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Citing the Transcript of Oral Argument: Which Justices Do It and Why

The behavior of the Justices during oral argument has always fascinated Supreme Court watchers. Recent studies have confirmed what experienced observers have long known: Justice Breyer talks the most,¹ Justice Thomas says the least,² and Justice Scalia gets the most laughs.³ What has remained somewhat of a mystery, however, is how much the Justices continue to think about oral argument after they leave the courtroom and return to their chambers. Which Justices give oral argument the most consideration? Which statements by advocates make the most lasting impressions?

The Justices' own opinions are as good a place as any to start looking for answers. The very purpose of oral argument is to influence how the Justices decide cases. If something said at oral argument strikes a Justice as particularly noteworthy, one would think it would show up in the Justice's opinion. So, too, if a Justice considers oral argument an especially helpful source of information,⁴ one would think the Justice would reference it often.

Thankfully, references to oral argument are clearly marked in the Justices' opinions by citations of the transcript released after each case is heard. To get

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1. Michael Doyle, *Transcripts Give a Glimpse into Many Justices' Personalities*, MCCLATCHY NEWSPAPERS, May 16, 2007, http://www.mcclatchydc.com/staff/michael_doyle/story/16193.html.
 2. *Id.*
 3. Jay D. Wexler, *Laugh Track*, 9 GREEN BAG 2D 59, 60 (2005); Jay D. Wexler, *Laugh Track II—Still Laughin'!*, 117 YALE L.J. POCKET PART 130 (2007).
 4. See TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT 122 (2004) (pointing to data “suggest[ing] . . . that the oral arguments in a case provide unique information the justices use when they make substantive choices about the merits of a case”).

an accurate picture of the Justices' practices, I examined every citation of the transcript of oral argument made between the start of the 1994 Term, Justice Breyer's first, and the end of the 2007 Term, the Court's most recent. In the roughly 2600 opinions written during this fourteen-year span, there were 787 citations of the transcript.⁵ For each one, I noted the type of opinion in which the citation appeared, the Justice who wrote the opinion, the Justice's reason for citing the transcript, the identity of the speaker cited, and the party who won the case.

As shown in Table 1,⁶ the data leave no doubt which Justice references oral argument the most. Accounting for nearly a third of the total citations by the Court as a whole, Justice Ginsburg cited the transcript a staggering 248 times – almost once per opinion. In absolute numbers, Justice Souter came in a distant second, with eighty-nine citations, followed by Justice Stevens, with seventy-nine. The order behind Justice Ginsburg changes dramatically, however, when one considers instead the rate of citations per opinion. Chief Justice Roberts catapults to second place, averaging about one citation for every two opinions. Given that both were distinguished Supreme Court advocates before joining the bench, it is perhaps no coincidence that Justice Ginsburg and Chief Justice Roberts reference oral argument so frequently.⁷

Which Justice cites the transcript least often? Based on how rarely he asks questions, one might guess Justice Thomas. One would be wrong. Justice Thomas's silence should not be confused with indifference; the fact that he referenced oral argument sixty-eight times at a rate of 0.211 citations per opinion shows that he is listening.⁸ Ironically, the most active Justices during

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5. I counted a string of citations referencing the same advocate for the same point as a single citation. For an example of a string of citations that I counted as only one citation, see *Gratz v. Bollinger*, 539 U.S. 244, 266 n.16 (2003) (Rehnquist, C.J.).
 6. Table 1 does not include four citations in per curiam opinions. It counts the two citations in the joint opinion by Justices Stevens and O'Connor in *McConnell v. FEC*, 540 U.S. 93 (2003), twice—once for Justice Stevens and once for Justice O'Connor. I calculated the number of opinions authored by each Justice based on the *Harvard Law Review's* annual statistics for the 1994–2006 Terms, see, e.g., *The Supreme Court, 2006 Term—The Statistics*, 121 HARV. L. REV. 436, 436 tbl.I(A) (2007), and my own tally for the 2007 Term.
 7. Justice Ginsburg argued six cases before the Court. Franklin L. Jonas, *Ruth Bader Ginsburg*, in DIANA KLEBANOW & FRANKLIN L. JONAS, *PEOPLE'S LAWYERS: CRUSADERS FOR JUSTICE IN AMERICAN HISTORY* 349, 365 (2003). Chief Justice Roberts argued thirty-nine. Charles Lane, *Nominee Excelled as an Advocate Before Court*, WASH. POST, July 24, 2005, at A5. Justice Alito serves as a counterexample: although he argued twelve cases before the Court, his citation rate is one of the lowest. Adam Liptak, *In 12 Arguments Before the Supreme Court, Alito Drew Praise for Preparedness and Style*, N.Y. TIMES, Nov. 20, 2005, § 1, at 24. Of course, it may be too soon to reach any conclusions about either Justice Alito or Chief Justice Roberts.
 8. Granted, eight of Justice Thomas's sixty-eight citations referenced statements at arguments that took place before he joined the Court. See *Parents Involved in Cmty. Sch. v. Seattle Sch.*

