Testimony of

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Statement of Peter Irons, Ph.D., J.D.
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Mr. Chairman, and Members of the Committee:

My name is Peter Irons, and I am a professor of political science at the University of California in San Diego, now emeritus. My field is constitutional law, and I specialize in the Supreme Court and constitutional litigation. I am also an attorney, and a member of the United Supreme Court bar. I thank the Committee for inviting me to speak in support of Senate Bill 1768.

My invitation to appear this morning, I understand, stems from my role--or perhaps, my notoriety--as the person who first released to the public, back in 1993, audio-tapes of Supreme Court oral arguments in 23 historic cases, including Roe v. Wade, Miranda v. Arizona, the Pentagon Papers case, and the Watergate Tapes case.

Let me first briefly explain the history of those tapes. Chief Justice Earl Warren initiated the audio-taping of Supreme Court oral arguments in 1955, recognizing their historic importance. The tapes were stored in the National Archives, with no restrictions on their use until 1986, when Fred Graham of CBS News obtained a tape of the arguments in the Pentagon Papers case and played excerpts on both television and radio, on the fifteenth anniversary of the Court's decision in that case. Chief Justice Warren Burger was displeased with Graham's actions, to say the least; he even asked the FBI to find out how Graham had obtained the tapes, which the agency declined to do. Burger then instructed the Archives staff to require any further requesters of the tapes to sign an agreement limiting their use to "private research and teaching," and prohibiting any duplication or distribution of the tapes.

Hardly anyone at that time even knew the oral argument tapes existed, or how to gain access to them, which was a time-consuming and expensive process. Back in 1978, in an appellate advocacy class at Harvard Law School, our instructor played the tape of arguments in a 1958 case, Kent v. Dulles, which challenged the denial of a passport to an alleged Communist sympathizer. The arguments were fascinating, but I didn't think more about the tapes until 1991, when I directed the Earl Warren Bill of Rights Project at UCSD, designed to create innovative teaching materials for high-school and college classes on the Bill of Rights. I decided that providing students with edited and narrated versions of oral arguments in landmark Supreme

Court cases would be a valuable educational project, so I visited the Archives and requested copies of tapes in cases I had selected for their importance and interest. When I arrived, I was asked to sign a document, headed "Exhibit A," containing the restrictions imposed by Chief Justice Burger. I had not known of these restrictions, but I considered them unenforceable and a violation of the First Amendment. These were public records, not classified or subject to the Privacy Act. The Archives staff, in fact, had objected to imposing these restrictions, bowing to Burger's threat to withhold tapes in the future.

At that point, I faced two choices: I could refuse to sign, and perhaps sue the Archives on First Amendment grounds, which might take years and be costly. Or I could sign "Exhibit A" and face any consequences for violating its terms. I chose the latter course, although I also informed the Court, in a letter to Chief Justice Rehnquist, about my plans for providing the edited and narrated tapes to schools and the public, through a non-profit publisher, The New Press. The Chief Justice raised no objection to my plans; in fact, I received a letter from his administrative assistant, telling me he endorsed this "educational" project.

Let me recount two little stories about what happened later. In August of 1993, just before my publisher released the oral argument tapes, I was being interviewed by Tim O'Brien of ABC television. During the interview, the telephone rang, with a call to Mr. O'Brien from the Court's public information officer. She read to him a statement that the Court was contemplating "legal remedies" against me for releasing these tapes. The statement said I had violated the terms of the document I had signed at the Archives, which the Court's statement said was a contract I had breached. I explained to Mr. O'Brien why I felt the document violated the First Amendment. Needless to say, that statement was news, and it was not only on national television that night but also in newspaper headlines the next morning. The Washington Post headline said "Imminent Release of Court Material Rankles Court." The Post quoted Professor Laurence Tribe of Harvard Law School as saying, "These are clearly public documents. Why access should be limited to the few who are lucky enough to sit in the courtroom is beyond me." On the other hand, Professor Charles Fried of Harvard dismissed the tapes as "pure entertainment" and said their release might encourage "grandstanding" by lawyers who argued before the Court. However, the media reaction to this flap was overwhelmingly critical of the Court's response, including columns supporting me by William Safire and James J. Kilpatrick. Four months later, the Court backed down and removed all restrictions on distribution of the oral argument tapes, except for one person. The Court's clerk, General William Suter, sent a letter to the Archives saying that I could only copy more tapes with the Court's prior approval. This letter prompted another round of media criticism, and the Court promptly lifted that judicial bill of attainder. The Warren Project has subsequently produced three additional sets of edited and narrated oral arguments, on cases dealing with abortion, the First Amendment, and the rights of students and teachers.

