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ESSAY

MUTED JUSTICE

LEAH M. LITMAN†

The Chief Justice of the United States possesses significant power. His position as the senior-most Justice on the U.S. Supreme Court allows him to assign opinions to other Justices and to coordinate scheduling the Court's cases for argument.¹ And after Justice Kennedy retired in June 2018, Chief Justice Roberts was the median Justice on the Court, whose vote often determined the outcome in a case.² Even after Justice Barrett's confirmation changed that state of affairs, the Chief remains an important Justice to watch.³

Recent scholarship has identified another source of the Chief Justice's power: moderating oral arguments.⁴ Oral arguments at the Court are

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¹ G. Edward White, *The Internal Powers of the Chief Justice: The Nineteenth-Century Legacy*, 154 U. PA. L. REV. 1463, 1464-65 (2006); Walter F. Murphy, *Marshaling the Court: Leadership, Bargaining, and the Judicial Process*, 29 U. CHI. L. REV. 640, 643 (1962).

² Mark Walsh, *Chief Justice Roberts Slides into the High Court's Ideological Middle with the Retirement of Justice Kennedy*, ABA J. (Sept. 1, 2018, 3:15 AM), https://www.abajournal.com/magazine/article/roberts_kennedy_scotus_swing_vote [<https://perma.cc/4EPZ-56XC>].

³ Leah Litman & Melissa Murray, *Shifting from a 5-4 to a 6-3 Supreme Court Majority Could Be Seismic*, WASH. POST (Sept. 25, 2020, 12:13 PM), https://www.washingtonpost.com/outlook/trump-ginsburg-conservative-supreme-court-majority/2020/09/25/17920cd4-fe85-11ea-b555-4d71a9254f4b_story.html [<https://perma.cc/8HPL-3JE5>].

⁴ See Tonja Jacobi & Dylan Schweers, *Justice, Interrupted: The Effect of Gender, Ideology, and Seniority at Supreme Court Oral Arguments*, 103 VA. L. REV. 1379, 1495 (2017) (describing the Chief Justice as the "referee" for oral arguments). For additional studies on oral arguments at the Court, see generally Tonja

typically something of a free-for-all, where each Justice can ask a question at any time. Because multiple Justices try to speak at the same time, and because Justices often interrupt one another and the advocates, the Chief Justice determines which Justice will speak when multiple Justices want to do so.⁵ A path-marking study by Tonja Jacobi and Dylan Schweers determined that female Justices were more likely to be interrupted than male Justices and also less likely to be allowed to speak when interrupted.⁶ These findings are consistent with social science research finding women are interrupted more than men even though women do not talk more frequently or more assertively than men.⁷ (The same Jacobi and Schweers study also found that conservative Justices are more likely to interrupt than liberal Justices).⁸

For the last arguments of the 2019 October Term, the Court used a different model for oral argument than its typical one. The coronavirus pandemic forced the Court to postpone its in-person arguments from the March and April sittings.⁹ The Court rescheduled some of the cases for telephone arguments over the first two weeks of May.¹⁰ And the format of the telephone arguments was not the Court's typical free-for-all. Rather, the Court instructed the advocates that each Justice would be allowed to ask questions for an allotted period of time, with each Justice asking questions in order of seniority.¹¹ This system eliminated the Justices' ability to interrupt one another, but it forced the Chief Justice to singlehandedly police each Justice's time limits.

Studying what happened during these May arguments is helpful for several reasons. The Court has continued remote arguments into the 2020 October Term. This data might be helpful if the Court chooses to retain this format but make minor modifications. It may, in particular, help the Chief Justice better enforce the stated rules for the different Justices.¹² Having a picture of what

Jacobi & Matthew Sag, *The New Oral Argument: Justices as Advocates*, 94 NOTRE DAME L. REV. 1161 (2019) [hereinafter Jacobi & Sag, *Advocates*], and Tonja Jacobi & Matthew Sag, *Taking Laughter Seriously at the Supreme Court*, 72 VAND. L. REV. 1423 (2019) [hereinafter Jacobi & Sag, *Laughter*].

⁵ Jacobi & Schweers, *supra* note 4, at 1495.

⁶ *Id.* at 1384-85.

⁷ See *id.* at 1402-08 (summarizing social science literature). If anything, the same research has concluded women speak less frequently and less assertively than men. *Id.*

⁸ *Id.* at 1453-54.

⁹ Press Release, Sup. Ct. of the U.S. (Mar. 16, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_03-16-20 [<https://perma.cc/87LN-BW92>]; Press Release, Sup. Ct. of the U.S. (Apr. 3, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-03-20 [<https://perma.cc/G772-A7CZ>].

¹⁰ *Supreme Court of the United States October Term 2019 Oral Argument Calendar for the Session Beginning May 4, 2020*, SUP. CT. OF THE U.S. (Apr. 15, 2020), https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalMay2020.pdf [<https://perma.cc/S9EQ-QUN9>].

¹¹ Press Release, Sup. Ct. of the U.S. (Apr. 28, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-28-20 [<https://perma.cc/FG2R-JVMK>].

¹² Cf. Jacobi & Schweers, *supra* note 4, at 1495 (“[B]etter enforcement by the Chief Justice . . . would be aided by the Chief Justice being aware of the phenomenon.”).

happened at the telephonic arguments may be useful to the advocates. The data might also inform the Court's decision about whether to continue the seriatim format from the May sitting or instead revert to a more unstructured argument system, now that arguments continue to happen remotely.

Additionally, the data provide some very limited insight into the behind-the-scene dynamics at the Court and among the different Justices. Some Justices spoke more than others, and some Justices were allowed to speak more than others. The Chief Justice's decisions about when to cut off which Justices in which arguments might also provide some clues about where the new Court may be leaning on particular issues. The allotted speaking times corresponded in important respects to how the Chief Justice ultimately voted in the cases: In every single case, the Chief Justice voted with the Justice who received the longest questioning period in a case.¹³ (However, in one case, there was a two-way tie between Justice Gorsuch and Justice Sotomayor, and the Chief Justice voted with Justice Gorsuch but not Justice Sotomayor).¹⁴

The data also run counter to several common tropes about the Court. In particular, Justice Breyer, despite his reputation as a somewhat lengthy questioner,¹⁵ spoke relatively little compared to his colleagues. Justice Breyer was also the only Justice to pass on asking questions to a particular advocate. And although Justice Sotomayor had her questioning sessions ended the most by the Chief Justice, she had none of the nine longest questioning periods (she had only one of the fourteen longest questioning periods—a tie for the tenth longest).

Consistent with the social science literature on who is allowed to talk,¹⁶ all three of the longest questioning periods were from male Justices. Seventy-five percent of the twelve longest questioning periods were from male Justices (who make up two-thirds of the Court), all of them conservative. Similarly, all three of the shortest questioning periods that the Chief Justice ended were from women Justices; indeed, women had eight of the twelve shortest questioning periods that the Chief Justice ended.

This small snapshot, however, can only tell us so much. There were a mere ten arguments over a two-week period, and this format was new to everyone. But it is still interesting to see how the Court and the various Justices adapted to the new format, and quantifying how they did may help them to adapt further.

¹³ In one case, the Chief Justice voted for the same outcome—affirmance—with a Justice who concurred in the judgment, Justice Kavanaugh. See *Trump v. Vance*, 140 S. Ct. 2412, 2419, 2431 (2020).

¹⁴ See text accompanying note 21 (summarizing findings for *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2020)).

¹⁵ See Adam Feldman, *Empirical SCOTUS: Is Oral-Argument Talking Time All It's Cut Out to Be?*, SCOTUSBLOG (Oct. 21, 2019, 2:00 PM), <https://www.scotusblog.com/2019/10/empirical-scotus-is-oral-argument-talking-time-all-its-cut-out-to-be> [<https://perma.cc/3MXA-NZ8B>] (describing Justice Breyer as “notorious for his lengthy mid-argument orations”).

¹⁶ Jacobi & Schweers, *supra* note 4, at 1402-08 (summarizing social science findings on gender and power dynamics during oral arguments).

I. METHOD

Before laying out the results, a word about method. I listened to the Court's arguments on *Audio Arguendo*—a podcast that plays unfiltered and unedited Court arguments.¹⁷ I timed the amount of time each Justice received to ask questions and have them answered. I refer to this as the “questioning period,” and I've listed my time stamps in the Appendix.

There were a few times during arguments when a Justice apparently did not unmute themselves when it was their turn to speak, and so the Chief Justice would call their name multiple times before proceeding on to the next Justice. I did not count that time toward any Justice's questions and answers, but I have identified when that occurred.¹⁸ There were also a few times where the Chief Justice had to call out a Justice's name multiple times before the Justice started asking questions.¹⁹ Here too, I did not count that time toward the Justice's questioning period. Rather, I started the Justice's questioning period at the last point in time where the Chief Justice said a Justice's name before that Justice started asking questions.

I concluded the time counted toward each Justice's questioning period when the first of three things occurred: (1) the Chief Justice said “thank you,” signaling a move to the next Justice; (2) the Justice questioning the advocate said “thank you,” signaling a move to the next Justice; or (3) the Chief Justice

¹⁷ AUDIO ARGUENDO, <http://www.audioarguendo.com> (last visited June 21, 2020).

¹⁸ In *Little Sisters*, the Chief Justice called on Justice Thomas from 3:50 to 4:09 before going to Justice Ginsburg. Oral Argument at 3:50, *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*, 140 S. Ct. 2367 (2020) (Nos. 19-431 and 19-454), https://www.supremecourt.gov/oral_arguments/audio/2019/19-431 [<https://perma.cc/7VYP-8G3M>]. In *Barr v. American Ass'n of Political Consultants*, the Chief Justice called on Justice Breyer from 47:03 to 47:18 before going to Justice Alito and then Justice Sotomayor. Oral Argument at 47:03, *Barr v. Am. Ass'n of Pol. Consultants, Inc.* 140 S. Ct. 2335 (2020) (No. 19-631), https://www.supremecourt.gov/oral_arguments/audio/2019/19-631 [<https://perma.cc/GPJ3-ZZWD>]. In *McGirt v. Oklahoma*, the Chief Justice called on Justice Alito from 32:39 to 32:55 before going to Justice Sotomayor. Oral Argument at 32:39, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020) (No. 18-9526), https://www.supremecourt.gov/oral_arguments/audio/2019/18-9526 [<https://perma.cc/5FQ7-KP6P>]. In *Trump v. Mazars*, the Chief Justice called on Justice Thomas from 4:36 to 4:51 before going to Justice Ginsburg. Oral Argument at 4:36, *Trump v. Mazars USA, LLP*, 140 S. Ct. 2019 (2020) (No. 19-715 & 19-760), https://www.supremecourt.gov/oral_arguments/audio/2019/19-715 [<https://perma.cc/2U9L-S4NT>].