oral argument are among the least likely to cite the transcript: Justice Breyer's fifty citations at a rate of 0.162 per opinion place him near the bottom of the list, while Justice Scalia's forty-eight citations at a rate of 0.132 per opinion put him dead last. Justice Scalia's numbers are consistent with the theory that he considers oral argument not so much a chance to be persuaded by what he hears as "a chance to drive home his points by exposing weaknesses in a lawyer's position."⁹ Indeed, despite being the Justice who cited the transcript the least, he was the Justice whose own words at oral argument were cited the most: eleven times in all,¹⁰ seven times by his longtime friend, Justice Ginsburg.¹¹

Table 1.**TRANSCRIPT CITATIONS BY JUSTICE, 1994-2007 TERMS**

JUSTICE	TRANSCRIPT CITATIONS	AUTHORED OPINIONS	CITATIONS PER OPINION
Rehnquist	47	137	0.343
Stevens	79	428	0.185
O'Connor	74	202	0.366
Scalia	48	365	0.132
Kennedy	57	239	0.238
Souter	89	253	0.352
Thomas	68	323	0.211
Ginsburg	248	254	0.976
Breyer	50	309	0.162
Roberts	19	40	0.475
Alito	6	43	0.140
Total	785	2593	0.303

Dist. No. 1, 127 S. Ct. 2738, 2782 n.20, 2783 n.21, 2784 n.22, 2785 nn.24-25, 2786 n.27 (2007) (Thomas, J., concurring).

9. JAN CRAWFORD GREENBURG, *SUPREME CONFLICT: THE INSIDE STORY OF THE STRUGGLE FOR CONTROL OF THE UNITED STATES SUPREME COURT* 114 (2007).
10. See, e.g., *Howard Delivery Serv. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 667 (2006).
11. Judith Baer, *Advocate on the Court: Ruth Bader Ginsburg and the Limits of Formal Equality*, in *REHNQUIST JUSTICE: UNDERSTANDING THE COURT DYNAMIC* 216, 221 (Earl M. Maltz ed., 2003) ("Her friendship with Antonin Scalia began on the court of appeals and has continued on the Supreme Court.").

Of course, when the Justices reference oral argument, they almost always cite statements by *advocates* in the case being decided, not statements by the Justices themselves. The three main reasons Justices cite the transcript are: (1) to describe an advocate's affirmative position;¹² (2) to record an advocate's concession;¹³ and (3) to note an advocate's representation of the record or facts.¹⁴ As shown in Table 2,¹⁵ there were about twice as many citations describing a position as recording a concession, and about twice as many recording a concession as noting a factual representation. An advocate's concession was three times more likely to be cited in an unfriendly opinion (that is, by a Justice voting *against* the advocate's side) than in a friendly opinion (that is, by a Justice voting *for* the advocate's side). Still, the fact that one in four citations of an advocate's concession appeared in a friendly opinion demonstrates that concessions made at oral argument are not "inevitably damaging."¹⁶ In the words of Justice Ginsburg, "a concession once in a while can enhance a lawyer's credibility."¹⁷

