



And May It Please the Court: Navigating U.S. Supreme Court Oral Argument



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[*Author's Note:* To create a comprehensive and accurate analysis of each Supreme Court Justice's approach to oral argument, several sources were consulted. First, the authors visited the Court personally to note behaviors only observable in person. Second, the transcripts of numerous cases from the last three terms were reviewed, many of them school law cases, including the following: *Horne v. Flores*, *Safford Unified School District No. 1 v. Redding*, *Ricci v. DeStefano*, *Forest Grove School District v. T.A.*, *Caperton v. A.T. Massey Coal Co.*, *Flores-Figueroa v. United States*, *Abuelhawa v. United States*, *Haywood v. Drown*, *Fitzgerald v. Barnstable School Committee*, *Crawford v. Metropolitan Government of Nashville and Davidson County*, *Parents Involved in Community Schools v. Seattle School District No. 1*, *Arlington Central School District Board of Education v. Murphy*, and *Morse v. Frederick*. Finally, secondary sources were consulted, which are cited in the footnotes of this article where relevant, to verify and supplement the authors' conclusions.]

INTRODUCTION

Arguing a case before the Supreme Court of the United States could intimidate even the boldest appellate advocates, making adequate preparation key to a successful oral argument. Perhaps because of the Supreme Court's visibility to the general public and the fact that very few attorneys ever argue a case before the Court, relevant scholarship often discusses the political affiliations of the members rather than the practicalities of presenting one's case in oral argument. For an advocate before the Court, however, one of the most important aspects of being prepared is understanding the way that oral arguments work in the Supreme Court and how the temperament and personality of each Justice affects the way he or she interacts with the attorneys.

This publication will offer general tips for oral argument before the Supreme Court, followed by more specific advice on what to expect from each Justice during oral argument in terms of manner and behavior. More specifically, this publication discusses things like whether a particular Justice typically asks a lot of questions, is likely to help out a struggling attorney, likes to ask hypothetical questions, etc. Knowing, for example, that Justice Alito may ask all parties questions on the same topic may not help an attorney win his or her case, much less the oral argument. However, understanding the oral argument personality and questioning style of each Justice will help an advocate be more comfortable and prepared before the Court.



GENERAL ADVICE

Even experienced appellate litigators should expect the unexpected during their first Supreme Court oral argument. Attorneys should keep in mind that while federal courts of appeals and district courts are most concerned with following precedent, the Justices of the Supreme Court are often more concerned with setting precedent or even overturning past decisions that they feel were wrongly decided. This essential difference often drives both the questions the Justices ask and the way that they ask them. For first-time Supreme Court advocates, the following additional general tips for oral argument preparation may be helpful.

BEFORE THE ARGUMENT

Once your case has been granted *certiorari*, attempt to visit the Court and watch at least one oral argument in person. By doing so, you will become more comfortable with the entire experience, from the arrangement of the room, to the order in which the Justices are seated, to the specific procedures of the Court.¹ Occasionally, advocates will have trouble adjusting the microphone or podium after the argument has already begun. Such struggles are not only an unnecessary source of frustration during an already stressful process, but they also may waste valuable argument time.² In short, a prior visit to the Court will allow an advocate to figure out ahead of time how to avoid “technical difficulties.”

As you prepare your argument, it is best to think of oral arguments as a dialogue between you and the Justices about the main points in the case rather than a carefully planned lecture occasionally interrupted by questions.³ The Justices seem to appreciate flexibility and may demand answers to the specific questions asked if attorneys fail to sufficiently address them. Therefore, prepare to diverge from your prepared statements very early on in the arguments.

DURING THE ARGUMENT

When argument day finally comes, remember to speak as clearly and slowly as possible while maintaining eye contact with the Justices.

The Justices will likely allow you to speak for only a minute at most before asking the first question and may interrupt you even sooner. For example, in *Safford v. Redding*, a case involving the constitutionality of a strip search at school, the petitioner’s counsel uttered only two sentences before Chief Justice Roberts asked the first question.⁴

Be prepared for the first question to be hostile to your position. For example, in *Morse v. Frederick*, where the Court was asked to decide whether a school principal should be granted qualified immunity for disciplining a student who unfurled a banner entitled “BONG HiTS 4 JESUS” at a school-sponsored event, the student’s attorney began his argument by stating: “This



is a case about free speech. It is not a case about drugs.”⁵ Chief Justice Roberts quickly interrupted and contradicted the attorney by stating: “It’s a case about money. Your client wants money from the principal personally for her actions in this case.”⁶

Be prepared for some distracting behavior from the bench. Justice Thomas is well-known for being quiet during oral arguments⁷ and even has been accused of sleeping. However, Justice Thomas and Justice Breyer sit next to each other and often pass notes, whisper, and joke during oral arguments. This behavior is at times so distracting that Justice Kennedy, seated on the other side of Thomas, has seemed to be affected by it.⁸

While most of the Justices are fairly easy to hear, it may be difficult to tell when Justice Ginsburg is attempting to ask a question because she is soft-spoken. She has acknowledged that she occasionally has to repeat a lawyer’s name a few times before the lawyer finally stops to answer her question.⁹ Occasionally, even the other Justices are unable to hear her and may talk over her while asking their own questions.¹⁰

Watch the bench closely; some Justices, like Justice Alito, may lean forward when they are about to ask questions or look confused or inquisitive.

Different Justices seem to prefer different types of questions, but all grill attorneys with similar goals in mind. According to Justice Ginsburg, judges ask some of the more difficult questions not to prove their superior intelligence but to let attorneys know what issues in the case most trouble them.¹¹ Other times, judges may be letting counsel know that their current argument is an unconvincing one, in which case counsel should consider emphasizing other lines of reasoning. If it becomes obvious that the Justices are unconvinced by one of your points, it may be best to agree and abandon it. “A concession once in a while,” Ginsburg said, “can enhance a lawyer’s credibility.”¹²

Many advocates loathe hypothetical questions, and certainly those posed by some of the Justices can derail a carefully planned argument. However, Justice Scalia in particular, seems to resent this aversion to hypotheticals. If possible, avoid responding to hypotheticals by stating that the situation presented is not the one before the Court. Certainly, the Justices are aware of that fact, but they are equally aware that the decision they will issue will set precedent and thus affect numerous cases that differ from the case at hand.¹³ In such cases, it may be more effective to answer the hypothetical, and then explain why the Court need not decide the case as expansively as the hypothetical suggests.