¹⁹ In *Booking.com*, the Chief Justice started calling Justice Sotomayor's name at 19:54 and she began asking questions at 20:06. Oral Argument at 19:54, *USPTO v. Booking.com B.V.*, 140 S. Ct. 2298 (2020) (No. 19-46) https://www.supremecourt.gov/oral_arguments/audio/2019/19-46 [<https://perma.cc/5HUI-VMND>]. In *Agency for International Development*, the Chief Justice started calling Justice Sotomayor's name around 19:44 and she started talking at 19:54. Oral Argument at 19:44, 19:54, *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082 (2020) (No. 19-177) https://www.supremecourt.gov/oral_arguments/audio/2019/19-177 [<https://perma.cc/R4CC-VM2Z>]. In *Chiafalo v. Washington*, the Chief Justice started calling Justice Alito's name at 16:07 and he began asking questions at 16:16. Oral Argument at 16:07, 16:16, *Chiafalo v. Washington*, 140 S. Ct. 2316 (2020) (No. 19-465) https://www.supremecourt.gov/oral_arguments/audio/2019/19-465 [<https://perma.cc/6HV5-BXLT>].

said the name of the next Justice in the questioning order, signaling a move to the next Justice. There were a handful of times when these events did not end a Justice's time to ask questions and receive answers. I have noted below when that occurred, and I ended those questioning periods when one of the preceding events occurred and that event marked the end of the Justice's question/answer period.

Two Justices were recused from two cases during the May sitting. Justice Sotomayor was recused from *Colorado v. Baca*, and Justice Kagan was recused from *United States Agency for International Development v. Alliance for Open Society International, Inc.*²⁰ Because their recusals meant that they had fewer opportunities to ask questions, their total number of seconds for questioning may appear artificially low. However, I have included the average times per questioning rounds used, which adjusts for their recusals.

Additionally, some of the Justices elected to pass on asking questions. Those passes were counted as zero for purposes of the total amount of time the Justices had for asking questions and for calculating averages. But because those opportunities did not allow me to measure or compare the amount of time the Chief Justice allowed the various Justices to speak, I have included averages for questioning periods that exclude the times when a Justice passed, which I believe reflects the best assessment of how much the Chief Justice allowed the different Justices to speak. I have also included a projected total time that the Justices would have received if those Justices had used their questioning periods. (I projected that the Justices would receive the average of the other Justices' questioning periods during that particular round of questioning).

Two of the arguments—the presidential immunity cases—involved “second” rounds of questioning where the Justices were given the opportunity to question a particular advocate for a second time.²¹ These second rounds were comparatively shorter than other rounds of questioning. The second rounds were when both Justice Ginsburg and Justice Gorsuch elected to pass on asking questions (Justice Breyer also passed on one of the rounds in another argument).²²

²⁰ See Robert Barnes, *Sotomayor Recuses from One of Two Supreme Court Cases with Consequences for Electoral College*, WASH. POST (Mar. 10, 2020, 5:26 PM), https://www.washingtonpost.com/politics/courts_law/sotomayor-recuse-supreme-court-electoral-college/2020/03/10/145a0b1c-6307-11ea-acca-80c22bbe96f_story.html [<https://perma.cc/XG7J-BZK5>] (discussing Justice Sotomayor's recusal from *Colorado Dep't of State v. Baca*, 140 S. Ct. 2316 (2020)); Amy Howe, *Argument Preview: Court to Consider Constitutionality of Condition for HIV/AIDS Funding—Again*, SCOTUSBLOG (Apr. 28, 2020, 11:55 AM), <https://www.scotusblog.com/2020/04/argument-preview-court-to-consider-constitutionality-of-condition-for-hiv-aids-funding-again/> [<https://perma.cc/X42F-FEGJ>] (discussing Justice Kagan's recusal from *Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc.*, 140 S. Ct. 2082 (2020)).

²¹ Oral Argument, *Trump v. Vance*, 140 S. Ct. 2412 (2020) (No. 19-635), https://www.supremecourt.gov/oral_arguments/audio/2019/19-635; Oral Argument at 4:36, *Mazars*, *supra* note 18.

²² *Id.*; Oral Argument, *McGirt*, *supra* note 18.

II. FINDINGS

A. *Numbers and Charts*

With those explanations, here are several charts displaying various findings from the 2019 October Term telephonic oral arguments.²³

Table 1: Total Time Each Justice Was Allowed to Speak (in Seconds)

Chief	CT	RBG	SGB	SAA	SS	EK	NG	BK
4293	4663	4397	4495	5362	5023	4771	4990	5097

Table 2: Total Time Each Justice Was Allowed to Speak (in Minutes)

Chief	CT	RBG	SGB	SAA	SS	EK	NG	BK
71.5	78	73	75	89	84	79.5	83	85

Table 3: Average Number of Seconds Each Justice Was Allowed to Speak Over All of the Questioning Periods²⁴

Chief	CT	RBG	SGB	SAA	SS	EK	NG	BK
159	173	152	155	199	186	177	185	189

Table 4: Average Number of Seconds Each Justice Was Allowed for Each Questioning Period They Used²⁵

Chief	CT	RBG	SGB	SAA	SS	EK	NG	BK
159	173	176	180	199	200	191	200	189

²³ Each of the Justices are abbreviated in the tables as follows: Chief Justice Roberts (Chief); Justice Thomas (CT); Justice Ginsburg (RBG); Justice Breyer (SGB); Justice Alito (SAA); Justice Sotomayor (SS); Justice Kagan (EK); Justice Gorsuch (NG); Justice Kavanaugh (BK).

²⁴ There were twenty-seven questioning periods for all Justices, even those who were recused or passed.

²⁵ Excluding questioning periods they passed on or questioning periods in which they were recused.

Table 5: Justices Ranked by Average Time Allowed to Speak per Questioning Period They Used (in Seconds)

NG/SS (tie)	200
SAA	199
EK	191
BK	189
SGB	180
RBG	176
CT	173
Chief	159

Table 6: Justices Ranked by Average Time Allowed to Speak over All Questioning Periods (Including When They Passed or Were Recused) (in Seconds)

SAA	199
BK	189
SS	186
NG	185
SGB	180
EK	177
RBG	176
CT	173
Chief	159

Table 7 provides projected totals that estimate the total amount of time a Justice would have had to speak if the Justice had not passed (as Justice Gorsuch and Justice Ginsburg did in the second round of questioning in the presidential immunity cases, which was relatively shorter than other questioning rounds, and Justice Breyer did in *McGirt* and *Vance*) and if a Justice was not recused (as Justice Sotomayor was in *Baca* and Justice Kagan was in *Agency for International Development*).

Table 7: Total Time Each Justice Would Have Received (in Seconds)

Chief	CT	RBG	SGB	SAA	SS	EK	NG	BK
4293	4663	4626	4752	5326	5420	5215	5219	5097

I projected that each Justice would have been given an additional amount of time that represented the average of their colleagues' questioning times during the rounds that they missed. These projections would have slightly changed the rankings—Justice Sotomayor would have spoken the most, followed closely by Justice Alito; Justice Gorsuch would have spoken the third-most, followed closely by Justice Kagan.

I have also included a breakdown below of questioning time per argument.

Table 8: *USPTO v. Booking.com B.V.* (in Seconds)²⁶

Chief	CT	RBG	SGB	SAA	SS	EK	NG	BK
447	465	448	394	418	413	483	475	361

Table 9: *Agency for International Development v. Alliance for Open Society International, Inc.* (in Seconds)²⁷

Chief	CT	RBG	SGB	SAA	SS	EK	NG	BK
359	435	498	385	464	532	o (recused)	532	338

Table 10: *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania* (in Seconds)²⁸

Chief	CT	RBG	SGB	SAA	SS	EK	NG	BK
396	638	644	464	784	620	688	586	562

Table 11: *Barr v. American Ass'n of Political Consultants, Inc.* (in Seconds)²⁹

Chief	CT	RBG	SGB	SAA	SS	EK	NG	BK
418	403	400	342	427	430	424	479	487

²⁶ Oral Argument, *Booking.com*, *supra* note 19.

²⁷ Oral Argument, *Agency for Int'l Dev.*, *supra* note 19.

²⁸ Oral Argument, *Little Sisters*, *supra* note 18.

²⁹ Oral Argument, *Barr*, *supra* note 18.

Table 12: *McGirt v. Oklahoma* (in Seconds)³⁰

Chief	CT	RBG	SGB	SAA	SS	EK	NG	BK
263	405	410	264	419	438	422	432	443

Table 13: *Our Lady of Guadalupe School v. Morrissey-Berru* (in Seconds)³¹

Chief	CT	RBG	SGB	SAA	SS	EK	NG	BK
349	461	649	642	626	679	694	665	563

Table 14: *Trump v. Mazars* (in Seconds)³²

Chief	CT	RBG	SGB	SAA	SS	EK	NG	BK
481	465	364	641	716	625	663	462	765

Table 15: *Trump v. Mazars* with No Second Round of Questioning for Douglas Letter (in Seconds)³³

Chief	CT	RBG	SGB	SAA	SS	EK	NG	BK
333	483	364	488	598	564	540	462	613

Table 16: *Trump v. Vance* (in Seconds)³⁴

Chief	CT	RBG	SGB	SAA	SS	EK	NG	BK
670	563	500	481	710	734	570	569	762

Table 17: *Trump v. Vance* with No Second Round of Questioning for Carey Dunne (in Seconds)³⁵

Chief	CT	RBG	SGB	SAA	SS	EK	NG	BK
535	469	500	481	634	617	497	569	615

30 Oral Argument, *McGirt*, *supra* note 18.

31 Oral Argument, *Our Lady of Guadalupe Sch. v. Morrissey-Berru*, 140 S. Ct. 2049 (2020) (No.19-267), https://www.supremecourt.gov/oral_arguments/audio/2019/19-267 [<https://perma.cc/V9W8-KAB4>].

