Oral argument at the Supreme Court before, during, and after the pandemic
The pandemic has upended things big and small, from our daily routines to the very institutions we hold dear. Perhaps nowhere else in government have these changes been so peculiar and so visible than at the Supreme Court, where COVID-19 has fundamentally altered more than a century of oral argument tradition.

Prior to the pandemic — and dating back as far as the post–Civil War period — advocates banded with the Court over cases in a “free-for-all” style, in which justices were free to interrupt and ask questions of the attorneys at any point during oral argument. But when the pandemic began, the Court adopted telephonic arguments, and the free-for-all that had characterized arguments for generations disappeared. The parties and the justices all appeared. The parties and the justices all argued before the Court under all of these systems. We asked three of them — JEFF FISHER (co-director of the Supreme Court Litigation Clinic at Stanford Law and special counsel at O’Melveny & Myers LLP), NEAL KATYAL (former acting solicitor general of the United States and current partner at Hogan Lovells LLP), and ERICA ROSS (assistant to the solicitor general of the United States) — to share their thoughts about the evolution of argument and what the future may hold for an old institution faced with new challenges. And in what proved to be one of his last exchanges with some of his colleagues, the late WALTER DELINGER, a former acting solicitor general of the United States, argued 24 cases before the Supreme Court, moderated. Their conversation, recorded in December 2021 and edited lightly for length and clarity, follows.

DELLINGER: First, I want to get your thoughts on the importance of oral argument generally, before we had a pandemic. My point of reference is a discussion I led for the 50th anniversary of the American College of Trial Lawyers in 2000. The panel was made up of three chief justices: Chief Justice William Rehnquist of the United States; Chief Justice Beverley McLachlin of Canada; and Lord Chief Justice Harry Woolf of England and Wales.

Chief Justice Rehnquist asked me to interview them about their role. When we came to discuss oral argument, it was quite striking how different the responses were. First was a matter of time. Chief Justice Rehnquist severely limited oral arguments to 30 minutes a side and was quite strict about it. He was once said to have cut off an advocate when the red light went on in the middle of the word “of.” Chief Justice McLachlin said that in Canada the oral arguments were two hours a side — though it was under consideration to reduce that to one hour a side. The Lord Chief Justice Woolf said that all arguments went on for at least a full day in England and Wales.

When I asked them how important or influential oral arguments were, it tracked very much the difference in the time allocated to arguments: Lord Chief Justice Woolf thought that oral presentations were the decisional fulcrum; Chief Justice McLachlin thought they were very influential;
and Chief Justice Rehnquist minimized their importance on influencing the outcome.

Let me begin this discussion by asking you all: How important do you think oral arguments are?

FISHER: My first reaction to your comparative comments, Walter, is that the influence of oral argument can’t be considered in a vacuum. It can only be considered in relation to the briefing rules and how a court prepares for argument. So I don’t think there’s any absolute answer to how important any oral argument is overall. It just depends on how the court prepares for argument and how deeply it engages with the briefs before argument. In the world of the U.S. Supreme Court, the word “brief” is now a misnomer, because the written submissions are no longer brief; they are quite lengthy and detailed. And the Court builds in quite a bit of time to read and distill those documents — along, of course, with the amicus briefs — before oral argument. I think in that world, it is perfectly fine to limit oral argument, relatively speaking, as compared to the English and other models.

As for oral argument in the U.S. Supreme Court, I do think it matters. And I think I would highlight two ways in which it matters from a broad-strokes perspective. First, I think there are the difficult cases where the Court actually may come out one way or the other based on how oral argument goes, either because the question is just exceptionally close and vexing, or because it’s an area of law where the justices may not have as much familiarity — for example, when they deal with a new statute or an arcane area of law. In those cases, the justices are learning more at argument about either the law or the real world as it applies to that legal issue. In this slice of cases, I think there are some that actually do come out differently based on oral argument.

I think there’s actually another group of cases that’s even bigger in which one party doesn’t necessarily win or lose based on oral argument, but the Court writes an opinion in a particular way based on the argument. As we all know, cases don’t necessarily go up to the Court with an either/or or component. There are many shades of gray, many different rules the Court could adopt, and many different doctrinal pathways it might follow. It could rule broadly or narrowly, or on one legal ground or another. Far more often than the outcome turning on oral argument, I think the nature of the opinion or of the rule the Court adopts or the reasoning the Court follows is a product of the oral argument. Neal and Erica may speak to this phenomenon even more than I can. When representing institutional clients like the federal government, it often matters a lot more what the Court says by way of reasoning than whether a particular conviction is upheld, a particular individual recovers damages, or even whether or not a particular law is upheld.

