Newspaper vs. Non-Newspaper Litigants in the U.S. Supreme Court, 1964-2001

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Newspaper vs. Non-Newspaper Litigants
in the U.S. Supreme Court, 1964-2001

Newspapers have been involved as litigants in some of the most significant First Amendment cases to come before the U.S. Supreme Court. Particularly since the groundbreaking case *New York Times Co. v. Sullivan*\(^1\) in 1964, newspapers have played a prominent role in Supreme Court cases that have defined many important points of First Amendment doctrine and have tested the nation’s commitment to freedom of expression. Newspapers have successfully challenged, among other regulations, strict liability for defamation,\(^2\) a mandatory right of reply for political candidates,\(^3\) prior restraint of publication\(^4\) and a courtroom closure order in a high-profile state murder trial.\(^5\) But not all important Supreme Court cases involving newspapers in the last four-and-a-half decades have resulted in victories for newspapers. Among others, newspapers or their reporters have lost cases on journalist’s privilege,\(^6\) libel\(^7\) and copyright law.\(^8\)

One aspect of these cases that has not been extensively examined is oral argument. Oral argument in newspaper cases, like other cases, exists largely outside the public consciousness due to lack of television coverage in the Supreme Court and limited public access to the Court itself during argument sessions. Although the Supreme Court began transcribing oral arguments for select cases in the early 20th century, the practice of recording oral arguments did not become standard until the late 1960s. Even today, transcripts of oral arguments in some of the Court’s most important late-20th century newspaper cases may be obtained only through the Court’s Library or the National Archives.\(^9\)

Yet the study of Supreme Court oral arguments promises to yield new and important insights about the Court’s decision-making process and the substantive issues
the Court considers. A small group of scholars has begun to make Supreme Court oral arguments the topic of serious study. This research seeks to build on that research and, specifically, to explore whether newspaper litigants are treated differently than other litigants during Supreme Court oral arguments.

**Literature**

Scholars examining the behavior of Supreme Court Justices can generally be divided into three major schools of thought. The legal model contends that “the decisions of the Court are substantially influenced by the facts of the case in light of the plain meaning of statutes and the Constitution, the intent of the Framers, and/or precedent.”

The attitudinal model, meanwhile, theorizes that Justices’ behavior can be described and predicted by the ideological values they hold. Segal and Spaeth found little statistical change in Justices’ initial, non-binding votes after oral argument and their ultimate final votes, lending support to the contention that the Justices’ values have largely if not completely determined case outcomes.

Segal and Cover further attempted to explain how values influence judicial behavior by using pre-confirmation newspaper editorial copy to identify Justices’ values and then gauging the impact of those values on judicial decisions; the authors concluded that the attitudinal model explains judicial behavior remarkably well. In a recent study of ideological drift among Justices, scholars have detected further evidence for the impact of ideology on Supreme Court decisions, observing:

> Drift to the right or, more often, the left is the rule, not the exception. In some instances, the movement may be relatively inconsequential but in others substantial doctrinal change may result.
However, a third theory of judicial behavior—the strategic model—contends that Justices, while attempting to achieve outcomes as close as possible to their policy preference, are influenced by the inclinations of fellow Justices and the norms of the institution of the Supreme Court, as well as external political and societal factors. Murphy concluded opinions of the Court are mostly compromised settlements among Justices. Maltzman and Wahlbeck found that Justices do sometimes change their votes after giving an initial non-binding vote at post-argument conference. The authors attributed these vote changes to the persuasive efforts of other Justices. Epstein and Knight produced an influential work supporting the strategic model but they, like other researchers, did not examine the role of oral argument in the strategic nature of judicial behavior. Other studies have examined various other aspects of the strategic model.

Systematic research about oral argument seeks to understand the function that oral argument plays in the Supreme Court. Wasby, D’Amato and Metrailler found “strong parallels” between Justices’ remarks during argument and their final positions on cases. In looking at oral arguments in school desegregation cases from 1954 to 1969, the authors found:

A judge may appear to be asking the lawyer a question, but it may be a question in form only, with the justice more intent on stating his position. Judges may make a variety of observations which do not necessarily require a response.