32 Oral Argument, *Mazars*, *supra* note 18.

33 *Id.*

34 Oral Argument, *Vance*, *supra* note 21.

35 *Id.*

Table 18: *Chiafalo v. Washington* (in Seconds)³⁶

Chief	CT	RBG	SGB	SAA	SS	EK	NG	BK
437	456	201	478	505	527	438	378	469

Table 19: *Colorado Department of State v. Baca* (in Seconds)³⁷

Chief	CT	RBG	SGB	SAA	SS	EK	NG	BK
473	372	283	404	504	0 (recused)	389	412	347

B. Analysis

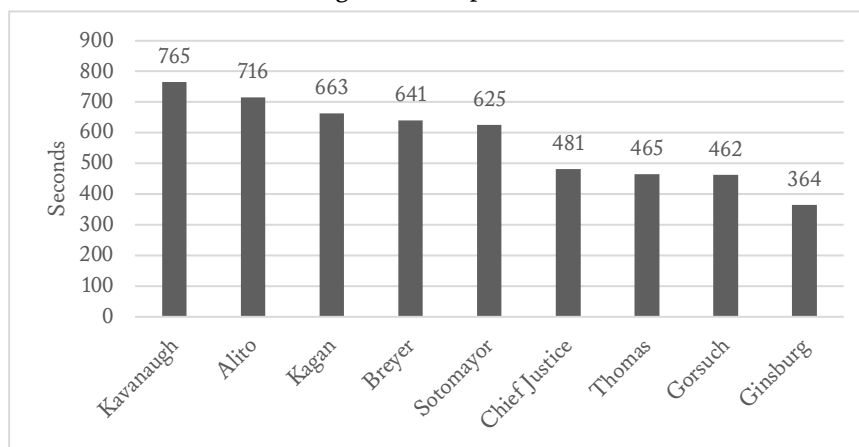
Judged by the metric of average time per questioning period used, the Chief Justice appears to have done an evenhanded job of moderating the questions, at least ideologically. Justice Gorsuch, one of the Court's conservatives, and Justice Sotomayor, one of the Court's liberals, spoke the most. Justice Alito, one of the Court's conservatives, spoke the third-most, followed by Justice Kagan, one of the Court's liberals. But there are additional complications explained below that raise questions about how evenhanded the questioning periods were in particular cases.

Comparing average time across all questioning periods, the balance is somewhat less evenhanded—Justice Alito spoke much more than other Justices (ten seconds more every questioning period), and Justice Kavanaugh spoke the second-most.

The ideological balance in questioning appeared to break down somewhat in the presidential immunity cases. In the congressional subpoena case in particular (*Trump v. Mazars*), Justice Alito and Justice Kavanaugh were both allowed significantly more time during the questioning period than their colleagues. Justice Kavanaugh spoke a minute and a half more than Justice Kagan, the Justice who spoke the third-most, and Justice Alito spoke almost a minute longer than Justice Kagan. The Chief Justice also spoke relatively more in these cases than in others, where he consistently had the shortest questioning periods.

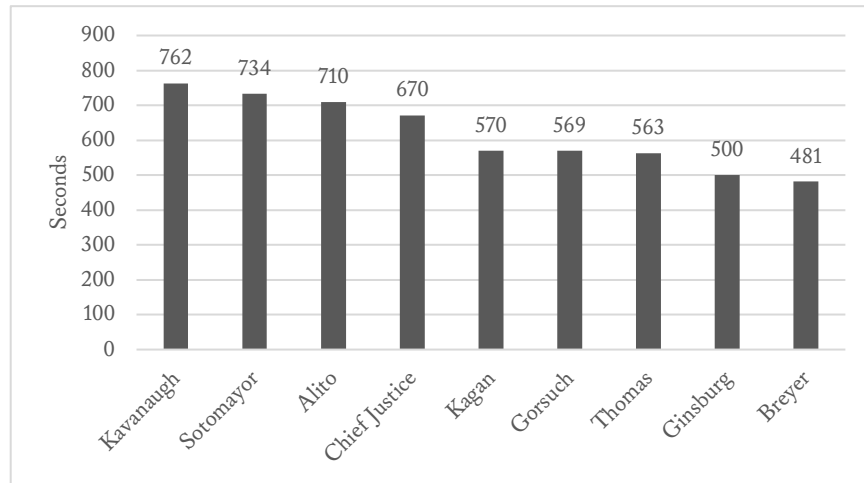
³⁶ Oral Argument, *Chiafalo*, *supra* note 19.

³⁷ Oral Argument, *Colorado Dep't of State v. Baca*, 140 S. Ct. 2316 (2020) (No. 19-518), https://www.supremecourt.gov/oral_arguments/audio/2019/19-518 [<https://perma.cc/83ZN-9C8B>].

Figure 1: *Trump v. Mazars*³⁸

In the grand jury subpoena case, *Trump v. Vance*, three of the four Justices speaking the longest were conservative Justices (though in that case, the Chief Justice in particular seemed receptive to New York's position, and he ended up largely endorsing it). But the disparities between the length of time they spoke and the length of time their liberal colleagues spoke is striking. Justice Kavanaugh spoke for thirty seconds longer than Justice Sotomayor, who spoke the second-most (and was the most active liberal Justice). Justice Kavanaugh also spoke a full three minutes longer than the next most liberal Justice, Justice Kagan. Both Justice Alito and the Chief Justice, who spoke the third- and fourth-most, spoke more than two minutes and one minute (respectively) longer than Justice Kagan, the Justice who spoke the fifth-most, and the liberal Justice who spoke the second-most in the argument.

³⁸ Oral Argument, *Mazars*, *supra* note 18.

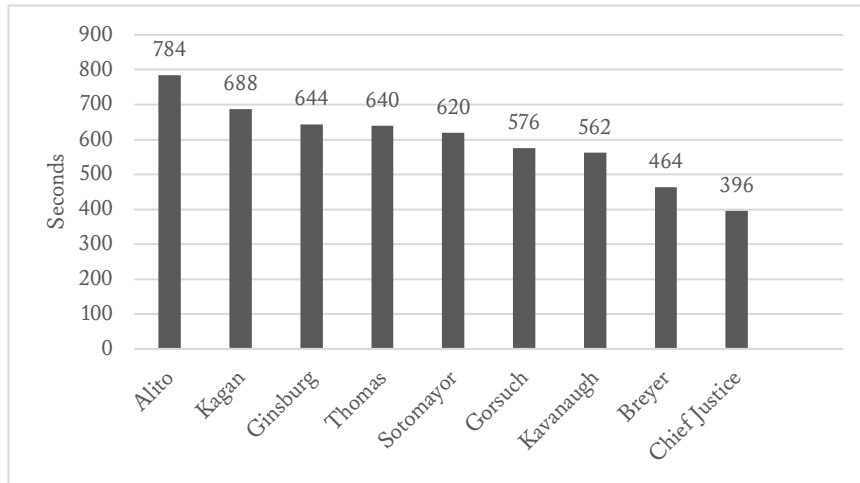
Figure 2: *Trump v. Vance*³⁹

Justice Kavanaugh also spoke much more during the oral arguments for the presidential immunity cases than he did in any other cases. Whereas he often had or received questioning periods that were shorter than a majority of his colleagues, he spoke the most in the congressional subpoena case and in the grand jury subpoena case.

The other major cases from this sitting were either slightly more balanced ideologically in some respects or slightly reversed in that the liberal Justices spoke more.

The contraceptive mandate case, *Little Sisters*, was slightly more ideologically balanced in the sense that a conservative Justice, Justice Alito, spoke the most and more liberal Justices spoke the second- and third-most. But it was not particularly well balanced given that Justice Alito was allowed to speak more than a minute and a half longer than the Justice who spoke the second-most (Justice Kagan), and two minutes longer than the Justice who spoke the third-most (Justice Ginsburg).

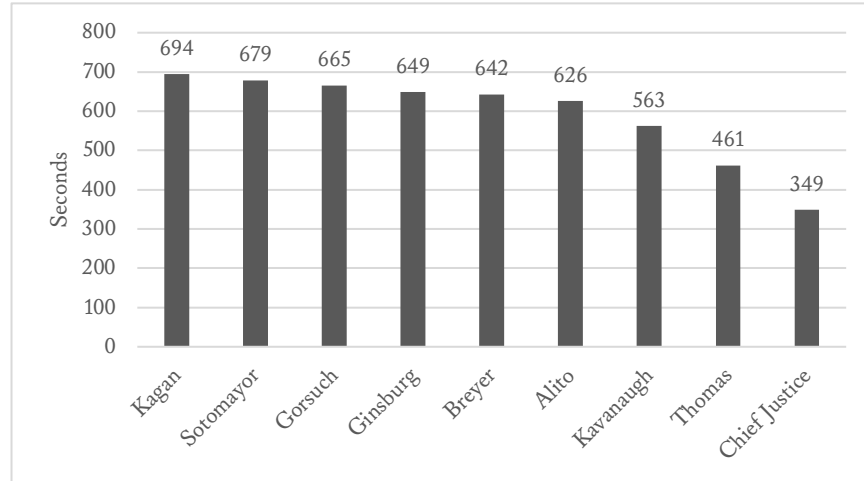
³⁹ Oral Argument, *Vance*, *supra* note 21.

Figure 3: *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*⁴⁰

The religious exception case (*Our Lady of Guadalupe*) involved the liberal Justices speaking relatively more—Justice Kagan and Justice Sotomayor spoke the most, and Justice Ginsburg and Justice Breyer spoke the fourth- and fifth-most. But the differences between Justice Kagan and Justice Sotomayor and the conservative Justice who spoke the most (Justice Gorsuch) is fifteen to thirty seconds, respectively. And the differences between Justice Ginsburg and Justice Breyer and Justice Alito, the conservative Justice who spoke the most after they did, was similarly no more than fifteen to twenty-five seconds, respectively.

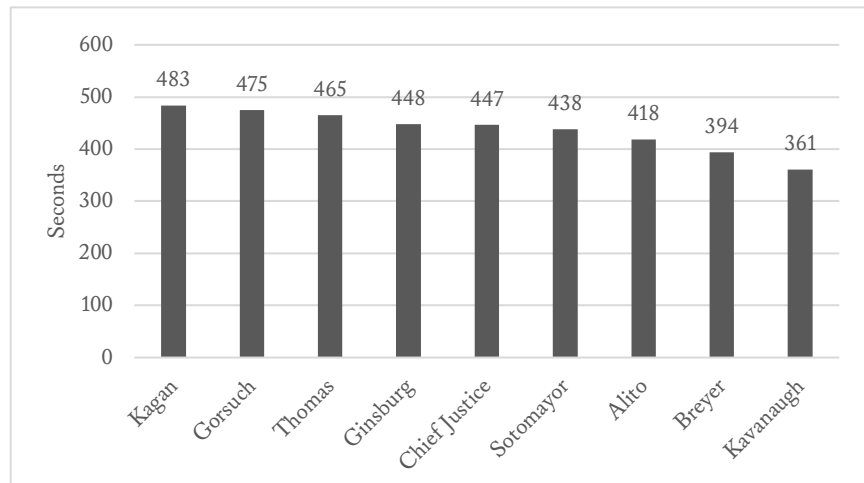
⁴⁰ Oral Argument, *Little Sisters*, *supra* note 18.