ROSS: I would echo a lot of what Jeff said. There is some perhaps small subset of cases where the outcome changes due to oral argument, but, in the main, oral argument is more likely to change how an opinion is written. One thing I think you see a lot is that, at oral argument, advocates can’t avoid the hard questions or the implications of their theory in the same way that they can in the briefs. And if the reply came in and the opposing advocate hadn’t had to respond to those tough questions in writing, then she may have the opportunity to flesh out a lot of those nuances during oral argument.

DELLINGER: Right. One generally does not say in the briefs, “Here is the least acceptable application of the principle for which I’m arguing,” but that’s what you’re going to encounter at oral argument.

ROSS: Right. And, conversely, I think often a brief may say, “This is the rule that I’m suggesting, and that resolves my case.” And the advocate doesn’t have the space or the need or the desire to explain how it would apply across the waterfront or what the implications are. But that often is a focus of argument — I think rightly so — and it can impact the way that the opinion is written.

KATYAL: I agree that it will impact the reasoning of a decision. That is the importance of the argument. In rare cases, I do think I’ve seen it flip the outcome. But for me, the bigger consequence of oral argument is that you can and people do lose cases at oral argument. Justice [John Paul] Stevens in particular could isolate the logic in a
position — Justice [Samuel] Alito does this, too, and, to some extent, Justice [Elena] Kagan does it as well. They ask, “Well, if that argument is true, then wouldn’t you say it’s also true in case Y?” The attorney would say, “Yeah, that sounds totally reasonable.” Justice Stevens always appeared so reasonable — and then he would twist the knife in and ask, “Well, if you agree with that, then what about Z?” And I’ve seen several advocates falter when things like that have happened. But, for the most part, I do think the brief writing matters a lot more than the oral argument. I think all of us love the argument and love the challenge, but the truth is a lot of what goes into a decision is baked in before you stand up at the podium.

DELLINGER: I’ve had the experience of sitting at counsel’s table and thinking that the justices’ minds were changed by the advocate. It was Michael Dreeben arguing for the United States for a novel application of the criminal securities law. He was asking the Court on behalf of the United States to take a step the Court hadn’t made before in terms of the reach of insider trading. And the Court came with a number of hypotheticals — “If we can criminalize this, how about X, Y, and Z?” — just as you were describing, Neal. And Dreeben had an answer for every single hypothetical. And the Court sat back thinking, “Well, that would work. We’re entering into uncharted territories, but the advocate has made us feel comfortable when we ask these hard questions.”

KATYAL: Yes, the case was United States v. O’Hagan. I was a clerk during that term. And I won’t say what happened, but that was one of the more extraordinary oral arguments I’ve ever seen in my life.

DELLINGER: How has your experience with oral argument changed since the pandemic?

ROSS: I became an assistant in the Office of the Solicitor General [OSG] in 2017. Before the pandemic, I think I had done maybe five arguments in the Court. And then we shifted to the pandemic world — where I had the honor of being the first person to do one of these oral arguments by phone, along with Lisa Blatt, who represented the respondents in the case. It was very interesting to be the guinea pig for that experience and get to see it all unfold for the first time in history.

Just sitting in the same conference room that I’m actually in right now to do a Supreme Court oral argument was a very odd and interesting experience. Since then, I have argued twice more in this room by phone. Now, this term, I’ve done one argument back in the courtroom — in October, coincidentally on the first day of the term this year. And so I’ve been able in my four years in the solicitor general’s office to sample all three types of argument.

DELLINGER: What was it like to do the very first telephonic Supreme Court argument?

ROSS: I think it altered both preparation and the argument itself. With respect to preparation, the Court had postponed the March argument session a week before my scheduled argument, so I was literally in the middle of a moot when the Court decided that there wouldn’t be arguments in March. A colleague came running into the room and said, “Your moot’s been mooted. You should all go home because this isn’t happening.” So that, of course, was very strange — to put aside what you had been focusing on and preparing for, and not know, quite frankly, when the argument would wind up happening. Then, when we found out that we would be doing the argument in May, the preparation started again, and it was a bit different in part just because the moots, like the arguments themselves, were on the phone. I wasn’t in the office, so there wasn’t as much collaboration. One thing that is wonderful about working at OSG is being able to walk down the hall and bounce ideas off your colleagues, or to do so at lunch, and that was missing.

