REBUTTAL TIME IN SUPREME COURT ARGUMENTS

Appellate lawyers almost always reserve time for rebuttal when in a position to do so. Reserved time for rebuttal gives advocates the opportunity to raise points that they were not able to make during their initial argument and to address points made during their opponent's argument. More simply, reserving rebuttal time allows a lawyer to "have the last word" and perhaps leave a lasting impression on the court.

Considering the many benefits of reserving time for rebuttal, it is no wonder that lawyers in all twenty-three cases that we considered this semester reserved some amount of time for rebuttal.[1] This paper attempts to identify how the advocates used that time to further their arguments, as well as how the justices used that time to seek clarifications and make points of their own. Section I begins by presenting the amount of time advocates reserved. Section II analyzes the specific points that advocates were able to make during rebuttal on their own initiative (i.e. not in response to a question asked by a justice). Section III switches the focus of attention to the justices, particularly the number and type of questions asked by different justices. Section IV analyzes one strategy used by some of the advocates—stating that they intend to make a specific number of points—to see whether it is correlated with more effective rebuttal arguments and fewer interruptions from justices. Section V briefly concludes.

I. Amount of Time Reserved

In the twenty-three cases we considered this semester, advocates reserved a total of eighty minutes for rebuttal, and average of just under three and a half minutes per case.[2] Eric Miller, the lawyer representing the plaintiff in *Lewis v. Clarke*,[3] reserved seven minutes for rebuttal, the most of any case considered. Three different attorneys reserved only one minute of rebuttal time.[4] Four minutes was the median amount of time reserved, as well as the most common amount of time reserved (eight advocates reserved four minutes, twice as many as reserved any other amount of time).[5]

II. "New" Points Made

A. "New" Points

Generally, during rebuttal, advocates are doing one of two things: presenting arguments to judges on their own initiative or responding to a question asked by a justice. This paper refers to the points advocates make on their own initiative (i.e. not in direct response to a justice's question) as "new" points. Attorneys have more control over the discussion when making new points then when responding to justices, as attorneys can select the topics covered in the points they make on their own initiative, but have much less control the topics covered by justices' questions. Thus, this paper accepts the proposition that the more time spent during rebuttal making new points, and the less time spent responding to questions, the more control an attorney had over the rebuttal discussion. This paper consequently treats new points as a sign of an effective oral argument.

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[1] *See* Appendix 1, which lays out the data I collected on cases we examined this semester.

[2] Appendix 1.

[3] *Lewis*, Oral Arg. T. at 50.

[4] These attorneys represented the petitioners in *Expressions Hair Design v Schneiderman, Beckles v. United States*, and *Hernandez v. Mesa*.

[5] Appendix 1.

Advocates made a total of ninety-eight new points on rebuttal in the cases we considered, an average of about 4.26 new points per case.[6] The median number of new points made was four, which was also the most common number.[7]

Former Acting Solicitor General Ian Gershengorn made twelve new points in his rebuttal argument on behalf of the NLRB in *NLRB v. SW General, Inc.*,[8] the most in any case we considered.[9] Interestingly enough, the NLRB lost that case.[10] Former Solicitor General Paul Clement was able to make the second most new points in rebuttal (eleven) in *McCrory v Harris*, which has yet to be decided.[11] The fact that the two attorneys who made the most new points in rebuttal both at one time were Solicitor General of the United States might suggest that lawyers with experience arguing before the Supreme Court are better at working new points into their rebuttal arguments. However, Christina Swarns, the attorney who made the third most new points (ten),[12] is currently the Litigation Director of the NAACP Legal Defense & Educational Fund and does not have significant experience arguing before the Supreme Court.[13] Ms. Swarns made those ten points in her successful argument on behalf of a criminal defendant.[14] Ms. Swarns' presence in the small group of attorneys who made ten or more new points suggests that lawyers without Solicitor-General-level experience before the Court are also capable of fitting a large amount of new points into their rebuttal time.

