

# HEINONLINE

Citation: 55 Loy. L. Rev. 331 2009

Content downloaded/printed from  
HeinOnline (<http://heinonline.org>)  
Thu Feb 25 14:29:33 2010

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?  
&operation=go&searchType=0  
&lastSearch=simple&all=on&titleOrStdNo=0192-9720](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0192-9720)

# PARDON THE INTERRUPTION: AN EMPIRICAL ANALYSIS OF SUPREME COURT JUSTICES' BEHAVIOR DURING ORAL ARGUMENTS

*Timothy R. Johnson\**

*Ryan C. Black*

*Justin Wedeking*

## Abstract:

This paper addresses how U.S. Supreme Court Justices use oral arguments in cases they decide to converse with one another about the legal and policy decisions they must make. Our past work has focused on the extent to which Justices Harry A. Blackmun and Lewis F. Powell listened to questions and comments made by their colleagues during these proceedings. Here we use the Oyez.org database to go a step further. Specifically, we are interested in examining the extent to which Justices communicate with one another during oral arguments by analyzing empirically the oral argument transcripts of cases decided from 1998 through 2006. Our results provide specific systematic patterns of how Justices respond to one another during oral arguments.

---

\* Timothy Johnson (trj@umn.edu) is Associate Professor of Political Science, University of Minnesota. Ryan Black (rblack@wustl.edu) is a Ph.D. candidate in Political Science at Washington University in St. Louis. Justin Wedeking (justin.wedeking@uky.edu) is Assistant Professor of Political Science, University of Kentucky. This essay was prepared for presentation at Loyola University New Orleans' law review symposium entitled "On the Brink: The Judiciary's Tug of War with Technology" (Mar. 13, 2009, New Orleans, La.). Portions of this paper were previously presented at the 2008 annual meetings of the American Political Science Association (Aug. 28-31, 2008, Boston, Mass.). We thank David Adkins and Ryan J. Owens for providing comments and helpful feedback.

## I. INTRODUCTION

In *Danforth v. Minnesota*,<sup>1</sup> the U.S. Supreme Court ruled that, when deciding whether to apply a precedent retroactively, states may utilize broader standards than the rule set forth by the Court. While *Danforth* was not considered a major decision of the 2007 Term, the policy significantly increased states' discretionary power over how to interpret and apply retroactive rules in criminal proceedings.<sup>2</sup> *Danforth* is also important and interesting for understanding the Justices' actions during oral arguments. Indeed, although these proceedings are formally viewed as an exchange between attorneys and the Justices, *Danforth* demonstrates that the conversations that transpire are often more of a dialogue among the Justices than they are a discussion between the Court and counsel.<sup>3</sup>

This view of oral arguments was most evident late in the *Danforth* proceedings when Justices Breyer, Scalia, Stevens, and Ginsburg all spoke before Patrick Diamond (arguing for the State of Minnesota) could get a word in edgewise.<sup>4</sup> The exchange began with a long hypothetical posed by Breyer (including a discussion of metaphysics).<sup>5</sup> Justice Scalia then responded, and both Stevens and Ginsburg replied with statements about the retroactivity of Court precedents.<sup>6</sup> Finally, a sympathetic Chief Justice Roberts drew chuckles from the gallery when he told Diamond, "I think you're handling these questions very well."<sup>7</sup> Justice Ginsburg immediately followed the laughter and made the point even more explicit, "That was not a question addressed to you, Mr. Diamond."<sup>8</sup> Interestingly, this was not the only instance where counsel simply stood at the podium and watched the Justices respond to one another. As Denniston put it, "there were sustained moments when it appeared that the Justices were only talking among themselves, often correcting or contradicting each other . . . ."<sup>9</sup>

Is *Danforth* an anomaly? Did the Justices need to converse with one another during this case in a way they usually do not need to do so

1. 128 S. Ct. 1029 (2008). The Court heard oral argument on October 31, 2007.

2. *See id.*

3. *See* Transcript of Oral Argument, *Danforth*, 128 S. Ct. 1029 (No. 06-8273), 2007 U.S. Trans. LEXIS 54 [hereinafter *Danforth* trans.].

4. *Id.* at \*36-39.

5. *Id.* at \*36.

6. *Id.* at \*8-9.

7. *Id.* at \*39. *See also* Lyle Denniston, Commentary: *What does the Supreme Court really do?*, SCOTUSBLOG.COM, Oct. 31, 2007, <http://www.scotusblog.com/wp/?s=danforth+v.+minnesota>.

8. *Danforth* trans., *supra* note 3, at \*39.

9. Denniston, *supra* note 7.

generally? Or, does *Danforth* give insight into how Justices interact with one another more generally when they appear in public seventy to eighty times per year to engage with attorneys in open court? This essay provides data to answer these questions. Specifically, we seek to determine the extent to which Justices act in a manner similar to their behavior in *Danforth* across cases and over time.

We proceed as follows. First, we review the scholarly and media literature that focuses on how Justices act and interact with each other during oral arguments. This section also reviews what Justices themselves have said about how they utilize these proceedings to discuss cases with their colleagues. We then describe the data we use to determine whether Justices act in the manner that scholars, Justices, and the media suggest. Finally, we present the results and make several observations about future research.

## II. ORAL ARGUMENT AS A CONVERSATION BETWEEN JUSTICES

Scholars who study Supreme Court oral arguments have long held that these proceedings are as much a conversation between Justices on the bench as they are between the Justices and the attorney standing at the podium below. As Wasby, et al., argue, “Another, less noticed function is that oral argument serves as a means of communication between judges . . . .”<sup>10</sup> The reason for such communication is also clear to Wasby and his colleagues. Indeed, they conclude that “it is not surprising that the judges would naturally use part of the oral argument time for getting across obliquely to their colleagues on the bench arguments regarding the eventual disposition of a case.”<sup>11</sup> Cooper agrees and suggests that the process of coalition-formation between the Justices actually begins during oral arguments.<sup>12</sup> If he is correct, then it is intuitive that Justices would communicate with each other as they engage counsel on the legal and policy issues they must decide. Perhaps the reason it is intuitive that Justices engage one another at oral argument is that, as another scholar argues, oral argument serves as a “pre-conference” because conferences during the Rehnquist era were rumored to produce little dialogue and no substantial amount of “give and take.”<sup>13</sup> In fact, Frederick suggests that oral arguments provide Justices the

---

10. Stephen L. Wasby et al., *The Functions of Oral Argument in the U.S. Supreme Court*, 62 Q.J. SPEECH 410, 418 (1976).

11. STEPHEN WASBY ET AL., *DESEGREGATION FROM BROWN TO ALEXANDER: AN EXPLORATION OF COURT STRATEGIES* xviii (S. Ill. Univ. Press 1977).