Then, I think the other thing that changed enormously for the first set of telephonic arguments was how much we knew going into arguments. The Court very graciously, through the clerk’s office, provided a fair amount of information about what would happen, but we had just never seen this before. I didn’t know, for example, exactly how long each justice would spend questioning each lawyer. Of course, over time that became something that we all got used to — the rhythm of the telephonic arguments — but that was entirely new that first time. And I didn’t know, for example, whether all of the justices would ask questions. We found out that, by and large, they would all ask questions, which I thought was a wonderful development. So, the preparation and the experience itself were both a little bit different because we didn’t know exactly how it would all play out on that first morning.

KATYAL: I have to say, Erica, you were marvelous. I mean, to go first and pull that off with that poise was impressive. I remember I was listening to those first telephonic arguments live at the time. Erica was a Bristow Fellow when I was in the solicitor general’s office, so she’s had a special spot in my heart, and it was just awesome to see.
I think I did three or four telephonic arguments, and then I just recently did one in person under the new rules. For me, I think telephonic arguments were not really the same as pre-COVID arguments. It was really hard, I think, to focus in on the key points that someone was making, and hard to respond in a sustained way to a line of questioning, because you’d have a chance to answer for a minute or two and then it’s on to the next justice. And so, a line of questioning just disappears when the next justice takes their turn.

**DELLINGER:** How did the justices organize their questioning for telephonic arguments?

**KATYAL:** It was two minutes uninterrupted at the opening, although I’m not even sure they told us that it’d be that way at the beginning. But I think ultimately they started telling you that you’d have two minutes uninterrupted. And then, in order of seniority, they would ask questions. They wouldn’t really even tell you for exactly how long, but it looked like around two and a half minutes if you had a full argument.

Jeff and I actually did one case together, *Fulton v. City of Philadelphia.* And, while I nominally had 20 minutes and he had 10, I suspect that it wound up being a more even amount of time — probably a half hour for Jeff and a half hour for me, something like that. Thank God, because he’s way better at answering the questions.

The result of this is that you’d have the justice ask questions for two minutes and then you’d move on. And then another justice would ask questions about something totally different. It was really hard, I think, to drill down on what the position was and really to uncover all the weaknesses, because advocates as good as the people on this call can basically dodge some of the hard stuff if they need to for a little bit of time. Whereas in the usual traditional scrum of the Supreme Court, if you try to evade something, there’s five or six of them who are going to come after you. This made it just a lot harder. So I’m not surprised to see that the Court was frustrated with where oral arguments were. I think everyone did their best, but it was really an inferior substitute.

**FISHER:** Like Erica and Neal, I’ve been fortunate enough, I guess, to argue in all three modes: the pre-pandemic mode, the telephone mode, and now the post — I guess I can’t quite call it the post-pandemic mode, but at least the “back in the courtroom” mode happening right now. As for the telephonic arguments, I agree with Neal that they were inferior. I understand that the arguments were much more orderly, and the lawyers got more room to talk. But from my perspective, the telephonic arguments were far less helpful for the Court — and even for the advocates — in terms of really moving the needle on the outcome of the case. I think the greatest opportunity from the advocate’s perspective is to have a deep, layered, across-the-bench conversation about the hardest points of each case. And that was just much harder to do in the telephonic setting, for the reasons Neal described. I totally understand why the Court did what it did, given the public health emergency. But it was frustrating, I thought, to be part of the process over the telephone.

Going in, I thought that the hardest part of telephonic arguments would be not seeing the justices’ faces and body language. That was a challenge, and it made the communication less efficient. But as it turned out, I think the biggest challenge was what Erica and Neal have alluded to, which was the inability to have a multilayered conversation among many people at the same time, which would home in on particular issues and insufficiencies in advocate’s positions.

One thing that terrific advocates do, as you all know, is weave themes and ideas through the entire 30 minutes. As they get questions, particularly from justices who might be pivotal on the outcome, they circle back to those ideas and weave the argument back to these key issues. But during telephonic arguments, where each justice had his or her own allotted two or three minutes, you just felt much less able, or even entitled, to circle back to other justices’ points that might really be the critical things in the case. And so it just felt like you were much more hamstrung in that environment.

