

Justices Back On Bench, But Hearings Still Getting Longer

By Jimmy Hoover

Law360 (December 1, 2022, 7:02 PM EST) -- For decades, the U.S. Supreme Court was famous for enforcing time limits on oral arguments. That changed during the pandemic due to the challenge of telephonic hearings. But despite the justices' return to the bench a year ago, arguments have only gotten longer.

Members of the public are allowed back into the courtroom this term, but those hoping to see the nation's highest bench in action should get comfortable because they could be sitting there for hours. Oral arguments so far this term are even longer than the telephonic hearings held during the pandemic, when the justices first began regularly disregarding time limits to allow each court member to ask his or her questions.

That approach has led to some of the longest hearings in years. The Nov. 9 case on the constitutionality of the Indian Child Welfare Act, for example, clocked in at over three hours. At around the 3-hour mark, Chief Justice Roberts mistakenly tried to adjourn the hearing before realizing that the petitioner had yet to argue his rebuttal.

"The case is submitted," he said, prompting a confused reaction from his colleagues on the bench. "No? I'm sorry, Mr. McGill. It is late."

"Thank you very much, Mr. Chief Justice," responded attorney Matthew McGill. "I will take the hint."

The week before, the court heard over five hours of oral arguments across two cases challenging affirmative action policies at the University of North Carolina and Harvard University. In between the two cases, the court recessed for a rare 10-minute break.

And on Oct. 11, an appeal from pork producers challenging a California animal welfare ballot initiative stretched over two hours as the justices debated the contours of the so-called dormant commerce clause.

The length of Supreme Court hearings has ebbed and flowed throughout the court's history but the modern format of giving each side a total of 30 minutes for a roughly hour-long argument dates back to 1970. Chief Justice William Rehnquist became notorious for strictly enforcing those time limits for advocates, and was known to cut off an attorney's argument in the middle of a sentence once their time expired.

Chief Justice Roberts more or less adhered to those limits until the outbreak of COVID-19 in March 2020 prevented the justices from sitting for oral argument. They debuted the first telephonic arguments in the court's history that May and introduced a new format allowing the justices to ask questions in order of seniority. Previously, the court's arguments were a free-for-all where justices had to be aggressive in order to get a chance to ask their most pressing questions before the time expired.

The change had two immediate effects. Justice Clarence Thomas, who rarely asked questions during arguments, became an active participant. And second, the hearings suddenly began exceeding the allotted hour due to the increased number of questions being asked by the justices during their designated times.

In the October 2018 term immediately preceding the pandemic, arguments lasted an average of 59 minutes and 53 seconds, according to Law360's analysis of argument recording files. In the October 2020 term, during which the court heard arguments via telephone in its new "seriatim" format, arguments lasted an average of 1 hour, 19 minutes and 56 seconds, an increase of 20 minutes.

A scatter plot of argument length since the 2017 term shows the striking impact of the pandemic on Supreme Court hearings, with pre-pandemic cases clustered around the 1-hour mark and post-pandemic cases demonstrating far greater outliers and variability.

But while the justices, advocates and members of the public have returned to the courtroom with the height of the outbreak behind us, long arguments have not just remained, but the data shows that they're even longer now.

In the October 2021 term, the first in which the justices returned to the bench, oral arguments lasted an average of 1 hour, 23 minutes and 41 seconds, an increase of nearly four minutes over the pandemic term preceding it. And this term could prove even longer still, with the average length of cases argued in October and November being a whopping 1 hour, 38 minutes and 42 seconds.

Although the Supreme Court has been hearing cases back in the courtroom for over a year, it has adopted a new hybrid format that combines the free-for-all aspect of the pre-pandemic era with a final round-robin section at the end that allows the justices to ask any remaining questions of counsel in order of seniority. Justices have taken full advantage of that policy and the round-robin portion can last nearly as long as the initial free-for-all section. On Tuesday, the first advocate arguing in a major immigration case, U.S. Solicitor General Elizabeth Prelogar, was still answering questions from the bench when the allotted hour for the hearing came and went.

The marathon courtroom sessions have led to some grumblings by journalists in the Supreme Court's press room. But advocates have positive reviews for the new format, especially compared to the pre-pandemic days, which one advocate likened to a "firing line."

"It's just staccato question, question, question, a lot of interruptions" said Timothy Bishop, an appellate partner at Mayer Brown LLP. "The advocate rarely got to finish any answers before the next question came. And really the best way to describe it is you really feel as an advocate like you're in the firing line and you never feel like you get the chance to answer any question because the next question is on you before you have any chance."

The new format is "a lot more civilized," said Bishop, who experienced it first-hand arguing the Oct. 11

case in *National Pork Producers Council Inc. v. Ross* challenging a California ballot initiative establishing minimum standards of confinement for pork sold in the state.

"My sense was that justices weren't feeling the same imperative to get their question answered and make their own points through their questions," he said. "It didn't seem like you were being interrupted all the time," he said, suggesting that's because the justices know they will have an opportunity to ask questions they didn't have an opportunity to ask in the initial round of questions. "That's clearly what's adding the time."

Bishop didn't seem to mind the added length of argument if it meant having an opportunity to answer the justices' most pressing questions. "I much prefer it," he said.

Daniel Volchok, an appellate partner at WilmerHale, said the new hybrid format reflects the advantages of both the free-for-all and the seriatim structures.

"It yields the benefits of both ways, and the only trade-off is that the oral arguments run longer. But I don't view that as a downside at all," he said. "It's assuredly not a downside from a practitioner's perspective; I think advocates often leave the podium wishing they had more time to argue, and almost never do so feeling like they wish they had had less."

In fact, even the increased length of recent arguments pales in comparison to those from the court's early days, when legendary advocates like Daniel Webster and William Pinkney plied their craft before the bench in what one late Supreme Court lawyer described as "the golden age of American oratory." In those days, the convention of America's public institutions was to allow unlimited exposition by famed orators, and arguments could last for several days.

"The Supreme Court entertained these orations not only without limitation upon time but also without interruption," the late Supreme Court attorney Steve Shapiro, also of Mayer Brown, wrote in an address to the Supreme Court Historical Society on the evolution of oral argument.

It's unlikely that the court will revert to those days any time soon, Volchok said, insisting that the court seems to have found a nice format with the hybrid structure.

"Daniel Webster of course famously spent days arguing cases to the justices of his day. I'm guessing there's little appetite on the court (and maybe off it) for anything like that," he said.

--Editing by Michael Watanabe.