

# Working Remotely: How the Supreme Court Adapted Oral Arguments Procedures during the Pandemic

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# WORKING REMOTELY: HOW THE SUPREME COURT ADAPTED ORAL ARGUMENTS PROCEDURES DURING THE PANDEMIC

## Document Outline

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*The Supreme Court opened its 2020 term on October 5, 2020, to an empty courtroom, with lawyers presenting their arguments over the telephone as justices listened on the telephone in their homes. With the deadly coronavirus pandemic still spreading throughout the country, the justices bowed for the second time to social-distancing guidelines to conduct oral arguments remotely instead of in person. In this Court Report, court expert [Kenneth Jost](#) discusses the mixed reactions of court observers and reports to Court's remote approach to oral arguments in the previous term.*

The Court decided to follow the example set in May 2020 of allowing the virtual arguments to be live-streamed over the Court's website and broadcast in real time by, for example, the cable network C-SPAN. Longtime advocates of greater public access to the Court's arguments cheered the historic decision in May and had laid the groundwork for urging the justices to do so again in the 2020 term.

Veteran Court watchers were less than pleased, however, by the unaccustomed format for questions from the justices in the telephone arguments that displaced the customary free-for-all pace of questioning. With the justices and the lawyers unable to see each other, the Court decided to recognize the justices for questions, in turn, in order of seniority beginning with the chief justice and followed by the associate justices one by one.

Among the critics was the now-retired Supreme Court reporter Lyle Denniston, who called the seriatim format a "failed experiment" because it "kills crosstalk entirely." Denniston, who began covering the Court in the late 1950s, went so far in an interview in September to suggest that with this format the justices should decide cases solely on the basis of the briefs without oral arguments. "Oral argument is a really dynamic process and to have it stilted like this is just like not having oral argument," Denniston remarked.

The justices last heard oral arguments in the courtroom on March 4, at the end of the so-called February calendar. The Court then postponed the March and April calendars entirely, with twenty cases in all. The justices picked ten of the more significant cases for oral argument in a later-than-usual May calendar and pushed the other ten into the next term.

Jeffrey Toobin, the longtime Court watcher now with CNN, also said in an on-air comment on May 12 that he found the seriatim format lacking after eight of the ten cases had been argued. "It doesn't have the same interactive energy that arguments in the courtroom have," Toobin remarked.

Kannon Shanmugam, a frequent Supreme Court advocate with a major Washington law firm, was also dismissive of the telephone format at the time. "Before the Supreme Court's argument session began, I told a reporter that telephonic arguments were better than nothing, but no substitute for the real thing," Shanmugam recalled in a tweet. "Having now listened to almost all of them, I'm still of that view."

## Mixed Reviews for 'Experiment'

The format put Chief Justice John G. Roberts Jr. in the delicate position of keeping watch on his colleagues' question times. Leah Litman, an assistant professor at the University of Michigan Law School, compiled statistics on the individual justices' question times during the ten arguments and found Roberts to have been somewhat but not completely even-handed in managing the clock.

In an [article](#) published online in June, Litman reported that the three longest questioning periods were from male justices. Overall, nine of the twelve longest questioning periods were likewise from male justices, all of them conservative.

Overall, Litman found that three conservatives—Alito, Gorsuch, and Kavanaugh—were among the four justices, along with Sotomayor, who had the most time for questioning during the ten arguments. Alito had 89 minutes in all, Gorsuch 85 minutes, and Kavanaugh 83 minutes. With 84 minutes in all, Sotomayor was the only one of the four liberal justices with more than the average time for all nine justices.

Roberts used the least time for questions: only 71.5 minutes, per Litman's calculation. Thomas, who hardly ever participates in oral arguments under the usual format, took his turn in each of the ten cases argued in May under the seriatim format. Overall, he used 78 minutes for questions in the ten cases, just below the average of 80 minutes for the nine justices.

Several of Thomas's admirers praised his questions in the cases as showing that the justice knows how to pose good questions even if he ordinarily chooses not to. On the other hand, Thomas misfired with his opening question in *Trump v. Mazars*, the president's challenge to the House committees' subpoenas for Trump's tax returns and financial records. Thomas in effect asked the president's lawyer, Patrick Strawbridge, to cast doubt on Congress's power to subpoena private documents at all. "I'm very interested," Thomas said in introducing his question. "Do you think that there are any implied powers for the Congress to request or to subpoena private documents?"