Figure 4: *Our Lady of Guadalupe School v. Morrissey-Berru*⁴¹



The non-ideological cases reflected more ideological balance. Justice Sotomayor also tended to talk more—and was allowed to talk more—in these cases.

Figure 5: *USPTO v. Booking.com*⁴²



⁴¹ Oral Argument, *Our Lady of Guadalupe*, *supra*, note 31.

⁴² Oral Argument, *Booking.com*, *supra* note 19.

Figure 6: *Agency for International Development v. Alliance for an Open Society*⁴³

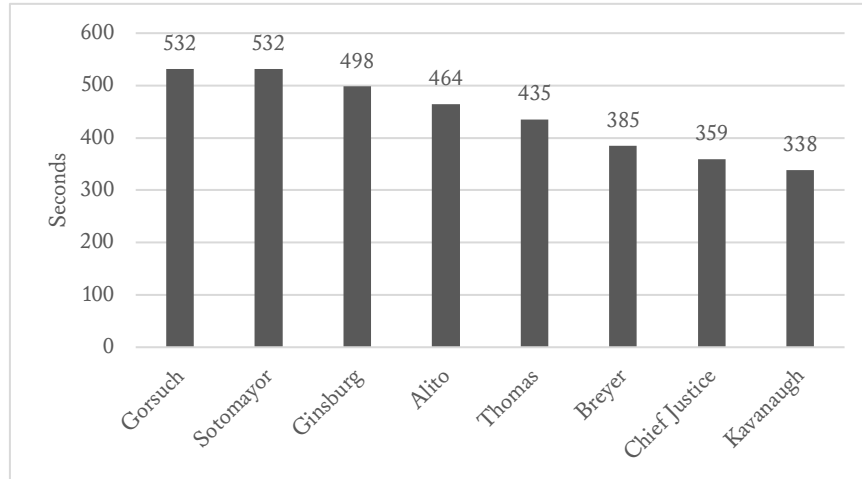
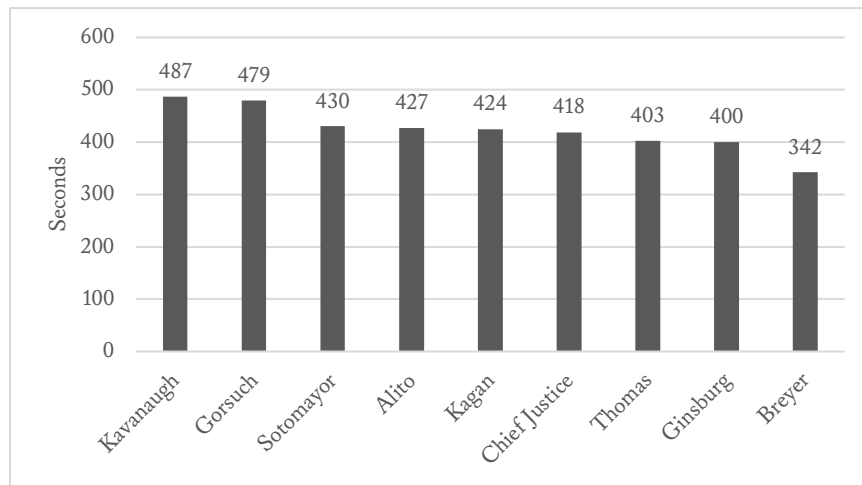
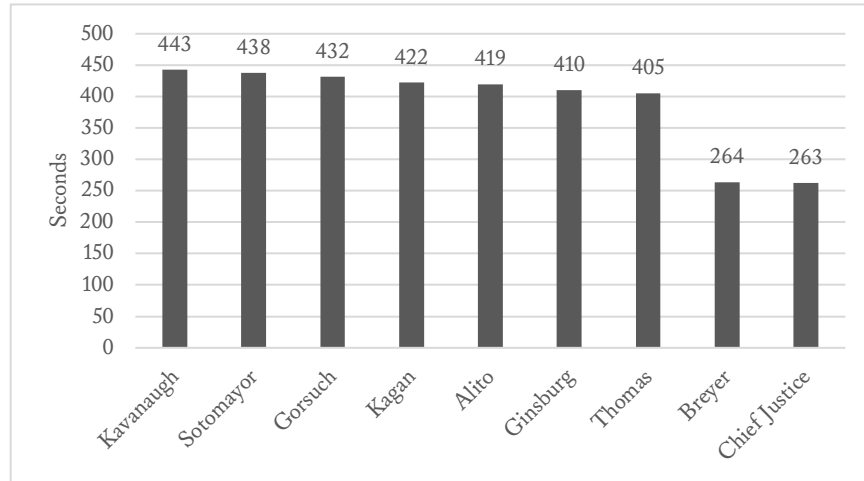
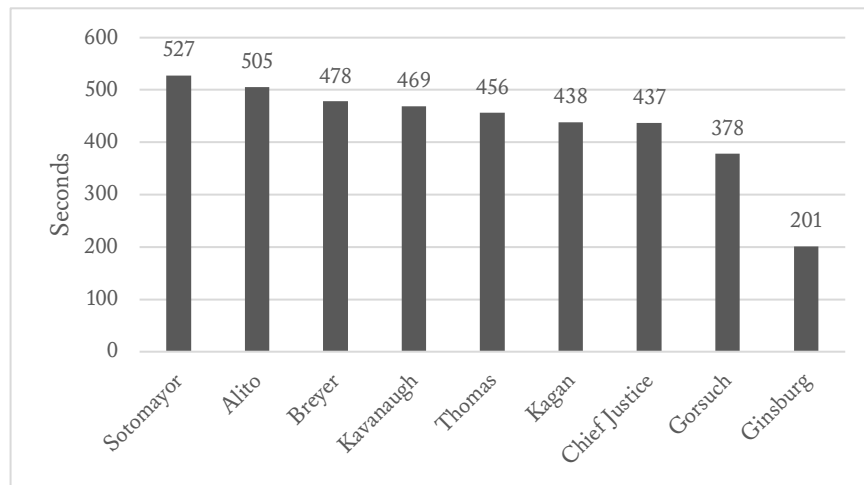


Figure 7: *Barr v. American Ass'n of Political Consultants*⁴⁴



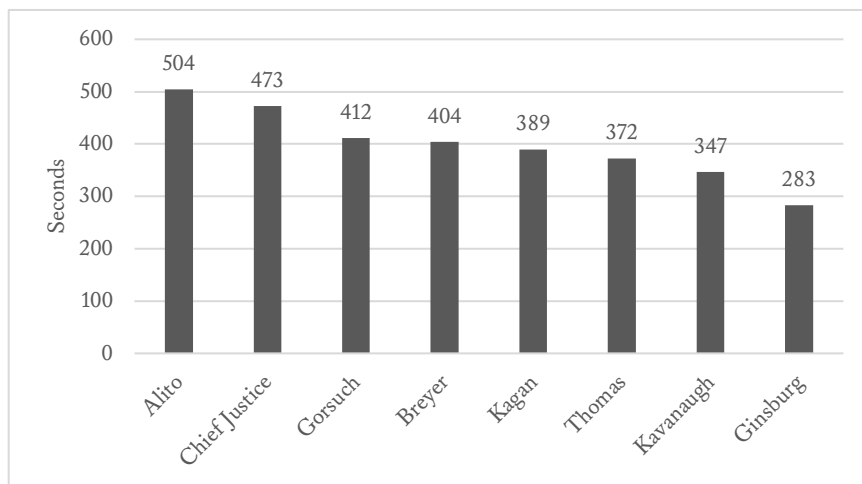
⁴³ Oral Argument, *Agency for International Development*, *supra* note 19.

⁴⁴ Oral Argument, *Barr*, *supra* note 18.

Figure 8: *McGirt v. Oklahoma*⁴⁵Figure 9: *Chiafalo v. Washington*⁴⁶

⁴⁵ Oral Argument, *McGirt*, *supra* note 18.

⁴⁶ Oral Argument, *Chiafalo*, *supra* note 19.

Figure 10: *Colorado v. Baca*⁴⁷

There are other interesting aspects of these statistics. For one thing, the Chief Justice spoke, by far, less than any other Justice. He spoke for a total of 4293 seconds; the Justice closest to him, Justice Ginsburg, spoke for 4397 seconds.

On the other end, Justice Alito spoke the most of any Justice. He spoke for a total of 5362 seconds; the Justice who spoke the second-most, Justice Kavanaugh, spoke for 5063 seconds, and the Justice who spoke the third-most, Justice Sotomayor, spoke for 5023 seconds. Justice Gorsuch spoke the fourth-most for 4990 seconds. However, both Justice Sotomayor and Justice Kagan were recused from an argument. If they were not recused, I projected that Justice Sotomayor would have spoken the most and Justice Kagan the fourth-most, though again, those are just projections. It is also important to note that Justice Gorsuch, who spoke the fourth-most in absolute numbers, passed on two rounds of questioning. So, he could have spoken more had he wanted to.

Justice Alito, Justice Gorsuch, and Justice Sotomayor spoke for roughly the same amount of time per questioning period that they used. Justice Gorsuch and Justice Sotomayor spoke the longest per questioning period (an average of 200 seconds per questioning period they used), and Justice Alito spoke the next longest (199 seconds per questioning period). The Chief Justice, by contrast, spoke for 159 seconds per questioning period. And in between those poles were Justice Kagan at 191 seconds, Justice Kavanaugh at 189 seconds, Justice Breyer at 180 seconds, Justice Ginsburg at 176 seconds, and Justice Thomas at 173 seconds.

⁴⁷ Oral Argument, *Baca*, *supra* note 37.

