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Kenneth N. Flaxman
Law Offices of Kenneth N. Flaxman P.C.

WILL IT MAKE MY JOB EASIER, OR WHAT'S IN IT FOR ME?

Kenneth N. Flaxman[*] †

Putting aside philosophical questions about public access to government proceedings—what we now call "transparency"—and without regard to whether televising Supreme Court arguments is a logical extension of the common law's "absolute personal right of reasonable access to court files" as described in 1977 by the Seventh Circuit in *Rush v. United States*, my real concern about whether Supreme Court arguments should be televised is somewhat narcissistic. Will it make my job—as a plaintiff's civil rights lawyer who dabbles in criminal defense and post-conviction matters and who has had five adventures as "arguing counsel" in the Supreme Court—easier? I explain below why I think the answer is a resounding "yes."

In this age of YouTube, *Media Matters*, and low-cost desktop video editing, televised Supreme Court arguments will not follow the 1950s model of the Army-McCarthy hearings, which the Museum of Broadcast Communications described as "the first nationally televised congressional inquiry and a landmark in the emergent nexus between television and American politics." In addition to the inevitable C-SPAN-style sterile coverage starting with counsel's opening words of "May it please the Court" and ending with the Chief Justice's concluding statement of "The case is submitted," expect to see on your favorite video blog or fake news program short video bites that capture the essence of a case—or more likely, in my view, excerpts that make someone (most likely a judge) look and sound like an ignorant or prejudiced bumpkin. (This is *not* criticism of the Court or of any of its past or present members, only a reflection on the reality of sound bite and video snippet journalism.)

Based on my experience arguing more than two hundred appeals, including five in the Supreme Court, my guess is that this type of exposure would be a good thing and would make my job easier. A lawyer's job in a case before the Supreme Court is different than in a case before a trial judge or an intermediate appellate court. Rather than trying to convince a judge (or a panel of judges) why a particular outcome is compelled by precedent, an attorney presenting a case before the Supreme Court has an opportunity to urge the Court to change the law—as it did in the case I argued just this year, *Wallace v. Kato*—and reject the construction that every Court of

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* Principal of the Law Offices of Kenneth N. Flaxman P.C. in Chicago, Illinois; arguing counsel for more than 200 appeals.

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Appeals had afforded to an earlier Supreme Court case, meanwhile announcing a new rule. (The Court can make new law without any request from the parties, as it did on this issue in *Wallace*.) Oral argument before the Supreme Court need not focus on whether prior decisions require a particular result, but rather on the "big picture" justifications for a particular result.

Another salient factor for a lawyer with a case before the Supreme Court is that the Court controls the size of its docket and, at least in the number of cases it decides on the merits, is not a victim of litigation explosion. This means the Supreme Court, unlike the lower federal courts, is not compelled by its workload to decide cases without oral argument, or with oral argument limited to "ten minutes per side" as is common in at least one federal court of appeals.

Oral argument before the Supreme Court is always at least thirty minutes per side. While this may seem long, arguments in the Court's early days could extend over several days while Justices ate and sometimes slept, as explained by Stephen M. Shapiro in *Oral Argument in the Supreme Court: The Felt Necessities of the Time*. The first formal limitation on oral argument came in 1849, when each side was limited to a mere two hours. The time was reduced to one hour per side in 1925 and then reduced again to its present thirty minutes per side in 1970.

Although ten minutes of oral argument before a trial judge or an intermediate appellate court may be required before the court will understand a party's position, this should not be true in the Supreme Court, where the written submissions are more thorough, more carefully researched, and better written than briefs filed in lower courts. In my perhaps jaundiced view, the Supreme Court should not need to hear oral argument to understand the positions of the parties.

Other than tradition or public spectacle, is there a reason why the Supreme Court continues to hear oral arguments? I believe that oral argument before the Supreme Court is the prequel to the decision conference. Arguments before a Court comprised of Justices with widely disparate views may very well frame the debate that will presumably take place during the post-argument conference.

Televising arguments should make it easier for arguing counsel to frame the post-argument debate by encouraging better judicial behavior. A Justice who is successful at provoking laughter in the courtroom may find that his or her humor falls flat in a video snippet. Similarly, a Justice who declines to ask questions of counsel at oral argument, but who engages in whispered conversations with other justices, might change his or her behavior in light of its exposure on YouTube. Likewise, a Justice who makes a truly stupid comment may find that life tenure does not provide immunity from public ignominy. And a Justice who is well past his or her prime and no longer in touch with reality (and no, I'm not suggesting this is the case with any member of the Court) would have greater difficulty hiding his or her disability.

I expect that televising arguments, like the recent amendment to Rule 32.1 of the Federal Rules of Appellate Procedure authorizing the citation of unpublished opinions, would enhance the integrity of the decisional process.

Unpublished opinions—which, of course, are actually published on Westlaw and LexisNexis—permit a court to reach a result that it could not justify in an opinion that would be precedential. I was exposed to this almost twenty years ago in *Browder v. Director, Illinois Department of Corrections*, where the Supreme Court reversed the Seventh Circuit's judgment. In an unpublished opinion, the appellate court had committed the unspeakable sin of stating that it need not resolve the challenge to its appellate jurisdiction. In resolving *Browder*, the Supreme Court did not reach the issue whether the rules authorizing unpublished opinions exceeded the rulemaking authority of the courts of appeals, leaving the question for "another day." That day arrived more than twenty years later when the Supreme Court adopted the amended Rule 32.1.

In sum, sunlight may or may not be the "best disinfectant," and I am not suggesting that Supreme Court proceedings are infested with bacteria or germs. Moreover, I do not want to see TV cameras roll over the dead body of any Supreme Court Justice. But television coverage would significantly increase the utility of oral arguments at the Supreme Court. Justice Souter's hyperbolic bon mot notwithstanding, I anxiously await video podcasts of Supreme Court arguments.