

The Roberts Court and Oral Arguments: A First Decade Retrospective

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INTRODUCTION

When John Roberts was tapped by President George W. Bush to fill Chief Justice William Rehnquist's seat on the U.S. Supreme Court, a narrative immediately developed. Shared by allies and detractors alike, this narrative suggested Roberts had been one of the greatest litigators of his generation. After describing him as "among the best in [the] profession . . .,"¹ one commentator even claimed that his gift for advocacy—including his intellect, affable demeanor, and willingness to prepare for weeks—would "serve him well on the other side of the bench."² Perhaps for this reason, the media has spilt a fair amount of ink on Roberts' leadership during oral arguments.³

This attention has emphasized three aspects of the Justices' behavior: more than ever they talk quite a bit during arguments, and actually speak more than do attorneys who appear before the bench; they can and do telegraph their positions when they ask questions during oral arguments; and some are willing to interrupt their colleagues in order to make specific point during these proceedings. Here we assess each of these behaviors to provide a snapshot of how the Justices have acted in this most recent era during the public

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¹ Charles Lane, *Nominee Excelled as an Advocate Before Court*, WASH. POST (July 24, 2005), http://www.washingtonpost.com/wp-dyn/content/article/2005/07/23/AR2005072300881_pf.html.

² *Id.*

³ Even a simple Google search brings up dozens of articles related to Roberts' leadership during these proceedings (search term: Robert's leadership during oral argument). A Lexis search of the same terms provides similar results.

portion of the Court's decision-making process.

ACCOUNTS OF THE ROBERTS COURT AND ORAL ARGUMENTS

Much of the coverage of oral arguments in the Supreme Court has focused on the questions Justices ask. This is not a new phenomenon. Especially after major cases, journalists have long covered what the Justices ask and how their questions might signal the positions they are likely to take.⁴ During the Roberts Court, though, the conventional wisdom seems to be that these signals are stronger, more intentional, and often more partisan. Stephen Wermiel, a journalist and author, even seemed to bemoan this development. "Twenty-five years ago, Supreme Court watchers advanced the view that oral arguments enabled [J]ustices to signal one another about their view of a case . . . [b]ut there are arguments today which seem more like sparring among the [J]ustices, rather than signaling."⁵ Wermiel is not alone in pointing out this trend. More and more, the news mentions Justices tipping their hand during oral arguments, occasionally openly stating their positions, and frequently interrupting their colleagues' questions and comments.⁶

Wermiel's insights harken a larger trend that has received significant attention from scholars and the media alike: the Justices seem to be asking more questions under Roberts.⁷ This trend is not new, certainly, and probably started long before Roberts joined the Court. Scholars and the media attribute much of the change to the appointment of Justice Scalia in 1986. As Biskupic put it, "[d]uring his first days on the bench, Scalia asked so many questions that, [Justice] Powell, according to biographer John Jeffries, leaned over to

⁴ See, e.g., Joan Biskupic, *Justices Make Points by Questioning Lawyers*, USA TODAY (Oct. 5, 2006, 9:14 PM), http://usatoday30.usatoday.com/news/washington/judicial/2006-10-05-oral-arguments_x.htm; Linda Greenhouse, *Justices Indicate They May Uphold Voter ID Rules*, N.Y. TIMES, Jan. 10, 2008, at A1.

⁵ Adam Liptak, *Nice Argument, Counselor, but I'd Rather Hear Mine*, N.Y. TIMES (Apr. 5, 2011), <http://query.nytimes.com/gst/fullpage.html?res=9C0CE7DC1339F936A35757C0A9679D8B63> [hereinafter Liptak, *Nice Argument*].

⁶ See, e.g., Biskupic, *supra* note 4; Greenhouse, *supra* note 4.

⁷ See, e.g., Ryan C. Black, Timothy R. Johnson & Justin Wedeking, *Oral Arguments and Coalition Formation on the U.S. Supreme Court: A Deliberate Dialogue*, ANN ARBOR: U. MICH. PRESS (2012).

