

Supreme Court Sluggers ♦ October Term 2009



*John Glover Roberts, Jr.*



*Pitcher*

EX POST

Devlin knew the guy wasn't buying bus tokens. He radioed a description and Officer Stein picked up the buyer. Sure enough: three bags of crack in the guy's pocket. Head downtown and book him. Just another day at the office.

John G. Roberts, Jr.

*Pennsylvania v. Dunlap,*  
129 S. Ct. 448 (2008)



# SUPREME COURT SLUGGERS

## BEHIND THE NUMBERS

*Ross E. Davies & Craig D. Rust*

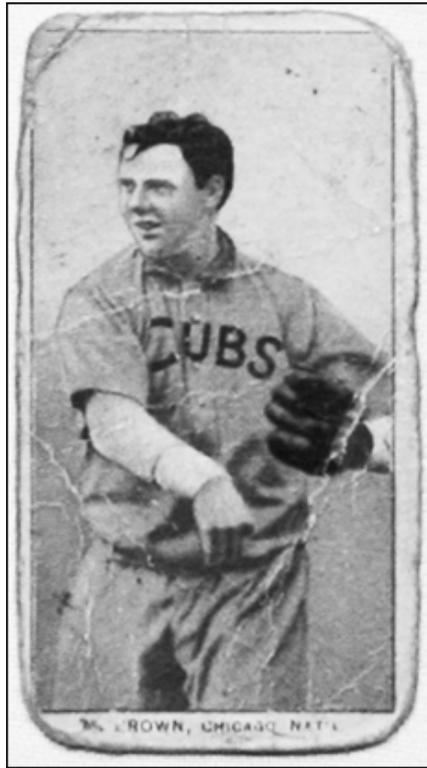
**I**SSUED LAST FALL, the Chief Justice John G. Roberts “Supreme Court Sluggers” trading card pictured on page 213 above is the first in what should be a very long series of “Sluggers” cards. The first Associate Justice card – of John Paul Stevens – will be out this spring. Others, of the sitting Justices and of their predecessors, will follow in the coming months and years. The *Green Bag*’s ambitions for this project are simple, if not small:

- (a) to develop and share comparable measurements of the work of every member of the Supreme Court since 1789;
- (b) to gradually expand and refine those measurements with an eye to making them as useful and interesting as possible;
- (c) to create informative, entertaining, and unorthodox yet respectful portraits of the Justices by first-rate artists; and
- (d) to present all of this material in a way that will be enjoyable for the producers, consumers, and subjects of the “Sluggers” cards.

As an introduction to the “Sluggers” project, we offer here short descriptions of what went into the development of the front and back of the Chief Justice Roberts card. The front is a work of art that makes light-hearted connections between its subject and the game of baseball. The back is packed with statistics and sprinkled with quotations drawn from the subject’s judicial work.

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### THE FRONT: A VISUAL PORTRAIT

The portrait of Chief Justice Roberts was painted by Alec Spangler.<sup>1</sup> It is based on the classic Mordecai “Three Finger” Brown trading card pictured above.<sup>2</sup> Why Brown? Because:

- Brown was a pitcher, the #1 position on a baseball team, just as Roberts, as Chief Justice, is #1 in seniority on the Supreme Court.<sup>3</sup>

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<sup>1</sup> Alec Spangler, *Supreme Court Chief Justice John Roberts, Pitcher* (2009) (gouache on illustration board, 12 x 8 inches). Spangler received his MFA from Purchase College and is now studying at the Harvard University Graduate School of Design.

<sup>2</sup> *M. Brown, Chicago Nats*, T206 (Piedmont 1909).

<sup>3</sup> Cindy Thomson, *Mordecai Brown*, BASEBALL BIOGRAPHY PROJECT, bioproj.sabr.

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- He played for Roberts's favorite team, the Chicago Cubs.<sup>4</sup>
- He was very good at what he did, winning 239 games and losing 130 from 1903 to 1916, with a career earned run average of 2.06. He was elected to the Hall of Fame in 1949.<sup>5</sup>
- Like Roberts, Brown was raised in Indiana.<sup>6</sup>

People who know more about Roberts and Brown might well come up with other interesting connections.

