



Communication Matters: The NCA Podcast | **TRANSCRIPT**
Episode 18: Muted Justice: Analysis of the Supreme Court's First Telephonic Arguments

****Please note: This is a rough transcription of this audio podcast. This transcript is not edited for spelling, grammar, or punctuation.****

Participants:

Trevor Parry-Giles

Leah Litman

[Audio Length: 0:25:07]

RECORDING BEGINS

Trevor Parry-Giles:

Welcome to *Communication Matters, the NCA podcast*. I'm Trevor Parry-Giles, the Executive Director of the National Communication Association. The National Communication Association is the preeminent scholarly association devoted to the study and teaching of communication. Founded in 1914, NCA is a thriving group of thousands from across the nation and around the world who are committed to a collective mission to advance communication as an academic discipline. In keeping with NCA's mission to advance the discipline of communication, NCA has developed this podcast series to expand the reach of our member scholars' work and perspectives.

Introduction:

This is *Communication Matters, the NCA podcast*.

C-SPAN Audio clip:

Because of the coronavirus for the first time in history, the Supreme Court heard an oral argument via teleconference earlier today. The case involved a popular travel reservation company and its fight to trademark its website, Booking.com. Here's the argument now.

Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States. Oyez, oyez, oyez. All persons having business before the Honorable, the Supreme Court of the United States are admonished to give their attention to the Court is now sitting. God save the United States and this Honorable Court.

Trevor Parry-Giles:

In this episode of *Communication Matters, the NCA podcast*, I'm speaking with Leah Litman. Professor Litman is an assistant professor in the University of Michigan Law School. In this episode, Professor Litman discusses the essay "Muted Justice". It's a publicly accessible essay published on SSRN, a site that is devoted to giving scholars the opportunity to rapidly share early



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stage research. The essay examines how much time each of the Supreme Court Justices was given to ask questions during May's oral arguments and those oral arguments were made over the phone because of the coronavirus pandemic. And so, that makes this particular research study timely and more than a little interesting. First, a bit more about Professor Litman. Prior to joining Michigan's faculty, Professor Litman received the Professor of the Year award in 2019 as an assistant professor at the University of California-Irvine. Professor Litman was also a visiting assistant professor in the Supreme Court Litigation Clinic at Stanford Law School and Professor Litman's research is in the area of constitutional law and federal post-conviction review. Professor Litman has published numerous articles in law journals and has written for the New York Times, The Washington Post and other publications. In addition, Professor Litman is a creator and co-host of *Strict Scrutiny*, a podcast about the Supreme Court and I'm sure they would want us to say subscribe to *Strict Scrutiny* wherever you listen to your podcasts. Hi, Leah and welcome to *Communication Matters*. Thanks for joining me.

Leah Litman:

Thanks so much for having me and thanks so much for including the plug to subscribe to *Strict Scrutiny* as well.

Trevor Parry-Giles:

You bet. Now the essay in question here focuses on the most recent session of the U.S. Supreme Court and because of the COVID-19 pandemic, the oral arguments were rescheduled for May and held over the phone instead of in person which is probably a first for the U.S. Supreme Court. How did that affect the oral arguments and more interestingly perhaps, how did that affect the Chief Justice's role as moderator of those oral arguments?

Leah Litman:

So, usually oral arguments at the Supreme Court are something of a free-for-all. The Court recently instituted a two-minute rule during which during the first two minutes of an advocate's argument, they're allowed to speak without interruptions. But after that, any Justice can speak as they would like. The Chief Justice's role in that sitting is essentially to play traffic cop and determine which of the Justices who want to speak are allowed to. Some of the Justices will try to speak at the same time or talk over one another in which case, it's the Chief Justice's job to say you get to speak or you get to speak and so on. However, in the telephonic arguments from the May sitting, the oral argument was not just an unstructured free-for-all. Instead, the Court directed the advocates and also released this memo to the public that the Justices would question the advocates in serial fashion starting with the most senior Justice. So, each Justice was supposed to have a designated amount of time to question the particular advocates and once that amount of time ended, then the next Justice would begin. And so, in that context, the Chief



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Justice's role was not to determine which of several different Justices who wanted to speak could speak. It was instead to police each Justice is compliance with the time limits and determine when the next Justice would begin speaking and when any particular Justice's time period had concluded.