At times, it may be difficult to answer all the questions posed during oral argument for a variety of reasons. Sometimes counsel may be reticent to reveal an accurate but unfavorable answer. At other times counsel may not be sure of the correct answer or may not understand the question asked. Occasionally counsel may be overwhelmed by a series of questions from different (or the same) Justices. While the urge to avoid answering a difficult question in any of these circumstances is understandable, an advocate should try to answer each question directly or ask for clarification lest he or she be chastised, most likely by Justice Kennedy or Justice Stevens.



SAMUEL A. ALITO, JR.

Justice Samuel A. Alito, Jr., the second most recent addition to the Court, joined his colleagues in the middle of the October 2005 term. He replaced Justice Sandra Day O’Conner, the Court’s long-time “swing Justice” when she resigned in July of 2005. Justice Alito is well-known as one of the more conservative Justices on the Court, though he does not always join his like-minded colleagues in their opinions.¹⁴

While Justice Alito has been nicknamed “Scalito” for his conservative views, his behavior during oral argument differs greatly from that of his more gregarious colleagues. While Justice Scalia often dominates the conversation, making his personal views on the case abundantly clear, Justice Alito prefers a more subtle approach.

Justice Alito typically asks few questions on a limited number of topics during oral argument. In fact, it is not uncommon for Justice Alito to ask all the attorneys arguing a case about a particular issue. For example, in *Ceballos v. Garcetti*, the issue before the Court was whether speech made pursuant to a public employee’s job duties was protected by the First Amendment. Justice Alito asked all three attorneys arguing the case about the difficulty of determining whether particular speech falls within an employee’s job duties.¹⁵

Justice Alito generally questions attorneys in a mild-mannered and polite fashion, even when his questions point out a flaw in the attorney’s argument. For example, in *Forest Grove School District v. T.A.*, Justice Alito pointed out that the petitioner’s counsel had hinged his argument on a rather impractical situation by simply asking the attorney, “Do you think that is realistic?” rather than accusing the lawyer of making an unconvincing argument.¹⁶

As the previous example illustrates, Justice Alito considers the practical implications of the Court’s decisions when asking questions about the issues. His hypothetical questions often test how the attorneys’ theories would play out in real life situations. For example, in *Abuelhawa v. United States*, a case in which the Justices interpreted a statute that makes using a cellular phone or other communications facility when committing a drug felony a crime, Justice Alito asked the petitioner’s counsel a series of specific hypothetical questions. His precise, clear questions pushed the limits of the lawyer’s argument, and Justice Alito continued the line of questioning for several minutes. At one point, Justice Alito and the attorney both began to speak at the same time. In his typically polite fashion, the Justice stopped and asked the attorney to continue his argument.¹⁷

Justice Alito also frequently considers how a decision will impact the judicial process or affect the lower courts. For example, in *Safford v. Redding*, involving the constitutionality of a school district strip search, he asked all three attorneys arguing the case whether the finder of fact rather than an appellate court should determine whether reasonable suspicion existed to search the student.¹⁸

When he asks questions, Justice Alito often looks pensive and thoughtful and sometimes leans forward toward the microphone. This behavior makes it relatively easy to tell when he is about to ask a question.¹⁹



Finally, Justice Alito comes to oral arguments well-prepared. His questions are generally well thought-out and reflect careful research. Since he asks relatively few questions, those that he does ask are generally detailed and specific. His questions often refer specifically to language in relevant documents, such as statutes or briefs. For example, when asking a question during a recent oral argument, he cited a test proposed in several *amicus* briefs and referred to a number of *amici* by name.²⁰



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STEPHEN G. BREYER

Former President Bill Clinton appointed Justice Stephen G. Breyer to the Court in 1994. Justice Breyer is known for his pragmatic approach to the law and has stated that he focuses on a law's purpose and consequences when drafting his opinions. When he was appointed, court watchers considered him to be “the sunniest individual to serve on the Supreme Court in a great many years.”²¹ Anyone who has witnessed Justice Breyer grill an attorney during oral argument, which is not an infrequent occurrence, may question the characterization of him as “sunny,” though lively and energetic are both accurate.

In fact, Justice Breyer can be one of the most difficult Justices for counsel to contend with during oral argument for a number of reasons. First, his manner of questioning can be aggressive and even hostile, his tone can be impatient and even condescending, and at times he does not hide his exasperation with counsel and even his colleagues by sighing and snickering.

Second, Justice Breyer is rarely quiet for long. According to one transcript review, he is among the most verbose of the Justices. He uttered nearly 35,000 words during arguments between January and May of 2007.²²

Third, much of the time, it seems that Justice Breyer is not asking questions so much as advocating a position. It can be difficult for attorneys to know how to respond to Justice Breyer's advocacy, particularly when other Justices get involved. For example, in the arguments for *Arlington Central School District Board of Education v. Murphy*, a case about whether a school should pay a parent's expert fees in an Individuals with Disabilities Education Act case, Justice Breyer asked a few long, seemingly rhetorical questions expressing clear disagreement with the attorney. Justice Scalia jumped in with his opinion, and the pair seemed to use the exchange as an excuse to argue with each other rather than with the attorney.²³ As the argument continued, Justice Breyer's comments became increasingly heated and at times seemed disparaging toward the attorney.²⁴ This behavior, while likely disconcerting for even an experienced appellate advocate, comes as no surprise. Court watchers have noticed since as early as his first term that Justice Breyer often uses his questions to persuade his peers to adopt his position on the issues.²⁵

If an attorney gets caught in the middle of a verbal brawl between Justice Breyer and one of his colleagues, it is probably best to let the two Justices continue their discussion if for no other reason than it will provide counsel a break from an intense argument. Likewise, counsel may have difficulty getting a word in edgewise. When an opportunity to rejoin the conversation arises, an attorney should determine which Justice is advocating the position most similar to his or her position, and try to engage that Justice in further dialogue.