The authors also noted Justices use oral arguments to communicate with each other via remarks to counsel; a Justice may bring up points at oral argument that he or she wants fellow Justices to consider later.

McFeeley and Ault provided an early attempt at using content analysis on oral arguments. They broke oral argument questions into the following categories:
substantive questions, repetition, leading questions, procedural questions, tangential questions, hypothetical questions, statements (substantive/factual, rephrasal, challenge, distortion, asides), and interruptions.25 Given that data revealed three of the five top categories dealt with statements rather than questions, the authors concluded, “This indicates that one of the main purposes of oral argument is making one’s views known.”26 Four scholars noted in their 1992 research that about one-third of Justices’ speaking turns (what this manuscript terms “prompts”) were found to deal with an argument’s validity, revealing the importance of persuasion among Justices in oral argument.27

A 2004 study of 10 Supreme Court cases evaluated judicial patterns of questioning by dividing questions into four categories: total questions, questions asked in each case, and questions asked by Justices of the side they eventually voted for and against. The questions were also ranked on a scale of one to five, with lower scores indicating helpful questions and higher scores indicating hostility by the Justice.28 Creating a profile for each Justice, the study determined that in general Justices ask more questions of and display a greater degree of measurable hostility toward the side they eventually rule against.29

In 2001 Johnson examined 75 cases to compare information presented in lawyers’ written briefs to topics discussed at oral argument and topics ultimately discussed in written Court opinions. He found that a significant minority of topics discussed at oral argument were never mentioned in written briefs but were later discussed by Justices in their written opinions. Johnson thus concluded that oral arguments play a vital information-gathering role for Justices, who, as strategic actors, desire outcomes as close
as possible to their policy preferences but who are limited by the parties’ written briefs in terms of the issues they may consider. Johnson, Wahlbeck and Spriggs later found that an attorney’s performance at oral argument was related to a successful disposition in the case, thus emphasizing that oral arguments do matter. Johnson’s other research led him to conclude that oral arguments can “provide unique information the justices use when they make substantive choices about the merits of a case.”

**Research Questions**

Taking note of the above-mentioned literature about judicial behavior, the researchers desired to test the presence of the legal, attitudinal and strategic models in a series of newspaper cases in the latter half of the 20th century. Specifically, this study sought to determine whether judicial behavior at oral argument was related to the identity and status of the litigants. In this regard, three primary characteristics were identified and subjected to close examination: (1) whether the party was a newspaper or not; (2) whether the party was a petitioner or respondent before the Court; and (3) whether the party ultimately won or lost the case. The research questions examined were designed to allow scrutiny of judicial behavior at oral argument:

**RQ1:**
How often do newspapers prevail in Supreme Court appeals when they are the parties filing an appeal (“petitioners”) versus when they are the parties responding to an appeal (“respondents”) filed by the opposition?

**RQ2:**
Are newspaper litigants treated differently than their opponents during oral argument in the U.S. Supreme Court, as measured by number and type of prompts from Justices?

**RQ3:**
Do the number and type of prompts given to newspapers’ attorneys at oral argument before the Supreme Court relate to whether the newspapers ultimately prevail in the case?
Method

Newspaper cases were identified within all the subcategories under the “First Amendment” heading at the OYEZ Project website (http://www.oyez.org) maintained by Northwestern University. These results were then cross-checked against the results of a series of Boolean searches on the same website for terms involving the word “newspaper.” The result was 31 cases involving newspapers as either petitioners (filing an appeal) or respondents (responding to an appeal filed by the other party) in the Supreme Court from 1964 to 2001. (There were no newspaper cases after 2001, although the search was conducted for cases through 2006).

Of the 31 newspaper cases identified for study, oral argument transcripts for 16 of the cases were located at the OYEZ Project website. Transcripts for the remaining 15 cases were not available through the website, but photocopies were obtained in Washington, D.C., at the Supreme Court Library, currently accessible only to members of the Supreme Court Bar.