The Roberts portrait also includes a miniature portrait-within-a-portrait of William J. Klimm, better known as Bill Klem, the John Marshall of umpires. Like Marshall, Klem was the greatest figure in his field at a time when that field was just taking on its modern form. Simultaneously creative and conservative in the execution of his duties, he was also a model of professional integrity and a fierce defender of his independence and authority. None of which is to say, of course, that Klem was just like Marshall in every respect. (No literate reader would demand so much from a mere analogy.) For example, while Marshall had a reputation for low-key congeniality, Klem was famously prickly.<sup>7</sup>

In 2005, then-Judge Roberts offered his own, now-famous judge-umpire analogy. Nominated by President George W. Bush to be Chief Justice of the United States, he was called to testify before the Senate Committee on the Judiciary. Roberts said:

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org/bioproj.cfm?a=v&v=l&bid=101&pid=1684 (vis. Oct. 22, 2009); Bob Dolgan, *Glad You Asked*, PLAIN DEALER [Cleveland], Sept. 15, 1999, at 6D; 28 U.S.C. § 3; *A Reporter's Guide to Applications Pending Before The Supreme Court of the United States*, www.supremecourtus.gov/publicinfo/reportersguide.pdf at 13 (vis. Jan. 18, 2010).

<sup>4</sup> Thomson, *Mordecai Brown*; see also Paul C. Frisz, *Mordecai Peter Centennial Brown*, 1976 BASEBALL RES. J. 18.

<sup>5</sup> *Mordecai Brown*, RETROSHEET, www.retrosheet.org/boxesetc/B/Pbrown102.htm (vis. Oct. 22, 2009).

<sup>6</sup> Thomson, *Mordecai Brown*; Frisz, *Mordecai Peter Centennial Brown*.

<sup>7</sup> David Anderson, *Bill Klem*, BASEBALL BIOGRAPHY PROJECT, bioproj.sabr.org/bioproj.cfm?a=v&v=l&bid=1221&pid=7595 (vis. Jan. 18, 2010); R. Kent Newmyer, *John Marshall, McCulloch v. Maryland, and the Southern States' Rights Tradition*, 33 J. MARSHALL L. REV. 875, 888-89 (2000).

*Described in his 1951 New York Times obituary as the “dean of major league baseball umpires,” Bill Klem was a National League umpire from 1905 to 1941.*

*During his long tenure Klem delivered numerous memorable kernels of baseball wisdom, including, “Your job is to umpire the ball and not the player.”*



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While many advocates on the left and right would like a Court that promotes their agenda, I do not want that and neither do the American people. What we must have, what our legal system demands, is a fair and unbiased umpire, one who calls the game according to the existing rules and does so competently and honestly every day. This is the American ideal of law. Ideals are important because they form the goals to which we all strive. We must never abandon our ideal of unbiased judges, judges who rule fairly without regard to politics.<sup>8</sup>

Roberts’s invocation of the umpire excited several of the Senators considering his nomination, and drew the attention of the news media as well. Senators and commentators hostile to Roberts

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<sup>8</sup> *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the Comm. on the Judiciary, S. Hrg. 109–158, 109th Cong., 1st Sess. (2005) 31 (statement of Judge John G. Roberts, Jr.).*

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treated his comment as an equation<sup>9</sup> (judging is just like umpiring), while those whose sympathies were with him treated it as an analogy<sup>10</sup> (there are similarities between the role of judge and the role of umpire).<sup>11</sup> That kind of treatment has become part of the package for an individual nominated for an important job in the federal government in the late 20th or early 21st century, and it is not entirely unlike the umpiring experience in baseball in the late 19th or early 20th century.<sup>12</sup>

### THE BACK: STATISTICAL & RHETORICAL PORTRAITS

The first challenge we faced in compiling Chief Justice Roberts's "statistics" was developing a reliable search method that could be used to locate all of the opinions that he had been involved in throughout his judicial career. Some trial and error was inevitable as we experimented with search terms broad enough to capture all of our desired results, yet still narrow enough so as not to overwhelm

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<sup>9</sup> *equation*, III.5, OED ONLINE (vis. Oct. 10, 2009) ("The action of stating the identity in value of two quantities or expressions.").

<sup>10</sup> *analogy*, 5 & 9, OED ONLINE (vis. Oct. 10, 2009) ("similarity" and "Resemblance of form or function between organs which are *essentially* different (in different species), as the analogy between the tail of a fish and that of the whale, the wing of a bat and that of a bird, the tendril of the pea and that of the vine.").