12. PHILLIP J. COOPER, *BATTLES ON THE BENCH: CONFLICT INSIDE THE SUPREME COURT* 71-73 (Univ. Press of Kan. 1995).

13. DAVID C. FREDERICK, *SUPREME COURT AND APPELLATE ADVOCACY* 5 (Thomson &

opportunity to “express their thoughts or float various theories to gauge the reactions of other Justices without necessarily being committed to a particular viewpoint.”<sup>14</sup>

Court watchers concur with the assessments made by Wasby, Frederick, and Cooper. For instance, Biskupic points out, “The hour-long sessions in the ornate courtroom also offer the Justices a chance to make their own case—to each other.”<sup>15</sup> She goes on to note that the Justices sometimes make explicit points to their colleagues through the attorneys standing before the bench.<sup>16</sup> In *Garcetti v. Ceballos*,<sup>17</sup> for example, Biskupic argues that Chief Justice Roberts tried to get one of the lawyers to alter her arguments when he said to her, “we would have thought you might have argued that it’s speech paid for by the government . . . so there’s no First Amendment issue at all.”<sup>18</sup> Other Justices act like the current Chief and even interrupt their colleagues at times. According to O’Brien, Ruth Bader Ginsburg “is also an aggressive questioner who at times even interrupts other Justices and has prompted O’Connor and Kennedy to respond ‘excuse me,’ before continuing their questioning of attorneys.”<sup>19</sup>

Sometimes the exchanges between Justices become quite heated, especially between ideologically opposing Justices. In his analysis of the psychology of the Court, for example, Wrightsman found that,

In a 1982 death penalty appeal [*Eddings v. Oklahoma*<sup>20</sup>], Justices Rehnquist and Marshall clashed; after Rehnquist pushed the point that execution of a prisoner would be cheaper for the court system than a long imprisonment, Justice Marshall sarcastically interjected, ‘Well, it would be cheaper just to shoot him when you arrested him, wouldn’t it?’<sup>21</sup>

The point is that Justices will take each other to task for making statements about which they disagree, and sometimes they will even

West 2003).

14. FREDERICK, *supra* note 13.

15. Joan Biskupic, *Justices Make Points by Questioning Lawyers*, USA TODAY, Oct. 5, 2006, [http://www.usatoday.com/news/washington/judicial/2006-10-05-oral-arguments\\_x.htm](http://www.usatoday.com/news/washington/judicial/2006-10-05-oral-arguments_x.htm).

16. *Id.*

17. 547 U.S. 410 (2006).

18. Biskupic, *supra* note 15.

19. DAVID O’BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 261 (W.W. Norton & Co. 2000).

20. 455 U.S. 104 (1982).

21. LAWRENCE WRIGHTSMAN, *THE PSYCHOLOGY OF THE SUPREME COURT* 72 (Ronald Roesch ed., Oxford Univ. Press 2006) (citing F. Barbash, *Brennan, Marshall Keep Vigil Against Death Penalty*, WASH. POST, Dec. 5, 1983, at A10)).

interrupt each other to do so.

It is not only court reporters who view the oral arguments as a time for Justices to speak with each other. Attorneys who appear before the Justices believe they are often the third wheel involved in the conversation taking place in open court. Former Solicitor General Theodore Olson put it this way: "It's like a highly stylized Japanese theater . . . . The Justices use questions to make points to their colleagues."<sup>22</sup> And as the third wheel in the production, Walter Dellinger (another former Solicitor General) points out that the attorneys must "be speaking with not only the Justice who has asked the question, but the one to whom the question is actually addressed."<sup>23</sup> Shapiro adds, "During the heat of debate on an important issue, counsel may find that one or more Justices are especially persistent in questioning and appear unwilling to relent. This may be the case when a Justice is making known his or her views in an emphatic manner . . . ."<sup>24</sup> Neuborne makes the point succinctly: "Sometimes I think I am a post office. I think that one of the Justices wants to send a message to another Justice and they are essentially arguing through me."<sup>25</sup>

While counsel may feel left out in the cold during oral arguments or that they are only messengers for the Justices before them, the Justices do not seem to mind ignoring those prepared to argue. As Justice Breyer points out, "[During oral arguments] the Court is having a conversation with itself through the intermediary of the attorney."<sup>26</sup> Justice Scalia agrees: "It isn't just an interchange between counsel and each of the individual Justices; what is going on is to some extent an exchange of information among Justices themselves."<sup>27</sup> Former Chief Justice Rehnquist sums it up best and also suggests that attorneys can use this method of communication to their advantage: "The judges' questions, although nominally directed to the attorney arguing the case, may in fact be for the benefit of their colleagues. A good advocate will recognize this fact and make use of it during his presentation . . . ."<sup>28</sup>

Overall, widespread agreement exists among Justices, attorneys, and scholars who study oral arguments. They believe questions asked during these proceedings often communicate the questioner's preferences to the

---

22. Biskupic, *supra* note 15.

23. *Id.*

24. Stephen Shapiro, *Oral Argument in the Supreme Court of the United States*, 33 CATH. U.L. REV. 529, 547 (1984).

25. *This Honorable Court* (PBS Video 1988).

26. *America and the Courts* (C-SPAN 1998).

27. *This Honorable Court*, *supra* note 25.

28. WILLIAM H. REHNQUIST, *THE SUPREME COURT 244* (Vintage Books 2002) (1987).

rest of the Court. In turn, when other Justices respond to these questions or comments before counsel have the opportunity to do so, it provides an indication of the interrupter's views as well.