Justice Breyer is also known for frequently posing hypothetical questions, some of which are humorous or even bizarre. In one case, he asked former Solicitor General Ted Olson to consider a situation in which federal officials hired a lipstick company, as experts on the color red, to test the redness of apples. In another famed example, Justice Breyer asked an attorney to “[s]uppose the policeman comes along, and he sees three people in a car and there is Jack the



Ripper driving.”²⁶ Most recently, Justice Breyer discussed his childhood experience of changing for gym class in *Safford v. Redding*, involving the constitutionality of a strip search in school: “In my experience when I was 8 or 10 or 12 years old . . . we did take our clothes off once a day, we changed for gym, ok? And in my experience too, people did sometimes stick things in my underwear.”²⁷

If possible, attorneys should attempt to answer Justice Breyer’s questions, no matter how far-fetched they seem. Justice Breyer seems to appreciate attorneys who are willing to engage in this exercise. However, if a question is too confusing to answer, it is best to just say so. In *Zuni Public School District v. Department of Education*, Justice Breyer asked a series of hypothetical questions to which the assistant solicitor general responded. However, after several minutes of questioning, Justice Breyer asked a final, complicated question and the attorney replied, “I’m not sure I understand.” Justice Breyer simply dismissed the question and the courtroom chuckled in response.²⁸

Attorneys also should be careful to not dismiss Justice Breyer’s hypotheticals as irrelevant. At times, his hypotheticals are carefully crafted to force an attorney to make a critical concession.²⁹ An attorney who can foresee this trap is wise to try to avoid it. However, conceding the point and moving on to other, more persuasive arguments may sometimes be necessary.

Like Justice Alito, Justice Breyer’s non-hypothetical questions reflect careful study of the record and thought before arguments. For example, in the *Fitzgerald v. Barnstable School Committee* arguments, he referred directly to the briefs and joint appendix when questioning both petitioner and respondents’ counsel.³⁰ Likewise, in *Crawford v. Metropolitan Government of Nashville*, he referred directly to opinions advanced in several *amicus* briefs.³¹



RUTH BADER GINSBURG

Ruth Bader Ginsburg was appointed by Former President Bill Clinton in 1993 as the second female Justice to serve on the Court. Justice Ginsburg gained recognition as a leader in the women's liberation movement when she worked as a litigator for the American Civil Liberties Union in the 1970s. Appointed to the D.C. Circuit by Former President Jimmy Carter in 1980, she typically votes with the liberal wing of the Court.

Justice Ginsburg has said that she feels her gender allows her to consider issues differently than her male colleagues. While she says that the differences between male and female justices are "seldom in the outcome," occasionally her unique experience as a woman informs her opinions.³² When asked about her colleagues' seemingly insensitive comments during the arguments for *Safford v. Redding*, a case about the constitutionality of strip searching a student suspected of possessing over-the-counter drugs at school, she said, "They have never been a 13-year-old-girl. I don't think that my colleagues, some of them, quite understood."³³

At barely five feet tall and one hundred pounds, Justice Ginsburg appears tiny when seated next to the other Justices. Because of her diminutive size, she can be difficult to see during oral argument and sometimes her questions seem to come from nowhere. Justice Ginsburg often asks her questions softly and politely, sometimes opening with the attorney's name. Occasionally, it may be necessary to politely ask Justice Ginsburg to repeat an inaudible question.³⁴ In fact, even her colleagues are often unable to hear her and simply interrupt her with their own questions.³⁵ Also, Justice Ginsburg may take longer than some of the other Justices to ask a question, so attorneys should wait patiently for her to finish her thoughts.

Justice Ginsburg tends to ask questions that focus on the specific facts of the case before the Court. For example, in *Crawford v. Metropolitan Government of Nashville*, Justice Ginsburg scolded her colleagues for steering the argument away from the facts at hand, asking, "But why . . . are we spending so much time on hypotheticals that are so far from this case?"³⁶ Despite her apparent desire to keep the Court on task, Justice Ginsburg frequently asks unclear or seemingly obvious questions. In one recent case involving a school district, Justice Ginsburg simply read part of a relevant statute aloud and asked the attorney to reiterate his interpretation of it.³⁷

Justice Ginsburg frequently asks numerous questions during oral argument. However, her level of engagement in an oral argument appears to be at least somewhat dependent on her interest in the subject matter of the particular case. Likewise, her willingness to help a struggling attorney appears to be dependent on her support for the attorney's position.

Given her background, it is no surprise that Justice Ginsburg participated wholeheartedly in the argument in *Fitzgerald v. Barnstable School Committee*, a case involving student-on-student sexual harassment. The parents' attorney seemed nervous throughout his oral argument, and perhaps because of that and her support for his position, Justice Ginsburg posed a series of sympathetic questions. Essentially, she made an argument that supported his position, and gently guided him along her path of reasoning.³⁸ Justice Ginsburg used similar tactics in *Safford v.*



Redding, simply stating her take on the facts of the case and allowing the student’s counsel to simply respond, “That’s right, Justice Ginsburg.”³⁹

On the other hand, Justice Ginsburg can be somewhat antagonistic when she disagrees with an attorney’s position. For example, in *Forest Grove School District v. T.A.*, Justice Ginsburg became argumentative and clearly irritated when the school district’s attorney discussed the process by which a child’s individualized education program (IEP) is developed.⁴⁰ Though the topic is not inherently controversial, Justice Ginsburg seemed dubious that the school district’s attorney was providing an accurate depiction of how schools develop IEPs.

It is worth noting that Justice Ginsburg frequently incorporates oral arguments when she authors opinions. According to one study, she references oral arguments more than any other Justice. Between 1994 and 2007, she cited transcripts 248 times or nearly once per opinion.⁴¹ While scholars are hesitant to assign too much significance to this trend, it does suggest that no matter how many or how few questions Justice Ginsburg is asking, she is paying close attention. For example, one of the factors Justice Ginsburg cited in her dissenting opinion in *Safford v. Redding*, in which she would have denied school officials qualified immunity, was the fact that the student who was strip searched was forced to sit outside the principal’s office for two hours after the search.⁴² She had also brought up this seemingly minor point during oral argument.⁴³



ANTHONY M. KENNEDY

Justice Anthony M. Kennedy was appointed by Former President Ronald Reagan in 1988 and has been considered the swing vote on the Court since Justice Sandra Day O'Connor retired. When he was appointed to the Ninth Circuit Court of Appeals in 1975, he was the youngest member in the nation at the age of 39. He has been a judge for most of his professional life, and has spoken of the “poetry” of the law and of his love of cases that instruct law students on classic legal principles.⁴⁴

Compared to his colleagues, Justice Kennedy does not speak frequently during oral argument. However, when he does ask questions, his voice is loud, clear, and easy to hear; and his manner is generally mild.