<sup>11</sup> See generally *Confirmation Hearing on the Nomination of John G. Roberts, Jr.*, S. Hrg. 109–158; see also, e.g., Thomas Oliphant, *Kennedy's Doubts on Roberts May Prove Right*, BOSTON GLOBE, Sept. 29, 2005, at A11; Katherine M. Skiba, *Roberts a step closer to chief justice*, MILWAUKEE J. SENTINEL, Sept. 23, 2005, at 1; Ellen Goodman, *Roberts seems disingenuous in veiling the man behind the robe*, DESERET MORNING NEWS, Sept. 23, 2005; *Senate committee approves Roberts nomination*, NPR: ALL THINGS CONSIDERED, Sept. 22, 2005; The Editors, *Hail to the Chief*, NATIONAL REV., Sept. 21, 2005; *Confirming Roberts Sets Good Example*, WIS. ST. J., Sept. 30, 2005, at A6; cf. *Charles O. Finley & Co. v. Kuhn*, 569 F.2d 527, 537 (7th Cir. 1978).

<sup>12</sup> Compare BENJAMIN WITTES, CONFIRMATION WARS: PRESERVING INDEPENDENT COURTS IN ANGRY TIMES (2006), with BILL JAMES, THE NEW BILL JAMES HISTORICAL BASEBALL ABSTRACT 53 (2001); *People v. Cantwell*, 160 Ill. App. 652 (Ill. App. Ct.), *aff'd* 97 N.E. 287 (Ill. 1911); see also, e.g., *Locke v. Ozark City Board of Education*, 910 So.2d 1247 (Ala. 2005).

us with a large amount of irrelevant data. Rather than attempt one extremely complicated search, we decided to organize the data we sought into three different categories: (1) opinions Roberts participated in while a member of the U.S. Court of Appeals for the District of Columbia Circuit; (2) opinions delivered since he has been a member of the U.S. Supreme Court; and (3) citations to Roberts's comments and written work in federal courts nationwide. Ultimately, we ran nine different searches in various Westlaw databases to get the data we needed.

To obtain the opinions that Roberts participated in while a member of the D.C. Circuit, we began by attempting to use Westlaw's "Profiler" search.<sup>13</sup> The Profiler system ostensibly allows you to search through all of the opinions written by a particular judge or justice in their career. Unfortunately, we subsequently learned that this database did not contain all of the opinions we were looking for.

In an attempt to pick up any opinions that the Profiler missed, we ran another search on Westlaw's D.C. Circuit database (CTADC) using the following search terms: "Roberts, Circuit Judge" between the dates of May 1, 2003, and January 1, 2007.<sup>14</sup> As a final precaution, we later ran an even broader search for "Roberts /10 Judge or 'Roberts, J.'" between the dates of October 6, 2002, and August 31, 2005.<sup>15</sup> The dates of these searches were chosen to make sure we caught every case that then-Judge Roberts participated in beginning with his confirmation to the D.C. Circuit in May of 2003 and ending with his move to the U.S. Supreme Court in September of 2005.

Our initial data for Roberts's work on the Supreme Court came from the same Profiler search mentioned above.<sup>16</sup> After being disappointed with the Profiler results, we ran a search in Westlaw's

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<sup>13</sup>The results of this search are listed in the "Roberts Search Data" spreadsheet ("Roberts Search Data") in the tab labeled "Search 1 – Profiler." This spreadsheet is available on the *Green Bag's* website, [www.greenbag.org](http://www.greenbag.org).

<sup>14</sup>Roberts Search Data, tab "S2 – DC Cir Op."

<sup>15</sup>*Id.* at tab "S6 – DC Cir CN."

<sup>16</sup>*Id.* at tab "Search 1 – Profiler."

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**John G. Roberts, Jr.**  
*Chief Justice of the United States*

born Jan. 27, 1955, Buffalo, NY  
raised Long Beach, IN  
appointed from MD

Harvard AB 1976; JD 1979  
Gov. svc.: 1979-86, 89-93, 2003-05  
Priv. prac.: 1986-89, 1993-2003  
S. Ct. jud. oath: Sept. 29, 2005

**Term**=yr. starting 1st Mon. in Oct.;  
**TO**=MO+PO+CO+DO+OO+IC;  
**MO**=majority opinions; **UO**=MOs  
w/ no other opinions; **PO**=plural-  
ity opinions; **CO**=concurrences;  
**DO**=dissents; **PC**=per curiam  
joined; **JN**=non-PCs joined when  
not writing (max. 1/ case); **OO**=  
opinions relating to orders; **IC**=in-  
chambers opinions; **CN**=cites by  
name in West's 'Federal' reporters