The anecdotal accounts presented in this section are supported by more systematic analyses as well. For instance, Johnson finds that Justice Powell often listened to his colleagues while he sat at oral arguments.<sup>29</sup> Indeed, Powell actually took notes of questions and comments made by his colleagues during these proceedings.<sup>30</sup> Specifically, in a sample of approximately 100 cases, Johnson finds that Powell used oral arguments to learn about his colleagues' views of each case and that this learning process affected the way in which he built coalitions after oral arguments.<sup>31</sup> Subsequent work focusing on the behavior of Justice Blackmun has produced similar results.<sup>32</sup>

Previous scholarly treatment of oral arguments, then, has focused primarily on how individual Justices, such as Justices Blackmun and Powell, use oral arguments to learn about their colleagues' preferences. While certainly informative, we wish to advance the study of oral arguments beyond focusing on individual Justices. In particular, we know of no study conducted to date that has examined various dynamics of the Justices' on-bench interactions. If most acknowledge Justice Scalia's verbosity and Justice Thomas' relative silence, then that still leaves seven additional Justices whose behavior at oral arguments has gone largely unanalyzed—not to mention even more Justices over time. If oral arguments can be characterized as a dialogue among the Justices in which the attorney is merely a third wheel, then arguably there is much to be gained by looking at quantifiable components of that conversation.

In what follows, we examine the frequency and length of questions asked by each Justice and, additionally, the extent to which each Justice interrupts his or her colleagues *or* is interrupted by another Justice while he or she is speaking. In short, our goal is to provide a preliminary sketch of how Justices ask questions during oral argument and how they interact with one another through their questioning styles.

---

29. TIMOTHY R. JOHNSON, ORAL ARGUMENTS AND DECISION MAKING ON THE UNITED STATES SUPREME COURT 57-70 (State Univ. of New York Press 2004).

30. *Id.*

31. *Id.*

32. Timothy R. Johnson, Paul J. Wahlbeck & James F. Spriggs II, *The Influence of Oral Arguments on the U.S. Supreme Court*, 100 AM. POL. SCI. REV. 99, 100 (2006) [hereinafter *Influence of Oral Arguments*]; Timothy R. Johnson, Ryan C. Black, & Justin Wedeking, *Oral Argument and the Process of Coalition Formation on the U.S. Supreme Court*, Paper Presented at the Annual Meetings of the American Political Science Association, Boston, MA (2008) [hereinafter *Oral Argument & the Process of Coalition Formation*].

### III. DATA

To gain empirical leverage on our questions of interest, we turn to the 628 cases decided by the Supreme Court during its 1998-2006 Terms. Using these most recent data is necessary due to data limitations before 1998. Prior to its 2004 Term, Supreme Court oral argument transcripts did not provide the name of the Justice who was speaking (making a comment or asking a question). All remarks from the Justices in pre-2004 transcripts were denoted with the moniker “Question” rather than with a Justice’s name.<sup>33</sup> Thus, initially, we began with the 2004-2006 Terms. We are able to bridge the gap between 1998 and 2004 by using voice-identified transcripts provided by the Oyez Project.<sup>34</sup> In total, we use all orally-argued cases for nine of the most recent Supreme Court Terms, which includes the final years of the Rehnquist Court and the first two Terms of the Roberts Court.

For each case, we downloaded the voice-identified transcripts from the Oyez Project and counted the number of times each Justice spoke during oral arguments. This process yielded a total of 83,385 Justice utterances across the 628 cases. Consistent with Johnson’s findings, this indicates that the Justices collectively ask an average of 133 questions per case.<sup>35</sup> The bottom line is that the Justices ask many questions, and often make it difficult for the attorneys to get through the vast majority of their arguments.

To determine how often the Justices interrupted each other, we returned to the transcripts and used a computer script that assessed whether, for each utterance made by a Justice, the speaker immediately preceding the Justice was also a member of the Court. This is our operationalization of an interruption. We are able to accomplish this task because every utterance in the oral argument transcripts begins with a description of who is speaking (e.g., Justice Scalia), followed by a colon. The computer script, then,

---

33. Beginning in the 2004 Term, however, each Justice is identified in the transcript. Thus, for the most recent 3 Terms in our data it is easy to determine who speaks, when, and how often.

34. See generally The Oyez Project, <http://oyez.org>. Oyez is in the process of using the raw oral argument audio files provided by the National Archives to generate voice-identified transcripts. While voice identification is not yet available prior to 1998, the goal of the Oyez Project is to provide full audio and voice identified transcripts back to 1955—the Term when the Court began to record all of its oral arguments. See *id.* at <http://oyez.org/about>.

35. See generally JOHNSON, *supra* note 29, at 57-70. Certainly, we do not account for the cases where the Court grants more than the allotted one hour (e.g., *Bush v. Gore*), but even compensating for the few cases with increased time, the Justices ask more than 100 questions per argument. Note that this number (and all we report below) might more accurately be called Justice utterances as opposed to questions. That is, we simply count the number of times each Justice’s name appears, regardless of the content that follows.



allowed us to count every time one of the nine Justice's names appeared in the speaker section of an utterance after another Justice's name appeared in the previous speaker section. While there is some noise in the data (an interruption that is one word or an "um" for instance), this noise is random and the resulting data generally paint a clear picture of how the Justices treat each other during oral arguments.<sup>36</sup>

#### IV. ANALYSIS AND RESULTS

##### A. AGGREGATE RESULTS

At the aggregate level—contrary to the accounts provided by the media, advocates, and the Justices themselves—we find that Justices do not interrupt each other as often as has been suggested. Specifically, of the more than 83,000 utterances, only 4,869 (roughly six percent) occur after another Justice has spoken but before an attorney can get a word in edgewise. In the average hour-long oral argument session, then, this amounts to just under eight interruptions (with a standard deviation of approximately six interruptions). While the number of interruptions might be lower than expected, we do find that complete absence of interruptions is uncommon. Indeed, only five percent of our cases had no interruptions at all. At the opposite end of the spectrum, with a total of 57 interruptions during a single hour of oral argument, *Cheney v. U.S. District Court for the District of Columbia*,<sup>37</sup> had the most.