**ROSS:** I agree. Like Jeff said, I completely understand why the Court chose to do arguments in that way. And, in fact, I think it’s pretty commendable that they found a way to do the arguments during a pandemic we really had never seen the likes of before, and in a variety of ways the Court really was very flexible with filings and arguments. But I did have the same reaction, which is that it’s harder to have that conversation that Jeff and Neal have talked about. It’s also harder for the justices to have that conversation among themselves. So because the justices asked questions in order of seniority, the more junior justices were able to reference prior questions and answers. But the more senior justices didn’t always have the opportunity to go back and ask more questions once they had heard what all of their colleagues thought. So I think not only the advocate was hamstrung by the telephonic format, but the justices...
themselves weren’t able to interact in the same way that they normally can and pivot off of each other’s ideas in the same way.

KATYAL: Walter, back in 1994 when you were at Office of Legal Counsel, you taught me something about the Court. You said, “Look, at oral argument the justices are actually talking to one another more than they’re talking to the advocate and trying to answer the questions.” And, I think what this format did was make it really hard for the justices to talk to one another in the course of an oral argument. It was just impossible for a justice to make a question or embed a substantive comment into a question and then return to that and hammer the point, just because of the seriatim nature of the questioning.

DELLINGER: You have all mentioned that the telephone necessitated the Court organizing itself in this new and rigid formula, where they proceed in order of seniority, and I was reminded how utterly unfruitful most House and Senate committee hearings are. Each member in turn has his or her three to five minutes, unrelated to what preceded and what followed and with no real capacity to jump in and develop a point that someone else has made. But I assume the Court approached it this way because, by phone, you can’t see the other people who were involved in the argument, and a free-for-all likely would have descended into utter chaos.

KATYAL: Walter, I completely agree with you. One of the things I love, and I’m sure we all love, about the Supreme Court is its decorum. And, yes, there have been exceptions, but for the most part, it’s a really genteel, polite, respectful place. The image of justices tripping over each other, when they can’t see each other and read body language, to ask a question at the same time would’ve really been at odds with this image of the Court that we all celebrate and cherish.

At the same time, this is totally bound up with the Court’s allergy to technology. And, in particular, its allergy to video, because I think most of us have done Zoom oral arguments in the federal courts of appeal now. I’ve done many arguments on Zoom at this point, including really controversial ones, like gun control. And you don’t have the judges tripping over one another — because they can essentially read body language on Zoom and know when someone wants to ask a question — and it’s worked remarkably well. It’s always been a shame to me that the Court isn’t televised, but now, during the pandemic, it’s an even bigger shame, particularly if there’s any chance that we’re going to have to go back to telephonic arguments. I think we’re missing out on a chance for the American people to see this Court in action and to watch them develop a form of truth-seeking that is far better than the telephonic arguments that we have been doing over the last year.

FISHER: If the justices are unwilling to project video of any kind to the public, they could still be on Zoom, and broadcast only the audio from that. That could be a possible middle ground if they had to go back to remote arguments.

DELLINGER: Now the Court is back in the courtroom, but it didn’t go back to the prior oral argument method it had used for many, many decades. Instead, it has adopted a kind of “hybrid” oral argument method. What is this new approach like?

ROSS: Under the hybrid method, a party gets two minutes at the beginning, uninterrupted, and an amicus gets one. From there, the Court has the normal free-for-all, for the period of time that you were allotted. So, for a party, that’s 30 minutes, and an amicus often has less. Once that wraps up, the Court goes into seriatim questioning, meaning one justice at a time in order of seniority, just as they did on the phone.

The new hybrid method takes advantage of the strengths of the telephonic format, which was the opportunity for each justice to ask questions. It also seems to have taken a little bit of pressure off the free-for-all, because the justices each have the ability to come back later and loop back to questions for a little bit more time. I don’t have data on this, but it feels like there’s a little bit more time for the advo-
cates to answer questions during the free-for-all, because the justices know that subsequent round of seriatim questioning is coming. It also gives advocates the opportunity to get a better understanding in that subsequent round of exactly what might still be bothering a particular justice and to take that head on. So I think it has a lot of advantages.

DELLINGER: Has it been your experience, participating in and listening to others, that the new hybrid method seems to be expanding the time for oral argument?