### The Numbers (as of July 3, 2009)

<b>Court</b>	<b>Term</b>	<b>TO</b>	<b>MO</b>	<b>UO</b>	<b>PO</b>	<b>CO</b>	<b>DO</b>	<b>PC</b>	<b>JN</b>	<b>OO</b>	<b>IC</b>	<b>CN</b>
<sup>1</sup> DC Cir.	2002	1	0	0	0	0	1	0	0	0	0	0
DC Cir.	2003	27	25	24	0	2	0	3	41	0	0	0
DC Cir.	2004	21	18	15	0	1	2	4	39	0	0	1
<sup>1</sup> DC Cir.	2005	0	0	0	0	0	0	1	0	0	0	0
<b>Tot.</b>		<b>49</b>	<b>43</b>	<b>39</b>	<b>0</b>	<b>3</b>	<b>3</b>	<b>8</b>	<b>80</b>	<b>0</b>	<b>0</b>	<b>1</b>
<b>Avg.</b>		<b>12</b>	<b>11</b>	<b>10</b>	<b>0</b>	<b>1</b>	<b>1</b>	<b>2</b>	<b>20</b>	<b>0</b>	<b>0</b>	<b>0</b>
S. Ct.	2005	13	8	4	0	2	3	16	52	0	0	24
S. Ct.	2006	13	7	2	0	1	3	7	54	0	2	42
S. Ct.	2007	17	7	3	1	5	4	5	49	0	0	64
<sup>2</sup> S. Ct.	2008	18	8	0	0	4	5	8	58	1	0	47
<b>Tot.</b>		<b>61</b>	<b>30</b>	<b>9</b>	<b>1</b>	<b>12</b>	<b>15</b>	<b>36</b>	<b>213</b>	<b>1</b>	<b>2</b>	<b>177</b>
<b>Avg.</b>		<b>15</b>	<b>8</b>	<b>2</b>	<b>0</b>	<b>3</b>	<b>4</b>	<b>9</b>	<b>53</b>	<b>0</b>	<b>1</b>	<b>44</b>

The back-up for these numbers is at [www.greenbag.org](http://www.greenbag.org). Please send corrections and suggestions to [editors@greenbag.org](mailto:editors@greenbag.org).

<sup>1</sup>These are partial Terms, thus the low numbers. <sup>2</sup>This Term might require adjustment to include *Citizens United v. FEC* (argued this Term but on June 29 restored to the calendar for reargument Sept. 9), as well as any other action before October 5.

### The Words (OT 2008)

"That constitutional question has attracted ardent briefs from dozens of interested parties, but the importance of the question does not justify our rushing to decide it." *Northwest Austin Municipal Util. Dist. v. Holder*

"A stay does not make time stand still . . . ." *Nken v. Holder*

"The question is whether the State must affirmatively assist political speech by allowing public employers to administer payroll deductions for political activities. . . . [T]he answer is no." *Ysursa v. Pocatello*

"Devlin knew the guy wasn't buying bus tokens. He radioed a description and Officer Stein picked up the buyer. Sure enough: three bags of crack in the guy's pocket. Head downtown and book him. Just another day at the office." *Pennsylvania v. Dunlap*

serial no.

/2000



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Numbers by **Craig Rust**.  
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Supreme Court database (SCT) for: "Roberts 'per curiam'" between the dates of September 1, 2005, and March 4, 2009.<sup>17</sup> We repeated the search for the period between March 4 and July 3,

<sup>17</sup>*Id.* at tab "S7 – S.Ct. Op. Verif." Our research initially began in March 2009, which is why these searches contained an end date in that month.

2009 to capture the remaining opinions in the term.<sup>18</sup> Additionally, we confirmed our results for the per curiam decisions by comparing our Westlaw results with the opinions designated as per curiam decisions on the Supreme Court's website.<sup>19</sup> At the time the card was published, the latest update to these Supreme Court statistics had been done on July 3, 2009.