In all, 3,578 prompts were identified and coded for the following categories: interrogatories, declarations and mixed. An interrogatory occurred whenever the transcript for a particular prompt contained a question mark. Declarations did not contain question marks, and the mixed category included both interrogatories and declarations in a single prompt. Prompts were not coded if they merely contained salutations from the Justices or perfunctory matters such as how much time the litigant’s lawyer had remaining for argument.

Once coding was completed in Microsoft Excel spreadsheets, prompts were grouped in six major categories: newspapers, non-newspapers, petitioners, respondents,
prevailing parties and losing parties. A series of PivotTable Reports produced counts and summaries of the data. Statistical analysis was conducted using the SAS System software.

**Findings**

Overall, newspapers prevailed in 20 of 31 cases (64.5 percent). (See Table 1). This category included high-profile victories by newspapers such as *New York Times Co. v. Sullivan* and *New York Times Co. v. United States* (the “Pentagon Papers” case). As petitioners, newspaper prevailed 17 of 22 times (77.3 percent), whereas newspapers as respondents prevailed 3 of 9 times (33.3 percent). This latter finding is notable given that petitioners, by definition, are fighting an uphill battle to convince the Supreme Court it should reverse the decision reached in the court below. Thus the conclusion to the first research question is that newspapers have been more successful as parties bringing an appeal to the Supreme Court than they have been as parties responding to an appeal brought by opposing litigants.

(Table 1 about here)

Certain groups of litigants in the Supreme Court – including, foremost, newspapers – interacted more with the Justices during oral arguments than their opponents. During their time before the Court at oral argument, advocates for newspapers received more prompts than lawyers for non-newspaper parties. On average, newspapers’ lawyers fielded 63.5 prompts from the Court in each case, whereas their opponents fielded only an average of 52 prompts per case. (See Table 2). Similarly, petitioners, who carry the burden of persuasion and also are given rebuttal, fielded more
prompts than respondents (average of 62 per case compared to average of 54 per case). Finally, losing parties fielded more prompts than winners.

(Table 2 about here)

The relatively large number of prompts given to newspapers may have been influenced by the fact that newspapers in this population of cases were petitioners 22 of 31 times. Petitioners carry the burden to show the Court why the decision below should be overturned and hence might be expected to receive more statements and queries by the Court. But there is evidence the newspapers were treated differently than their opponents regardless of the role each played.

First, the researchers measured the difference between the average number of prompts fielded by the newspapers (mean=63.45, sd.=22.39) and their opposition (mean=51.97, sd.=20.71). A paired t-test showed that this difference was significant (t=3.02, p=.0052). Second, the data showed that newspapers fielded, on average, 27 percent more prompts from the Court than their opponents when the newspapers were petitioners. But even when the newspapers were respondents and the non-newspaper parties were petitioners, the newspapers still garnered more comments and questions from the Court. (See Table 3). Even as respondents who did not carry the burden of convincing the Court to reverse an opinion issued by a court below, the newspapers fielded 10 percent more queries and declarations from the Justices.

(Table 3 about here)

Newspaper litigants in the Supreme Court also dealt with more statements and queries by the Justices at oral argument when examined from the perspective of parties that ultimately won and lost the cases. As demonstrated above in Table 2, the overall
numbers showed that losers got, on average, about 10 percent more prompts than
winners. But newspaper losers got 51.4 percent more prompts than non-newspaper
winners in the same cases. (See Table 4). The gap between prompts to newspapers as
losers and non-newspapers as winners was so large that it largely accounted for the
overall high number of prompts for losers; hence, even though newspapers won more
often than not, and even though newspapers got more questions than their opponents,
losers ultimately fielded more prompts (1,872) than winners (1,706). Notably, newspaper
winners actually received more prompts than their opponent losers, although this gap was
relatively small (an average difference of just under five prompts – see Table 4). In
summary, the answer to the second research question is that newspapers are indeed
treated differently than their opponents at oral argument, and the primary difference is
that Justices ask more questions and make more statements when newspapers’ attorneys
appear before the Court than when opponents’ attorneys appear.