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12. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 30 (2005) (Stevens, J.) ("Respondents . . . contend that their activities were not 'an essential part of a larger regulatory scheme' because they had been 'isolated by the State of California, and [are] policed by the State of California,' and thus remain 'entirely separated from the market.'" (quoting the transcript of oral argument)).
 13. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 571 (2005) (Kennedy, J.) ("[I]t is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles, as counsel for the petitioner acknowledged at oral argument.").
 14. See, e.g., *United States v. Am. Library Ass'n*, 539 U.S. 194, 214 (2003) (Kennedy, J., concurring in the judgment) ("If, on the request of an adult user, a librarian will unblock filtered material or disable the Internet software filter without significant delay, there is little to this case. The Government represents this is indeed the fact." (citing the transcript of oral argument)).
 15. Table 2 includes only citations of advocates in the case being decided. It excludes citations of advocates in cases other than the one being decided, citations of the Justices themselves, and citations of a line of questioning rather than any speaker in particular.
 16. Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 569 (1999).
 17. *Id.* (paraphrasing Judge Patricia M. Wald); see also ANTONIN SCALIA & BRYAN A. GARNER, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 20 (2008) (advising advocates to "[y]ield indefensible terrain—ostentatiously"). For an example of a helpful concession, see *Rumsfeld v. Forum for Academic & Institutional Rights*, 547 U.S. 47, 60 (2006) (Roberts, C.J.), which notes the Solicitor General's acknowledgement at oral argument that law schools "could put signs on the bulletin board next to the door, they could engage in speech, they could help organize protests," without violating the Solomon Amendment.

Table 2.**TRANSCRIPT CITATIONS OF ADVOCATES IN FRIENDLY AND UNFRIENDLY OPINIONS, 1994-2007 TERMS**

OPINION	CITATIONS DESCRIBING POSITION	CITATIONS RECORDING CONCESSION	CITATIONS NOTING FACTUAL REPRESENTATION	TOTAL
Friendly	135	56	66	257
Unfriendly	276	165	41	482
Total	411	221	107	739

As exciting as it is to be quoted in the *United States Reports*, oral advocates should not be too happy to find their own words in an opinion. As shown in Table 2, the Justices were nearly twice as likely to cite an advocate whose side they opposed than one whose side they supported. Moreover, as shown in Table 3,¹⁸ losing advocates were cited significantly more often than winning advocates. These numbers indicate that oral argument is indeed what Justice Ginsburg calls “a hold-the-line operation”¹⁹: “Not many cases . . . are won on the oral argument alone, but a case can be lost if a lawyer is unable or unwilling to answer a justice’s question honestly and persuasively.”²⁰ If Justices are umpires,²¹ then oral advocates are closers—pitchers who enter a game in the late innings to protect their team’s lead.²² The best they can hope for is to get the save; the worst that can happen is that they lose the game.

18. Table 3 includes only citations of advocates in the case being decided. It excludes citations of advocates in cases other than the one being decided, citations of the Justices themselves, and citations of a line of questioning rather than any speaker in particular.

19. Ginsburg, *supra* note 16, at 570.

20. Ruth Bader Ginsburg, *Foreword* to DAVID C. FREDERICK, *SUPREME COURT AND APPELLATE ADVOCACY: MASTERING ORAL ARGUMENT*, at viii (2003).

21. See *Confirmation Hearing on the Nomination of John G. Roberts, Jr. To Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55-56 (2005) (statement of John G. Roberts, Jr.) (“Umpires don’t make the rules, they apply them. . . . I will remember that it’s my job to call balls and strikes, and not to pitch or bat.”).

22. Cf. ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 273 (1990) (comparing litigators to pitchers).

Table 3.**TRANSCRIPT CITATIONS OF WINNING AND LOSING ADVOCATES, 1994-2007 TERMS**

ADVOCATE	CITATIONS DESCRIBING POSITION	CITATIONS RECORDING CONCESSION	CITATIONS NOTING FACTUAL REPRESENTATION	TOTAL
Winning	159	101	62	322
Losing	252	120	45	417
Total	411	221	107	739

We should not be too quick to draw conclusions about the role of oral argument at the Supreme Court based solely on the data of this study. After all, citation counts can only show so much. The Justices might be thinking about oral argument without citing the transcript. Something an advocate said might make a difference and yet not make its way into an opinion. Still, we improve our understanding of how the Justices operate by knowing how often, and for what reasons, they cite the transcript of oral argument. Such information should interest not only the observer in the audience, but also the oral advocate at the lectern.

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