In pulling the citation data, we originally began by looking just for references to Roberts by name after he became a member of the Supreme Court.<sup>20</sup> The first search, conducted in Westlaw's database of all federal cases (ALLFEDS) consisted of the following terms: "Chief Justice John G. Roberts' 'Chief Justice John Roberts' 'Chief Justice Roberts' 'Roberts, Chief Justice' 'Roberts, C.J.'" We conducted two searches using these terms, covering the period from September 1, 2005 to July 4, 2009.<sup>21</sup> Later, we decided to also look for references to Roberts while he was still sitting on the D.C. Circuit. To locate these citations, we searched in the federal cases database for "Roberts /10 Judge or 'Roberts, J.'" between October 6, 2002, and August 31, 2005.<sup>22</sup>

Realizing that our search terms for references during the period in which Roberts was a member of the D.C. Circuit were broader than the ones we used for the period after he joined the Supreme Court, we decided to conduct one final search of the Supreme Court period in order to maintain consistency. This time, we used the same terms ("Roberts /10 Judge or 'Roberts, J.')" in the federal cases database for beginning on September 1, 2005.<sup>23</sup>

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<sup>18</sup> *Id.* at tab "S4 – Spring Update (Op.)."

<sup>19</sup> *Supreme Court of the United States – Opinions*, [www.supremecourtus.gov/opinions/opinions.html](http://www.supremecourtus.gov/opinions/opinions.html) (vis. Aug. 22, 2009).

<sup>20</sup> The Chief Justice is not the only person named "Roberts" ever to serve as a judge. There have been half-a-dozen others just on the federal bench, including Supreme Court Justice Owen Roberts. It was not difficult, however, to identify the Roberts references that were to the Chief Justice in whom we were interested.

<sup>21</sup> Roberts Search Data, tabs "S3 – S.Ct. CN Search" & "S5 – Spring Update (CN)."

<sup>22</sup> *Id.* at tab "S6 – DC Cir CN."

<sup>23</sup> *Id.* at tabs "S8 – All-fed CN Verif." & "S9 – All-fed CN update." The last date covered by these searches was July 4, 2009.

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After conducting these searches in Westlaw, we downloaded all of the results into a Microsoft Excel spreadsheet. We then accessed each case individually in Westlaw and searched it for mention of Roberts's name in the context of the categories set forth in the following section. The complete version of this spreadsheet (updated to reflect any corrections that may be called for in the future) is available on the *Green Bag's* website.<sup>24</sup>

### THE CATEGORIES

The statistical categories for this project were chosen for the purpose of quantifying the work (and, to a limited extent, the influence) of Roberts over the course of his judicial career. Like a traditional baseball card, the statistics show how “productive” he has been over time. But instead of tallying wins and losses, home runs and strikeouts, we counted opinions he has written or joined. Further, we attempted to quantify how influential or popular Roberts has been, by recording the number of unanimous opinions he has written (although this may also be an indicator of how many easy, or at least relatively uncontroversial, cases he has written in), as well as the number of times he was cited by name in a federal court opinion (which could, of course, include jabs as well as lauds).

#### *Majority Opinions (MO and UO)*

Majority Opinions are simply those opinions written by Roberts that were approved – in whole or in part<sup>25</sup> – by a majority of the members of either the D.C. Circuit panel hearing the case, or the Supreme Court. In order to qualify as a Unanimous Majority Opin-

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<sup>24</sup> [www.greenbag.org](http://www.greenbag.org).

<sup>25</sup> We are tracking partially Majority Opinions, which we have labeled Majority/Plurality Opinions – that is, Opinions only part of which receive majority support – with an eye to eventually placing them in a separate category on the Sluggers cards. That data is available on the *Green Bag's* website. This can get complicated when more than one opinion in a single case enjoys, in whole or in part, majority or plurality support. In those circumstances, we count every opinion with any majority support as a majority opinion, and any opinion with any plurality support (but no majority support) as a plurality opinion.

ion (UO), the majority opinion must not have elicited any concurring or dissenting opinions. A unanimous majority opinion counts as both a standard Majority Opinion and a Unanimous Majority Opinion.

### *Plurality Opinions (PO)*

Plurality Opinions are those opinions that received more votes – in whole or in part<sup>26</sup> – than any other opinion in the case, but fell short of receiving the support of a majority of the justices participating in the decision.

### *Concurring Opinions (CO) and Dissenting Opinions (DO)*

Concurring Opinions and Dissenting Opinions were counted any time Roberts wrote an opinion no part of which received the approval of a majority or plurality of the Court. An opinion concurring in part and dissenting (or anything else – dubitante, for example) in part was counted as a dissent.

