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When 4 Justices Did Not Pose Questions, a Quiet Record Was Set

Over the years, scholars have looked closely at the justices' questioning habits, trying to decipher what it might mean for one side or the other to get more, or fewer, questions.

By Marcia Coyle | May 14, 2021



Justice Stephen Breyer testifying in 2015. Credit: Diego M. Radzinski / NLJ

During an oral argument last month in the U.S. Supreme Court, a record quietly was set, one that spans the telephonic and nontelephonic eras of the last 30 years and that has its roots in the statement: "I have no questions."

In *United States v. Gary*, four justices had no questions for the lawyer who was arguing for the government, Jonathan Ellis, an assistant to the U.S. solicitor general. That left the remaining five justices to press the government on the strength and weaknesses of its argument.

The five justices who asked questions of Ellis that morning were the fewest on a full bench to question one side since 1991, when Justice Clarence Thomas joined the court, according to Timothy Johnson of the University of Minnesota Law School.

Before the April 20 **argument**

([//www.supremecourt.gov/oral_arguments/argument_transcripts/2020/20-444_5i26.pdf](https://www.supremecourt.gov/oral_arguments/argument_transcripts/2020/20-444_5i26.pdf)), Johnson said, the fewest number of justices who questioned a side was six (which means, of course, three justices were silent). “We clearly have a new record,” Johnson, a scholar of high court arguments, said.

The silent four in April began early in the argument with Justice Stephen Breyer. In the virus era, Chief Justice John Roberts Jr. **calls on justices** (<https://www.law.com/nationallawjournal/2020/05/05/briefly-counsel-how-chief-justice-roberts-keeps-phone-arguments-moving/>) to speak in order of seniority.

“I have no questions,” Breyer said after Thomas spoke.

“I have no questions at this time,” Justice Neil Gorsuch later said when his turn came up.

“No additional questions,” Justice Brett Kavanaugh, following Gorsuch, said.

“None from me either,” said Justice Amy Coney Barrett.

The announcement of no questions was particularly noticeable because of the court’s telephonic argument format, which began a year ago in response to the COVID-19 pandemic. A justice must either tell Roberts to keep moving, or the justice will ask questions when his or her turn arrives. Justices have a few minutes to ask their questions.

What’s lost in the telephone format is the sort of free-for-all argument that had often marked the in-person sessions at the Supreme Court. The justices would question advocates at will, sometimes interrupting their colleagues’ questions. When the bench was especially hot, Roberts played traffic cop, bringing order to the questioning. A justice who had no questions could be overlooked in the rapid give-and-take between justices and advocates.

In the *Gary* case, the government was asking the justices to reverse **a ruling** ([//www.ca4.uscourts.gov/opinions/184578.P.pdf](https://www.ca4.uscourts.gov/opinions/184578.P.pdf)) by the U.S. Court of Appeals for the Fourth Circuit that had granted relief to a defendant under the felon in possession of a firearm law. Michael Gary had pleaded guilty to that crime but his conviction was vacated because he had not been advised before pleading that the government had the obligation to prove he knew he was a felon at the time he possessed the firearm.

Over the years, scholars have looked closely at the justices’ questioning habits, trying to decipher what it might mean for one side or the other to get more, or fewer, questions from the court.



U.S. Supreme Court Chief Justice John Roberts Jr. Credit: Diego M. Radzinski / ALM

With four justices forgoing questions of him, Ellis, the government's attorney, may have felt he was likely to prevail, at least based on an informal survey by Roberts and formal studies of oral arguments from scholars.

When he was a federal appellate judge, Roberts, also a former successful advocate, had a theory that a case's outcome could be predicted by the number of questions asked of each side. In a small sampling of cases, he **found** (<https://onlinelibrary.wiley.com/doi/abs/10.1111/j.1059-4329.2005.00098.x>) that 86% of the time, the party who received the most questions ultimately lost the case.

In 2009, Johnson and three colleagues **tested** (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1373965) their hypothesis that when the justices focused more questions on the petitioner's side, they would be more likely to vote to affirm the lower court decision than reverse. Their research confirmed their theory.

During the *Gary* argument, Ellis was asked roughly 15 questions in 17 minutes of argument and three minutes of rebuttal. The justices asked his opponent, Stanford Law School's Jeffrey Fisher, at least 30 questions in 32 minutes.

Who will prevail? The justices' decision is expected before the end of June or early July.

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