His questions tend to be specific and to the point, and he rarely asks hypothetical questions. Instead, Justice Kennedy's questions often focus on the briefs and other materials filed with the Court. For example, in the oral argument for *Caperton v. A.M. Massey Coal Company*, he asked about an argument the attorney made in his petition for *certiorari*.⁴⁵ Similarly, in arguments for *Parents Involved in Community Schools v. Seattle School District No. 1*, he interrupted an attorney to ask the first question about whether the attorney agreed with an argument in the Solicitor General's brief.⁴⁶

Justice Kennedy sometimes simply asks the attorney to state his or her proposed rule.⁴⁷ He also tends to ask questions about the facts of the case.

Despite Justice Kennedy's generally mild manner, like Justice Stevens, when Justice Kennedy does not feel that his question has been properly answered, he makes his dissatisfaction clear. For example, in the *Parents Involved in Community Schools v. Seattle School District No. 1* argument, he pointed out that the attorney was unwilling to answer his question and make a critical concession stating: “You just don't want to embrace that contradiction.”⁴⁸ In another argument, he even pointed out when an attorney attempted to dodge another Justice's question.⁴⁹ When Justice Kennedy has noted an attempt to dodge a question, it may be wise for an attorney to answer the question, making a concession if necessary, and move on.

Justice Kennedy, like Justice Ginsburg, uses some oral arguments to simply state his point of view. He may ask clearly rhetorical questions, or even just make an explicit statement. For instance, in the arguments for *Crawford v. Metropolitan Government of Nashville*, involving whether providing information during an employer's internal Title VII investigation is protected by Title VII's “opposition” clause, Justice Kennedy gave his opinion of the “whole point” of the case early on in the argument.⁵⁰ When Justice Kennedy expresses his viewpoint, this is a great opportunity for an attorney to agree or disagree, and then redirect the argument by explaining how Justice Kennedy's view fits into the client's argument.

It is worth noting that Justice Kennedy has an avid interest in international law. In at least one case, he has used comparison between the United States and other countries to make a point during oral argument. In that case, he went on to cite foreign sources in his majority opinion.⁵¹ It may not be practicable to consult international sources when preparing for oral



argument in every case. However, when international law might be relevant, and particularly when Justice Kennedy may be the swing vote, attorneys should prepare for questions about other countries' practices that relate to a case.



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JOHN G. ROBERTS, JR.

Chief Justice John G. Roberts, Jr. was nominated by Former President George W. Bush in 2005. The Chief Justice has expressed his belief in judicial minimalism and works to influence his colleagues to adopt as many narrow, unanimous decisions as possible. In his early legal career, Chief Justice Roberts headed the appellate practice at Hogan & Hartson, where he argued over 39 cases before the Supreme Court.

The Chief Justice is known for his friendly, warm demeanor at the Court, and his pleasant disposition emerges during oral argument. He treats both his colleagues and the attorneys very politely. Perhaps because of his personal experience as an advocate before the Court, the Chief Justice seems empathetic toward struggling attorneys.

However, attorneys should not take his good nature for granted. Chief Justice Roberts may become frustrated with inattentive or inarticulate oralists. During arguments for *Crawford v. Metropolitan Government of Nashville*, the Chief Justice became obviously frustrated with an attorney who seemed to have not listened to his hypothetical.⁵² With all the Justices, but perhaps Chief Justice Roberts in particular, it is important that attorneys pay close attention and answer the question actually posed.

When either his colleagues or the attorneys themselves begin to guide the argument off course, Chief Justice Roberts, like Justice Ginsburg, may interrupt with a question that steers the discussion back to the heart of the matter.⁵³ On occasion, he even openly chides his colleagues for wandering off-topic. For example, in a recent free speech case, Chief Justice Roberts interrupted a series of Justice Breyer's hypotheticals to ask, "Can we get back to what this case is about?"⁵⁴

Chief Justice Roberts almost always asks questions of both sides. While occasionally his personal views emerge during the arguments, he seems most focused on making sure that oral argument is conducted efficiently and effectively.

He does not dominate the arguments, but he does tend to ask questions early in more controversial cases, again, perhaps to keep the rest of the Justices focused on the most important legal issues. For instance, in *Safford v. Redding*, he asked the first question and immediately directed the argument toward the principal's reasoning for ordering the strip search.⁵⁵ If he had not focused the argument at the outset on the specific facts of the case, it is possible that his colleagues would have begun the argument by peppering the attorney with less relevant and more politically-charged questions.

Like Justice Alito, the Chief Justice typically asks detailed questions that reflect careful research and study of the record. For example, in a recent tax case, he cited the relevant statute at length and referred directly to the attorney's interpretation presented in the brief.⁵⁶

Finally, attorneys arguing cases brought under the U.S. Constitution should be prepared for the Chief Justice to ask questions about well-known constitutional principles. For instance, he asked questions about the Spending Clause in two recent school law cases.⁵⁷



ANTONIN SCALIA

Justice Antonin Scalia exhibits the clearest, most recognizable personality on the current Court. Appointed by Former President Ronald Reagan in 1986, he is the second-most senior member of the Court and a core member of the Court's conservative wing. A self-proclaimed originalist, Justice Scalia has said that he believes the Constitution should be interpreted to "give the text the meaning it had when it was adopted."⁵⁸

Justice Scalia tends to dominate oral arguments with his witty, often-aggressive questions. Most of the time, he makes his point of view abundantly clear. In fact, Justice Scalia often explicitly states his opinion, leaving the arguing attorney to only agree or disagree.⁵⁹