I want to resist the impulse to think that these differences of mere seconds are insignificant. Justice Gorsuch spoke, on average, twenty seconds more per questioning period than Justice Breyer; almost twenty-five seconds more per questioning period than Justice Ginsburg; and almost ten seconds more per questioning period than Justice Kagan. Justice Alito and Justice Sotomayor spoke more than the preceding Justices by similar amounts of time. At Supreme Court arguments, these small differences matter. Ten seconds is more than enough time to rattle off a possible distinction with a case that an advocate has raised (think “that case involved executive privilege”)⁴⁸ or to suggest that the principle an advocate is articulating is inconsistent with a case (think “how about the Paula Jones case?”).⁴⁹ And those points can end up making the difference in how persuasive an exchange has been. All of those differences are more than enough time to get off at least one additional question, even if it is a short one.⁵⁰

Moreover, while Justice Gorsuch, Justice Alito, and Justice Sotomayor’s averages are relatively close to one another, in other respects their numbers are less comparable. In particular, the averages do not account for the number of times a Justice ended their own questioning periods. Justice Gorsuch ended his own questioning periods seven times, whereas Justice Sotomayor ended her own questioning period only once. But they spoke, on average, the same amount of time per questioning period, although the Chief Justice ended Justice Sotomayor’s questioning periods six more times. Justice Alito ended his own questioning period twice—more similar to the number for Justice Sotomayor.

Similarly, Justice Kavanaugh ended ten of his own questioning periods, but Justice Kagan ended six of her own questioning periods (she was also recused from two questioning periods), even though they spoke for roughly the same amount of time per questioning period. And Justice Thomas ended ten of his own questioning periods, while Justice Ginsburg ended five of her own questioning periods, although they still spoke for a similar amount of time per questioning period.

Justice Alito also had the single longest questioning period by over a minute. He had a 450-second questioning period during *Little Sisters*. Below are the top twelve longest discrete questioning periods.⁵¹

⁴⁸ See, e.g., Transcript of Oral Argument at 39-40, *Trump v. Vance*, 140 S. Ct. 2412 (2020) (No. 19-635) (discussing the precedential value of *United States v. Nixon*, 418 U.S. 683 (1974), in the grand jury subpoena case).

⁴⁹ See *id.* at 11 (“If Paula Jones had sued in state court rather than federal court, would Clinton have had absolute immunity?”).

⁵⁰ See Jacobi & Sag, *Advocates*, *supra* note 4, at 1171 (describing a final question by a Justice as “the final opportunity for meaningful advocacy at the oral argument”).

⁵¹ Oral Argument, *Little Sisters*, *supra* note 18; Oral Argument, *Our Lady of Guadalupe*, *supra* note 31; Oral Argument, *Vance*, *supra* note 21; Oral Argument, *Mazars*, *supra* note 18.

Table 20: Top Twelve Longest Discrete Questioning Periods (in Seconds)

Justice Alito (<i>Little Sisters</i>)	450
Justice Gorsuch (<i>Little Sisters</i>)*	367
Justice Alito (<i>Our Lady of Guadalupe</i>)	359
Justice Kagan (<i>Little Sisters</i>)*	353
Justice Alito (<i>Vance</i>)	341
Justice Gorsuch (<i>Our Lady of Guadalupe</i>)*	329
Justice Breyer (<i>Our Lady</i>)	324
Justice Thomas (<i>Little Sisters</i>)	319
Justice Kavanaugh (<i>Vance</i>)*	318
Justice Ginsburg (<i>Little Sisters</i>) & Justice Sotomayor (<i>Little Sisters</i>) (tie)	315
Justice Kavanaugh (<i>Mazars</i>) & Justice Kagan (<i>Our Lady of Guadalupe</i>) (tie)	310
Justice Alito (<i>Mazars</i>)	306

The three longest questioning periods were all male Justices (and two were from Justice Alito). Justice Alito had four of the fourteen longest questioning periods, and three of the five longest questioning periods. Justice Sotomayor had only one of the longest questioning periods (a tie for the tenth-longest questioning period), even though she ended the fewest of her own questioning periods (one). And the longest questioning periods happened during the cases involving contraception, presidential immunity, and religious exemptions from antidiscrimination statutes.

The asterisks in the table above represent times when the Justices ended their own questioning periods. This, too, colors the statistics. Justice Gorsuch ended his own questioning period during *Little Sisters*,⁵² so he had an uninterrupted 367-second period for questioning that was the second-longest questioning period in any argument.⁵³ Justice Gorsuch's 329-second period in *Our Lady of Guadalupe* was similarly uninterrupted.⁵⁴ Justice Kagan's 353-second questioning period in *Little Sisters* was also uninterrupted,⁵⁵ as was

⁵² Oral Argument at 23:05, *Little Sisters*, *supra* note 18.

⁵³ *Id.* at 1:26:52.

⁵⁴ Oral Argument at 1:25:55, *Our Lady of Guadalupe*, *supra* note 31.

⁵⁵ Oral Argument at 1:20:59, *Little Sisters*, *supra* note 18.

Justice Kavanaugh's 318-second questioning period in *Vance*.⁵⁶ But for reasons I explain below, I discount somewhat the fact that Justice Kagan and Justice Gorsuch's questioning periods in *Little Sisters* were not interrupted, since both questioning periods happened after Justice Alito's incredibly lengthy questioning period. The Chief Justice might have been giving the Justices who followed Justice Alito more latitude (although he does not appear to have done so evenly, as I explain below).

I have also included, below, a rank order of the twelve shortest questioning periods that were ended by the Chief Justice (rather than the questioning Justice themselves).⁵⁷

Table 21: Eleven Shortest Questioning Periods Ended by the Chief Justice
(in Seconds)

Justice Ginsburg (<i>McGirt</i>)	63
Justice Ginsburg (<i>Mazars</i>)	91
Justice Kagan (<i>Vance</i>)	108
Justice Gorsuch (<i>Mazars</i>)	109
Justice Kagan (<i>McGirt</i>)	119
Justice Alito (<i>Vance</i>)	121
Justice Thomas (<i>Mazars</i>)	123
Justice Breyer (<i>McGirt</i>)	124
Justice Ginsburg (<i>Mazars</i>)	129
Justice Sotomayor (<i>McGirt</i>)	130
Justice Ginsburg (<i>Little Sisters</i>) & Justice Alito (<i>McGirt</i>) (tie)	131

Consistent with the social science literature on the gendered nature of interruptions,⁵⁸ the three shortest questioning periods the Chief Justice allowed were for his female colleagues. Indeed, half of the shortest questioning periods the Chief Justice allowed were for his female colleagues even though they make up only one-third of the Court. And two-thirds of

⁵⁶ Oral Argument at 1:22:49, *Vance*, *supra* note 21.

⁵⁷ Oral Argument, *McGirt*, *supra* note 18; Oral Argument, *Mazars*, *supra* note 18; Oral Argument, *Vance*, *supra* note 21; Oral Argument, *Little Sisters*, *supra* note 18.

⁵⁸ See Jacobi & Schweers, *supra* note 4, at 1403-08 (summarizing empirical research studies examining the impact of gender on the act of interrupting).

the shortest questioning periods were given to the Chief Justice's more liberal colleagues even though they make up less than half of the Court.

Justice Alito also had the longest total questioning period for an argument: 784 seconds during *Little Sisters*. Justice Kavanaugh had the second longest period during *Trump v. Mazars* (765 seconds) and third longest period during *Trump v. Vance* (762 seconds). Below are the thirteen longest total time periods that Justices had during a single case.⁵⁹

Table 22: Thirteen Longest Total Questioning Periods During a Single Case
(in seconds)

Justice Alito (<i>Little Sisters</i>)	784
Justice Kavanaugh (<i>Mazars</i>)	765
Justice Kavanaugh (<i>Vance</i>)*	762
Justice Sotomayor (<i>Mazars</i>)	734
Justice Alito (<i>Mazars</i>)	716
Justice Alito (<i>Vance</i>)	710
Justice Kagan (<i>Our Lady of Guadalupe</i>)*	694
Chief Justice (<i>Vance</i>)	670
Justice Kagan (<i>Little Sisters</i>)*	688
Justice Sotomayor (<i>Our Lady of Guadalupe</i>)	679
Justice Gorsuch (<i>Our Lady of Guadalupe</i>)*	665
Justice Kagan (<i>Mazars</i>)*	663
Justice Ginsburg (<i>Our Lady of Guadalupe</i>)	649

The asterisks in the table above represent times when the Justices ended their own questioning periods. Of the thirteen longest total questioning times in a single case, Justice Alito had three and Justice Kagan had three (in all three cases, Justice Kagan ended some of her own questioning periods); Justice Kavanaugh had two (including one case where he ended his own questioning period); and Justice Sotomayor had two. The three longest total time periods were, again, all male Justices. Justice Alito had three of the six

⁵⁹ Oral Argument, *Little Sisters*, *supra* note 18; Oral Argument, *Our Lady of Guadalupe*, *supra* note 31; Oral Argument, *Mazars*, *supra* note 18; Oral Argument, *Vance*, *supra* note 21.

longest questioning periods and Justice Kavanaugh had two of the three longest questioning periods.

Some of the variation between the longer individual questioning periods and the total amount of time that the Justices had in particular arguments is due to the fact that some of the arguments involved more than two advocates. In many of the more ideologically salient cases—including the presidential immunity cases, the religious exception cases, and the contraception cases—the Trump administration participated in the arguments as *amicus curiae* or arguing together with another party, arguing in favor of what would be the “conservative” position (in opposition to contraception access, in favor of exemptions from antidiscrimination statutes, and in favor of presidential immunity).⁶⁰ The argument time for the conservative positions was therefore divided between two advocates, while all of the argument time for the more liberal position was given to one advocate. If each side gets thirty minutes, then each advocate for the conservative position might get ten to twenty minutes while the advocate for the more liberal position got thirty.

That argument structure may be partially driving the lengthier questioning periods given to conservative Justices. Justices tend to give more questions to the side with which they disagree.⁶¹ If the Chief Justice sought to divide the argument time allotted to an advocate by the number of Justices, then each Justice might have one to two minutes to question each of the advocates arguing for the conservative position, and three to four minutes to question the advocate arguing for the more liberal position. And so conservative Justices, who were more likely to question advocates arguing for more liberal positions, had longer uninterrupted blocks to question the advocates with whom they disagreed.

