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Supreme Court, Back on the Bench, Is Diligent and Dour

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6–8 minutes

Sidebar

The justices considered a routine case on unemployment benefits in characteristic style, peppering the lawyers with questions and dropping hints about their views.

Oral arguments before the Supreme Court in recent terms have been subject to frequent interruptions. Credit...Amir Hamja/The New York

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The last time the justices put on their robes and sat behind the Supreme Court's majestic mahogany bench, Chief Justice John G. Roberts Jr. announced that former President Donald J. Trump enjoyed substantial constitutional immunity from prosecution.

That all happened on the first Monday in July. Fourteen weeks later, on the first Monday in October, the justices returned to the bench for the first argument of the new term. It concerned unemployment benefits.

It was a routine case, as most Supreme Court cases are, but it opened a window onto the justices' mood and methods.

The question before them was intricate and technical: May people who sought unemployment benefits in Alabama during the coronavirus pandemic sue right away under a federal civil rights law over extreme delays or must they wait until the state's Labor Department has rendered a final decision?

The Alabama Supreme Court ruled that the claimants could not sue until they had, in the legal jargon, exhausted their administrative remedies. The claimants called that decision "positively Kafkaesque."

Except for a brief whispered aside between Justices Elena Kagan and Brett M. Kavanaugh that left them smiling, the justices were dour and diligent, methodically interrogating the lawyers before them. They were effectively starting their deliberations, discussing among themselves, for the first time, how the case should be resolved.

"We don't talk about cases before the argument," Chief Justice Roberts explained in 2013. "When we get out on the bench, it's really the first time

we start to get some clues about what our colleagues think. So we often are using questions to bring out points that we think our colleagues ought to know about."

In remarks at Harvard that same year, Justice Kagan agreed. "There's no doubt," she said, "that part of what oral argument is about is a little bit of the justices' talking to each other with some helpless person standing at the podium who you're talking through."

The lawyers at Monday's argument did not seem helpless, but many of the justices' questions were signals to their colleagues. Justice Kavanaugh said a key precedent supported the claimants, as did an array of supporting briefs from unlikely allies like the Chamber of Commerce and the American Civil Liberties Union.

He quoted from a brief filed by religious groups, which said that "costly and time-consuming proceedings can grind religious minority litigants into submission before they are able to have their claims heard in court."

Adam Liptak

Supreme Court reporter

"I try to make the Supreme Court accessible to readers. I strive to distill and translate complex legal materials into accessible prose, while presenting fairly the arguments of both sides and remaining alert to the political context and practical consequences of the court's work."

Justice Kagan repeatedly pressed Adam G. Unikowsky, a lawyer for the claimants, to articulate a narrow ground on which his clients might prevail.

Justice Neil M. Gorsuch suggested that the claimants had not pursued other ways to get relief in the state court.

Justice Sonia Sotomayor told Edmund G. LaCour Jr., Alabama's solicitor general, that there must be a limit to the state's delays. "If you make the hoops so difficult to go through, then they have no remedy," she said of the claimants.

The idiosyncrasies of Supreme Court argument these days are the subject of a new study by Richard K. Neumann Jr., a law professor at Hofstra University. "Our current justices' behavior is unique not only in history," Professor Neumann wrote, but also "unique in the common law world." He added that their rapid-fire questions and interruptions had rendered Supreme Court arguments "abusive and sterile."

Fifty years ago, he wrote, it was not unusual for lawyers to speak for long stretches. When Ruth Bader Ginsburg, then a lawyer with the A.C.L.U., made her first appearance before the court in 1973, she spoke without interruption for her first 11 minutes. (She joined the court in 1993 and died in 2020.)

Contrast that with Justice Kagan's first argument as U.S. solicitor general in 2009. Justice Antonin Scalia cut her off after 22 seconds. For the rest of her time behind the lectern, the longest time she was able to speak without interruption was 55 seconds.

Opinions vary about whether the fast-moving questioning that characterizes modern Supreme Court arguments is an improvement. Justice Clarence Thomas, who once went a decade without asking a question from the bench, has called it impolite and unseemly.

"We look like 'Family Feud,'" he told a bar association in Richmond, Va., in 2000. "If I invite you to argue your case, I should at least listen to you."

Justice Ginsburg agreed in a 2013 interview. “It’s a little unruly,” she said.

In 2019, the court introduced a new practice, giving lawyers two minutes to speak without interruption at the beginning of their arguments. After that, the questions start to fly.

When the justices meet to vote after arguments, their discussion is, by many accounts, stilted and compressed. That means oral arguments are a crucial part of the court’s deliberations.

“It’s hard to imagine a more inefficient and unreliable — and frankly bizarre — set of rules about communicating with colleagues,” Professor Neumann wrote. “In any other setting, this would quickly be seen as a dysfunctional workplace where nine people who make collective decisions refuse to converse with each other about work for which they share responsibility.”

As oral arguments have become more lively, their value may have diminished. In 1967, Justice William J. Brennan Jr. called them “absolutely indispensable.” In 2011, Justice Samuel A. Alito Jr. called them “relatively unimportant.”

Adam Liptak covers the Supreme Court and writes Sidebar, a column on legal developments. A graduate of Yale Law School, he practiced law for 14 years before joining The Times in 2002. More about Adam Liptak

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