Particularly, if the side that he favors is struggling, Justice Scalia may ask the attorney an easy question or even fills in gaps in the argument.⁶⁰ Perhaps because he likes to keep oral argument lively and interesting, Justice Scalia has even been known to help struggling counsel for a position he disfavors. For example, in *Crawford v. Metropolitan Government of Nashville*, a Title VII case that was decided unanimously in favor of the employee, Justice Scalia helped the school district's counsel more clearly articulate his position, which Justice Scalia ultimately voted against.⁶¹

However, if an attorney's argument differs from his own, Justice Scalia can become combative. For example, in a recent case involving the proper interpretation of a complicated section of the Individuals with Disabilities Education Act (IDEA), Justice Scalia, who joined a dissenting opinion supporting the school district, scolded the parents' attorney, telling him, "[Y]ou are reading [the statute] to say something that it doesn't say."⁶² In another recent case, he bluntly challenged an attorney's proposition, asking him, "Who says? Have we ever held that?"⁶³

Justice Scalia frequently asks carefully crafted hypothetical questions; many are seemingly designed to point out flaws in an attorney's argument. For example, during the argument for *Safford v. Redding*, he employed that technique during the assistant solicitor general's argument, finally telling him "Your logic fails me."⁶⁴ In short, attorneys should be prepared for Justice Scalia to test any rule or standard they propose with a carefully crafted hypothetical.

When attorneys stand up to his more antagonistic questions, Justice Scalia seems impressed. For example, in the *Caperton v. A.T. Massey Coal Co.* argument, a case about whether a judge must recuse himself or herself from a case in which he or she received campaign contributions from one of the parties to avoid violating the other's due process rights, the petitioner's attorney artfully steered the discussion from a series of increasingly hostile questions from Justice Scalia toward the attorney's main arguments. Justice Scalia acknowledged the attorney's position and then backed down, allowing his colleagues to take over.⁶⁵ While of course it is important to be deferential to all the Justices, attorneys who remain calm and confident under Justice Scalia's harshest scrutiny tend to fair well for the duration of the argument.

While Justice Scalia is clearly no shrinking-violet during oral argument, he is more lighthearted and able to let things go—as the example immediately above illustrates—than his



also combative colleague Justice Breyer. In fact, Justice Scalia frequently provides comic relief from intense questioning. According to one study, Justice Scalia prompts more laughter in the courtroom than any of his colleagues on the bench.⁶⁶ In argument for *United States v. Lopez*, where the issue before the Court was whether Congress exceeded its authority to legislate under the Commerce Clause when it enacted the Gun Free Schools Act, he jokingly expressed his views on Congress saying: “Can you tell me, Mr. Days, has there been anything in our recent history in the last twenty years where it appears that Congress made a considered judgment that it could *not* reach a particular subject?”⁶⁷ He also often uses humor to lightly poke fun at floundering attorneys. When an attorney recently said she didn’t know the answer to a question, Justice Scalia responded, “I don’t either.”⁶⁸



SONIA SOTOMAYOR

Sonia Sotomayor is the newest Supreme Court Justice. She is the first Latina and third female Justice to serve on our nation's highest court. When President Barack Obama announced her nomination and throughout the confirmation process, he emphasized her "extraordinary journey" to the Supreme Court from a housing project in the South Bronx in New York City.⁶⁹ She served on the Court of Appeals for the Second Circuit for 11 years before her Supreme Court appointment.

Court-watchers are curious about the temperament and personality of Justice Sotomayor. Information about her personality generally and her behavior during oral argument on the Second Circuit may be helpful to attorneys about to face the newest Justice. Regarding her personality generally, Justice Sotomayor, divorced and childless, has been said to treat her clerks like her extended family, working late with them, inviting them to her home, and taking them on field trips.⁷⁰

Evidence regarding her behavior during oral argument on the Second Circuit is conflicting. Anonymous reports in *The Almanac of the Federal Judiciary*, a compilation of biographies of federal judges, imply that Justice Sotomayor may be a bully on the bench. Reports described her as "a terror on the bench," "overly aggressive," and said that she "makes inappropriate outbursts."⁷¹ However, a June 1, 2009 letter from a group of her former clerks expressed the opinion that Justice Sotomayor would be well-prepared and well-behaved as a Supreme Court Justice stating: "Judge Sotomayor is thoughtful, engaged, and well-prepared during oral arguments, showing an extraordinary grasp of the factual details and legal nuances of her cases."⁷² Of course, Justice Sotomayor's manner and behavior as a Supreme Court Justice may vary from her temperament on the Second Circuit.

For now, Justice Sotomayor is a mysterious and somewhat controversial figure. According to her supporters, "[s]he is a rule-bound pragmatist—very geared toward determining what the right answer is and what the law dictates"⁷³ However, her opponents have said her unique background would influence her decision-making on the Court, especially in light of her statement that a "wise Latina" judge would make a better decision than a white man.⁷⁴ Only time will tell exactly who Justice Sotomayor is and what kind of Supreme Court Justice she will be.



JOHN PAUL STEVENS

Justice John Paul Stevens is both the oldest and longest serving member of the current Court. Appointed by Former Republican President Gerald Ford in 1975, he continues to describe himself as a judicial conservative.⁷⁵ However, many of his decisions showcase his liberal leanings on certain issues, and he is known to be an idiosyncratic decision-maker.

Justice Stevens speaks infrequently during oral argument. He has been described as “the most unfailingly polite of the Justices”⁷⁶ and is deferential to his colleagues and the attorneys arguing before the Court. For example, in one recent case, he began by asking, “[m]ay I ask what might be an awfully elementary and stupid question?”⁷⁷

He frequently asks attorneys to simply clarify their position. For example, in the argument for *Morse v. Frederick*, he asked an attorney, “May I just clear up one thing to be 100 percent sure I understand your position?”⁷⁸

Many of his questions concern practical and public policy justifications for deciding a case in a certain way. For example, in the *Forest Grove School District v. T.A.* argument, he pointed out that if the Court adopted the school district’s interpretation of IDEA, it would create a disincentive for schools to provide students with IEPs.⁷⁹

Justice Stevens, like Justice Alito, also tends to ask questions that focus on the efficient functioning of the judicial system. For example, in the *Fitzgerald v. Barnstable School Committee* argument, where the issue before the Court was whether Title IX precludes Section 1983 sexual harassment claims, he pointed out that the parents may still lose their Section 1983 claim on remand if the Court ruled in their favor.⁸⁰

He sometimes makes specific references to the case materials;⁸¹ so, attorneys should be prepared for questions about the content from any of the briefs filed.

