Colorado and New Mexico. The panel proceeded to ask questions designed, it appeared to me, to educate the enormous crowd who had come to Denver to listen to the argument. It was a masterful example of a panel of judges who were mindful of their audience, and who, through their questions of me and my opposing counsel, respectfully and delicately provided a thorough explication of the important constitutional reasons for what would inevitably be a disappointing decision for the audience.<sup>74</sup>

It was one of the Tenth Circuit's finest moments, of which there are undoubtedly many in the course of every term of court. There is no per-

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COLORADO STATE JUDICIAL BRANCH, <http://www.courts.state.co.us/Courts/Education/Community.cfm> (last visited Feb. 28, 2012); see also *Courts in the Community*, COLO. ST. JUDICIAL BRANCH, [http://www.courts.state.co.us/userfiles/file/Court\\_Probation/Educational\\_Resources/currentbrochure.pdf](http://www.courts.state.co.us/userfiles/file/Court_Probation/Educational_Resources/currentbrochure.pdf) (last visited Feb. 28, 2012).

72. O'Scannlain, *supra* note 32, at 329.

73. 263 F.3d 1169 (10th Cir. 2001).

74. The court's written opinion was equally respectful and sympathetic toward the plight of the American small farmer. See, e.g., 263 F.3d at 1171 ("Every branch of the federal government has recognized how difficult it is for small farmers to make a living by farming.").

suasive reason why such moments should be witnessed only by those lucky few who are actually present in the courtroom. The Court should liberalize its policy and give the public greater access to its oral arguments. Its reputation and standing in the public's perception will only be enhanced by doing so.