[Justice] Marshall and whispered ‘Do you think he knows that the rest of us are here?’”⁸ The same article, written just months after Chief Justice Roberts ascended to the bench, speculated the trend was likely to continue as the new Chief sought to “establish his presence” during oral arguments.⁹

The media has forwarded two distinct explanations for the uptick in questions on the contemporary Court. One is that the new Justices on the bench are simply more talkative than their predecessors. Roberts himself has noted this possibility: “[r]ecent appointees [tend] to be more active in questioning than the Justices they replaced.” Speaking about Justices Kagan and Sotomayor, he continued, “it is nothing bad about either of them. It’s just a fact.”¹⁰

The other explanation is perhaps more interesting. It posits that the role of oral arguments itself has changed under Roberts.¹¹ Although it has always been true that oral arguments provide Justices the first opportunity to hear what their colleagues think about a case, Chief Justice Roberts has been open about the fact that this is often a primary goal. When asked about the ever-more talkative Court, the Chief responded “there are excuses for it . . . [w]hen we get out on the bench, it’s really the first time we start to get some clues about what our colleagues think. So we often are using questions to bring out points that we think our colleagues ought to know about.”¹² Sotomayor, who has spent her entire tenure under Roberts’ leadership, has made similar arguments. Reflecting on what she had learned in her first years on the bench, Sotomayor argued that one purpose of oral argument, “is for judges to hear what’s bothering each other.”¹³ She added, “that she tailors her own reasoning [during conference] to take into account what she has heard from her colleagues at arguments.”¹⁴ The most junior Justice, Justice Elena

⁸ *Id.*

⁹ *Id.*

¹⁰ Adam Liptak, *Sotomayor Reflects on First Years on the Court*, N.Y. TIMES (Jan. 31, 2011), <http://www.nytimes.com/2011/02/01/us/politics/01sotomayor.html> [hereinafter Liptak, *Sotomayor Reflects*]

¹¹ Black et al., *supra* note 7.

¹² *Id.*

¹³ Liptak, *Nice Argument*, *supra* note 5.

¹⁴ Liptak, *Sotomayor Reflects*, *supra* note 10.

Kagan, echoed this point in a 2013 speech at Harvard University: “[t]here’s no doubt . . . that part of what oral argument is about is a little bit of the [J]ustices talking to each other with some helpless person standing at the podium who you’re talking through.”¹⁵

Part of what has led the oral argument conversation from a conversation between Justices and attorneys to a conversation between the Justices themselves is Roberts’ leadership style on the bench. By most accounts, the current Chief is more lenient during oral arguments. Early in Roberts’ tenure one commentator noted, “the Rehnquist-to-Roberts transition has altered the style of the [C]ourt. The atmosphere is more relaxed and the [C]hief [J]ustice is decidedly more laid back.”¹⁶ Roberts’ leniency has given all the Justices more room to volley with their colleagues, push the attorneys and, occasionally, ignore them altogether.¹⁷ One pundit said this change frequently requires the Chief to “play the role of air traffic controller, trying to make sure his colleagues’ questions land one at a time without crashing into one another.”¹⁸

Beyond the changes that took place within oral arguments under Roberts, the other part of the narrative may have been the degree of collegiality he sought as Chief. During his Senate confirmation hearings, Court watchers suggested that Roberts’ interest in collegiality was key to his confirmation¹⁹ and to presiding over a deeply divided Court. Indeed, as he noted in his hearings, “I’ve learned the most in the past two years on the Court of Appeals: how valuable it is to function in a collegial way with your colleagues on the bench”²⁰ After five years on the bench he felt good about

¹⁵ Adam Liptak, *A Most Inquisitive Court? No Argument There*, N.Y. TIMES (Oct. 7, 2013), <http://www.nytimes.com/2013/10/08/us/inquisitive-justices-no-argument-there.html>.

¹⁶ Michael McGough, *Ardor in the Court*, PITTSBURGH POST-GAZETTE (Nov. 14, 2005), <http://www.post-gazette.com/opinion/columnists/2005/11/14/intellectual-capital-ardor-in-the-court/200511140198>.