Three attorneys were only able to make one new point during their rebuttal.[15] Janice Bergmann, an Assistant Federal Defender, was only able to make one point in a losing effort on behalf of Mr. Beckles in *Beckles v. Florida*.[16] Stanley B. Eisenhammer, another lawyer with no experience arguing before the Supreme Court,[17] also was only able to make one point in rebuttal in *Manuel v. City of Joliet.*[18] However, the Court did find for Mr. Eisenhammer's client in that case.[19] The final lawyer who only made one new point on rebuttal, Deputy Solicitor General Edwin Kneedler, is not like Ms. Bergmann or Mr. Eisenhammer in that he has argued over 125 cases before the Supreme Court.[20] Thus, while this small sample of data suggests that inexperienced attorneys are more likely to struggle making new points in rebuttal, even experienced attorneys can encounter the same difficulties.

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[6] Appendix 1.

[7] *Id.*

[8] *SW General*, Oral Arg. at 50–53.

[9] Appendix 1.

[10] NLRB v SW Gen. Inc., No. 15-1251, 2017 WL 1050977 (Mar. 21, 2017).

[11] *McCrory*, Oral Arg. at 55–60.

[12] *Buck v. Davis*, Oral Arg. at 46–49.

[13] *Christina Swarns*, LDF, http://www.naacpldf.org/christina-swarns.

[14] Buck v. Davis, 137 S. Ct. 759, 775–76 (2017).

[15] *Id*.

[16] *Beckles*, Oral Arg. at 54–55.

[17] *See* Kimberly Robinson, *Odd Request for Supreme Court First Timer*, BLOOMBERGBNA, https://www.bna.com/odd-request-supreme-n57982068386/.

[18] *Manuel*, Oral Arg. at 53–56.

[19] Manuel v. City of Joliet, Ill., No. 14-9496, 2017 WL 1050976, at *6 (Mar. 21, 2017).

[20] Robert Barnes, *Edward Kneedler found a career and calling arguing before the Supreme Court*, WASHINGTON POST https://www.washingtonpost.com/politics/courts_law/edwin-kneedler-found-a-career-and-a-calling-arguing-before-the-supreme-court/2014/09/10/bfde2bc6-345a-11e4-9e92-0899b306bbea_story.html?utm_term=.6395abccf265. Mr. Kneedler only made one point in his rebuttal argument on behalf of the United States Department of Justice in *Sessions v. Morales-Santana. Morales-Santana*, Oral Arg. at 54–57.

B. Efficiency

Because the amount of time advocates reserve for their rebuttals directly affects the total number of new points an attorney is able to make during a rebuttal, it is likely that the number of new points per minute of time reserved for rebuttal is a better measure of advocate success than the total number of new points made. Appendix 1 and this paper refer to the number of new points per minute of time reserved for rebuttal as an NPPM score (New Points Per Minute).

The average NPPM score was 1.34, meaning the average attorney made just over four new points every three minutes.[21]

Interestingly, the highest NPPM score was earned by Deepak Gupta on behalf of Expressions Hair Designs in *Expressions Hair Design v. Schneiderman*,[22] a case that was decided in favor of Expressions.[23] Mr. Gupta was one of the three attorneys who only reserved one minute of rebuttal time,[24] but was able to make the most of his minute by making four new points.[25] The advocate with the second-highest NPPM score was John Bursch who represented Jae Lee in *Lee v. United States*, a case which is yet to be decided.[26] Mr. Bursch was able to make seven new points in two minutes for an NPPM score of 3.5.[27] Like Mr. Gupta,[28] Mr. Bursch is an appellate advocate with a wealth of experience.[29] The three attorneys who made the most new points, Mr. Gershengorn, Mr. Clement, and Ms. Swarns, round out the top five NPPM scores. Thus, of the five most "efficient" attorneys, four had extensive Supreme Court experience, suggesting a correlation. Furthermore, three of the five cases argued by these attorneys have been decided, and two went in favor of the attorney's client, possibly suggesting that an efficient rebuttal argument might be correlated with a positive result.

