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The Supreme Court's Secret Power

By JEFFREY L. FISHER SEPT. 24, 2015

Stanford, Calif. — ON Monday, the Supreme Court will meet in private to perform one of its most consequential — yet least appreciated — functions: choosing the cases it will hear. The court's nine justices hold regular conferences from late September to late June to perform this task. From the roughly 8,000 petitions that arrive at the court each year, the justices select about 75 cases. If four or more justices vote to take a case, it is added to the docket; otherwise, review is denied. Either way, an explanation for the court's decision is almost never given, nor is it customary to indicate how the individual justices voted.

It is hard to think of a more significant power in the machinery of our democracy that is exercised more secretly. Imagine if members of Congress could propose or filibuster bills anonymously. It's unthinkable. But that's essentially what the court does on a regular basis: With complete discretion, it decides whether to undertake potentially major lawmaking without exposing any governmental official to public scrutiny.

The justices should lift the veil of secrecy that shrouds this power.

I am not suggesting that the justices should have to *explain* their votes. They are already busy enough, and there are good reasons for allowing judicial deliberations to remain private. But the Supreme Court, which has always decided for itself how to transmit its work to the public, could easily do what many other federal and state appellate courts already do: Simply announce the vote tallies — that is, how each justice voted for each petition for review — when accepting or turning away cases.

In light of the Supreme Court's significant role in shaping so much of our national policy, it does not seem too much to ask to know which justices are putting which issues on the court's docket. Indeed, these votes are more consequential than anything said at oral argument. If some justices regularly vote to hear appeals from corporations and never from employees, the public ought to know this. If others often vote to hear petitions from civil rights groups but never from state or local governments defending their policies, the public should know this, too.

The justices often disagree over whether certain issues warrant their attention. Should the court revisit the rules governing the legality of race-conscious admissions plans, as at least four justices have required the court to do this fall in a case involving the University of Texas? Or would the court's time have been better spent interjecting itself into the debate in Silicon Valley (and elsewhere) concerning the extent of copyright protection for computer software, as the court declined to do on the same day it granted review in the case from Texas?

Wouldn't it be instructive to know, in each case, what the justices' votes were — and in so many other cases, too?

Admittedly, without including the reasons for the votes, this information about the justices' actions would not paint a full picture. But as the Supreme Court itself has held in First Amendment cases, the fact that information is incomplete is not a valid ground for withholding it. Any argument that the public is "better kept in ignorance than trusted with correct but incomplete information," the court has explained, "rests on an underestimation of the public." The same wisdom applies here.

Furthermore, if the justices were required to announce their votes, they might more often volunteer their reasoning, if only in brief missives, lest their votes be misunderstood. (Indeed, many justices already occasionally explain their votes when, for example, they feel strongly that a case that was not granted review should have been — a practice known as dissent from denial of certiorari.)

When the justices do provide glimpses into their decision-making process about which cases to hear, they offer the bar and the public at large valuable opportunities to learn more about their judicial philosophies.

Consider a case that the court heard and decided last term, City and County of San Francisco v. Sheehan, which concerned whether a lower court properly exposed police officers to financial liability for their allegedly improper treatment of a mentally disabled arrestee. In dissent, Justice Antonin Scalia (joined by Justice Elena Kagan) contended that the court should never have taken the case in the first place because it presented unusual facts unlikely to recur with any frequency. Justice Samuel A. Alito Jr. responded for the majority, however, that the prospect of holding a police officer liable in any case is so important "to society as a whole" that the court ought to review such cases.

Or consider the 1995 case Kyles v. Whitley, which concerned the claim that New Orleans prosecutors had withheld exculpatory evidence, leading to a wrongful conviction in a death penalty case. Writing for himself and Justices Ruth Bader Ginsburg and Stephen G. Breyer, Justice John Paul Stevens noted that review of the case had been warranted "even though our labors may not provide posterity with a newly minted rule of law." Other justices disagreed, however, arguing that the court should not try to perform "error correction" in capital cases.

In the end, the justices are public servants, and the court is a public institution. Absent a compelling reason to conceal their votes from the populace, the justices should let the country know how they each are using the enormous agenda-setting authority we have entrusted to them.

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