(Table 4 about here)

However, newspaper litigants were not treated differently than opposing litigants
in terms of the percentage of interrogatories and declarations, respectively, included
among the overall number of prompts they fielded from the Court. (See Table 5). For
both newspapers and non-newspapers, the percentage of declarations was between 40 and
41 percent; the percentage of interrogatories was between 47 and 48 percent; and the
percentage of mixed prompts was between 11.75 and 12.5 percent. A chi-square analysis
revealed no significant difference between the type of prompts given, overall, to
newspaper litigants and their opposition ($X^2=0.4003$; df=2; $p=0.8186$).

(Table 5 about here)
Although newspaper parties and non-newspaper parties received about the same mix of prompt types overall in the 31 cases, the mix differed significantly when comparing newspapers-as-respondents to newspapers-as-petitioners. As petitioners, newspapers received more questions (mean=32.8) per case than non-interrogatory statements by the Justices (mean=25). These figures were approximately in line with the overall numbers in these categories. However, as respondents newspapers handled more declarations (mean=28.6) per case than interrogatories (mean=23.3). A chi-square analysis demonstrated that the difference between the newspaper parties’ mix of prompts as petitioners and respondents, respectively, was significant ($X^2=19.1621; df=2; p=<.0001$). Hence it is when newspapers are respondents that the mix of prompts varies, and in that situation, newspapers get a large percentage of declarations (almost 50 percent of all prompts).

The difference in the mix of prompts given to newspapers was not significant when comparing the winning newspapers and losing newspapers. The newspaper winners (mean=29.05) received slightly fewer interrogatories, on average, than newspaper losers (mean=31.8). These figures for newspaper winners and losers were approximately in line with the overall numbers for the mix of prompts for winners and losers. Hence the answer to the third research question is that newspapers’ status as ultimate winners does not seem clearly related to the type of prompts received from Supreme Court Justices.

(Table 6 about here)

Discussion and Conclusion
The case outcomes in this study provide evidence for the conclusion that newspapers in the last four decades have been treated well by the Supreme Court. Newspapers prevailed in the Supreme Court 65 percent of the time despite most often fighting an uphill battle as petitioners desiring a reversal. In fact, newspapers asking for reversals were successful 77 percent of the time. (Overall, petitioners were successful 74 percent of the time, suggesting that the Court’s certiorari process weeds out cases unlikely to be reversed and signaling also that, once petitioners convince the Court to hear their cases, they stand a relatively good chance of being successful). Even though, as respondents, newspapers prevailed only a third of the time, this success rate was higher than the overall success rate (about 26 percent) for respondents in this study. Thus newspapers tend to do well before the Supreme Court in achieving ultimate success.

The results of this study demonstrate that Justices of the Supreme Court of the United States have interacted more, during oral argument, with attorneys from newspaper litigants than the Justices have interacted with non-newspaper litigants’ attorneys. Compared to their opponents, newspapers were given more questions and statements by the Justices in every category studied – as petitioners, as respondents, as winners and as losers. That newspapers received more prompts when they were petitioners and losers was in line with the overall trends in those categories. But the fact that newspapers received more prompts than their opponents when the newspapers were respondents and winners went against the overall numbers and suggested that newspapers truly are treated differently than their opponents by Supreme Court Justices at oral argument.

Although there was no significant difference between the mix of prompts (interrogatories, declarations or mixed) given to newspapers and their status as winners or
losers, there was a significant positive relationship between newspapers’ status as respondents and the percentage of declarations given. This suggests that Justices tend to engage more in strategic behavior when newspapers are respondents. Judicial strategic behavior is often marked by declarations at oral argument because it is through those statements that Justices are able to convey their view of a case and attempt to subtly persuade fellow Justices. Meanwhile, interrogatories signal that Justices conform more closely to the legal model, and this inquisitiveness was present when newspapers petitioned for reversal of an unfavorable decision below.

Further research could explore this by analyzing whether Justices’ questions are truly inquisitive (i.e. open-ended) or whether they merely seek to confirm tentative decisions already reached by Justices. This could be accomplished by analyzing interrogatories for their nature as either open-ended or not (can be answered “yes” or “no”) and their nature as either leading (question itself suggests the answer desired) or not. Such an analysis would shed further light on whether Justices’ behavior at oral argument can be identified as following the legal, attitudinal or strategic model.

