The Supreme Court's Secret Decisions

By William Baude
The New York Times
February 3, 2015

CHICAGO — A CONVICTED murderer, Charles F. Warner, was executed in Oklahoma last month after the United States Supreme Court denied his request for a last-minute stay. Mr. Warner and other death-row inmates had challenged the state's lethal injection procedures as unconstitutional. In a strange twist, the court agreed to hear his claims — a week after Mr. Warner had been executed.

Traditionally, the court postpones an execution once it has decided to hear an inmate's case. Why did the court wait to accept the case until it was too late for Mr. Warner? Did it decide for some reason to depart from tradition? The court gave no explanation. Four justices dissented from the refusal to stay the execution, but the majority issued only a one-sentence order stating that the application for a stay had been denied.

Mr. Warner's execution illustrates the high stakes in a crucial part of the court's work that most people don't know anything about: its orders docket.

Work at the Supreme Court is divided into two main categories. One is deciding the cases it hears on the merits: the 70-some cases each year that the court selects for extensive briefing, oral argument and a substantial written opinion, sometimes with dissents. These are the cases we hear about in the news.

The orders docket includes nearly everything else the court must decide — which cases to hear, procedural matters in pending cases, and whether to grant a stay or injunction that pauses legal proceedings temporarily. There are no oral arguments in these cases and, as in Mr. Warner's situation, they are often decided with no explanation.

This docket operates in such obscurity that I call it the "shadow docket." (I was a law clerk for Chief Justice John G. Roberts Jr. in 2008-9, but these views are solely mine.)

Despite their obscurity, these orders — there are thousands each year, if you count decisions not to hear cases — are significant. Consider the flurry of orders issued in the month before the 2014 election. The court stopped Wisconsin from implementing a strict voter identification law while it allowed a similar law to be implemented in Texas, and it also stopped lower courts from expanding early voting in Ohio or voter registration in North Carolina.

Different groups of justices dissented in some of the cases, but the court did not explain any of them. Richard L. Hasen, an authority on election law, has argued that there is a common legal thread in these decisions, but the court could have explained its own reasoning rather than leaving it to him to surmise what it did.

Or consider the strange situation of same-sex couples who have sought to marry while the court debated whether to hear a case about whether the Constitution required marriage equality. Last summer, the court temporarily stopped some lower courts from authorizing marriages while various constitutional challenges were pending, but then in the fall the court decided not to hear any of the challenges. It let marriages go forward without any explanation for the apparent change of heart. Then, last month, it decided to hear a case after all. It's as if the court were playing "red light, green light" with same-sex couples.

This lack of transparency has a practical impact. Because the court doesn't issue opinions in these cases, lawyers don't know what legal standards to apply when litigating the issue again in the future. (What if there's something that Mr. Warner's lawyers could have said to stay his execution, but they didn't know what it was?) And because we don't even know which justices have joined most of the orders, we don't know which justices are responsible, and we don't know whether the justices are being consistent and principled from case to case.

These procedural issues also affect the lower courts, which are supposed to follow Supreme Court precedent. But because the lower-court judges don't know why the Supreme Court does what it does, they sometimes divide sharply when forced to interpret the court's nonpronouncements. The orders can influence the substance of litigation, too, because a key factor in procedural cases is whether the claim has merit.

To be sure, there are good reasons for the court to proceed quickly and without much explanation in many of these cases. These disputes happen fast, and the justices may not want to commit to a public explanation that they haven't had time to fully consider. But even modest changes would provide valuable guidance.

What could the court do? First, it could provide more written explanations. It would not need to do so in every case. It could, however, briefly explain its decision when it either reversed a lower court decision, or when it proceeded in the face of a written dissent. In both cases, the presence of a thoughtful written opinion on the other side shows that the court's decision is not so obvious as to go without saying. In many cases these explanations would take only a paragraph or two — but they would be a big improvement over our current, murky practices.

Continue reading the main story58Comments

In the context of opinions on the merits, the justices have recognized the importance of individual accountability. Justice Antonin Scalia has said that writing separate opinions "forces them to think systematically and consistently about the law," while Justice Ruth Bader Ginsburg has said that it "puts the judge's conscience and reputation on the line." The court should extend this logic to the orders docket.

A second, even more modest step toward transparency would be to at least reveal which justices have voted on which side of an orders decision, which the court does not

do consistently. Again, the court would not have to do this in every case; it could announce that it would do so whenever there was a dissent, or whenever a dissenting justice requested it. Even knowing which decisions were controversial would enable us to better judge and predict the court.

The court is in the spotlight more and more. Transparency in all its decisions is vital to its continued legitimacy.

William Baude is an assistant professor of law at the University of Chicago.