¹⁷ Liptak, *Nice Argument*, *supra* note 5.

¹⁸ Liptak, *Nice Argument*, *supra* note 5.

¹⁹ See, e.g., Edward Lazarus, *John Roberts as the Anti-Robert Bork: How Roberts’s Nomination, and Conservatives’ Senate Hearings Strategies, Reflect Lessons Learned from the Bork Debacle*, FINDLAW FOR LEGAL PROFESSIONALS (Aug. 5, 2005), <http://supreme.findlaw.com/legal-commentary/john-roberts-as-the-anti-robert-bork-how-robertss-nomination-and-conservatives-senate-hearings-strategies-reflect-lessons-learned-from-the-bork-debacle.html> (last visited Nov. 8, 2016).

²⁰ *Transcript: Day Two of the Roberts Confirmation Hearings*, WASH. POST (Sept. 13,

achieving a higher level of collegiality among his colleagues. As he put it during a speech at the Indiana University School of Law, “[i]t is a very, very collegial court.”²¹

Taken together, news coverage of the first decade of the Roberts Court paints a remarkably coherent picture of a Chief Justice who values open dialogue, who desires to lead a collegial Court, and whose leadership and questioning style on the bench has fundamentally altered how the Justices interact with each other and with attorneys who appear before the Court. Here, we provide data from the first decade of the Roberts Court to demonstrate how these values have manifested themselves.

SUPREME COURT ORAL ARGUMENTS 2005–2015

To assess the degree to which Justices interact with one another and the degree to which this is the collegial Court Roberts envisioned, we examine electronic oral argument transcripts in 752 sessions that took place across a total of 741 cases decided during the Court’s 2005 through 2015 terms. The number of sessions exceeds the number of cases because some cases have multiple sessions were reargued, or were consolidated after oral argument took place.²²

The sheer quantity of data generated by the first eleven terms of the Roberts Court is impressive. If one were to go on a judicial bender and listen to the audio in all of these sessions, it would take roughly the same amount of time as watching all 150 episodes of the television show *The West Wing*—a total of seven times. The total number of words spoken during these sessions is about 7.8 million. To read the entire corpus would be equivalent to reading *The Catcher*

2005, 11:57 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2005/09/13/AR2005091300876.html> (last visited Nov. 8, 2016).

²¹ Debra Cassens Weiss, *Chief Justice Says Court Is Collegial, but Compromise Can Be Difficult*, ABA JOURNAL (Apr. 8, 2010, 1:11 PM), http://www.abajournal.com/news/article/chief_justice_says_court_is_collegial_but_compromise_can_be_difficult/ (last visited Nov. 7, 2016).

²² See, e.g., *Obergefell v. Hodges*, 576 U.S. ____ (2015). We obtained these data from Oyez (<http://www.oyez.org>), a magnificent resource for learning about oral arguments. Oyez is an online source that has audio and digital transcripts of all Supreme Court oral arguments from the time it began recording the arguments (1955) until the present.

in the Rye about 100 times or reading all seven books in the *Harry Potter* series a total of seven times. In short, Roberts and his colleagues have provided researchers with much to work with and much to contemplate.

With these data in hand, we present a view of the first decade of oral arguments on the Roberts Court. In terms of the number of instances when a Justice (as opposed to an attorney) spoke, the data are balanced almost perfectly, with 51% of all utterances coming from the bench and 49% coming from an attorney.²³ When we examine the total number of words spoken by each type of speaker, however, a considerable gap emerges, with Justices speaking only 39% of the total words and attorneys speaking the remaining 61%. Focusing on each individual oral argument session, which is typically 60 minutes long, Justices spoke an average of 1100 words compared to an average of 1700 words for attorneys. Finally, note that we can also disaggregate these data down to the individual utterance. Here, a speaking turn by a Justice is typically 34 words long compared to 55 words for an attorney.

JUSTICE BEHAVIOR DURING ORAL ARGUMENTS 2005–2015

Although we suspect there is much to be learned from how attorneys have adapted to changes in the bench, especially among the growing cadre of so-called Supreme Court “specialists,” we limit our focus to the behavior of the Justices. We consider, first, Chief Justice Roberts’ desire for him and his colleagues to participate actively in open discussion during oral arguments.

