



CHANGING OF THE GUARD:

ORAL ARGUMENT AT THE SUPREME COURT BEFORE AND AFTER JUSTICE SCALIA

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The death of Justice Antonin Scalia has prompted an outpouring of reminiscences and eulogies from his fellow justices, his former clerks, and countless others who were deeply affected by Justice Scalia's rich life and one-of-a-kind personality. Some commentators have also begun to consider the impact of Justice Scalia's jurisprudence, both on the Supreme Court and on American law more broadly. But it is impossible, at this early stage, to attempt any sort of comprehensive assessment of the influence of Justice Scalia's nearly thirty years of service on the Court. It will surely take many years to develop a full understanding and appreciation of his legacy, which will be refined over time as his forceful judicial opinions are either followed and expanded or departed from and limited in subsequent cases.

JUSTICE SCALIA'S EFFECT ON ORAL ARGUMENT

There is, however, one portion of Justice Scalia's legacy that can already be seen each day the Supreme Court sits for oral argument. Almost every observer agrees that Justice Scalia transformed the nature of oral argument at the Court. Before he joined the Court in 1986, the Court's questions were few. Prominent Supreme Court advocate Carter Phillips estimates that a normal pre-Scalia oral argument might contain only ten to fifteen questions in thirty minutes, and advocates could expect to get out whole paragraphs of analysis at a time.

Now, advocates consider themselves fortunate to get out a sentence or two before another question is asked. Justice Scalia's aggressive style of questioning is largely believed to be responsible for this change; indeed, Scalia himself agreed in a C-SPAN interview that he was the first justice "who started asking a lot of questions" at oral argument. The change began with the very first case the Court heard with Justice Scalia on the bench, in which he so dominated questioning that Justice Lewis Powell reportedly turned and asked Justice Thurgood Marshall, "Do you think he knows that the rest of us are here?"

DOES ORAL ARGUMENT MATTER?

Though Court observers agree that Justice Scalia's presence made oral argument more engaging, many doubt whether this change made any actual impact on the Court's decisions. Indeed, the traditional view is that beyond a few (possibly apocryphal) examples where the answer to a question proved pivotal, oral argument is largely immaterial to the outcome of a case.

Justice Scalia himself did not take that view, opining that "things can be put in perspective during oral argument in a way that they can't in a written brief." Oral argument might help the justices to expose weaknesses in the parties' positions that might not have been apparent from the briefing, and to shift the Court's focus and perhaps the

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—Justice Antonin Scalia

ultimate outcome by effectively cornering the advocates with sharp questioning.

Recently, academic literature has begun to take seriously the idea that Justice Scalia may have been right in valuing the importance of oral argument to the Court's decision making. One study forthcoming in the *Washington University Law Review* analyzed oral argument quality (as measured by Justice Harry Blackmun's notes on each oral advocate) and found that argument *did* make an impact on the outcome of the case, even after controlling for factors such as the justice's political preferences and the strength of the advocate's legal position. Moreover, Justice Blackmun's notes suggest that justices view each other's comments at oral argument as helpful information regarding their colleagues' views, and begin to formulate their strategies for which issues to press and coalitions to build at conference discussions.

Another study published recently in the *Political Research Quarterly* focused on whether justices' comments during argument served strategic purposes. This study considered whether justices who expected a case to be resolved unfavorably were more likely to raise threshold issues such as standing or jurisdiction, to decrease the chance that the Court would actually reach the merits. The evidence supported the existence of such a phenomenon, as justices who perceive the likely outcome of a case as unfavorable were three times as likely to bring up threshold issues.

SUPREME COURT WATCH

Whether consciously or not, then, justices do appear to contribute and listen to oral argument strategically, attempting to persuade and inform their colleagues through colloquy with the advocates and to gain information from each other's questions as well.