Mr. Eisenhammer and Mr. Kneedler, two of the attorneys who only made one point, received the lowest NPPM score, 0.33 (both made one new point in three minutes of rebuttal time).[30]

C. Addressing Opponents' and Justices' Questions and Comments

Attorneys often use at least a portion of their time to explicitly address questions or comments previously proffered by their opponent(s) or the justices.[31] Addressing a comment made by an opposing lawyer can be an effective strategy because it allows the lawyer to directly speak to the flaws in the opponent's argument. For example, during Malcom Stewart's rebuttal argument in *Lee v. Tam*, he stated that "[Opposing counsel]'s position clearly is that the test for

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[21] Appendix 1.
[22] *Id*.
[23] No. 15-1391, 2017 WL 1155913 (2017),
[24] *See supra*, note 4 and accompanying text.
[25] *Expressions*, Oral Arg. at 63–64.
[26] Appendix 1.
[27] *Id*.
[28] *Deepak Gupta*, GUPTA WESSLER, http://guptawessler.com/people/deepak-gupta/.
[29] *John Bursch*, BURSCH LAW PLLC, http://www.burschlaw.com/.
[30] Appendix 1.
[31] *Id*. According to Timothy S. Bishop , your "rebuttal will be most effective when you crystallize your principal arguments and deploy them—either to address new arguments respondent has raised or to address questions the Justices have posed to respondent's counsel." *Oral Argument in the Roberts Court*, AMERICAN BAR ASSOCIATION, 2, 2009, https://www.mayerbrown.com/files/News/57c309ea-fd8c-4064-bfc1-f957abb30dbf/Presentation/NewsAttachment/fc7d0d22-7f60-46c0-ab5d-7a0318d507f8/bishop35n2.pdf.

constitutionality of a registration condition is, could the government ban this speech altogether? And putting that in place would eviscerate the trademark registration program."[32] In this way, Mr. Stewart was able to remind the justices of his opponent's argument, reframe it in his own words, and suggest the negative practical consequences that would follow if it was accepted.

Addressing previous statements made by judges can also be an effective strategy. Citing a comment made by a justice earlier in the oral argument in support of a statement being made in rebuttal lends an air of authority to the statement. For example, Former Solicitor General Gershengorn stated in his rebuttal argument in *Jennings v. Rodriguez* that "There are two, as Justice Alito suggested, two fundamental differences with the Patriot Act. The first is that it allows for a certification. . . . The second . . . is that it overrides *Zadvydas* and actually permits the attorney general to provide for detention, even when there's no foreseeable likelihood of relief."[33] In this way, Mr. Gershengorn was able to make his point and demonstrate that Justice Alito agreed with it.

Referring in rebuttal to questions justices asked the opposing party can also be effective. For example, in *Manuel v. City of Joliet,* Mr. Einsenhammer began his rebuttal by stating "Just to answer Justice Kennedy's question about reasonable error on a detention, in that situation the officer would have the qualified immunity defense that would, assuming it was objectively reasonable, he would -- he would be protected in that situation."[34] By doing so, Mr. Eisenhammer was able to suggest his own answer to the question and calm a concern Justice Kennedy had voiced while questioning the other party.

In the twenty-three cases we considered, twenty attorneys addressed at least one comment or question offered earlier in the argument during their rebuttal.[35] In total, fifty previous comments and questions were addressed, about two thirds of which were made by the justices.[36] Mr. Gershengorn was able to address five comments and questions made by the justices in his rebuttal in *NLRB v. SW General*, as was Mr. Bursch in his rebuttal in *Lee v. United States*.[37] No other attorney addressed more than three.[38] The three attorneys who did not address any comments or questions previously made by the justices or their opponent were Mr. Eisenhammer and Mr. Kneedler, discussed in Sections II.A and II.B, and Stuart Banner who argued on behalf of Shannon Nelson in *Nelson v. Colorado.*[39] Mr. Banner, like Mr. Eisenhammer, was making his first appearance before the Supreme Court. The fact that the two attorneys who addressed the most comments and questions previously made by judges are both highly regarded and very experienced, while two of the three who addressed none were appearing before the Court for the first time suggests that there is a correlation between an attorney's supreme court experience and his or her ability to weave the justices previous statements into his or her rebuttal argument.