Trevor Parry-Giles:

Now correct me if I'm wrong. Isn't Clarence Thomas the Senior Justice?

Leah Litman:

Well, so, the Chief Justice is the senior most Justice.

Trevor Parry-Giles:

Right.

Leah Litman:

But yes, aside from him, Justice Thomas is the Justice who has been serving the longest and is the senior most Justice.

Trevor Parry-Giles:

So, did this new system require that Thomas actually speak?

Leah Litman:

Well, it doesn't require anyone to speak. Some of the Justices actually passed when it was their turn to ask questions. So, Justice Breyer passed as did Justice Ginsburg and Justice Gorsuch at different moments of questioning. Justice Thomas in the typical oral argument is not often speaking. He famously keeps quiet during the course of typical arguments. However, during this new format, he elected to ask questions when it was his turn to do so.

Trevor Parry-Giles:

Right, right. It was a surprise as I recall. There was some chatter about the fact that Justice Thomas finally is speaking and maybe that's because he was forced to. Are there other factors that affect this questioning process? Are they, for instance, actually seeing one another like a Zoom call or are there factors beyond the Chief Justice's sort of moderating role that might bear on how these oral arguments took place over the phone?

Leah Litman:

So, we don't have any additional details about whether there's some secret Zoom or Skype session with the Justices and the advocates. That's not available to the public. I think most people



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kind of think that's not happening because if it was, then someone might be able to get a hold of it or it might get released or whatnot. But it's possible. We just don't know. But in any case, it's not available to the public if it is.

Trevor Parry-Giles:

So, what were the overall results of your study before we dig a little bit deeper into the analysis? Who spoke most? Were there significant differences in time that the Justices were provided? A top line sort of executive summary if you will.

Leah Litman:

Yeah. So, top line executive summary, the Justices who spoke the most as far as the average amount of time they were allowed to speak per questioning period were Justice Gorsuch and Justice Sotomayor. They spoke the longest and then Justice Alito spoke one second less per average than they did. So, the three of them definitely spoke the most per questioning period on average. I also measured things like which Justice received the longest amount of time interrupted, the longest individual questioning period or the longest amount of time in a given case adding up the different questioning periods when they were questioning different advocates. In those cases, the Justices who receive the longest individual questioning periods and the longest total talking time per cases we're all conservative male Justices. So, Justice Alito and Justice Kavanaugh had some of the like longer questioning periods as well as the longer total talking time per case. And then the Justices with the shortest questioning periods that were ended by the Chief Justice were women, Justice Ginsburg and Justice Kagan. And then I also measured which of the Justices the Chief Justice interrupted as compared to when he interrupted an advocate.

Trevor Parry-Giles:

Right. And we'll get to that in a second. You argue in the essay that these averages can be a little misleading. Are there particular cases that the conservatives as opposed to the liberals spoke more frequently about or questioned more arduously or aggressively than in other cases and does that tell us something about speaking time or just the docket?

Leah Litman:

Yeah. It's a little bit difficult to know, of course, because there were only ten cases. And so, you can only tell so much when that's your kind of bottom line end. But yes, in some of the cases, there were some notable disparities. So, the longest individual questioning period was by far Justice Alito in the contraception case, *Little Sisters of the Poor*. The longest total time in a given case were the presidential immunity cases when Justice Kavanaugh spoke the longest. So, in some level, those are not that surprising. These are the more kind of politically relevant and



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publicly salient cases and they also seem to be cases in which particular Justices really wanted to talk the most.

Trevor Parry-Giles:

And on the liberal side, were there any cases that particularly excited a liberal Justice or contributed to their greater talking time?

Leah Litman:

So, the one case where I noticed that the more liberal Justices talked more was *Our Lady of Guadalupe School vs. Morrissey-Berru* which involved what's known as a ministerial exemption which is an exemption that applies to non-discrimination statutes that can't be applied to various religious institutions, to certain religious personnel.