It does not follow, however, that total argument time is more relevant to assessing the fairness of these arguments than longer or shorter individual questioning periods. Even if liberal Justices received as much total time for questioning in the immunity cases—which they did not—their time would have been divided between two advocates, which limited their ability to continue pressing on a line of inquiry. That issue came up repeatedly in the presidential immunity cases, when Justice Ginsburg, Justice Breyer, and Justice Sotomayor all sought to push on positions that were being pressed by the President’s personal lawyers or the Department of justice. Conservative Justices, by

⁶⁰ In recent years, the Court has granted almost every request by the Solicitor General to participate in oral arguments. See Adam Liptak, *The Supreme Court Has a Special ‘Friend’: The Justice Department*, N.Y. TIMES (June 9, 2020), <https://www.nytimes.com/2020/03/09/us/supreme-court-solicitor-general-amicus.html> [<https://perma.cc/9VLU-5G4K>].

⁶¹ Jacobi & Sag, *Advocates*, *supra* note 4, at 1202-27.

contrast, had longer uninterrupted blocks to question advocates with whom they were more likely to disagree (and with whom many of them did disagree).

Only three Justices passed on asking question when it was their turn to do so—Justice Ginsburg, Justice Gorsuch, and Justice Breyer. Both Justice Ginsburg and Justice Gorsuch passed on the second rounds of questioning of advocates (Doug Letter and Carey Dunne) in the presidential immunity cases.⁶² Justice Breyer passed on one of those second rounds (Carey Dunne in *Vance*).⁶³ Only Justice Breyer passed on asking any questions of a particular advocate (the state in *McGirt v. Oklahoma*).⁶⁴

There were also some notable variations in which Justices ended their own questioning periods and which Justices had their questioning times ended by the Chief Justice. Justice Breyer ended at least one round of his own questioning periods in every single argument with the exception of *McGirt v. Oklahoma*, when he passed on a round of questioning. Justice Breyer ended his own questioning periods a total of twelve times, more than any other Justice. Justice Thomas and Justice Kavanaugh ended ten of their own questioning periods. Justice Gorsuch ended seven of his own questioning periods. Justice Kagan ended six of her own questioning periods. Justice Ginsburg ended five of her own questioning periods. Justice Alito ended two of his questioning periods. Justice Sotomayor ended one of her own questioning periods.

As explained above, the data about who ended their own questioning periods complicates, to some extent, the rankings of which Justices spoke the most (both as a total amount of time and as averages). Justice Alito spoke the most of any Justice by absolute time and second most (by one second) per questioning period, so it is unsurprising that he ended relatively few of his own questioning periods. Justice Sotomayor and Justice Gorsuch spoke the most per questioning period. But Justice Sotomayor ended relatively few of her questioning periods (one), whereas Justice Gorsuch ended seven of his own questioning periods. Justice Gorsuch and Justice Kavanaugh ended their own questioning periods more than Justice Ginsburg but still spoke longer than she did, both as absolute numbers and as averages. Justice Thomas and Justice Ginsburg spoke, on average, about the same length of time per questioning period but Justice Thomas ended his questioning periods twice as many times as Justice Ginsburg did.

There were also some striking disparities in how the Chief Justice ended the questioning periods when he did so. The Chief Justice ended questioning periods a total of 158 times, either by interrupting someone or saying “thank you” after

⁶² Oral Argument at 1:22:57, 1:30:41, *Mazars*, *supra* note 18; Oral Argument at 1:32:17, 1:36:59, *Vance*, *supra* note 21.

⁶³ Oral Argument at 1:31:19, *Vance*, *supra* note 21.

⁶⁴ Oral Argument at 50:46, *McGirt*, *supra* note 18.

an advocate paused. The interruptions happened overwhelmingly when an advocate was speaking—there were only eleven interruptions of other Justices.⁶⁵

The Justices who were interrupted or cut off were overwhelmingly women. Of the eleven interruptions of other Justices, nine interruptions were of women. Justice Breyer was the only male Justice who the Chief Justice interrupted (twice).⁶⁶ All eleven interruptions were of liberal Justices—Justice Ginsburg, Justice Sotomayor, and Justice Breyer were the only Justices who were interrupted by the Chief Justice. The Chief Justice interrupted Justice Sotomayor twice in *Little Sisters*,⁶⁷ and ended Justice Ginsburg's questioning period as she attempted to continue speaking.⁶⁸ He interrupted Justice Sotomayor again in *McGirt*.⁶⁹ In *Mazars*, the Chief Justice cut off Justice Sotomayor twice and Justice Ginsburg and Justice Breyer once.⁷⁰ In *Vance*, the Chief Justice ended a questioning period as both Justice Sotomayor and the advocate were talking;⁷¹ he also allowed Jay Sekulow, on Sekulow's request, to answer a question that Justice Ginsburg had asked immediately before the Chief Justice ended her questioning period.⁷² And in *Chiafalo*, the Chief Justice interrupted Justice Sotomayor.⁷³

The Chief Justice interrupted Justice Sotomayor the most even though she had only one of the longest fourteen questioning periods (the tenth longest). While she did speak, per questioning period, the most of any Justice (tied with Justice Gorsuch), the Chief Justice never interrupted Justice Gorsuch even though he had, with Justice Sotomayor, the longest average questioning period. And while Justice Gorsuch was never interrupted, Justice Ginsburg was interrupted multiple times even though she had the third shortest average questioning period and the second shortest total time speaking over the sitting. The Chief Justice also gave her two of the three shortest questioning periods (Justice Kagan had the other). Like Justice Gorsuch, Justice Kavanaugh was never interrupted even though he had the longest total talking times, by far, in two of the cases where the Chief Justice

⁶⁵ I counted something as an interruption if the Chief Justice interrupted another Justice's remarks or ended their questioning period before an advocate had a chance to respond to a Justice's question.

⁶⁶ The Chief Justice cut off Justice Breyer's follow-up question/correction in *Mazars v. Trump*. I also erred on the side of counting the ending of one of Justice Breyer's questioning periods in *Our Lady of Guadalupe* as an interruption. Justice Breyer interjected a statement that may have been a question or correction in response to counsel, and the Chief Justice moved on from questioning before there was any response.

⁶⁷ Oral Argument at 18:38, 1:20:12, *Little Sisters*, *supra* note 18.

⁶⁸ *Id.* at 8:56.

⁶⁹ Oral Argument at 35:16, *McGirt*, *supra* note 18.

⁷⁰ Oral Argument at 11:52, 32:07, 1:06:30, 1:28:36, *Mazars*, *supra* note 18.

⁷¹ Oral Argument at 16:29, *Vance*, *supra* note 21.

⁷² *Id.* at 8:35.

⁷³ Oral Argument at 59:59, *Chiafalo*, *supra* note 19.

interrupted other Justices—*Trump v. Mazars* and *Trump v. Vance*. Two of Justice Kavanaugh’s questioning periods in those cases were also two of the three longest questioning periods in any case.

The disparities are also striking because the Chief Justice made various accommodations for other Justices who asked questions as the Chief Justice attempted to end a questioning period. On two occasions, the Chief Justice allowed an advocate to respond to a question near the end of the questioning period: In *Booking.com*, he instructed an advocate that they had time for a brief response to Justice Kagan’s question,⁷⁴ and in *McGirt*, the Chief Justice instructed an advocate that they had time for a brief response to Justice Kavanaugh’s question.⁷⁵ Also in *Barr*, there was some ambiguity about whether Justice Gorsuch wanted to continue talking after the Chief Justice said “thank you, counsel.”⁷⁶ After the Chief Justice apologized and said “Justice Gorsuch,” Justice Gorsuch indicated that he had finished talking.⁷⁷

The disparities in interruptions also probably cannot be explained on the ground that the Chief Justice ultimately succeeded in policing the average time per questioning periods. The interruptions did not all occur toward the end of the argument session in May, and the Chief Justice interrupted Justice Ginsburg and Justice Breyer even though they had among the shortest average questioning periods. It is also unlikely that the Chief Justice was keeping a running track of average questioning periods across different arguments while also monitoring the Justices’ questioning periods in each argument and participating in the argument himself, even if he was trying to ensure some rough equivalence in questioning times in individual cases.

There were also a few notable differences in which Justices continued to talk after they were initially interrupted and which Justices attempted to carve out additional time for themselves. These disparities are also consistent with the social science literature on the gendered nature of interruptions and who gets to talk more.⁷⁸ For example, Justice Alito’s long questioning period in *Little Sisters* included him saying, four minutes into his questioning period, “if I could ask one other question.”⁷⁹ That remark bought him an additional three minutes before the Chief Justice ended his questioning period. Justice Alito did something similar in *Trump v. Mazars* three minutes into his questioning period, saying he had “one more thing if . . . I can and there’s time,”⁸⁰ which bought him an additional ninety seconds in his questioning period. Similarly,

⁷⁴ Oral Argument at 27:47, *Booking.com*, *supra* note 18.

⁷⁵ Oral Argument at 23:11, *McGirt*, *supra* note 18.

⁷⁶ Oral Argument at 1:05:05–1:05:11, *Barr*, *supra* note 18.

⁷⁷ *Id.*

⁷⁸ Jacobi & Schweers, *supra* note 4, at 1403–08.

⁷⁹ Oral Argument at 1:12:34, *Little Sisters*, *supra* note 18.

⁸⁰ Oral Argument at 1:01:54, *Mazars*, *supra* note 18.

in *Colorado v. Baca*, Justice Alito said, three minutes into his questioning time, that he had one more question.⁸¹ But his questioning period lasted an additional two minutes with several questions in it.⁸² Yet when Justice Sotomayor in *Mazars* said, three minutes into her questioning period, that she had one last question, she received only an additional nineteen seconds.⁸³

Finally, in *Trump v. Vance*, the Chief Justice called on Justice Sotomayor over five minutes into Justice Alito's questioning period, but Justice Alito continued on for an additional twenty seconds.⁸⁴ None of the other Justices attempted to extend their own questioning periods even when the Chief Justice interrupted them mid-question (and occasionally, mid-important question). For example, the Chief Justice ended Justice Sotomayor's questioning period mid-question in *McGirt v. Oklahoma*.⁸⁵ He similarly cut off Justice Ginsburg's retort to Assistant Solicitor General Wall in *Trump v. Mazars*, when Justice Ginsburg asked the Solicitor General about the Paula Jones case (*Clinton v. Jones*).⁸⁶ He also interrupted Justice Breyer's rejoinder to the President's lawyer, Patrick Strawbridge, in *Trump v. Mazars*, about the lawfulness of the Watergate subpoenas.⁸⁷

Additionally, in *Trump v. Vance*, the Chief Justice interrupted Justice Ginsburg midway through her response to Trump's attorney Jay Sekulow, again about the Paula Jones case (*Clinton v. Jones*).⁸⁸ But it was Sekulow who asked the Chief Justice for the opportunity to respond, which the Chief Justice allowed Sekulow to do (and Justice Ginsburg did not have the opportunity to respond once more).⁸⁹ Soon after that, also in *Vance*, Justice Alito continued his questioning period after the Chief Justice called on Justice Sotomayor.⁹⁰ And the Chief Justice allowed Justice Alito to continue, three minutes into his questioning of Douglas Letter, with nearly two additional minutes after Justice Alito said he had one more question.