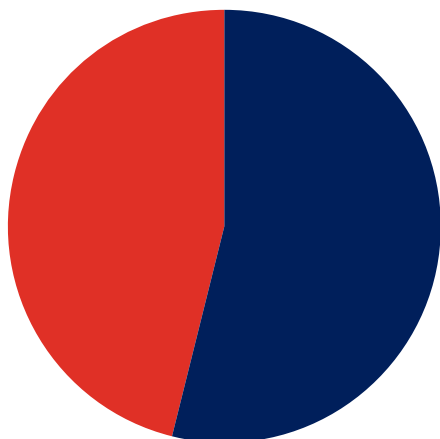
HOW ORAL ARGUMENT HAS CHANGED SINCE JUSTICE SCALIA'S PASSING

It is too early to be certain how Justice Scalia's loss will affect these Court dynamics. But his death is undoubtedly a seismic shift. Every other sitting justice joined the Court after Justice Scalia, and thus none have experience in the role without his presence at oral argument (we note,

however, that Justices Ruth Bader Ginsburg and Samuel Alito argued cases before the Court prior to Scalia's appointment, and Chief Justice John Roberts and Justice Stephen Breyer clerked on the Court prior to Scalia's appointment). Moreover, because Justice Scalia was also a reliable conservative voice, his passing might result in a leftward shift in the focus of questioning. To begin to consider these effects, we conducted an empirical analysis of oral argument in the two Supreme Court sessions immediately before Justice Scalia's passing and the two sessions immediately following his death.

We analyzed the arguments by calculating the number of lines of transcript of each argument that were controlled by each justice. For this purpose, justices are "credited" both with the lines of transcript in which they are

ORAL ARGUMENT WITH JUSTICE SCALIA



54%

of Argument Controlled by Democratic Appointees

46%

of Argument Controlled by Republican Appointees



CHIEF JUSTICE ROBERTS: 11.1%

Nominated 2005
by President George W. Bush



JUSTICE SCALIA: 14.6%

Nominated 1986
by President Ronald Reagan



JUSTICE KENNEDY: 10.9%

Nominated 1988
by President Ronald Reagan



JUSTICE THOMAS: 0%

Nominated 1990
by President George H. W. Bush



JUSTICE GINSBERG: 12.2%

Nominated 1993
by President Bill Clinton



JUSTICE BREYER: 15.3%

Nominated 1994
by President Bill Clinton



JUSTICE ALITO: 9.7%

Nominated 2005
by President George W. Bush



JUSTICE SOTOMAYOR: 13.3%

Nominated 2009
by President Barack Obama



JUSTICE KAGAN: 13%

Nominated 2010
by President Barack Obama

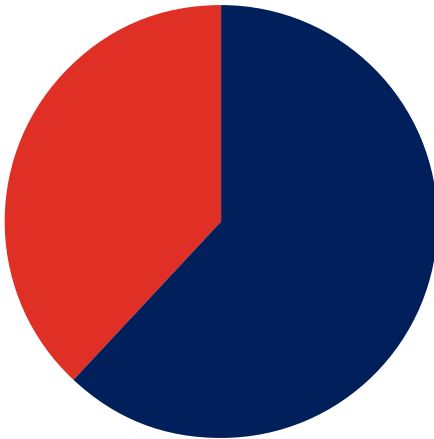
speaking themselves and the time spent by the advocate in responding to their questions. Although this is a crude method that cannot account for the potential impact of a short question and answer, it is at least suggestive of which justices are choosing the topics that will be discussed at the argument. To ensure a fair comparison of the full Court with and without Justice Scalia, we eliminated from the analysis those cases in which a justice recused him- or herself, so we are comparing the eighteen cases that were argued in the December and January sessions before all nine justices with the nineteen cases that were argued in the February and March sessions before the eight remaining justices.