FISHER: Well, it certainly is different from the strict 30 minutes that you described earlier, Walter, under Chief Justice Rehnquist. That, for the most part, continued in the pre-pandemic Roberts Court, where you maybe got to finish your sentence or your point when the 30 minutes was up, but that was it.

According to statistics I’ve seen, the Court is now expanding the argument almost 10 minutes per side, once you include the individual round of questioning at the end. So sheer length has certainly increased. And I wholeheartedly agree with Erica: I wasn’t sure how I would feel about the hybrid concept in practice, but I think it has been a wonderful compromise between the free-for-all and the benefits of the more orderly telephonic method. The hybrid method still allows for robust exploration of the issues, but it takes a little bit of the intensity and the pressure off when the lawyers and the justices know there will be that round at the end.

Something else that started to develop toward the end of the telephonic questioning that I feel like I’m seeing now that we are back in the courtroom is what I’ve called the “mini deposition” model of questioning. One example was in one of my cases, called Our Lady of Guadalupe School v. Morrissey-Berru, which was the ministerial-exception case. During oral arguments, Justice Kagan asked my opponent, I think, nine hypotheticals in the space of two minutes, demanding “yes” or “no” answers on each.

And other justices, like Justice Alito and Justice [Neil] Gorsuch, have done similar things. The justices will say, “Well, I’m going to give you several questions and I want quick, immediate answers.” I’m not sure I could remember that extremely pointed method of questioning before the telephonic arguments. I’m wondering if others have noticed this.

KATYAL: I agree, Jeff, it’s been an increasingly frequent thing. I remember Justice Kagan doing it a few years ago, I think, to Paul Clement, saying, “Here are five scenarios, give me a ‘yes’ or ‘no’ to each of them.” So I think it has happened before, but we’ve had an uptick. Maybe some of it has to do with format. Maybe some of it has to do with justices just copying other justices’ style — thinking, “Hey, that actually works pretty well. I’m going to do that.”

I think Erica and Jeff have both focused on the back end of this new format and how important it is to have to tell each justice, “Look, you’re going to have a chance to ask your line of questioning.” It reduces the pressure in the middle scrum of everyone trying to get their questions in. I really like it, and for exactly the reasons Erica and Jeff said. I want to point to one other feature of this new format, which is the uninterrupted minute or two that an advocate gets at the beginning, which never used to be the case.

I think only once in my 45 arguments have I ever actually gotten my introduction out — or once in 40 arguments pre-pandemic. That one time was for Ashcroft v. Al-Kidd, which was a really controversial case. I had written two lines down on my legal pad, hoping to get them out. And, it turned out that they didn’t really ask me any questions because they knew that we were right, and they were going to reverse. So I sat down with 26 minutes to go or something.

HOW HAS THE HYBRID APPROACH WORKED?

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But for the most part pre-COVID, you don't get your intro out. A lot of times those introductions are scripted and not particularly great. But when you have great advocates, like the three of you, those introductions are really helpful for the justices, because they focus the line of argument past the briefs: "Now, here's what this argument is going to be about." And I think it leads to better questioning.

I remember, Walter, Justice [Sandra Day] O'Connor used to do this to you all the time, jumping in before you could complete your introduction. You'd have two sentences and she'd ask a question.

DELLINGER: In the twin cases of Washington v. Glucksberg and Vacco v. Quill on physician-assisted suicide, I was arguing second. I was picking up my materials to move them to the podium, but I was still at counsel's table. And Justice O'Connor said, "General Dellinger, this last question is really directed to your briefing." And, I was like, "Hold on a minute, let me get to the microphone." So I had actually negative time to get out a position statement.

During telephonic arguments, a couple of journalists who cover the Supreme Court commented that they really disliked the telephone process, because they felt they couldn't learn as much about the question their readers were interested in — which way the justices are leaning. Did you find it harder to read the Court during the period that was by telephone?

KATYAL: I disagree with the idea that the words really changed. I think they asked the same questions they were going to ask and if a justice wanted to pass in either telephonic or this new hybrid, they pass. I think what the reporters are really complaining about is that they weren't in the courtroom to watch the body language. And that's true for us as advocates, too.

I would say I just did an argument recently in person, and you could read their body language. And, boy, they were so excited to be back in person. I mean, I can't tell you. My case was a technical case about Social Security benefits. They were ready to go, down to every footnote, asking all sorts of questions. You can see the unbridled joy they have for being back in the room.