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[32] *Lee v. Tam*, Oral Arg. at 49.
[33] *Jennings*, Oral Arg. at 65–66.
[34] *Manuel*, Ora Arg. at 53.
[35] Appendix 1.
[36] *Id*.
[37] *Id*.
[38] *Id*.
[39] *Manuel*, Oral Arg. at 53–56; *Morales-Santana*, Oral Arg. at 54–57; *Nelson*, Oral Arg. at 52–56.

III. Questioning by the Justices

A. Number of Questions

The justices asked a total of fifty-eight questions during rebuttal in the cases we studied, an average of about two and a half per case.[40] The median number of questions during rebuttal was two.[41] On average the justices asked one question every minute and twenty-four seconds.

By far the most questions were asked in *Star Athletica v. Varsity Brands*, a complicated case about the application of copyright law to clothing designs.[42] In that case, the justices asked twelve questions of John J. Bursch, the attorney representing Star Athletica, during the six minutes of rebuttal time.[43] Perhaps not surprisingly, Star Athletica lost the case in a six to two decision, and all three justices who questioned Mr. Bursch during his rebuttal argument sided with the majority.[44] However, the second-most questions, six,[45] were posed to Mr. Eisenhammer in *Manuel v. City of Joliet,* a case which was decided in favor of Mr. Eisenhammer and his client.[46] These cases also had the highest average number of questions per minute of rebuttal time (two each).[47] This suggests that a large amount of questioning during rebuttal does not necessarily mean that a party will lose the case.

In five cases, the justices asked no questions during rebuttal time: *Buck v. Davis*, *NLRB v. SW General*, *Expressions Hair Design, Beckles,* and *Hernandez v Mesa.*[48] In *Expressions*, *Beckles*, and *Hernandez*, the advocate only reserved one minute of rebuttal time, leaving little time for the justices to ask any questions.[49] However, in *Buck* and *SW General*, the advocates each reserved four minutes for rebuttal.[50] In those cases, the justices had ample time to ask questions, but the advocates were able to monopolize the conversation and use it to make "new" points (as discussed in Section II.A, Mr. Gershengorn made twelve new points during rebuttal in *SW General* and Ms. Swarns made ten new points during rebuttal in *Buck*, the most and third-most new points made, respectively).[51] However, other than the facts that both attorneys were able to use their rebuttal argument to make their own points rather than to respond to questions from the justices, *SW General* and *Buck* have little in common: *SW General* was argued by an experienced Supreme Court litigator, Ian Gershengorn, and went against Mr. Gershengorn's client,[52] while *Buck* was argued by an attorney with no experience before the Supreme Court, Christina Swarns, and was decided in favor of Ms. Swarns' client.[53] Thus, it is hard to draw any conclusions about the correlation between a lack of questions from the justices during rebuttal and an attorney's experience or a party's chances of winning a favorable outcome.

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[40] Appendix 1.
[41] *Id*.
[42] *Id*.
[43] *Varsity*, Oral Arg. At 55–62.
[44] Star Athletica, L.L.C. v. Varsity Brands, Inc., No. 15-866, 2017 WL 1066261 (U.S. Mar. 22, 2017). The three justices who asked questions were Justice Sotomayor, Justice Kagan, and Justice Ginsburg.
[45] Appendix 1.
[46] Manuel v. City of Joliet, Ill., No. 14-9496, 2017 WL 1050976, at *6 (Mar. 21, 2017).
[47] Appendix 1.
[48] *Id*.
[49] *Expressions Hair Design,* Oral Arg. T. at 60; *Beckles* Oral Arg. T. at 55; *Hernandez* Oral Arg. T at 54.
[50] *Buck v. Davis*, Oral Arg. at 46; *SW General*, Oral Arg. at 50.
[51] *Buck v. Davis*, Oral Arg. at 46–49; *SW General*, Oral Arg. at 50–53.
[52] NLRB v SW Gen. Inc., No. 15-1251, 2017 WL 1050977 (Mar. 21, 2017).
[53] Buck v. Davis, 137 S. Ct. 759, 775–76 (2017).