Trevor Parry-Giles:

Interesting. Concerning gender and this gets to something you alluded to a minute ago, what did you find? Which Justices were cut off the most? How did that happen? That kind of thing.

Leah Litman:

Yeah. So, some of the gender disparities were relevant to kind of the top line findings that we were discussing. The male Justices had the longest individual questioning periods as well as the longest total talking times in particular cases and the female Justices had the shortest individual questioning periods. There were also 11 times when the Chief Justice interrupted another Justice versus when he interrupted an advocate. So, when the questioning period was drawing to a close, the Chief Justice would say thank you, counsel or say the next Justice's name. And usually he did that when counsel was speaking or when counsel paused. Those were the super majority of instances of how the Chief Justice ended a questioning period. But on 11 occasions, he ended a questioning period by interrupting a Justice and of those 11 occasions, all were of Democratic appointed Justices and nine of them were of women Justices.

Trevor Parry-Giles:

So, the other two were what? Justice Breyer I guess?

Leah Litman:

Justice Breyer. Yep.

Trevor Parry-Giles:

I mean we're not talking a whole lot of Democratic appointees anymore.



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Leah Litman:

Right.

Trevor Parry-Giles:

Do you draw any implications from that? Are there any conclusions that you reach particularly about Chief Justice Roberts and his attempts to balance these oral arguments? Is there anything at work here?

Leah Litman:

Yeah. So, the social science literature more largely suggests that people are more likely to interrupt people with whom they disagree and more likely to let talk people who they like are saying. And in some ways, a Republican appointed Justice who is interrupting his Democratic appointed colleagues more so than his Republican appointed colleagues is entirely consistent with that. You are more likely to interrupt people who you are more likely to disagree with and Justices who are appointed by different Presidents have different ideological valiances and different predilections. So, it's very much consistent with that. Also, who the Chief Justice allowed to talk the most was very much correlated with how the Chief Justice ended up voting in particular cases. So, the Justice who had the longest talking time in a given case, the Chief Justice voted with that Justice as far as the bottom line disposition and I think all but maybe one of the cases because in one of the cases, Justice Gorsuch and Justice Sotomayor were actually tied for the total longest talking time and the Chief Justice only voted with one of them. But in the others, the Chief Justice ended up voting with the Justice who the Chief Justice let talk the most and that's also very much consistent with the social science literature on who you're more likely to interrupt and who you're more likely to let speak.

Trevor Parry-Giles:

Right. Hi, listeners. We're going to take a moment to highlight some of our colleagues' great work and accomplishments and we're going to do that right here and we're going to start right now. So, be sure to check out the new book from Luke Winslow who is an assistant professor at Baylor University. The book is entitled *American Catastrophe: Fundamentalism, Climate Change, Gun Rights and the Rhetoric of Donald J. Trump*. In other news, associate professor of communication Teresa Nance has been named vice president for diversity, equity and inclusion at Villanova University. According to Nance, there has never been a more challenging time to accept the responsibilities of vice president of diversity, equity and inclusion. Never has the work been more important. Never have the chances to make a difference been more real. Congratulations to Dr. Nance. And finally, Elizabeth Liz Petrun Sayers has accepted a position as a social scientist with the FDA or The Food and Drug Administration. Petrun Sayers will be leading campaign evaluations for several of FDA's tobacco prevention campaigns.



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Now I remember, okay, this is a little background. But probably gosh, 15 years ago, a graduate student came to me and said I want to do my dissertation on oral arguments at the Supreme Court and I said to this student at the time, oral arguments don't really matter. I mean they don't really mean anything in the end. The decisions are what matter. Of course, I didn't really believe that but I also didn't want them writing their dissertation on oral arguments. So, I guess the question is does Chief Justice Roberts' move to cut off Justices say anything material about the actual outcome of the case beyond his voting against the people he's cutting off?