DELLINGER: Do you think this experience with the three different formats has, or should, influence the debate over whether there should be televised arguments in the Supreme Court?

ROSS: I'm sure that people who want cameras in the Court will point to the telephonic method as an example of greater transparency and note that it all went OK. I think people who don't necessarily want cameras will likewise point to this example and say the public got a lot of information this way, without video, and it worked perfectly fine. I'm sure it'll be part of the debate, but I don't know where exactly it'll end up and how, if at all, it will influence those who would ultimately make the decision.

DELLINGER: During telephonic arguments, the Court provided a live audio feed for the first time. Do you think it's possible that the Court will go back to not providing this?

KATYAL: I can't imagine that there's a way to go back. I don't know what that rationale would be once they've done it and it's been enormously successful. It's allowed Americans to hear these really important arguments that they're hearing this year in real time.

FISHER: That's my instinct as well. One interesting feature of the place we're at right now, though, is that unless you are very familiar with the justices' voices, the ordinary lawyer — much less a member of the public — does not necessarily know who's talking. So even though it's good and beneficial in many, many ways to have more transparency, there's still a real gap there. It will be interesting to see whether there are various ways to try to move the Court a little more in the direction of transparency and technology and — for those who don't have video identifiers of who is talking — some version of letting the public and other members of the bar follow arguments a little better.

KATYAL: I covered both of the abortion arguments live for MSNBC. We had on screen who was asking each question to fill exactly that gap. Obviously, that's a case that people are going to watch. But I suspect that we will have some sort of firm come and fill the technological gap pretty easily — and just tell viewers who is asking the question.

DELLINGER: I have felt for a long time that the failure to have real-time audio, which advantaged those very few people who were able to get into the courtroom to watch the argument, was a significant problem on fairness to the public. For example, the Exxon Valdez case, Exxon Shipping Co. v. Baker — where Jeff and I argued against each other — was a two-and-a-half-billion-dollar case, and people were following it in the market. I had the sense that some people left the courtroom and said after my...
argument for Exxon, “Sell!” or whatever. That really is market-sensitive information that ought to be simultaneously available to everyone and not just those who can have someone stand in line to be in that courtroom or otherwise manage to get in.

The Court has released opinions recently without an announcement in the courtroom. Is it possible that we are losing the public opinion announcement?

FISHER: It’s funny you ask that, Walter, because I’ve been talking to a few people about that issue and it does seem like that is happening. The Court may have decided that a tradeoff for simulcasting oral argument is that they’re no longer going to do opinion announcements from the bench, at least not under the same simulcasting rules. What’s interesting is that feeds back to the cameras-in-the-courtroom debate that we’ve had all these years. One thing the justices have said is that greater access to its proceedings in that sense might affect primary behavior — both of the lawyers and the members of the Court themselves.

At least as to the current simulcasting rules, I can’t think of any case in which I’ve been involved or listened to where I thought any lawyer was doing anything differently because the argument was being simulcast. But I wonder whether the justices are nevertheless thinking that they themselves, at least particularly in high-profile cases, might act a little differently. When it comes to opinion announcements, that concern might be more acute, because those announcements are a statement to the world that is immediately available, characterizing what the Court has said and done in an opinion. I think the Court may be wary of giving any one of their colleagues a newfound ability, in a sense, to own the initial news cycles of decisions.

DELLINGER: One thinks back to Justice Ruth Ginsburg’s dissent from the bench in the Lilly Ledbetter case, Ledbetter v. Goodyear Tire & Rubber Co., involving wage discrimination. That would’ve been even more powerful if one could have actually heard her voice, but at least it had an immediacy for the press that was covering the Court there in the courtroom. I don’t think you get that when the Court simply posts an opinion on the internet. The justices have a more informal style in an opinion announcement — shorter, more concise, perhaps a little more brutal if it’s a dissent. I think it would be a loss if we didn’t get to hear a justice explain his or her reasoning in the majority opinion, in a sort of publicly accessible way that’s not part of a 70-page document that looks like a law review article. Often the opinion announcements are very revealing, and we may be in the process of silently losing them.