B. Types of Questions

Justices ask a number of different kinds of questions during rebuttal. This paper divides questions by judges into three distinct types: follow-up questions, hypotheticals, and new questions. Follow-up questions refer to a justices' question that directly relates to the advocate's most recent statement. For example, during Mr. Bursch's rebuttal argument in *Star Athletica v. Varsity Brands*, he had stated "it's more than just the shape" at which point Justice Ginsburg interjected "But we -- everybody agrees that the shape, the cut of the dress, that the garment itself is not copyrightable, right?"[54] Justice's Ginsburg's question is a classic follow-up—it is directly responsive to Mr. Bursch's previous statement. Hypotheticals are questions posed by the justices that ask an advocate to respond to an imagined scenario. The following question asked by Justice Alito during rebuttal argument in *Manuel v. City of Joliet* is a perfect example: "What happens in this situation? The person is -- is initially arrested and held for a period of time based on fabricated evidence, but then before trial, shortly before -- before trial, other valid evidence is gathered and person is convicted at the trial."[55] Finally, new questions are questions that are neither follow-ups nor hypotheticals.

Of the fifty-eight questions asked, seven were new questions, six were hypos, and forty-five were follow-ups.[56] This relative frequency of follow-ups as compared to the other two types of questions may mean that advocates have a considerable amount of control over a discussion that includes questioning from the justices, as justices' questions are usually related to the topic being discussed. However, advocates have less control over the discussion that follows a follow-up question than they do when no question is asked as follow-up questions allow the justices to explore the facets of the previous discussion that they find relevant, not those the advocate wishes to explore.

C. Questions Asked by the Individual Justices

The chart below shows the number of questions asked by each individual justice, as well as the type. Justice Sotomayor asked the most questions, eighteen.[57] Justice Thomas, who rarely ever asks questions,[58] asked zero.[59] More interestingly, Chief Justice Roberts also did not ask any questions during rebuttal argument in the twenty-three cases we considered. This might suggest a concerted effort on Chief Justice Robert's behalf to allow advocates to use their rebuttal time in the manner they wish. If this is in fact the Chief Justice's goal, it seems to be in line with other aspects of his management of an oral argument that "seem[] to be part of an effort to ensure that [advocates] have the latitude to present [their] case and respond to the Court's questions effectively . . . ."[60]

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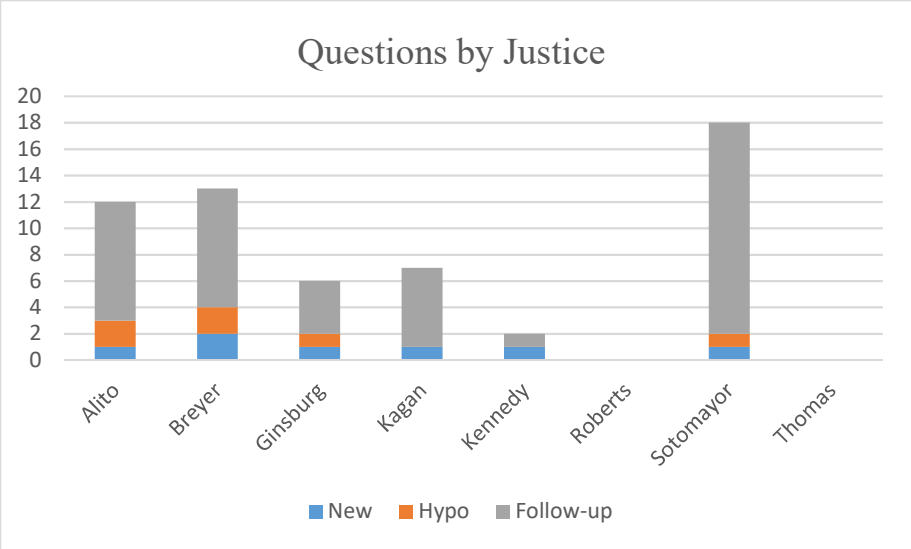
[54] *Star Athletica*, Oral Arg. at 60.
[55] *Manuel*, Oral Arg. at 54.
[56] Appendix 1.
[57] Appendix 1.
[58] *See* Derrick Augustus Carter, *Famous Criminal Appeals During the 2005-2006 Term of the United States Supreme Court*, 36 Cap. U. L. Rev. 883, 965 n. 143 (2008).
[59] *Id*.
[60] *Id*.