To do so we measure the loquaciousness of each Justice from this era to determine how willing they are to speak in a way that makes their views known to the public and to their colleagues. The boxplot

²³ We define an utterance as anytime a participant in the oral arguments speaks. In other words, an utterance could be a question from the bench or a statement a Justice makes. More specifically, we downloaded all available oral argument transcripts from the 2005 through 2015 Terms of the Court and then used a basic computer script to isolate Justices’ questions as well as to determine every time a Justice interrupted another Justice. We then simply added up the total number of instances of each of these phenomena.

presented in Figure 1 provides the data to do so.²⁴ On the Y-axis are the twelve Justices who served during the past decade and on the X-axis we summarize the number of words spoken during the 2005 through 2015 terms. The white vertical line for each Justice represents the median number of words used per case. The gray rectangle that houses the white vertical line shows the 25th and 75th percentile values for each Justice. This is to say that 50% of the observed values for a given Justice exist within this range, so it represents a Justice’s “usual” or average behavior, acknowledging that there is some variability from session to session. Horizontal lines come out from each side of the rectangle and lead to short vertical tick marks. These marks identify the range of behavior that encompasses all but the most exceptional sessions. And, the filled circles show statistical outliers. In our data, these all correspond to instances where a Justice was exceptionally active during an oral argument session. As readers will observe, the number of words spoken by Justice Clarence Thomas in a given case are *always* outliers precisely because he speaks so rarely.

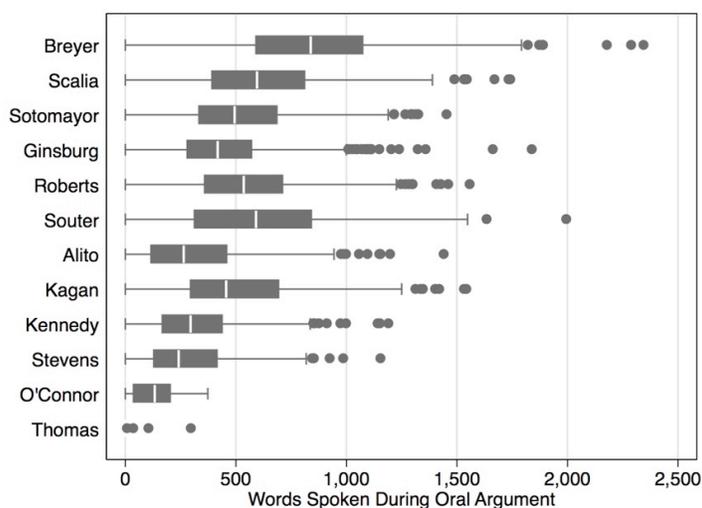


Figure 1: Words spoken by each Justice per case 2005–2015

²⁴ These calculations are quite simple. Specifically, calculated the median number of utterances for each Justice and the interquartile range.

It is immediately evident that ample variation exists in the number of words used by the Justices; that is, some simply have more to say than do others. In keeping with conventional wisdom, Justice Breyer is the most talkative of the Justices. His median argument session includes almost 840 words. This suggests that, even though there are ten other participants in the courtroom with him, Breyer dominates in terms of the length of his utterances. He also has three cases where he speaks well over 2000 words in a one-hour session.²⁵ These outliers often take the form of the long—and sometimes convoluted—hypotheticals he poses.²⁶

Scalia and Souter, the next chattiest Justices during the first decade of the Roberts Court, are also well-known for their soliloquies and long hypothetical questions. They each have a median of more than 600 words used per session. While neither has as many outliers as does Breyer, they both have cases where they use well over 1000 words in their combined utterances. These three Justices certainly command considerable time and attention with the questions they ask and the statements they make.