While Justice Stevens’ questions may often provide attorneys with a welcome respite from some of the other Justices’ more provocative inquiries, Justice Stevens, like Justice Kennedy, may become combative if an attorney fails to answer his questions. For example, during the *Caperton v. A.T. Massey Coal Co.* argument, Justice Stevens asked an attorney to state his position and pointed it out when the attorney failed to do so. He pressed the issue until Justice Scalia intervened with another question.⁸² Similarly, during the *Arlington Central School District Board of Education v. Murphy* argument, an attorney tried to avoid answering Justice Stevens’ question. Justice Stevens tersely interrupted the attorney, asking him, “Would you answer my question?”⁸³

Though attorneys may want to redirect an argument toward their pre-prepared points, the Court’s most seasoned Justices, like Justice Stevens, will likely notice attempts to do so. To avoid reprimand, attorneys should answer the question asked as simply as possible and only then move on to their next points.



CLARENCE THOMAS

Justice Clarence Thomas was nominated to the Court by Former President George H.W. Bush and was confirmed after a bitter, contentious confirmation hearing in 1991. Justice Thomas is generally regarded as one of the most conservative Justices on the Court and believes in limiting government power to the greatest extent possible.⁸⁴ The second African-American appointed to the Court, Justice Thomas has been criticized by civil rights activists for openly professing his belief that the Constitution is colorblind.

As discussed at the beginning of this article, during arguments, Justice Thomas is often observed passing notes with Justice Breyer with whom he is close friends. Occasionally, the two may laugh and whisper, and they can be somewhat distracting. According to one account, “[t]hings sometimes got so raucous between them that Kennedy, who sat on the other side of Thomas, would lean forward, trying to get away from the noise.”⁸⁵

Justice Thomas is reportedly one of the most well-liked Justices on the Court.⁸⁶ He is popular among both the staff and his fellow Justices, and is known for learning the names of each of the new clerks every year. He makes a point of meeting law students at moot courts and other events,⁸⁷ and has recently given a few high school graduation speeches.

Despite his friendly manner off the bench, Justice Thomas is almost always silent during oral argument. In 2008, the Associated Press reported that he had not uttered a single word during oral argument for the past two years. Justice Thomas has explained his silence in interviews: “If I think a question will help me decide a case, then I’ll ask that question. Otherwise, it’s not worth asking because it detracts from my job.”⁸⁸ In the unlikely event an attorney receives a question from Justice Thomas during oral argument, he or she is wise to answer the question thoughtfully if for no other reason than the dialogue is likely to receive a good deal of press coverage.

Though his critics attest that his silence reflects indifference, Justice Thomas asserts otherwise. In response to descriptions of him as “the silent Justice” he said, “I would like to . . . be referred as ‘the listening justice,’ you know. I still believe that, if someone else is talking, somebody should be listening.” And Justice Thomas does in fact appear to be listening; he cites oral arguments relatively frequently when he writes opinions.⁸⁹

Frequently, those opinions are dissents. Justice Thomas is somewhat ideologically isolated from his colleagues. Most notably, he has stated that he does not believe in *stare decisis*. If a decision is wrong, he has said, it should be overturned regardless of how long the issue has been settled. When asked to describe his judicial philosophy, Justice Thomas has said: “People can say you are an originalist, I just think that we should interpret the Constitution as it’s drafted, not as we would have drafted it.”⁹⁰



¹ Justice Ginsburg herself has endorsed this sort of preparation. See Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C.L. REV. 576, 569 (1999). “In preparing for oral argument, the careful lawyer will try to assure against discomfort because of lack of familiarity with the courtroom. She will observe proceedings in advance”

² See, e.g., Transcript of Oral Argument at 3, *Fitzgerald v. Barnstable Sch. Comm.*, 129 S.Ct. 788 (2009). Counsel for the petitioner, who admitted that he had never used the podium before, spent the a few minutes at the beginning of his oral argument adjusting the podium at the Justices’ request. Later in his argument, the podium made a loud banging sound, which was noted in the transcript of the argument. Counsel was visibly shaken, and the Court granted him an extra 10 seconds to make up for the lost time.

³ Ginsburg, *supra* note 1, at 569.

⁴ Transcript of Oral Argument at 3, *Safford v. Redding*, 129 S.Ct. 2633 (2009).

⁵ Transcript of Oral Argument at 29, 551 U.S. 393 (2007).

⁶ *Id.*

⁷ Posting of Jan Crawford Freenburg to Legalities, <http://blogs.abcnews.com/legalities/2007/10/thomas-and-oral.html> (Oct. 9, 2007, 16:60 EST).

⁸ JEFFERY TOOBIN, *THE NINE* 103-104 (Doubleday 2007).

⁹ Ginsburg, *supra* note 1, at 569.

¹⁰ See, e.g., Transcript of Oral Argument at 5-6, *Crawford v. Metro. Gov’t of Nashville*, 129 S.Ct. 846 (2009).

¹¹ Ginsburg, *supra* note 1, at 569.

¹² *Id.*

¹³ *Id.*

¹⁴ See SCOTUSblog Voting Analysis Chart, <http://www.scotusblog.com/movabletype/archives/June28VotingStats.pdf> (last visited July 22, 2009).

¹⁵ Transcript of Oral Argument at 18, 26, 54, *Ceballos v. Garcetti*, 547 U.S. 410 (2006).

¹⁶ Transcript of Oral Argument at 18, *Forest Grove Sch. Dist. v. T.A.*, 129 S.Ct. 2484 (2009).

¹⁷ Transcript of Oral Argument at 14-17, 129 S.Ct. 2102 (2009).

¹⁸ Transcript of Oral Argument at 3, 13, 59, *Safford v. Redding*, 129 S.Ct. 2633 (2009).