Leah Litman:

So, as I was kind of suggesting, I do think that who the Chief Justice allowed to talk the most was indicative of how the Chief Justice would ultimately vote in a given case. It was also particularly in the more publicly salient and ideologically divisive cases. He oftentimes allowed his more conservative colleagues who he is more similar to ideologically and jurisprudentially to talk more. And so, I think oral arguments can be instructive about where a Justice is leaning and which side the Justice is sympathetic to. Even if oral arguments are not necessarily changing where a Justice is voting, they might be pretty good evidence about where a Justice is leaning and how much overlap there is between different Justices.

Trevor Parry-Giles:

Well, and to be fair, my graduate student wanted to measure the sort of persuasive effect of oral arguments and based on what you just suggested and what I believe to be the case, it's less about the persuasive effect of the arguments themselves and more about sort of tea leaf reading, what they can tell us about where Justices are thinking and how they might end up playing themselves out. Yes?

Leah Litman:

Yes. Yep.

Trevor Parry-Giles:

Okay. That's interesting. Your article also noted that previous studies have found what you found which is that Justice Roberts is more likely to cut off women Justices. Some court observers suggest though that at least since those results were initially released, he has tried to minimize those disparities. Do you think that's true and do you think any of those changes are likely to portend future changes that Chief Justice Roberts might make?

Leah Litman:

Yeah. So, the initial study that you mentioned was by Professor Tonja Jacobi who is at Northwestern Law and she wrote it with one of her then students at the time and I believe she's



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working on a follow-up study that could actually empirically tell us whether the Chief Justice has adjusted his practices in a way to address the fact that the female Justices were being interrupted more even though they talked less and did not talk as assertively as some of the male Justices. So, I remember a handful occasions where the Chief Justice refereed a given dispute by giving a talking moment to a female Justice instead of a male Justice. But I just don't know whether in the aggregate, the last four years have been different than the period that Jacobi and her co-author measured and I'm very much looking forward to her findings. I think that the May sitting that I focused on is just unique because it's just the Chief Justice performing a different function and having a different role. And so, that might not be indicative about whether he's adjusted the practices elsewhere. In some ways, I hope it's not.

Trevor Parry-Giles:

Right. How do you think this whole remote experiment worked with regard to oral arguments? I mean they're so opposed to cameras in the Supreme Court. We've had these taped oral arguments in the past. They're on C-SPAN. Right? How do you think this remote oral argument process worked and what does it tell us about moving forward?

Leah Litman:

I think it went very well in a lot of ways. I think it was great for the public to have real-time access to the arguments. And so, more people could participate in real-time assessments and evaluations and the journalists who get to listen to them and then release their reports before the transcripts are ever released and several days before the audio is released. So, I think that the real-time release of audio was really fantastic I think that the Justices for the most part behaved very well and even though the arguments were being broadcast real-time, none of the advocates were grandstanding, none of the Justices were grandstanding. And so, in that sense, they really debunked some of the arguments that are often made to justify why there isn't real-time audio or why there shouldn't be real-time video. So, I think in a lot of ways they were huge successes. In other ways, they were less successful I think in particular the seriatim format or the serial format just allowed the Justices to talk with one another and to press an advocate a lot less than the unstructured form because one Justice couldn't pick up on a line of question and follow up immediately. And so, that led to a much more disjointed conversation than it would have been if it was just unstructured and allowed any Justice to jump in at any point. So, in that respect, I think that they were less helpful to the Justices and to the advocates than the Court's typical oral argument format is.

Trevor Parry-Giles:

That's interesting. I think the Justices probably felt the same way all of us are feeling in this COVID Zoom world where turn taking and reading off of non-verbals, all of that is gone.



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Leah Litman:

Yes.

Trevor Parry-Giles:

It's interesting. They also had and some of our listeners might be aware of this an instance on Wednesday, May the 6th when during these oral arguments suddenly in the background, you could hear a toilet flush.

C-SPAN Audio clip:

Going to be saying hey, call your congressman and change these laws that apply to banks. And what the FCC has said is that when the subject matter [toilet flushing] of the call ranges to such topics, then the call is transformed and it's a call that's been allowed and is no longer allowed. And so, I think—

Trevor Parry-Giles:

I'm curious about what you think the implications of the flush heard around the world might be. How does this affect the prestige, the mystique of the Supreme Court? I mean we've always known they're human after all but did this flush make any kind of impact or difference?