My second brief story is also revealing, I think. In March of last year, I was standing in the bar members' line at the Court, waiting for admission to the chamber for oral arguments in the Pledge of Allegiance case, in which I had written an amicus brief. The Court's clerk, General William Suter, came over to introduce himself, and said, "You're the guy who released the tapes." To which I replied, "And you're the guy who threatened to sue me." But he then said, "You know, there are a several justices who have listened to these tapes and think this was a very educational project."

I mention these stories to illustrate the fact that, over time, resistance to public access to the Court's proceedings has not only diminished, but has been replaced with understanding that allowing the American people to hear the arguments in its chambers has not damaged the Court

in any way. The audio-tapes that I produced for the May It Please the Court series have been played in thousands of classrooms, from middle schools through law schools. I have received hundreds of letters, phone calls, and e-mails from students and teachers who have shared their excitement at hearing these historic arguments. Let me quote a message from one teacher: "These tapes are fascinating! Regardless of how you feel about the issues involved, to hear the arguments made on both sides, and the questions of the justices, is truly riveting. They make the Supreme Court come alive."

If the Committee will indulge me, I would like to use one minute of my time to let you hear a brief excerpt of Thurgood Marshall's argument in the Little Rock case in 1958, Cooper v. Aaron. (Excerpt of Cooper v. Aaron argument: "I think we have to think about these children and their parents, these Negro children that went through this every day, and their parents that stayed at home wondering what was happening to their children, listening to the radio about the bomb threats and all of that business. I don't see how anybody under the sun could say, that after those children and those families went through that for a year to tell them: 'All you have done is gone. You fought for what you considered to be democracy and you lost. And you go back to the segregated school from which you came.' I just don't believe it. And I don't believe you can balance those rights."

A few years ago, while I was working on a book about the Brown v. Board of Education cases, I visited all the schools involved in those cases, from Summerton, South Carolina, to Topeka, Kansas, meeting with social studies and American government classes. I played for these students excerpts from the Little Rock arguments. The students were enthralled, and some even cried when they heard Marshall's impassioned words. At Topeka High School, from which Linda Brown graduated, one student said, "I never thought I would hear anything like this."

My point here is very simple. If public access to audio-tapes of oral arguments has given us what William Safire called "a fascinating you-are-there experience and an ear to history in the making," I perceive no reason why the American people should not be able to see these arguments as well. As the Committee knows, television cameras are allowed in the courts of all fifty states, under varying guidelines, and the highest courts of states from Alaska to Florida provide television coverage of all their sessions. There is no evidence that televising these public proceedings has turned them into "entertainment" or prompted "grandstanding," as Professor Fried predicted. On the contrary, the experience of courts that allow television coverage of appellate arguments is that lawyers and judges alike are not distracted by the cameras, or even pay attention to them. And there is no evidence that releasing the audio-tapes of Supreme Court sessions has affected the arguments of lawyers or questioning from the bench in any way. The public can even purchase DVD's in the Court's bookstore, entitled The Supreme Court's Greatest Hits, that contain sixty-two oral arguments, along with pictures and text.

In the past five years, the Court itself has released audio-tapes in six cases on the day of the arguments, including Bush v. Gore in 2000, the University of Michigan affirmative action cases in 2003, and the "enemy combatant" cases this past April. Television and radio stations have played excerpts of those arguments, along with pictures of the lawyers and justices, with no damage to the Court's reputation. Shortly after the Bush v. Gore arguments, Fred Graham, now of Court TV, talked with Chief Justice Rehnquist. According to Graham, "Rehnquist said he was very pleased with the reception that the playing of the Court's audio tapes had gotten. He said he watched it on television, and he thought it worked well--the way they put up the pictures that identified the justices and the lawyers who were speaking. He thought that the coverage communicated to the public what was happening in an extremely important case, and he was

pleased."
If those arguments had been televised, I doubt that anything that was said in the Court's chamber would have been affected in any way by the cameras. I'm not an authority on video technology, and I won't advise this Committee or the Court on how television coverage might be arranged. But I do know, from my experience with the Court's audio-tapes, that students, teachers, and the American public have benefited from hearing them. One final word: this past Monday, I met with students in a judicial process class at Missouri State University in Springfield, who had listened to audio-tapes in the May It Please the Court series. I asked them if they would have preferred watching those arguments on video or television, and every student raised their hand. That's an unscientific, but I think very revealing, expression of opinion on this topic.

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