¹⁹ This behavior was observed during the oral arguments for *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252 (2009).

²⁰ Transcript of Oral Argument at 24, *Caperton v. A.T. Massey Coal Co.*, 129 S.Ct. 2252 (2009).



²¹ TOOBIN, *supra* note 8, at 79.

²² Michael Doyle, *Transcripts Give a Glimpse into Many Justices' Personalities*, MCCLATCHEY NEWSPAPERS, May 16, 2007, available at http://www.mcclatchydc.com/staff/michael_doyle/story/16193.html.

²³ Transcript of Oral Argument at 11-12, *Arlington Central Sch. Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291 (2006).

²⁴ *Id.* at 15-26.

²⁵ TOOBIN, *supra* note 8, at 84.

²⁶ Michael Doyle, *Transcripts Give a Glimpse into Many Justices' Personalities*, MCCLATCHEY NEWSPAPERS, May 16, 2007, available at http://www.mcclatchydc.com/staff/michael_doyle/story/16193.html.

²⁷ Transcript of Oral Argument at 58, *Safford v. Redding*, 129 S.Ct. 2633 (2009).

²⁸ Transcript of Oral Argument at 44, *Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ.*, 550 U.S. 81 (2007).

²⁹ See TOOBIN, *supra* note 8, at 81-85.

³⁰ Transcript of Oral Argument at 13-14, 129 S.Ct. 788 (2009).

³¹ Transcript of Oral Argument at 24, 129 S.Ct. 846 (2009).

³² Joan Biskupic, *Ginsburg: Court Needs Another Woman*, USA TODAY, May 5, 2009, available at http://www.usatoday.com/news/washington/judicial/2009-05-05-ruthginsburg_N.htm.

³³ *Id.*

³⁴ See, e.g., Transcript of Oral Argument at 15, *Morse v. Frederick*, 555 U.S. 393 (2007) (petitioner's counsel had to ask Justice Ginsburg to repeat a question so that he could hear it).

³⁵ For example, in *Parents Involved in Community Schools v. Seattle School District No. 1.*, Justice Ginsburg began to ask the petitioner's attorney a question, but was almost immediately interrupted by Justice Kennedy, who seemed to not hear her speak. See Transcript of Oral Argument at 1, 555 U.S. 791 (2007).

³⁶ Transcript of Oral Argument at 8, *Crawford v. Metropolitan Gov't of Nashville and Davidson*, 129 S.Ct. 846 (2009).

³⁷ Transcript of Oral Argument at 4, *Forest Grove School District v. T.A.*, 129 S.Ct. 2428 (2009).

³⁸ See Transcript of Oral Argument at 8-10, *Fitzgerald v. Barnstable Sch. Comm.*, 129 S.Ct. 788 (2009).

³⁹ See Transcript of Oral Argument at 46, *Safford v. Redding*, 129 S.Ct. 2633 (2009).

⁴⁰ Transcript of Oral Argument at 10-11, 129 S.Ct. 2428 (2009).

⁴¹ Frederick Liu, *Citing the Transcript of Oral Argument: Which Justices Do It and Why*, 118 THE YALE LAW JOURNAL POCKET PART 32, 33 (2008).

⁴² See *Safford v. Redding*, 129 S.Ct. 2633, 2625 (2009) (Ginsburg, J., dissenting) ("To make matters worse, Wilson did not release Redding, to return to class or to go home, after the search.").



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- ⁴³ Transcript of Oral Argument at 19-20, *Safford v. Redding*, 129 S.Ct. 2633 (2009).
- ⁴⁴ TOOBIN, *supra* note 8, at 52.
- ⁴⁵ Transcript of Oral Argument at 15, *Capteron v. T.A. Massey Coal Co.*, 129 S.Ct. 2252 (2009).
- ⁴⁶ Transcript of Oral Argument at 4, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).
- ⁴⁷ In arguments for *Morse v. Frederick*, he asked both attorneys early in their arguments to state their proposed rule.
- ⁴⁸ Transcript of Oral Argument at 8, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).
- ⁴⁹ *See, e.g.*, Transcript of Oral Argument at 39, *Safford v. Redding*, 129 S.Ct. 2633 (2009) (demanding that an attorney respond to a hypothetical question posed by Chief Justice Roberts).
- ⁵⁰ Transcript of Oral Argument at 5, *Crawford v. Metropolitan Gov't of Nashville and Davidson County*, 129 S.Ct. 846 (2009).
- ⁵¹ *See* TOOBIN, *supra* note 8, at 194-95. Justice Kennedy used the fact that European Union counties must abolish the death penalty as evidence that the practice was “unusual” during the oral argument for *Roper v. Simmons*, 543 U.S. 551 (2005).
- ⁵² Transcript of Oral Argument at 8, 129 S.Ct. 846 (2009).
- ⁵³ *See* Transcript of Oral Argument at 31, *Forest Grove Sch. Dist. v. T.A.*, 129 S.Ct. 2428 (2009) (interrupting a series of questions to ask an attorney a practical question about what concessions he would be willing to make).
- ⁵⁴ Michael Doyle, *Transcripts Give a Glimpse into Many Justices' Personalities*, MCCLATCHEY NEWSPAPERS, May 17, 2009, available at http://www.mcclatchydc.com/staff/michael_doyle/story/16193.html (citing Transcript of Oral Argument at 48, *Morse v. Frederick*, 551 U.S. 393 (2007)).
- ⁵⁵ Transcript of Oral Argument at 3, *Safford v. Redding*, 129 S.Ct. 2633 (2009).
- ⁵⁶ Michael Doyle, *Transcripts Give a Glimpse into Many Justices' Personalities*, MCCLATCHEY NEWSPAPERS, May 17, 2009, available at http://www.mcclatchydc.com/staff/michael_doyle/story/16193.html, (citing Transcript of Oral Argument at 13, *Hinck v. United States*, 550 U.S. 501 (2007)).
- ⁵⁷ *See* Transcript of Oral Argument at 35, *Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006); *see also* Transcript of Oral Argument at 35, *Forest Grove Sch. Dist. v. T.A.*, 129 S.Ct. 2428 (2009).
- ⁵⁸ Antonin Scalia, Justice, Supreme Court of the United States, Remarks at the Woodrow Wilson International Center for Scholars in Washington, DC: Constitutional Interpretation the Old Fashioned Way (Mar. 14, 2005).
- ⁵⁹ *See, e.g.*, Transcript of Oral Argument at 10, *Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006) (“On its face, it covers at least half of the items that are not compensable.”); *id.* at 49 (“I don’t care what Congress expected It can’t leave it to a . . . committee to fill the blanks in a statute.”); *see also* Transcript of Oral Argument at 5, *Fitzgerald v. Barnstable Sch. Comm.*, 129 S.Ct. 788 (2009) (“Maybe the question ought to be whether this Court intended to have the Title IX action, which it invented, preclude 1983.”).
- ⁶⁰ *See, e.g.*, Transcript of Oral Argument at 6, *Forest Grove Sch. Dist. v. T.A.*, 129 S.Ct. 2428 (2009) (“(i) is only at most a negative implication, which -- which one would not draw in light of (ii) through (iv), is what you're saying.”).