We suspect that the number of interruptions may also tell us something about the level of congeniality between the Justices on the bench. While we leave for future efforts the development of a complete theoretical justification for this sensible conjecture, the aggregate data suggest that such an account has facial validity. During each of the last seven Terms of the Rehnquist era, the Justices interrupted each other an average of at least five times per case. However, during the first full Term of the current Roberts Court (2005), the mean dropped to under four interruptions per case on average. This is consistent with both media and scholarly accounts of a markedly different collegial atmosphere during the

---

36. One piece of evidence that supports the randomness of any errors associated with our measurement procedure is that, if it were biased, we would expect our measures to indicate that Chief Justices interrupt other Justices more often because of structural features associated with the job of being the Chief Justice, whose job is to keep oral arguments on schedule, which involves cutting off advocates and Justices, occasionally mid-sentence. For example, during the *Danforth* argument Justice Breyer was the last speaker during Mr. Diamond's session and Chief Justice Roberts then followed Breyer to recall Mr. Butler (attorney for the petitioner) for rebuttal. See generally *Danforth* trans., *supra* note 3. But even this structural feature does not evidence greater interruptions for either Chief Justice Rehnquist or Roberts. See *infra*, Figure 4.

37. 542 U.S. 367 (2004).

early years of the Roberts Court.<sup>38</sup>

To better gauge what these aggregate trends looks like, Figure 1 presents these results in the form of a series of box plots. The x-axis for this figure presents the 1998-2006 Terms and the y-axis displays the number of interruptions per argument session. Within each box plot, the bold horizontal line represents the median number of questions asked by each Justice during an oral argument session. The thin horizontal lines directly above and below the bold lines display, respectively, the 75th and 25th percentile values for the number of questions asked by a given Justice. The distance between these two lines (the box) is known as the inter-quartile range (IQR). Finally, the clear circles generally displayed above the median values represent individual observations that are outliers.<sup>39</sup>

---

38. See, e.g., Nina Totenberg, *Roberts' Court Produces More Unanimous Decisions*, N.P.R., May 22, 2006, <http://www.npr.org/templates/story/story.php?storyId=5421326>.

39. Generally speaking, outliers are defined as any value that is either larger than the 75th percentile plus 1.5 times the inter-quartile range or smaller than the 25th percentile minus 1.5 times the inter-quartile range. Here we note four cases, all with at least thirty interruptions. The Justices interrupted each other 31 times in *Maryland v. Blake*, 546 U.S. 72 (2005). See Recording of Oral Argument, *Maryland v. Blake*, 546 U.S. 72 (2005), [http://oyez.org/cases/2000-2009/2005/2005\\_04\\_373](http://oyez.org/cases/2000-2009/2005/2005_04_373). In *Hiibel v. Sixth Judicial District Court*, 542 U.S. 177 (2004), the Justices interrupted each other 36 times. See Recording of Oral Argument, *Hiibel v. Sixth Jud. Dist. Ct.*, 542 U.S. 177 (2004), [http://oyez.com/cases/2000-2009/2003/2003\\_03\\_5554](http://oyez.com/cases/2000-2009/2003/2003_03_5554). In *Murphy Bros. v. Michetti Pipe Stringing*, 526 U.S. 344 (1999), the Justices interrupted each other 38 times. See Recording of Oral Argument, *Murphy Bros. v. Michetti Pipe Stringing*, 526 U.S. 344 (1999), [http://oyez.com/cases/1990-1999/1998/1998\\_97\\_1909](http://oyez.com/cases/1990-1999/1998/1998_97_1909). Finally, in *Cheney v. U.S. District Court for District of Columbia*, 542 U.S. 367 (2004) the Justices interrupted each other 57 times. See Recording of Oral Argument, *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 344 (2004), [http://oyez.com/cases/2000-2009/2003/2003\\_03\\_475](http://oyez.com/cases/2000-2009/2003/2003_03_475).

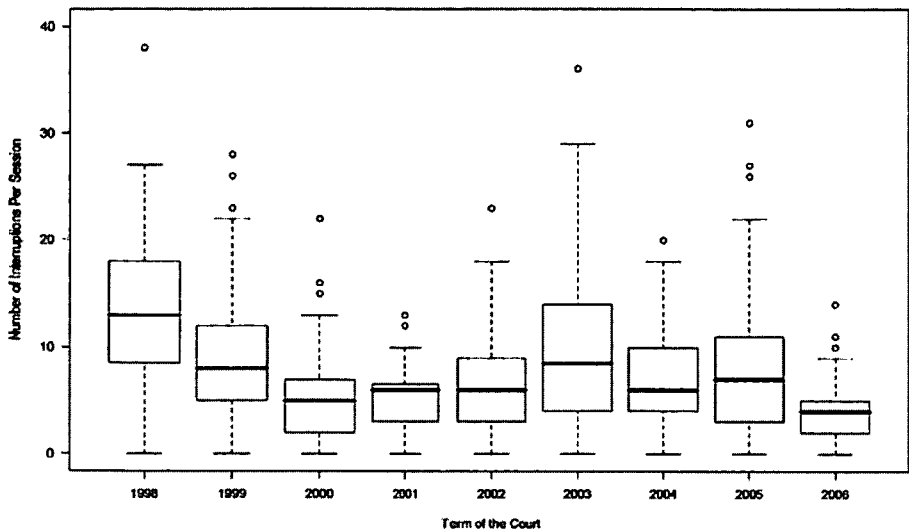
**Figure 1: Frequency of Interruptions at Oral Argument, by Term**

Figure 1 illustrates the frequency distribution of interruptions during oral argument, by Term. The box presents the inter-quartile 25-75% range. The circles for each Justice are cases where the number of interruptions is an outlier. Note, *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367 (2004), which was argued during the 2003 Term, had 57 interruptions, but is not shown due to space considerations.