The implications of this study’s conclusions are important for newspapers to consider, especially when preparing to litigate cases in the federal courts. Clearly, newspaper parties attract more attention from Supreme Court Justices at oral argument than do their opponents. Newspaper parties in the 31 Supreme Court cases since *New York Times Co. v. Sullivan* frequently presented arguments of First Amendment import, and the Justices clearly wanted to explore and test those arguments as fully as possible at oral argument. This desire for extensive exploration through questioning and other interaction with newspaper attorneys even overcame the newspapers’ sometime status as
respondents and frequent status as winners, both categories in which it would have been expected for newspapers to receive fewer prompts than opponents.

Additionally, that newspapers received more prompts from Justices could be due, at least in part, to the comfort level between Justices and the newspapers’ attorneys. Although this study did not examine this research question in detail, the researchers noted that newspaper attorneys often were experienced and high-profile Supreme Court litigators; the fact that these attorneys appeared before the Court on a regular basis may have provided a level of familiarity that resulted in extensive interaction between the bench and the bar. This would have to be explored through future research, however; examining relationships between the number of cases argued in the Supreme Court by a party’s attorney and the number of prompts received in a given case might prove fruitful in this regard.

Table 1 – Success Rates in the U.S. Supreme Court

<table>
<thead>
<tr>
<th></th>
<th>Petitioner</th>
<th>Respondent</th>
<th>Newspaper</th>
<th>Non-newspaper</th>
<th>Newspaper (petitioner)</th>
<th>Newspaper (respondent)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Won</td>
<td>23/31</td>
<td>8/31</td>
<td>20/31</td>
<td>11/31</td>
<td>17/22</td>
<td>3/9</td>
</tr>
<tr>
<td></td>
<td>(74.2%)</td>
<td>(25.8%)</td>
<td>(64.5%)</td>
<td>(35.5%)</td>
<td>(77.3%)</td>
<td>(33.3%)</td>
</tr>
</tbody>
</table>

Table 2 – Average Number of Prompts Per Case by Party

<table>
<thead>
<tr>
<th></th>
<th>Total Number of Prompts (31 cases)</th>
<th>Average Prompts Per Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Newspapers</td>
<td>1967</td>
<td>63.5</td>
</tr>
<tr>
<td>Non-newspapers</td>
<td>1611</td>
<td>52.0</td>
</tr>
<tr>
<td>Total</td>
<td>3578</td>
<td>57.7 (per side)</td>
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### Table 1

<table>
<thead>
<tr>
<th>Cases</th>
<th>Percent</th>
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<tr>
<td>Petitioners</td>
<td>1919</td>
</tr>
<tr>
<td>Respondents</td>
<td>1659</td>
</tr>
<tr>
<td>Total</td>
<td>3578</td>
</tr>
</tbody>
</table>

### Table 2

<table>
<thead>
<tr>
<th>Total Number of Prompts (31 cases)</th>
<th>Average Prompts Per Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Winners</td>
<td>1706</td>
</tr>
<tr>
<td>Losers</td>
<td>1872</td>
</tr>
<tr>
<td>Total</td>
<td>3578</td>
</tr>
</tbody>
</table>

### Table 3 – Prompts to Newspapers and Non-Newspapers in Different Roles

<table>
<thead>
<tr>
<th>Total Number of Prompts (22 cases)</th>
<th>Average Prompts Per Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Newspaper Petitioners</td>
<td>1437</td>
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<tr>
<td>Non-Newspaper Respondents</td>
<td>1129</td>
</tr>
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</table>

<table>
<thead>
<tr>
<th>Total Number of Prompts (9 cases)</th>
<th>Average Prompts Per Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Newspaper Respondents</td>
<td>530</td>
</tr>
<tr>
<td>Non-Newspaper Petitioners</td>
<td>482</td>
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</table>