III. OBSERVATIONS

All in all, the Supreme Court's telephonic arguments were a success. The Court broadcast live audio, and the sky did not fall. There were very few hiccups, and they were all minor (mostly Justices forgetting to unmute

⁸¹ Oral Argument at 47:48, *Baca*, *supra* note 37.

⁸² *Id.*

⁸³ Oral Argument at 1:06:11, *Mazars*, *supra* note 18.

⁸⁴ Oral Argument at 1:10:02, *Vance*, *supra* note 21.

⁸⁵ Oral Argument at 35:17, *McGirt*, *supra* note 18.

⁸⁶ Oral Argument at 32:07, *Mazars*, *supra* note 18.

⁸⁷ *Id.* at 11:52.

⁸⁸ Oral Argument at 8:29, *Vance*, *supra* note 21.

⁸⁹ *Id.* at 8:35.

⁹⁰ *Id.* at 1:10:02.

themselves).⁹¹ And the Chief Justice appeared to try to moderate arguments evenhandedly, and he accomplished that goal in many respects.

Part of the Chief Justice's efforts were evident when one Justice (often Justice Alito) pushed the limits of questioning periods. When that happened, the Chief Justice generally allowed the Justices who followed Justice Alito (Justice Sotomayor, Justice Kagan, Justice Gorsuch, and Justice Kavanaugh) more time for their questioning periods—but not quite as much time as Justice Alito received. For example, after Justice Alito's 450-second questioning period in *Little Sisters*, all of the later Justices spoke for over 300 seconds.⁹²

But that did not always happen. In *Mazars*, for example, after Justice Alito had a 306-second questioning period of Doug Letter on the first round of questions, both Justice Sotomayor and Justice Kagan spoke for under 200 seconds (although Justice Kagan ended her own questioning time, so she might have been allowed to speak more). Justice Gorsuch spoke for 206 seconds, while Justice Kavanaugh was allowed to speak for 310 seconds (the Chief Justice ended both of their questioning periods). Likewise, in *Vance*, Justice Alito spoke for 341 seconds when questioning Carey Dunne even though no other Justice, until that point, had spoken for more than 250 seconds. Both Justice Sotomayor and Justice Kagan had over a minute less than he did in their subsequent questioning periods—268 and 224 seconds, respectively (although Justice Kagan once again ended her own questioning time, so the Chief Justice might have allowed her to speak more). But Justice Kavanaugh was allowed to speak for 318 seconds, and Justice Kavanaugh ended his own questioning period, which was almost a minute longer than Justice Sotomayor's and over a minute longer than Justice Kagan's.

The Chief Justice's new role put him in a difficult position. Moderating the arguments likely detracted from his ability to ask his own questions when he is often an active participant during in-person oral arguments. And even though the Chief Justice probably tried to moderate the arguments evenhandedly, there were notable disparities—Justice Alito spoke and was allowed to speak much more than the other Justices, and the conservative male Justices had the longest total questioning periods and the longest individual questioning periods. Their female colleagues, by contrast, received the shortest

⁹¹ See Kimberly Strawbridge Robinson, *Justices Hear HIV/AIDS-Tied Case While Scattered by Pandemic* (1), BLOOMBERG L. (May 5, 2020, 3:01 PM), <https://news.bloomberglaw.com/us-law-week/justices-hear-hiv-aids-tied-case-while-scattered-by-coronavirus> [<https://perma.cc/Y3HH-U78N>] (“For the second day in a row, Sotomayor seemed to forget to take herself off mute before asking questions.”).

⁹² This may explain Adam Feldman's finding that *Little Sisters* was the most unevenly balanced case in terms of advocate time, with the petitioners receiving 391 more seconds than the respondents. Adam Feldman, *Empirical SCOTUS: Results from the Court's Experiment with a New Oral Argument Format*, SCOTUSBLOG (May 22, 2020, 4:51 PM), <https://www.scotusblog.com/2020/05/empirical-scotus-results-from-the-courts-experiment-with-a-new-oral-argument-format> [<https://perma.cc/JW3U-39DT>].

questioning periods. The Chief Justice did not reliably adjust later Justices' questioning times after Justice Alito spoke for much longer than the preceding Justices. The conservative Justices were allowed to dominate the presidential immunity cases by total time, and Justice Alito appeared willing to push through the Chief Justice's attempt to end questioning periods.

There were also some gender disparities that were consistent with larger societal and professional patterns. The men on the Court had almost all of the longest questioning periods. This can be partially explained by the fact that the Court is two-thirds men, but the men had three-fourths of the longest questioning periods and the longest three questioning periods. The conservatives on the Court also had most of the longest individual questioning periods (nine of the top twelve, although they make up only slightly more than half of the Court). The disparities were slightly less pronounced when the total amount of time per case was measured: Women had half of the longest periods in a case, even though they make up only one-third of the Court, but men still had the three longest total amounts of time in particular cases. Women also received the three shortest questioning periods—and half of the twelve shortest questioning periods—even though they make up only one-third of the court. And two-thirds of the twelve shortest questioning periods went to more liberal Justices.

The interruptions of other Justices were markedly gendered and ideological. The Chief Justice only interrupted liberal Justices, and nine of the eleven interruptions were of women Justices.⁹³

It is a common trope that the Chief Justice is “first among equals” at the Court.⁹⁴ The new oral argument format gave the Chief Justice a new and important power among the Justices—the power to decide how long each Justice had to speak. By some metrics, the Chief Justice succeeded in attempting to make the arguments and the various Justices' participation evenhanded. In other respects, he probably fell short of what the ideal might look like. But this was the Court's first attempt at this new format, limiting the sample to only ten arguments. And it is possible that if the format continues, the Court will get better at it.

In his 2005 Senate confirmation hearings, the Chief Justice analogized the role of a Supreme Court Justice to the job of an umpire: “The role of an umpire and a judge is critical. They make sure everybody plays by the

⁹³ Cf. Jacobi & Schweers, *supra* note 4, at 1493 (“[W]omen on the Supreme Court are interrupted at a markedly higher rate during oral arguments than men.”).

⁹⁴ White, *supra* note 1, at 1463 n.1 (citing HENRY J. ABRAHAM, *THE JUDICIAL PROCESS* 206 (4th ed. 1980)); Alpheus Thomas Mason, *The Chief Justice of the United States: Primus Inter Pares*, 17 J. PUB. L. 20, 22 (1968) (quoting Letter from Salmon P. Chase to John D. Van Buren (Mar. 25, 1868)).

rules . . . [M]y job is to call balls and strikes, and not to pitch or bat.”⁹⁵ The Chief Justice may have tried to carry out that role in telephonic arguments. But he probably could have done so more consistently to ensure that his “conservative male” colleagues, particularly Justice Alito, “play[ed] by the rules,”⁹⁶ and also to ensure that he treated his more liberal female colleagues the same as his conservative male colleagues.

MUTED JUSTICE APPENDIX

These are time stamps for oral argument periods and questioning periods on the telephonic arguments on the *Audio Arguendo* podcast. Unless noted, the Chief Justice ended the argument period either by interrupting an advocate or saying “thank you” when an advocate paused and another Justice was not talking.

As I explained in the paper, I began the questioning period when the Chief Justice said a Justice’s name and the Justice then started talking. I ended the questioning period when the Chief Justice said thank you or the subsequent Justice’s name and the questioning Justice stopped talking.

*USPTO v. Booking.com*⁹⁷

- Chief Justice: 2:33-6:00, 37:34-41:34
- Justice Thomas: 6:03-9:52, 41:36-45:32
- Justice Ginsburg: 9:54-13:32, 45:34-49:24
- Justice Breyer: 13:36-16:12 (Justice Breyer ended), 49:26-53:24
- Justice Alito: 16:16-19:52, 53:26-56:55
- Justice Sotomayor: 20:06-23:34, 56:57-1:00:47
- Justice Kagan: 23:36-28:07, 1:00:49-1:04:21
- Justice Gorsuch: 28:09-31:38, 1:04:22-1:08:48
- Justice Kavanaugh: 31:40-34:29 (Justice Kavanaugh ended), 1:08:51-1:12:03

*Agency for International Development v. Alliance for an Open Society*⁹⁸

- Chief Justice: 2:30-5:56, 33:23-35:56
- Justice Thomas: 5:58-8:56 (Justice Thomas ended), 35:57-40:14

⁹⁵ Confirmation Hearing on the Nomination of John G. Roberts, Jr., to be Chief Justice of the United States: Hearing Before the Subcomm. on the Judiciary, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.).

⁹⁶ Jacobi & Schweers, *supra* note 4, at 1496.

⁹⁷ For the following questioning periods, see Oral Argument, *Booking.com*, *supra*, note 18. The time from 19:54-20:06 was when the Chief Justice called Justice Sotomayor’s name before she un-muted her microphone.

⁹⁸ For the following questioning periods, see Oral Argument, *Agency for International Development*, *supra*, note 19. The time from 19:44-19:45 was when the Chief Justice called Justice Sotomayor’s name before she un-muted her microphone.