Figure 1 illustrates several points. First, the 1998 Term has the highest median and the bulk of the interruptions for 1998 (represented by the IQR) are substantially higher than the 2000, 2001, and 2006 Terms. Accordingly, there is remarkable variation across Terms, both with respect to the median and the IQR. For example, some Terms have large gaps in the IQR distribution (1998, 2003, 2005), while other Terms are very compact (2000, 2001, 2006). Additionally, while the 1998 Term marks the highest median at thirteen, 2006 marks the lowest median with approximately four interruptions. Finally, and perhaps most noteworthy, there is no clear upward or downward trend. In fact, Figure 1 might give the appearance that nothing substantial is taking place at all. We argue, however, that these aggregate data may be masking important interactions taking place at the individual-Justice level. While we believe these aggregate results can speak to important trends, the real advantage these data provide is their ability to shed light on the behavior and relationships among the individual Justices, to which we next turn.

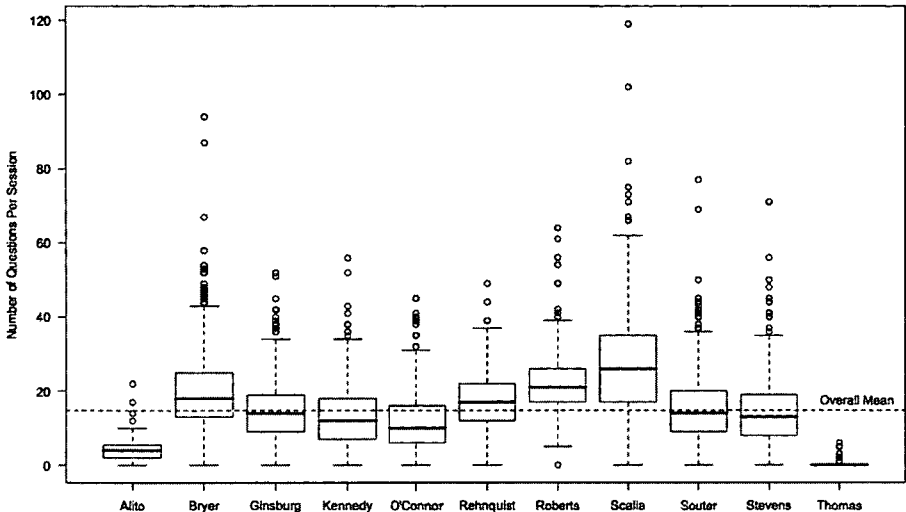
## B. INDIVIDUAL (JUSTICE-LEVEL) RESULTS

Our individual analysis begins with an assessment of how often Justices speak during oral arguments. Figure 2 presents these results in the form of a series of box plots. The x-axis for this figure presents each of the Justices and the y-axis displays the number of questions asked per argument session. The horizontal dashed line displays the overall average across all Justices, which is just under twenty questions per Justice per case. While there is a wealth of information communicated in this figure, there are three aspects that we wish to highlight. Consider first the differences among Justices in the median number of questions asked.

We find, consistent with conventional wisdom, that Justice Scalia asks significantly more questions than the Court average as well as significantly more questions than each of his colleagues. On the other hand, Justice Alito asks far fewer questions than the average and far fewer than almost all other Justices. Indeed, he is second only to Justice Thomas in his overall lack of activity at oral arguments. Interestingly, we also note that any time Justice Thomas asks a question, it is an outlier for him. In other words, he does not even have an inter-quartile range to report; rather, because he asks so few questions, anytime he does speak it is clearly notable.<sup>40</sup>

---

40. See also Mark Sherman, *Justice Thomas Silent Through More Than Two Years of Supreme Court Arguments*, THE ASSOCIATED PRESS, Feb. 25, 2008, <http://www.law.com/jsp/article.jsp?id=1203939949026>.

**Figure 2: Frequency of Justice Participation at Oral Argument (1998-2006)**

This figure provides data on the median number of questions (bold lines) asked by a Justice from 1998-2006. The box presents the inter-quartile 25-75% range. The circles for each Justice are cases where the number of questions is an outlier.

Second, beyond merely describing central tendency, these box plots also allow us to assess the overall distribution of questions asked by each Justice. We can examine this by visually gauging the approximate distance between each Justice's 25th and 75th percentile values, which gives us a sense of the extent to which each Justice is consistent (or inconsistent) in the number of questions that he or she asks. Justices that are consistent will have a small vertical distance between their 75th and 25th percentile values, whereas those that are less consistent will have a larger gap between the 75th and 25th percentiles. With a few exceptions, the Justices appear to have roughly the same consistency despite having significant variation in the median number of questions asked. That is, while Chief Justice Roberts asks more questions in a given case than say his predecessor Chief Justice Rehnquist, the spread between cases where each Justice is very active (i.e., the 75th percentile) versus less active (i.e., the 25th percentile) is approximately the same.

There are, of course, several exceptions to this statement. The size of the inter-quartile range for Justices Alito and Thomas is smaller than those of their colleagues, but Justice Scalia's range is more than double the size of Chief Justice Roberts. In other words, while Scalia is clearly the most

frequent questioner during oral argument, he is also the most unpredictable in terms of his *expected* level of activity.<sup>41</sup> For instance, in *FEC v. Wisconsin Right to Life*<sup>42</sup> and *BP America Production Co. v. Burton*,<sup>43</sup> Justice Scalia asked more than 100 questions. Justice Breyer also has several key outliers, making more than 80 comments or questions in two cases. As Figure 2 indicates, however, there are times when each of the eleven Justices in our sample spoke significantly more often than they did on average.

Overall, we already know the number of questions asked to each side during oral arguments has a significant impact on who will win the case.<sup>44</sup> The data here paint a more general picture of how the Justices act during these proceedings. They show that, like Johnson's<sup>45</sup> findings, the Justices simply dominate the time that counsel are supposed to use to ultimately win their case before the nation's highest Court.