In keeping with his openness and desire for such behavior, Chief Justice Roberts is the only other Justice on the Court who has a median of more than 500 words per case. Interestingly, his outliers include far fewer words than do those of Breyer, Scalia, or Souter. In fact, there is only one case in which Roberts spoke more than 1500 words. In addition, the newest members of the bench—Justices Sotomayor and Kagan—speak in similar quantities to the Chief. Specifically, they are the only other Justices whose median utterances come very close to 500 words. They each also have few outliers, although this may be the case because they have not served as long as the others.

²⁵ These cases are, *Evans v. Chavis* (2345 words), *Sanchez-Llamas v. Oregon* (2180 words), *PPL Corp. v. Comm'r Internal Rev.* (2290 words).

²⁶ Ronald K.L. Collins, *Hypothetically Speaking: Justice Breyer's Dialectical Propensities*, CONCURRING OPINIONS: THE LAW, THE UNIVERSE, AND EVERYTHING (Feb. 28, 2014), <https://concurringopinions.com/archives/2014/02/hypothetically-speaking-justice-breyers-dialectical-propensities.html>.

The remaining Justices are more judicious in their use of words when they speak during oral arguments. The median for Justices Alito, Ginsburg, Kennedy, Stevens, and O'Connor are well below 500 words per case although only O'Connor has no cases that fall beyond her interquartile range. One explanation for why Ginsburg, Kennedy, Stevens, and O'Connor are quieter than they began serving at a time when the Justices did not speak as often as they do today. Ginsburg, O'Connor and Stevens straddle these two eras, which is evidenced by their wide range of outliers in relation to their quieter colleagues. Kennedy acts in a similar manner, which could be the case because he joined the Court just after Scalia (in 1988 as opposed to Scalia in 1986).

Although the above data are enlightening, they tell only part of the story about Chief Justice Roberts' style for running oral argument. We also want to know what drives the variability we observe: is it because some Justices prefer to speak less or because they are unable to get a word in edgewise due to competition from his colleagues? The data presented in Figure 2 provides a partial answer to that question. It shows how often interruptions occur between Justices during oral argument. We define an interruption as occurring if an utterance by one Justice is immediately followed by an utterance from a different Justice, with no intervening words spoken by the attorney. Overall, we observe an interruption in about 4.3% of all Justice utterances.

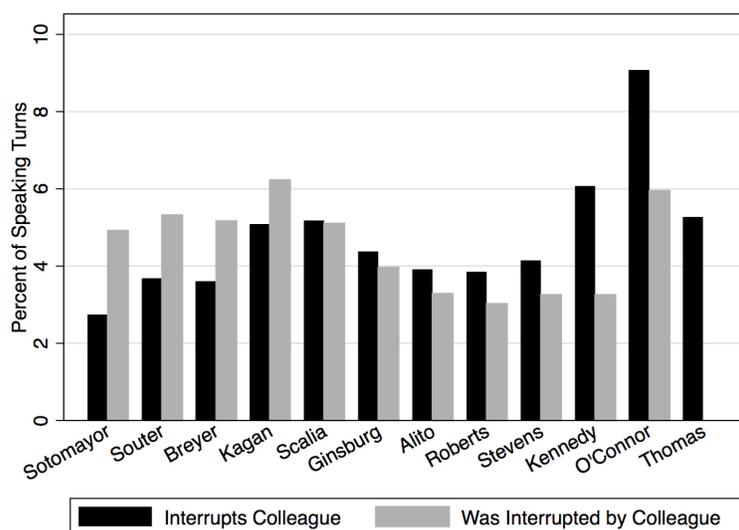


Figure 2: Percentage of time Justices interrupt are interrupted 2005–2015

Within the figure, the black bars indicate the relative frequency that a Justice interrupted a colleague, as a percentage of the total number of utterances spoken by a justice. The gray bars, by contrast, indicate how often a speaking Justice was interrupted by another of his or her colleagues. Much like Justices' verbosity, we find significant variation in terms of interrupting behavior on the bench. Starting on the left side of the figure, Justice Sotomayor is the least likely to butt in on someone else while they are speaking. She spoke a total of nearly 8400 times since joining the Court, but only 2.7% of those utterances came immediately after a statement or question by one of her colleagues. This makes her seem the politest and therefore the most deferential Justice over the first decade of the Roberts Court. Interestingly, this cuts against the reputation Sotomayor had prior to her ascension to the high bench. In fact, media accounts often portrayed her as not very nice during oral arguments—at least to attorneys.²⁷ Justice Souter is right behind Sotomayor as the second

²⁷ See, e.g., Sheryl Gay Stolberg, *Sotomayor, a Trailblazer and a Dreamer*, N.Y. TIMES

politest Justice on the Court. It is, in fact, Souter's seat that Sotomayor now occupies.