### *Per Curiam Opinions Joined (PC)*

Per Curiam Opinions Joined are cases in which Roberts participated but did not write separately, and the Court issued a per curiam decision with an opinion that was published in West's *Federal Reporter* or in the *United States Reports*. Any per curiam in which Roberts did not participate, or in which he wrote a concurring or dissenting opinion, did not count in this category.<sup>27</sup>

### *Opinions Joined (JN)*

Opinions Joined are cases in which Roberts voted to join another judge's or justice's opinion. We only counted one Opinion Joined per case. So, for example, if Roberts voted to join two different

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<sup>26</sup> See note 24 above.

<sup>27</sup> We are also tracking Unpublished Per Curiam Opinions Joined – that is, Per Curiam Opinions that were not published in West's *Federal Reporter* but were published in West's *Federal Appendix* – with an eye to eventually placing them in a separate category on the Sluggers cards. That data is available on the *Green Bag's* website. Per curiam Opinions that were not published in the *Federal Reporter* or the *Federal Appendix* are not counted at all.

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dissenting opinions in a case, we only counted one Opinion Joined. Similarly, if he wrote an opinion in the case, we did not count any other opinions he joined in that case as Opinions Joined.

### *Opinions Relating to Orders (OO)*

Opinions Relating to Orders are opinions designated as such on the Supreme Court's website. This website defines Opinions Relating to Orders as "those written by individual Justices to comment on the summary disposition of cases by orders. Such an opinion might, for example, dissent from the denial of certiorari or concur in that denial."<sup>28</sup> Therefore, for the purposes of these statistics, a dissent from a denial of certiorari was counted as an Opinion Relating to an Order, and not as a Dissenting Opinion.

### *In-Chambers Opinions (IC)*

Individual members of the Supreme Court and the federal appellate courts have long enjoyed, but rarely exercise, the authority to act on their own in certain limited circumstances.<sup>29</sup> In this category we searched the ALLFEDS database for in-chambers opinions by then-Judge Roberts, and found none. For his in-chambers work on the Supreme Court, we counted the number of in-chambers opinions reported on the Court's website,<sup>30</sup> and cross-checked that result in the relevant volume of *In Chambers Opinions by the Justices of the Supreme Court of the United States*.<sup>31</sup>

### *Citations by Name (CN)*

This category tracks the number of times that Roberts was referred to by name in a federal court opinion. Nearly any reference to Roberts was counted, not just citations to opinions he had written. For example, an opinion that referred to Roberts's comments at oral

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<sup>28</sup> 2008 Term Opinions Relating to Orders, [www.supremecourtus.gov/opinions/08relatingtoorders.html](http://www.supremecourtus.gov/opinions/08relatingtoorders.html) (vis. Aug. 22, 2009).

<sup>29</sup> See Stephen M. Shapiro & Miriam R. Nemetz, *An Introduction to In-Chambers Opinions*, 2 Rapp ix (2004).

<sup>30</sup> *Opinions*, [www.supremecourtus.gov/opinions/opinions.html](http://www.supremecourtus.gov/opinions/opinions.html).

<sup>31</sup> See 4 Rapp pt. 4 (2007).

argument, or referred to a law review article he had written, would count in this category.

However, not every single reference to Roberts counted as a Citation by Name. Cases where he was referred to as a defendant, for example, were not counted. Also, we did not count any reference to an opinion written by him within the same case. For example, if the majority opinion in a particular case cited a dissent written by Roberts in the same case, then that citation did not count toward this total. Only one reference per case counted toward this total.

## THE RHETORIC

On many trading cards, there is room to spare once the statistics are all in place. Some card producers fill the extra space with trivia. We decided to fill it with choice bits of the subject's recent written work. Thus the quote from *Pennsylvania v. Dunlap*,<sup>32</sup> which appears on the back of the Roberts card and on page 214 above. There is never enough room for all the interesting lines that might fill such a small opening, and so we close with one that didn't make the cut, but perhaps should have, especially given the distinctively extensive responsibilities of the Chief Justice, whose channels for official rhetoric are correspondingly broad:

Our country wisely preserves and maintains its national symbols. As citizens, we should strive with no less determination and vigor to preserve and maintain what our flag signifies and our anthem celebrates. The Constitution that secures the freedoms we hold dear endures not only because it enables self-government, but also because individuals come forward to participate in the function of governing, through voting and jury duty, through military and civilian service, and through elected and appointed office. A great government depends on all its citizens to contribute their talents and ideals in response to their Nation's call.<sup>33</sup>



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<sup>32</sup> 129 S. Ct. 448 (2008).

<sup>33</sup> 2008 Year-End Report on the Federal Judiciary, Dec. 31, 2008, at 2.