Understanding the dynamic of how much each Justice speaks during the oral arguments is only part of the story. We are also interested in the verbosity of the questions and comments they make. Figure 3 contains our measures of the verbosity of each Justice in panel format, where each panel represents the length (in words) of each utterance for a particular Justice. As in Figure 2, there is significant variation in the number of questions asked by each Justice. Accordingly, there is heterogeneity in the number of data points portrayed in each histogram.<sup>46</sup> We can make direct comparisons

---

41. It is worth noting, however, that even a "slow" day for Justice Scalia eclipses the activity of many of his colleagues. Scalia's 25th percentile value—roughly 18 questions—is approximately equal to former Chief Justice Rehnquist's median level of questioning and is equivalent to the 75th percentile value for Justice O'Connor. What is more, we note that a session of 18 questions asked by Justice Alito would be deemed an outlier and Justice Thomas, according to our data, has *never* had a session in which he has asked more than a dozen questions.

42. 551 U.S. 449 (2007). See Transcript & Recording of Oral Argument, *FEC v. Wis. Right to Life*, 551 U.S. 449 (2007), [http://oyez.com/cases/2000-2009/2006/2006\\_06\\_969](http://oyez.com/cases/2000-2009/2006/2006_06_969).

43. 549 U.S. 84 (2006). See Transcript & Recording of Oral Argument, *BP Am. Prod. Co. v. Burton*, 549 U.S. 84 (2006), [http://oyez.com/cases/2000-2009/2006/2006\\_05\\_669](http://oyez.com/cases/2000-2009/2006/2006_05_669).

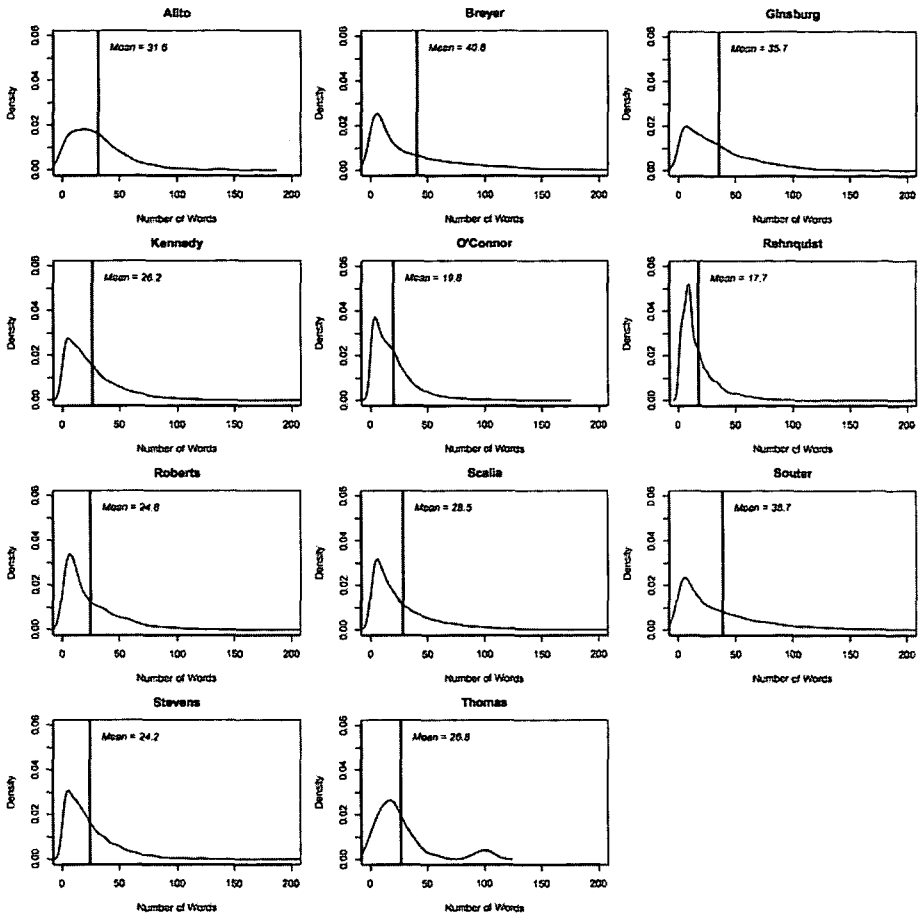
44. See Johnson, Black, Treul, & Goldman, *Inquiring Minds Want to Know: Do Justices Tip their Hands with Questions at Oral Argument in the U.S. Supreme Court?* WASH. UNIV. J. L. & POL'Y, (forthcoming 2009). Examining data from all orally argued cases from 1979-1995, totaling 2086 cases, they find a statistically and substantively significant relationship between the difference in the number of questions asked and the likelihood of a given side prevailing at the merits. *Id.* In particular, the side that is asked the most questions at oral arguments is *least* likely to win at the merits stage. *Id.* As the differential between two sides increases, so too does the likelihood of winning/losing. *Id.*

45. JOHNSON, *supra* note 29, at 57-70.

46. Justice Scalia, for example, has a total of 16,812 utterances in our dataset (the maximum). Justice Thomas, by contrast, has only 34 (the minimum). The remaining Justices (with number of questions in parentheses) are: Alito (461), Breyer (12,375), Ginsburg (9516), Kennedy (8219), O'Connor (5726), Rehnquist (7987), Roberts (3224), Souter (9324), and Stevens (8938).

across different panels, however, because the y-axis represents the density of the distribution (similar to percentage of observations). There are differences between the Justices; some have more to say than others. Initially, we note that a third of the Justices in our sample, including Justice Thomas, hover around (or just below) twenty-five words per question. Certainly they ask questions and try to make points, but they are not incredibly long-winded.

Figure 3: Verbosity of Justices during Oral Arguments



This histogram depicts the mean number of words each Justice is using when they speak at oral arguments. The vertical line for each Justice is his or her mean number of questions. The x-axis is the number of words used and the y-axis is the percentage of questions.