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- ⁶¹ Transcript of Oral Argument at 32-33, *Crawford v. Metropolitan Gov't of Nashville and Davidson County*, 129 S.Ct. 846 (2009).
- ⁶² Transcript of Oral Argument at 29, *Forest Grove Sch. Dist. v. T.A.*, 129 S.Ct. 2428 (2009).
- ⁶³ Transcript of Oral Argument at 3, *Caperton v. T.A. Massey Coal Co.*, 129 S.Ct. 2252 (2009).
- ⁶⁴ Transcript of Oral Argument at 27, *Safford v. Redding*, 129 S.Ct. 2633 (2009).
- ⁶⁵ See Transcript of Oral Argument at 11-13, *Caperton v. T.A. Massey Coal Co.*, 129 S.Ct. 2252 (2009).
- ⁶⁶ Jay D. Wexler, *Laugh Track*, 9 GREEN BAG 59 (2005).
- ⁶⁷ TOOBIN, *supra* note 8, at 85.
- ⁶⁸ Transcript of Oral Argument at 50, *Haywood v. Drown*, 129 S.Ct. 2180 (2009).
- ⁶⁹ Barack Obama, Remarks by the President in Nominating Judge Sonia Sotomayor to the United States Supreme Court (May 26, 2009).
- ⁷⁰ Jeffery Rosen, *The Case Against Sotomayor*, NEW REPUBLIC, May 4, 2009, available at www.tnr.com.
- ⁷¹ Seth Stern, *Is Sotomayor a Bench Bully?*, CQ TODAY ONLINE NEWS, June 3, 2009, available at www.cqpolitics.com.
- ⁷² Letter from Adam Abensohn, et al., Former Clerks for Judge Sonia Sotomayor, to Republicans on the Senate Judiciary Committee (June 1, 2009) (on file with the White House Press Office).
- ⁷³ *Id.*
- ⁷⁴ *Sotomayor Criticizes Wording but Defends Point of 'Wise Latina'*, CNN.com, July 15, 2009, available at <http://www.cnn.com/2009/POLITICS/07/15/sotomayor.hearing/index.html>.
- ⁷⁵ Jan Crawford Greenburg, *Supreme Court Justice Stevens Recalls Ford's Selection Over Conservative Favorite*, NIGHTLINE, Jan. 2, 2007, available at <http://abcnews.go.com/Nightline/story?id=2765753&page=1>.
- ⁷⁶ Michael Doyle, *Transcripts Give a Glimpse into Many Justices' Personalities*, MCCLATCHEY NEWSPAPERS, May 27, 2009, available at http://www.mcclatchydc.com/staff/michael_doyle/story/16193.html.
- ⁷⁷ *Id.* citing Transcript of Oral Argument at 25, *Schriro v. Landrigan*, 550 U.S. 465 (2007).
- ⁷⁸ Transcript of Oral Argument at 13, *Morse v. Frederick*, 555 U.S. 393 (2007).
- ⁷⁹ Transcript of Oral Argument at 19, *Forest Grove Sch. Dist. v. T.A.*, 129 S.Ct. 2428 (2009).
- ⁸⁰ Transcript of Oral Argument at 15, *Fitzgerald v. Barnstable Sch. Comm.*, 129 S.Ct. 788 (2009).
- ⁸¹ See, e.g., Transcript of Oral Argument at 5, *Arlington Central Sch. Dist. Bd. of Educ.*, 548 U.S. 291 (2007).
- ⁸² Transcript of Oral Argument at 30, *Caperton v. T.A. Massey Coal Co.*, 129 S.Ct. 2252 (2009).



⁸³ Transcript of Oral Argument at 25, *Arlington Central Sch. Dist. Bd. of Educ. v. Murphy*, 549 U.S. 291 (2006). Justice Stevens asked a similar question of an attorney in the argument for *Tennessee Secondary School Athletic Association v. Brentwood*. Transcript of Oral Argument at 29, 531 U.S. 228 (2007).

⁸⁴ Hannah L. Weiner, *The Next "Great Dissenter"? How Clarence Thomas is Using the Words and Principles of John Marshall Harlan to Craft a New Era of Civil Rights*, 58 DUKE L.J. 139, 145 (2008).

⁸⁵ TOOBIN, *supra* note 8, at 103-04.

⁸⁶ *Clarence Thomas: The Justice Nobody Knows*, CBS.com, Sept. 20, 2007, available at http://www.cbsnews.com/stories/2007/09/27/60minutes/main3305443_page8.shtml?tag=contentMain;contentBody.

⁸⁷ TOOBIN, *supra* note 8, at 103.

⁸⁸ Mark Sherman, *Justice Thomas Silent Through More Than Two Years of Supreme Court Arguments*, ASSOCIATED PRESS, Feb. 25, 2008, available at <http://www.law.com/jsp/article.jsp?id=1203939949026>.

⁸⁹ Liu, *supra* note 41, at 23.

⁹⁰ David B. Rivkin & Lee A. Casey, *Mr. Constitution*, WALL STREET JOURNAL, Mar. 22, 2008, available at <http://online.wsj.com/article/SB120614142302256093.html>.