### Table 4 – Prompts to Newspapers and Non-Newspapers as Winners and Losers

<table>
<thead>
<tr>
<th>Total Number of Prompts (20 cases)</th>
<th>Average Prompts Per Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Newspaper Winners</td>
<td>1199</td>
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<tr>
<td>Non-Newspaper Losers</td>
<td>1104</td>
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</table>
Newspaper vs. Non-Newspaper Litigants

<table>
<thead>
<tr>
<th></th>
<th>Prompts (11 cases)</th>
<th>Prompts Per Case</th>
</tr>
</thead>
<tbody>
<tr>
<td>Newspaper Losers</td>
<td>768</td>
<td>69.8</td>
</tr>
<tr>
<td>Non-Newspaper Winners</td>
<td>507</td>
<td>46.1</td>
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</table>

Table 5 – Prompts From Supreme Court Justices During Oral Argument

<table>
<thead>
<tr>
<th></th>
<th>Prompts</th>
<th>Interrogatories</th>
<th>Declarations</th>
<th>Mixed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Newspapers</td>
<td>1967</td>
<td>931 (47.3%)</td>
<td>807 (41.0%)</td>
<td>232 (11.8%)</td>
</tr>
<tr>
<td>Non-newspapers</td>
<td>1611</td>
<td>766 (47.5%)</td>
<td>647 (40.2%)</td>
<td>199 (12.4%)</td>
</tr>
<tr>
<td>Total</td>
<td>3578</td>
<td>1697 (47.4%)</td>
<td>1454 (40.6%)</td>
<td>431 (12.0%)</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Prompts</th>
<th>Interrogatories</th>
<th>Declarations</th>
<th>Mixed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Petitioners</td>
<td>1919</td>
<td>936 (48.8%)</td>
<td>759 (39.6%)</td>
<td>224 (11.7%)</td>
</tr>
<tr>
<td>Respondents</td>
<td>1659</td>
<td>761 (45.9%)</td>
<td>695 (41.9%)</td>
<td>207 (12.5%)</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Prompts</th>
<th>Interrogatories</th>
<th>Declarations</th>
<th>Mixed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Winners</td>
<td>1706</td>
<td>775 (45.4%)</td>
<td>721 (42.3%)</td>
<td>210 (12.3%)</td>
</tr>
<tr>
<td>Losers</td>
<td>1872</td>
<td>922 (49.3%)</td>
<td>733 (39.2%)</td>
<td>221 (11.8%)</td>
</tr>
</tbody>
</table>

Table 6 – Mix of Prompts to Newspapers

<table>
<thead>
<tr>
<th></th>
<th>Interrogatories</th>
<th>Declarations</th>
<th>Mixed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Newspaper Petitioners (22 cases)</td>
<td>721 (50.2%)</td>
<td>550 (38.3%)</td>
<td>166 (11.6%)</td>
</tr>
<tr>
<td>Newspaper Respondents (9 cases)</td>
<td>210 (39.4%)</td>
<td>257 (48.2%)</td>
<td>66 (12.4%)</td>
</tr>
<tr>
<td>Newspaper Losers (11 cases)</td>
<td>350 (45.4%)</td>
<td>328 (42.5%)</td>
<td>93 (12.0%)</td>
</tr>
<tr>
<td>Newspaper Winners (20 cases)</td>
<td>581 (48.5%)</td>
<td>479 (40.0%)</td>
<td>139 (11.6%)</td>
</tr>
</tbody>
</table>

1 376 U.S. 254 (1964).
Newspaper vs. Non-Newspaper Litigants

9 Although the Supreme Court now publishes all transcripts from contemporary oral arguments on its website, the Court has not indicated plans to transcribe and publish past oral arguments. Among the private entities attempting to accomplish this task is the website http://www.oyez.org, although many cases remain to be completed. For the lists of transcripts accessed electronically and in person at the Court for this article, see notes 33 and 34 and accompanying text.
13 Segal & Spaeth, 285.
19 Ibid., 582.
23 Ibid.
24 Ibid., 418.
Newspaper vs. Non-Newspaper Litigants

26 Ibid., 71.
29 Ibid., 278-279.
32 Ibid., *Oral Arguments and Decision Making on the United States Supreme Court*, 122.