Leah Litman:

I don't think it affected the prestige or mystique of the Court at all or its institutional standing. I do think that that is an example about one of the Justices' worst fears coming to pass and why there is never going to be video in the Court and why it's unlikely that there's going to be real-time audio whenever we revert to a post-pandemic world. They really do not like making themselves into jokes or memes or internet shticks and they don't want to be the butt of public jokes.

Trevor Parry-Giles:

So to speak.

Leah Litman:

Right. This kind of put them in those crosshairs for a little bit.

Trevor Parry-Giles:

Right, right. That's funny. We always ask and because of who we are at The National Communication Association, we're always interested in how communication matters. Right? How does communication matter in this instance do you think in potentially ameliorating some of these gender-based disparities that you've explored in your study and that exists all around us all the time?



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Leah Litman:

So, I think communication matters because the more you know, the more you can do about it and to the extent that the Chief did respond to those earlier findings that his male colleagues were interrupting his female colleagues more, then perhaps he will respond to a set of findings that suggested he could have done a more equitable job of policing the oral arguments that were done telephonically. Given the state of the world and the state of the pandemic, there are very good odds that the Supreme Court session that is going to start for October term is not going to be back to perfectly normal and they might have to do some remote arguments. And in that world, perhaps he will internalize some of these findings and adjust the practices as far as policing different Justices' compliance with the time suggestions and his own ability to kind of enforce those rules. So, that's one of the reasons. But also just more generally, I think it's very important to give all of your colleagues the ability to make their point about a case. Those oral arguments are how people learn about the cases. People were listening to the arguments real-time, law students, aspiring lawyers. And so, it's really important for them to hear all the different Justices' inputs and all the different Justices' voices.

Trevor Parry-Giles:

That's really interesting. Well, I really want to thank you, Leah, for joining us today on *Communication Matters* and talking about your fascinating study. Listeners, this essay will be available on the NCA website at natcom.org/podcast. And I look forward to future endeavors and studies along the same lines, Leah, from you and again, thank you so much for joining me today and thank you listeners for joining us on *Communication Matters, the NCA podcast*.

Leah Litman:

Thanks so much for having me.

Trevor Parry-Giles:

In NCA news, the NCA 106th annual convention will be completely virtual this year and will include both synchronous and asynchronous sessions. Asynchronous content will be available beginning November 1st on NCA Convention Central. Most synchronous sessions will take place as originally scheduled on November 18th through the 22nd. Visit natcom.org/convention to register today. On that page, you'll also find links to NCA's guide to the 2020 convention and a best practices document for participating in the convention virtually.

And listeners, I hope you'll tune in on September 7th for a special episode of *Communication Matters* developed in honor of Labor Day. Two graduate employee labor activists, José G. Izaguirre III and Alicia Massey join me to discuss their experiences as labor organizers and the



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effect that the COVID-19 pandemic may have on graduate employee organizing. Mark your calendar for this important Labor Day discussion. The audio clip at the beginning of today's episode is of introductory remarks of Bar Attorney General against American Association of Political Consultants, Inc., oral arguments that are courtesy of C-SPAN and they took place May 6, 2020. The toilet flush audio clip is from U.S. Patent and Trademark Office against Booking.com, the oral argument courtesy again of C-SPAN May 4th, 2020.

Be sure to engage with us on social media by liking us on Facebook, following NCA on Twitter and Instagram and watching us on YouTube. And before you go, hit subscribe wherever you get your podcasts to listen in as we discuss emerging scholarship, establish theory and new applications, all exploring just how much communication matters in our classrooms, in our communities and in our world. See you next time.

Conclusion:

Communication Matters is hosted by NCA Executive Director Trevor Parry-Giles and is recorded in our national office in downtown Washington DC. The podcast is recorded and produced by Assistant Director for Digital Strategies Chelsea Bowes with writing support from Director of External Affairs and Publications Wendy Fernando and Content Development Specialist Grace Hébert. Thank you for listening.

RECORDING ENDS