Other Justices are more or less wordy than their colleagues who hover around 25 words per question. Clearly, Justice Breyer uses the most words on average—almost 41 per question or comment. Justices Souter, Ginsburg, and Alito are close behind, as they use more than 30 words per utterance. There are also a few Justices who are more taciturn than the rest of their colleagues. Indeed, Justice O'Connor used just under 20 words per utterance, while former Chief Justice Rehnquist used fewer than 18.<sup>47</sup>

47. We also note that nearly all of the Justices in our data will occasionally go “off the deep



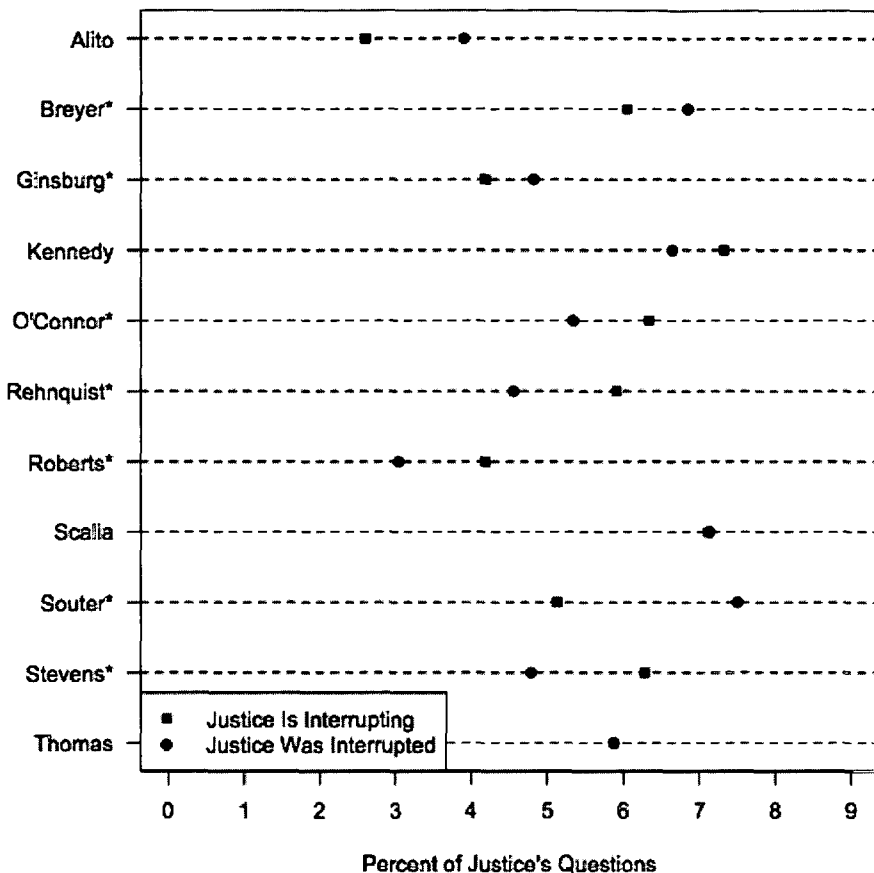
So far we have simply demonstrated how often Justices speak at oral arguments as well as how many words they use when they do speak. While these data provide some new insights into oral arguments, our primary purpose is to forge a preliminary understanding of the empirical aspects of how Justices treat one another when they engage attorneys during these proceedings.

Figure 4 addresses precisely this question. The x-axis presents the percentage of the questions asked by each Justice and the y-axis displays each Justice that appears in our dataset. The solid squares represent the percentage of each Justice's questions that were asked immediately following a comment or question by one of his or her colleagues. An example illustrates. Justice Alito, portrayed in the top row of the dot plot, asked 461 questions in our dataset. Of these 461 questions, 2.6 percent of them came immediately after another one of his colleagues had spoken (i.e., he interrupted his colleague). The solid black circles, by contrast, present the percentage of a Justice's questions that were immediately followed by another Justice's question (i.e., a Justice was interrupted by one of his or her colleagues). Continuing to use Alito as an example, we note that in 3.9 percent of Alito's questions, the person to speak immediately after Alito was another Justice and not an attorney to whom the question/comment was likely directed.

---

end" in terms of loquaciousness. Note, for example, that the "tail" of Justice Breyer's histogram extends off the scale whereas the tail for Justice Alito does not. This indicates there are some outlier observations for Breyer that are above 200 words. The same holds for all Justices except Justices Alito, O'Connor, and Thomas.

Figure 4: Interruptions between Justices during Oral Arguments



Viewed from a slightly different perspective, the squares provide an indicator of each Justice's politeness whereas the circles indicate (potentially) the level of deference afforded to each Justice during oral arguments. Focusing on the former quantity, Justice Alito seems to be the most polite (although he is only on the Court for a little over one term in our sample), as he clearly interrupted his colleagues less often compared to everyone else in the sample. At the other end of the continuum, more than seven percent of Justice Kennedy's and Justice Scalia's utterances interrupted their colleagues. Justices Breyer, O'Connor, Rehnquist, and Stevens are next in line with at least six percent of their questions interrupting other Justices.<sup>48</sup>

48. We note that Justice Thomas is just under six percent, but because he speaks so few times during oral arguments, we do not draw strong conclusions from this finding.

Figure 4 also gives insight into which Justices are the most likely to be interrupted when they speak. There seems to be little ideological explanation for who is interrupted the most. Indeed, the liberal wing (Breyer and Souter), the moderate wing (Kennedy), and the conservative wing (Scalia) are all interrupted at least seven percent of the time when they speak. On the other hand, it seems as if the Justices give newcomers some level of deference at oral argument. This is evidenced by the fact that Chief Justice Roberts and Justice Alito are the least interrupted Justices during their first full Term together on the Court (2006).

One other notable trend is the apparent congruence between a Justice's tendency to interrupt a colleague and be interrupted by other colleagues. That is, in the figure, the circles are generally located spatially close to the squares for each Justice. This bivariate relationship is statistically significant<sup>49</sup> and suggests that Justices who "dish it out" to their colleagues must also be able to "take it."

Second, Justices who are cut off by their colleagues clearly have shorter questions and comments than when they are not interrupted. Across all Justices, uninterrupted utterances averaged 30 words (standard deviation of 33.6) and interrupted utterances averaged only 27 words (standard deviation 35.8). This difference is statistically significant ( $p < .05$ ).<sup>50</sup> Certainly this is intuitive because, when interrupted, their colleagues appear to "cut them off at the knees."