- Justice Ginsburg: 8:57-12:44, 40:16-44:47
- Justice Breyer: 12:45-16:11, 44:48-47:47 (Justice Breyer ended)
- Justice Alito: 16:12-19:44, 47:50-52:02
- Justice Sotomayor: 19:54-24:04, 52:04-46:46
- Justice Gorsuch: 24:06-27:14, 56:49-1:02:33
- Justice Kavanaugh: 27:17-30:28, 1:02:35-1:05:02 (Justice Kavanaugh ended)

*Little Sisters of the Poor v. Pennsylvania/Trump v. Pennsylvania*⁹⁹

- Chief Justice: 2:19-3:50, 26:50-29:22, 52:54-55:27
- Justice Thomas: 9:26-12:08, 29:27-32:04, 55:29-1:00:48
- Justice Ginsburg: 4:09-9:24, 32:06-34:17 (Chief Justice interrupted/cut off Justice Ginsburg); 1:00:50-1:04:08
- Justice Breyer: 12:10-13:26 (Justice Breyer ended), 34:19-36:51, 1:04:10-1:08:06 (Justice Breyer ends)
- Justice Alito: 13:27-15:53 (Justice Alito ended), 36:53-40:01, 1:08:07-1:15:37
- Justice Sotomayor: 15:56-18:39 (Chief Justice interrupted/cut off Justice Sotomayor and counsel), 40:02-42:24, 1:15:38-1:20:53 (Chief Justice interrupted/cut off Justice Sotomayor)
- Justice Kagan: 18:41-21:46, 42:26-44:45, 1:20:55-1:26:48 (Justice Kagan ended)
- Justice Gorsuch: 21:48-23:05 (Justice Gorsuch ended), 45:01-47:23, 1:26:50-1:32:57 (Justice Gorsuch ended)
- Justice Kavanaugh: 23:07-24:21 (Justice Kavanaugh ended), 47:25-50:23, 1:32:59-1:38:09 (Justice Kavanaugh ended)

*Barr v. American Ass'n of Political Consultants, Inc.*¹⁰⁰

- Chief Justice: 2:31-6:06, 36:41-40:04
- Justice Thomas: 6:07-9:28, 40:06-43:28
- Justice Ginsburg: 9:31-12:38, 43:30-47:03
- Justice Breyer: 12:40-15:08 (Justice Breyer ended), 54:29-57:43 (Justice Breyer ended)
- Justice Alito: 15:09-18:24, 47:18-51:10
- Justice Sotomayor: 18:25-22:19, 51:11-54:27
- Justice Kagan: 22:21-25:39, 57:47-1:01:33

⁹⁹ For the following questioning periods, see Oral Argument, *Little Sisters*, *supra*, note 18. The time from 3:50-4:09 was when the Chief Justice called Justice Thomas's name before he moved on to call on Justice Ginsburg.

¹⁰⁰ For the following questioning periods, see Oral Argument, *Barr*, *supra*, note 18. The time from 47:03-47:18 was when the Chief Justice called Justice Breyer's name before he moved on to call on Justice Alito.

- Justice Gorsuch: 25:41-30:10, 1:01:35-1:05:05
- Justice Kavanaugh: 30:11-34:23 (counsel ended), 1:05:15-1:09:10

*McGirt v. Oklahoma*¹⁰¹

- Chief Justice: 2:15-3:47, 24:58-26:42, 44:41-45:48
- Justice Thomas: 3:48-6:36, 26:44-28:29 (Justice Thomas ended), 45:49-48:01
- Justice Ginsburg: 6:38-9:45, 29:31-30:34, 48:02-50:42
- Justice Breyer: 9:48-12:08, 30:35-32:39; passed on third round of questioning
- Justice Alito: 12:10-14:36, 35:17-37:28, 50:49-53:11
- Justice Sotomayor: 14:41-16:51, 32:55-35:35 (Chief Justice interrupted/cut off Justice Sotomayor), 53:13-56:01
- Justice Kagan: 16:52-18:51, 37:30-39:44, 56:03-58:52
- Justice Gorsuch: 18:53-21:07, 39:45-40:04 (Justice Gorsuch ended), 58:54-1:02:33
- Justice Kavanaugh: 21:09-23:46, 41:06-43:28 (Chief Justice and Justice Kavanaugh ended), 1:02:35-1:04:59

*Our Lady of Guadalupe*¹⁰²

- Chief Justice: 2:09-4:02, 26:20-28:03, 53:05-55:18
- Justice Thomas: 4:04-5:25, 28:04-29:59 (Justice Thomas ended), 55:18-59:42
- Justice Ginsburg: 5:27-8:09, 30:00-33:33, 53:43-1:04:17 (Justice Ginsburg ended)
- Justice Breyer: 8:09-10:32 (unclear if Chief Justice interrupted/cut off Justice Breyer), 33:34-36:29 (Justice Breyer ended), 1:04:18-1:09:42
- Justice Alito: 10:32-12:46 (Justice Alito ended), 36:33-38:46, 1:09:42-1:15:41
- Justice Kagan: 16:02-19:34, 41:54-44:46, 1:20:42-1:25:52 (Justice Kagan ended)
- Justice Gorsuch: 19:34-21:56, 44:48-48:02, 1:25:53-1:31:22 (Justice Gorsuch ended)
- Justice Kavanaugh: 21:56-25:04, 48:02-50:27, 1:31:24-1:35:14 (Justice Kavanaugh ended)

¹⁰¹ For the following questioning periods, see Oral Argument, *McGirt*, *supra*, note 18. The time from 32:39-32:55 was when the Chief Justice called Justice Alito's name before moving on to call on Justice Sotomayor.

¹⁰² For the following questioning periods, see Oral Argument, *Our Lady of Guadalupe*, *supra*, note 31.

*Trump v. Mazars*¹⁰³

- Chief Justice: 2:22-4:36, 27:04-28:26, 49:00-50:57, 1:18:34-1:21:02
- Justice Thomas: 7:17-9:20, 28:26-29:56 (Justice Thomas ended), 50:57-53:24 (Justice Thomas ended), 1:20:05-1:22:50
- Justice Ginsburg: 4:52-7:16, 29:58-32:07 (Chief Justice interrupted/cut off Justice Ginsburg), 53:28-54:59 (Justice Ginsburg ended); pass on fourth round of questioning
- Justice Breyer: 9:20-11:53 (Chief Justice interrupted/cut off Justice Breyer), 32:10-34:35, 55:02-58:12 (Justice Breyer ended), 1:23:01-1:25:34
- Justice Alito: 11:53-14:19, 34:35-37:01, 58:14-1:03:20, 1:25:35-1:27:33
- Justice Sotomayor: 14:19-17:50, 37:02-39:44, 1:03:20-1:06:31 (Chief Justice interrupted/cut off Justice Sotomayor and counsel), 1:27:34-1:28:35 (Chief Justice interrupted/cut off Justice Sotomayor)
- Justice Kagan: 17:50-21:05, 39:46-42:21, 1:06:32-1:09:42 (Justice Kagan ended), 1:28:36-1:30:39
- Justice Gorsuch: 21:05-23:32, 42:21-44:10, 1:09:44-1:13:10, pass on fourth round of questioning
- Justice Kavanaugh: 23:32-26:06, 44:12-46:41, 1:13:10-1:18:20, 1:30:45-1:33:17

*Trump v. Vance*¹⁰⁴

- Chief Justice: 2:13-4:42, 25:45-28:08, 51:43-55:36, 1:28:14-1:30:39
- Justice Thomas: 4:43-6:23 (Justice Thomas ended), 28:10-30:26, 55:37-59:30 (Justice Thomas ended), 1:30:40-1:32:14
- Justice Ginsburg: 6:26-8:30, 30:27-33:39, 59:31-1:02:14 (Justice Ginsburg ended); pass on fourth round of questioning
- Justice Breyer: 8:52-11:45, 33:39-36:20, 1:02:17-1:04:44 (Justice Breyer ends); pass on fourth round of questioning
- Justice Alito: 11:45-13:46 (Justice Alito and Chief Justice ended), 36:20-39:12, 1:04:45-1:10:26, 1:32:24-1:33:40
- Justice Sotomayor: 13:48-16:53, 39:13-41:57 (Chief Justice interrupted/cut off Justice Sotomayor and counsel), 1:10:26-1:14:54, 1:33:44-1:35:41
- Justice Kagan: 16:54-18:42, 42:00-44:45, 1:14:54-1:18:38 (Justice Kagan ended), 1:35:43-1:36:56

¹⁰³ For the following questioning periods, see Oral Argument, *Mazars*, *supra* note 18. The time from 4:36-4:51 was when the Chief Justice called Justice Thomas's name before moving on to call on Justice Ginsburg.

¹⁰⁴ For the following questioning periods, see Oral Argument, *Vance*, *supra* note 21.

- Justice Gorsuch: 18:43-21:23, 44:47-47:31, 1:18:39-1:22:44 (Justice Gorsuch ended), pass on fourth round of questioning
- Justice Kavanaugh: 21:24-24:30, 47:33-49:24, 1:22:46-1:28:04 (Justice Kavanaugh ended), 1:37:01-1:39:28

*Chiafalo v. Washington*¹⁰⁵

- Chief Justice: 2:17-5:30, 38:21-42:25
- Justice Thomas: 5:32-10:02, 42:27-45:33
- Justice Ginsburg: 10:04-12:31 (Justice Ginsburg ended), 45:34-46:28 (Justice Ginsburg ended)
- Justice Breyer: 12:33-16:07, 46:30-50:54 (Justice Breyer ended)
- Justice Alito: 16:16-20:22, 50:56-55:15
- Justice Sotomayor: 20:29-24:32, 55:16-1:00:00 (Chief Justice interrupted/cut off Justice Sotomayor)
- Justice Kagan: 24:33-27:50, 1:00:01-1:04:02 (Justice Kagan ended)
- Justice Gorsuch: 27:51-31:31, 1:04:04-1:06:42 (Justice Gorsuch ended)
- Justice Kavanaugh: 31:33-35:04, 1:06:45-1:11:03

*Colorado v. Baca*¹⁰⁶

- Chief Justice: 2:14-6:46, 32:14-35:35
- Justice Thomas: 6:47-9:44 (Justice Thomas ended), 35:36-38:51 (Justice Thomas ended)
- Justice Ginsburg: 9:46-11:57 (Justice Ginsburg ended), 38:53-41:25 (Justice Ginsburg ended)
- Justice Breyer: 12:00-15:27 (Justice Breyer ended), 41:28-44:45 (Justice Breyer and the Chief Justice ended)
- Justice Alito: 15:29-19:00, 44:46-49:39
- Justice Kagan: 19:01-22:24, 49:42-52:27 (Justice Kagan and the Chief Justice ended)
- Justice Gorsuch: 22:46-26:42, 52:31-55:27 (Justice Gorsuch ended)
- Justice Kavanaugh: 26:43-30:10, 55:30-57:50 (Justice Kavanaugh ended)

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¹⁰⁵ For the following questioning periods, see Oral Argument, *Chiafalo*, *supra* note 19. The time from 16:07-16:16 was when the Chief Justice called Justice Alito's name before Justice Alito started speaking.

¹⁰⁶ For the following questioning periods, see Oral Argument, *Baca*, *supra* note 37.