Analyzing the questions asked during rebuttal along standard liberal-conservative lines demonstrates that advocates are markedly more likely to be asked a question during their rebuttal by a liberal justice than by a conservative justice. Whereas conservative justices only asked fourteen questions during rebuttal, the liberal justices asked forty-four, more than three times as many.[61] Keeping this in mind, advocates preparing to argue before the Roberts court might want to consider tailoring their rebuttal arguments to address the concerns of the liberal justices.

IV. Numbering

This section focuses on one strategy employed by a few advocates during their rebuttal argument: "numbering." "Numbering," as the term is used in this paper, occurs when an advocate states that he or she is about to make a certain number of points. For example, Jeff Fisher began his rebuttal argument in Pena-Rodriguez v Colorado by stating "I'd like to make four points, please." It seems possible that numbering warns the justices of the advocate's intent to make multiple points without interruption, and that the justices may heed that warning and be less likely to interrupt. If this is true, it is likely that numbering would be correlated with an increased efficiency score and fewer questions from the justices.

A total of six advocates used numbering during their rebuttal arguments.[62] Despite the fact that those advocates reserved slightly less rebuttal time than their peers (they reserved an average of three minutes per rebuttal), they were able to make an average of 5.67 new points per rebuttal.[63] Advocates who did not use numbering, on the other hand, only averaged 3.76 new points per rebuttal.[64] In new points per minute, the different is even more glaring: advocates that used numbering made an average of 1.89 NPPM, while advocates who did not made an average of 1.06 NPPM.[65] This information certainly suggests that numbering helps advocates make more new points during a rebuttal argument.

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[62] The advocates represented the petitioners in *Pena-Rodriguez v. Colorado*, *Endrew F. v. Douglas County School District, Lee v. Tam, Moore v. Texas, Packingham v. North Carolina,* and *Lee v. United States*. Appendix 1.

[63] *Id*.

[64] *Id*.

[65] *Id*.

The six advocates who used numbering were also less likely to be interrupted by questions from the justices. Those six advocates were interrupted a total of ten times, for an average of 1.67 questions per rebuttal (.56 questions per minute).[66] Advocates who did not use numbering, on the other hand, received about 2.82 questions per rebuttal (about .78 questions per minute).[67] Again, this data suggests that numbering dissuades the justices from interrupting.

Perhaps not surprisingly, the three of the six cases in which the advocate used numbering during rebuttal that have already been decided all were decided in favor of the petitioner: *Pena-Rodriguez v. Colorado*,[68] *Endrew F. ex rel Joseph F. v. Douglas County School District RE-1*,[69] and *Moore v. Texas*.[70]

V. Conclusion

In summary, this admittedly small sample of data does suggest a few things about rebuttal arguments before the *Roberts* court. First of all, experienced Supreme Court advocates may be more capable of making new points during their rebuttal than inexperienced lawyers, although there are certainly exceptions.[71] Experience lawyers are also may be more likely to explicitly address comments and questions previously made by the justices and their opponent.[72] Justice Sotomayor was the justice most likely to ask a question during rebuttal, and advocates were about three times more likely to receive a question from a liberal justice than from a conservative justice during rebuttal, in large part because Justice Thomas and Chief Justice Roberts never asked any questions.[73] Finally, using numbering during rebuttal argument is correlated with a increased efficiency and fewer interruptions from the justices, as well as (perhaps coincidentally) a successful outcome for one's client.[74]

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[66] *Id*.
[67] *Id*.
[68] 137 S. Ct. 855, 869 (2017);
[69] No. 15-827, 2017 WL 1066260, at *10 (U.S. Mar. 22, 2017)
[70] No. 15-797, 2017 WL 1136278, at *4 (U.S. Mar. 28, 2017)
[71] *See* Sections II.A. and II.B.
[72] *See* Section II.C.
[73] *See* Section III.
[74] *See* Section IV.