The first interesting note is that the amount of colloquy between justices and advocates did not diminish in Justice

Scalia's absence. There were an average of 1,257 lines of colloquy in the transcripts of the arguments where Scalia participated, and an average of 1,274 lines of colloquy when he was absent, an insignificant difference. Thus, the Court does not seem to have reduced its questioning; instead, the other justices have taken up questioning time that was formerly used by Justice Scalia.

How much time? Our data indicate that Justice Scalia took up 14.6 percent of the questioning time in his last two Court sessions, which was the second highest percentage. Justice Breyer took the most time, with 15.3 percent of the questioning. And, because Justice Breyer famously asks extremely long questions, often taking up full pages of the transcript, it is likely that Justice Scalia asked the most questions of any justice. In addition, the

ORAL ARGUMENT WITHOUT JUSTICE SCALIA



62%
of Argument Controlled by Democratic Appointees

38%
of Argument Controlled by Republican Appointees



CHIEF JUSTICE ROBERTS: 15.2%
Nominated 2005
by President George W. Bush



JUSTICE KENNEDY: 9.5%
Nominated 1988
by President Ronald Reagan



JUSTICE THOMAS: 0.5%
Nominated 1990
by President George H. W. Bush



JUSTICE GINSBERG: 12.6%
Nominated 1993
by President Bill Clinton



JUSTICE BREYER: 16.2%
Nominated 1994
by President Bill Clinton



JUSTICE ALITO: 13.3%
Nominated 2005
by President George W. Bush



JUSTICE SOTOMAYOR: 16.1%
Nominated 2009
by President Barack Obama



JUSTICE KAGAN: 16.8%
Nominated 2010
by President Barack Obama

SUPREME COURT WATCH

data show that Republican-appointed justices were taking up 46 percent of the questioning time, while Democratic-appointed justices were taking up 54 percent, close to an even split. (If we were to include *Fisher v. University of Texas*, in which Justice Elena Kagan recused herself and Republican-appointed justices dominated the questioning, there would be no change in the order of the justices, but the split between Republican- and Democratic-appointed justices would be closer to 50–50.)

In the two more recent argument sessions, there has been a notable shift. Justice Kagan has been the most active justice with 16.8 percent of the questioning, while Justice Breyer and Justice Sonia Sotomayor have both taken up slightly more than 16 percent as well. Moreover, the overall balance of oral argument has shifted substantially, with Democratic-appointed justices now controlling oral argument by a margin of 62–38. (This shift would be even greater if we included arguments in which a justice recused him- or herself, because Justice Alito recused himself from the Puerto Rico bankruptcy cases, in which Justice Sotomayor alone controlled over 40 percent of the oral argument and Democratic-appointed justices on the whole controlled over 90 percent.)

While this sample is small, and it is likely that the Court is still adapting to the post-Scalia era, the results to date are nonetheless intriguing. First, the pronounced shift in the amount of time controlled by Democratic-appointed justices certainly affects the tone of oral arguments, although any effect on outcomes remains to be seen as of this writing. Even if one is skeptical of the effects of oral argument, surely the individual justices are trying to achieve some goals through oral argument, and the degree to which one wing of the Court now has more time to pursue those goals is noteworthy.

A second interesting finding is that the time formerly taken up by Justice Scalia has gone to the newer justices, with little effect on the more senior justices. Collectively, the four older justices did not increase their percentage of argument time at all, while all four newer justices significantly increased their argument time and collectively absorbed all the time that was formerly taken by Justice

Scalia. This may indicate that justices with longer tenures were already able to get the amount of argument time they want, while newer justices defer to the older justices and thus must seize the opportunity to take up more argument time when a more senior justice is no longer present.

Ultimately, it seems clear that oral argument at the Court will not return to the more passive style that existed before Justice Scalia's appointment any time soon. The subsequently appointed justices (with the exception of Justice Clarence Thomas) have taken up his aggressive style, and that will likely be the dominant mode at the Court for the foreseeable future. But, although the method of argument may be the same, the identities of the people asking the questions, and the type of questions they are asking, seem to be shifting dramatically.

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