Strawbridge declined to reinforce Thomas's doubts. "I think that there might be limited powers in some cases for the House to subpoena private documents," Strawbridge replied. Elaborating, he explicitly rejected Thomas's suggestion. "We don't quarrel with the general notion that Congress has some implied power to exercise its legislative powers," the lawyer added.

In her article, Litman found an ideological bias in Roberts' interruptions of justices' question periods. "The interruptions were markedly gendered and ideological," Litman wrote. "The Chief Justice only interrupted liberal Justices, and nine of the 11 interruptions were of women Justices."

Denniston also found Roberts' management of the clock less than perfect. "The chief justice was too much in control of the process," Denniston remarked in September. "I thought he cut the justices off before they were finished, and yet he allowed the arguments to go over the scheduled time."

Denniston also complained that the seniority-based sequence unduly favored the senior justices. "Following the seniority system gives the impression that the senior justices are more important than the junior justices," Denniston remarked. In the free-for-all format, junior justices, including Sotomayor and Kagan, are among the most active questioners.

## Media Groups' Views

In her article, Litman wrote that "all in all" the arguments in May were "a success." In an interview, however, she stressed that she did not consider the format itself successful. "I definitely don't think this format worked well compared to the unstructured format—at least with respect to allowing the justices to test the advocates' position and communicate to their colleagues," she wrote in an email.

Paul Clement, the former U.S. solicitor general who went on in private practice to become a leading advocate for conservative causes, was one of the two dozen lawyers who participated in the telephone arguments in May. He noted in an interview that the clerk's office "worked overtime to make the experience as stress-free as possible for the advocates."

Clement said he gave no thought to the fact that his argument was being broadcast nationwide in real time. "At a traditional oral argument when the gallery is full and the audio transcript is released at the end of the week, the advocate is really just locked into what the justices are saying and almost oblivious to the audience," Clement explained. "It really seemed exactly the same with the telephonic argument. All of the focus was on the audience of nine."

Shanmugam similarly found no apparent effect from the real-time broadcasting. "Live streaming didn't lead to the showboating or soundbiting that some had feared, even in some high-profile cases," he remarked in a tweet in June. "I hope it's here to stay."

Clement said that despite the unusual format, he did not feel hampered in presenting his argument without being able to see the justices. He joined, however, in finding the telephone format less than ideal. "I do not think anyone would suggest that the telephonic format is an improvement over the traditional oral argument, as opposed to just a sensible accommodation to difficult circumstances," he said.

C-SPAN supplemented its coverage of the arguments by partnering with the National Constitution Center to broadcast hour-long post-mortems featuring lawyers from opposite sides of each case to analyze the arguments. In advance of the October 2020 arguments, the Reporters Committee for Freedom of the Press noted the public interest in the live-streamed arguments in May and urged the Court to continue the practice in the new term.

The group's letter, written on behalf of an array of media organizations, stated that "upwards of 50,000 people" listened to the May 12 arguments in the Trump subpoena cases in real time and that 500,000 people streamed the arguments within hours the same day. Overall, the group reported in September that two million people had listened to at least one of the recorded arguments. "Telephonic access during COVID-19 has convincingly demonstrated the public's appetite to observe the operations of the Court and has shown that the Court can balance increased access with the integrity of its proceedings," the group argued in urging the justices to continue live-streaming in the new term.

The Court's statement left open whether oral arguments in November and December would also be conducted remotely instead of in the courtroom. "The Court will continue to closely monitor public health guidance in determining plans" for sessions later this fall, the Court said. The November calendar includes a major challenge to the Affordable Care Act, scheduled to be heard on November 10, one week after the presidential and congressional elections.

The Reporters Committee commented after the Court's announcement that the decision to continue live-streaming arguments was "a great step towards greater access and transparency." It also urged the Court to provide live audio for the entirety of the term. Without other arrangements, the Court's customary practice is to post audio recordings of oral arguments on the Court's website at the end of the week.

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