At the other end of politeness spectrum are Justices O'Connor, Kennedy, and Thomas. More than 6% of each of these Justices' utterances interrupted another colleague. Three other Justices break the 4% mark—Scalia, Kagan, Stevens, and Ginsburg. These “middle category Justices” certainly do interrupt others but not to the rate of the serial interrupters. That said, such behavior does not always go unpunished. In *United States v. R.L.C.*,²⁸ when Rehnquist began to ask a question and Scalia began to speak almost immediately, Justice Blackmun documented the Chief's irritation: “CJ tells AS t[o] shut up while he is asking a q[uestion].”

In terms of who suffers the most interruptions at the hands of their colleagues, we turn to the light gray bars in Figure 2. The most interrupted Justices include O'Connor, Kagan, Sotomayor, Scalia, Breyer, and Souter. Interestingly, two of this group are the newest members of the bench and, with the exception of Ginsburg, women. While we cannot make any definitive conclusions based on these data, these data indicate that newer Justices or female Justices may be overshadowed by their colleagues more often than those who have a longer tenure on the bench or by their male colleagues.

On the other side of the spectrum, Kennedy, Stevens, Roberts, and Alito are not interrupted as often by their colleagues. Again, we cannot make definitive conclusions, but Kennedy and Stevens have been on the bench the longest and so may garner deference from their colleagues.²⁹ Roberts may be interrupted less often because he is the chief.³⁰ Finally, we note that Thomas is never interrupted because he almost never speaks; is no opportunity for him to be interrupted by

(May 26, 2009), <http://www.nytimes.com/2009/05/27/us/politics/27websotomayor.html> (last visited Dec. 23, 2016). One explanation for the dichotomy is that she may be deferential to colleagues more than to attorneys. Of course, this is an empirical question that will be tested as her tenure continues on the bench.

²⁸ *United States v. R.L.C.*, 503 U.S. 291 (1992).

²⁹ Of course, the same could be said of O'Connor, but given that she was the most likely to interrupt others while she was on the bench it seems as if she suffers from her colleagues' retribution. That is, because she speaks over her colleagues they are more likely to interrupt her.

³⁰ Timothy R. Johnson & Charles Gregory, *The Chief Justice and Oral Arguments*, in *THE CHIEF JUSTICE: APPOINTMENT AND INFLUENCE* 151–71 (Artemus Ward & David Danelski eds., 2016).

others.

CONCLUSION

Oral arguments are increasingly of interest to scholars, media, and court-watchers alike. They represent one of the few opportunities for the public to observe the Court's decision-making process at work. Thanks to Oyez, we are able to step back and provide an initially empirical assessment of the nature of oral arguments on the Roberts Court.

This exercise reveals a few noteworthy aspects. First, although Justices are hardly wallflowers, attorneys still dominate the proceedings in terms of the number of words spoken. Second, there is tremendous variation among the Justices in terms of their propensity to talk.³¹ Third, we also see variability in terms of how Justices behave towards one another. Perhaps most interestingly, our data suggest that some Justices, such as Sotomayor (despite not being particularly aggressive in the way they participate during oral arguments), are, nonetheless, frequently interrupted by their colleagues when speaking. And others, such as Kennedy, despite being among the most "notorious" of offenders when it comes to interruptions, are not themselves interrupted when speaking. These dynamics certainly vary over time and, with a new Justice soon joining the bench, they will surely change as the Roberts Court continues into its second decade.

³¹ Justice Breyer's speaks more than 50% longer than any of his current (as of December 2016) colleagues.