Finally, we can provide some insight into which Justices are most apt to interrupt other colleagues. In particular, we can examine each possible two-Justice permutation to see how often a single Justice interrupts each one of his or her colleagues. Table 1 presents these descriptive results.

---

49. The correlation coefficient is 0.62 with a 95 percent confidence interval of [0.04, 0.89]. This means the relationship is statistically significant at the 95 percent level.

50. The p value is the probability that the relationship is significantly different from zero. In this instance it means that Justices are significantly more likely to use longer sentences when they interrupt their colleagues than when they ask questions that do not interrupt someone else.

**Table 1: Relative Frequency of Interruptions by Justice Pairings**

		Speaking Justice										
		Alito	Breyer	Ginsburg	Kennedy	O'Connor	Rehnquist	Roberts	Scalia	Souter	Stevens	Thomas
Interrupting Justice	Alito	x	0.05	0.07	0.00	--	--	0.12	0.14	0.11	0.07	0.00
	Breyer	0.22	x	0.53	1.19	0.99	0.94	0.38	1.73	1.08	0.83	3.03
	Ginsburg	0.43	0.43	x	0.62	0.52	0.38	0.37	0.63	0.88	0.36	0.00
	Kennedy	0.44	0.81	0.97	x	0.77	0.43	0.50	0.98	0.76	0.89	0.00
	O'Connor	--	0.75	0.40	0.63	x	0.65	0.49	0.68	0.77	0.27	0.00
	Rehnquist	--	0.94	0.90	0.78	0.67	x	--	1.08	0.83	0.68	0.00
	Roberts	1.15	0.96	0.80	0.87	0.63	--	x	1.04	1.17	0.30	0.00
	Scalia	1.52	2.67	1.11	1.97	1.38	1.28	1.02	x	2.62	1.50	0.00
	Souter	0.22	0.68	0.44	0.66	0.54	0.52	0.43	1.03	x	0.44	0.00
	Stevens	0.00	0.74	0.60	0.95	0.51	0.40	0.19	1.22	0.68	x	2.94
	Thomas	0.00	0.01	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.01	x

Each row presents the name of the Justice who is interrupting a colleague, whose identity can be chosen by selecting a particular column value. The value displayed in each cell represents the total percentage of a speaking Justice's utterances that were interrupted by the interrupting Justice. For example, Justice Breyer interrupted 0.22 percent of all of Justice Alito's questions in our data—a very small percentage. Some clear ideological relationships exist. For instance, 2.7 percent of the time that Justice Scalia (a conservative) interrupts another Justice, his focus is on Justice Breyer (a liberal). In response, Justice Breyer interrupts 1.7 percent of all of Justice Scalia's questions but only 0.82 percent of the questions asked by Justice Stevens, a presumed ideological ally of Justice Breyer. We also note that Justice Scalia interrupts each of his colleagues except for his staunchest ally, Justice Thomas—although almost nobody interrupts Justice Thomas because he rarely, if ever, talks. The table reveals that other similar patterns emerge, which bolsters this ideological argument.

## V. CONCLUSION

Former Supreme Court Justice, Solicitor General, and experienced advocate Robert H. Jackson once said that he gave three arguments in each case: "First came the one that I planned—as I thought, logical, coherent, complete. Second was the one actually presented—interrupted, incoherent, disjointed, disappointing. The third was the utterly devastating argument that I thought of after going to bed that night."<sup>51</sup> This paper is the first study that systematically documents the extent that oral arguments tend to resemble the second type of argument that Justice Jackson outlined—interrupted and disjointed. To accomplish this, we examined how Justices behaved during oral argument and how Justices treated their colleagues during these proceedings. What we find suggests that interruptions are not

51. FREDERICK, *supra* note 13, at 12 (quoting Robert H. Jackson, *Advocacy Before the Supreme Court*, 37 A.B.A. J. 801, 803 (1951)).

as pervasive as media accounts, attorneys, and Justices indicate. But, at the same time, these interruptions certainly do have distinct patterns. Justices who take opposite ideological positions more frequently interrupt each other.

Up until this point, we have steered clear of the theoretical reason for “why” Justices appear to not only make verbose utterances, but also on a non-trivial number of occasions interrupt their brethren to make a point or ask a question. Without going into too much detail, it is necessary and possible to sketch an outline of potentially why Justices interrupt other Justices. To understand the role and importance of interruptions, we have to take a step back and reiterate the purpose of oral arguments. These proceedings serve as an information-gathering device for the Justices, where they use oral argument to acquire information about other Justices’ preferences and about information that the parties or amici did not provide in the briefs.<sup>52</sup> This information is vital because it enables Justices to establish legal policy as close to their own personal policy preferences as possible.<sup>53</sup>

Consistent with the information function of oral arguments, when Justices ask questions of the attorneys, part of the function that questions serve is to signal to the other Justices potentially important issues that may be crucial to garnering a fifth vote for a coalition. In other work, we have theorized about how Justices use oral argument to listen to each other and learn information and how it will help them build coalitions.<sup>54</sup> Accordingly, one potential function that interruptions serve is to either enhance or hinder the learning process with an eye toward the coalition-formation process. In other words, if a particular Justice does not like the focus of a particular line of questioning by another Justice, which other Justices are using to learn information about the case and other Justices’ preferences, an interruption could disturb this learning process and ultimately affect the coalition-formation process.

In sum, further exploration and analyses of interruptions are needed to unpack the intricacies of oral argument. We have shown that with certain technological advancements made by sites such as Oyez.org, we are able to link up statements made at oral argument with individual Justices. When more Terms are added to the site, we can expand the analysis to different Court eras and we will be able to advance our understanding of how individual Justices’ utterances in specific cases and Terms are part of the

---

52. JOHNSON, *supra* note 29, at 1-19.

53. *Id.*

54. *Influence of Oral Arguments*, *supra* note 32; see also *Oral Argument & the Process of Coalition Formation*, *supra* note 32.

“bigger” picture across terms. Gauging oral argument activity by individual Justices across Terms and eras will shed light on the important ideological game that we found initial evidence for here.

\*\*\*