KATYAL: I think there are two different questions here. One, Walter, is what you’re asking about, which is whether live opinion announcements will go by the wayside, and opinions will just be posted on the website. The other, from Jeff, is about whether the opinion announcements will be live audio streamed. I agree with Jeff that I don’t see a world right now in which the opinion announcements are going to be live audio streamed. The Court hasn’t crossed that bridge yet. And if they haven’t yet, I suspect they’re not going to. But I’m not worried at all about the prospect that the Court is going to get rid of announcing opinions from the bench. I think that’s too important of a tradition and it gives the justices an important tool to demonstrate the intensity of their views — it allows them to basically signal to the public and to Court watchers when they think a dissent is really important.

Whether to read an opinion from the bench is a really crucial decision that every justice makes. I remember when I was arguing Hamdan v. Rumsfeld, my first case about terrorist suspects detained at Guantanamo Bay. Justice [Clarence] Thomas began his dissent reading it from the bench, saying, “I’ve never read a dissent from the bench in my years on the Court, but I feel so strongly about this.” (He actually had read a dissent from the bench before that he’d forgotten about.) But that really does, I think, illustrate the purpose that live opinion announcements serve. Just like you were saying, Walter, with Justice Ginsburg in the Lilly Ledbetter case. So I can imagine they wouldn’t want to give up on that tool.

ROSS: I think Neal’s right. There’s an advantage for the justices themselves to be able to show the extent of their disagreement and to distinguish between dissents. People also talk about whether a justice “respectfully dissents” or just “dissents,” so there are other ways to show that to the world, but those are very, very subtle clues. I think the number of people not on this call who think about those other ways is limited. So I share the sense that the bench announcements do serve a purpose. I do hope that they, like so many of the other aspects of the Court that we’re used to, come back in a post-pandemic world, whatever that looks like.

FISHER: Do you believe that the Court is not doing announcements right now
simply because the public isn’t allowed into the courtroom, and when the public is allowed back in the courtroom, they’ll resume?

KATYAL: Exactly. One thing we haven’t talked about is that in order to argue before the Court or be that one designated additional counsel that each advocate can bring to the Court, you’ve got to get COVID tested the day before at a testing facility that the Supreme Court selects and so on. So it’s a really controlled subset of people who are in there, and it’s certainly not members of the public. Because of this, it would be a little weird for them to be reading opinions. I suppose they could just have the journalists there, but I can see why they made the decision they did, which is just to post their opinions on the website. But, once the public is back, I do suspect that they will go back to the tradition of reading opinion.

DELLINGER: Any further thoughts on anything having to do with arguing before the Court? I will follow in the pattern of Chief Justice [John] Roberts and give each of you an opportunity, if you wish, at the end of the scrum now, to say anything else you might have on your mind.

KATYAL: Well, just in response to your last question about long-lasting effects from the pandemic argument experience, I think one will be Justice Clarence Thomas. This is a justice with whom I profoundly disagree on lots of issues, but I think that he has been unfairlymaligned as being disengaged. But during the pandemic, everyone got to hear his questions, and I don’t think that they were really smart, really hard questions. So I hope that trope goes away and people will focus on the substance of his opinions, which I at times find concerning to say the least.

ROSS: I definitely agree with that last point that Neal made. That’s one of the real joys of both the telephone format and the hybrid format — seeing Justice Thomas ask questions, and often the first question out of the box. And I think it has been really useful to the advocates and the Court to have all of the data points in terms of what they’re all thinking and have everybody engaged in that conversation. And so I, too, certainly hope that that lasts.

FISHER: There’s the saying, “You don’t know what you’ve got until it’s gone.” I think the Court does seem, as Neal said, especially excited to be back in the courtroom, which makes it a pleasure to be on the other side of the podium as well. Indeed, one of the silver linings of what we’ve all had to go through is that the Court seems, out of these challenging circumstances, to have created a more perfect system of oral argument. And perhaps the justices themselves are going to be more committed to making that argument useful for themselves, having not been able to do so as readily over the last year or two.

DELLINGER: At the top of our discussion, I referenced the panel discussion where I was the interlocutor and the three chief justices of three different countries were asked to weigh in on how their courts functioned. And, at the conclusion, I expressed my special thanks to the Chief Justice of England and Wales and the Chief Justice of Canada for traveling to the United States for this particular event. Then, I turned to our own Chief Justice and said, “And, for our own Chief Justice, Justice Rehnquist, I now have an opportunity and an obligation to say to you something I’ve always wanted to say, and this is my one and only chance: Mr. Chief Justice, your time has expired.” And so has ours.