

November 17, 2010

Justices Are Long on Words but Short on Guidance

By ADAM LIPTAK

WASHINGTON — In June, the [Supreme Court](#) issued a [decision](#) on the privacy rights of a police officer whose sexually explicit text messages had been reviewed by his employer. Ever since, lower court judges have struggled to figure out what the decision means.

The case “touches issues of far-reaching significance,” Justice [Anthony M. Kennedy](#) wrote. Then he explained why the court would decide none of them. A definitive ruling should be avoided, he said, because “it might have implications for future cases that cannot be predicted.”

Justice [Antonin Scalia](#) went along with the decision, but he blasted his colleagues for “issuing opaque opinions.”

A month later, Judge Frank M. Hull of the federal appeals court in Atlanta [complained](#) that the privacy decision featured “a marked lack of clarity,” and was almost aggressively unhelpful to judges and lawyers.

The Supreme Court under the leadership of Chief Justice [John G. Roberts Jr.](#) is often criticized for issuing sweeping and politically polarized decisions. But there is an emerging parallel critique as well, this one concerned with the quality of the court’s judicial craftsmanship.

In decisions on questions great and small, the court often provides only limited or ambiguous guidance to lower courts.

And it increasingly does so at enormous length.

[Brown v. Board of Education](#), the towering 1954 decision that held segregated public schools unconstitutional, managed to do its work in fewer than 4,000 words. When the Roberts court returned to just an aspect of the issue in 2007 in [Parents Involved v. Seattle](#), it published some 47,000 words, enough to rival a short novel. In more routine cases, too, the court has been setting records. The median length of majority opinions reached an all-time high in the last term.

Critics of the court’s work are not primarily focused on the quality of the justices’ writing, though it is often flabby and flat. Instead, they point to reasoning that fails to provide clear guidance to lower courts, sometimes seemingly driven by a desire for unanimity that can lead to fuzzy, unwieldy rulings.

The privacy decision that angered Justice Scalia was unanimous. So was a [decision](#) in March, on [mutual fund](#) advisers' fees, that was, nevertheless, vague enough that both sides plausibly could and did claim victory.

Writing for the court, Justice [Samuel A. Alito Jr.](#) told lower courts little more than that the law requires that "all relevant circumstances be taken into account" in deciding whether advisers' fee arrangements were proper. He acknowledged that this guidance "may lack sharp analytical clarity."

One measure of whether unanimity is authentic is the number of separate opinions in nominally unanimous decisions. This last term set a record for such opinions, known as concurrences, in which justices join or vote with the majority but also issue their own opinions to express qualms about some aspect of the majority's approach.

But divided decisions can be maddeningly vague, too, of course.

A [decision](#) in May striking down life-without-parole sentences for juvenile offenders who did not kill anyone said only that states must provide "some meaningful opportunity to obtain release." In dissent, Justice [Clarence Thomas](#) wondered what that could possibly mean.

A [decision](#) last year that required a judge to step aside from a case involving a coal executive who had spent millions to help elect the judge left many questions unanswered about when recusal is required. How many questions? Chief Justice Roberts, dissenting, listed 40.

In a pair of civil procedure decisions in [2007](#) and [2009](#) that have been cited many thousands of times, the court gave trial judges more authority to throw out cases early based on, in the words of the later decision, their "experience and common sense."

That standard, Arthur R. Miller [wrote](#) last month in *The Duke Law Journal*, is "shadowy at best" and has caused "confusion and disarray among judges and lawyers."

Unanimous in Name Only

Chief Justice Roberts, who has led the court for more than five years, early on expressed his preference for unanimous opinions even as he seemed to recognize a potential cost in providing guidance to the lower courts.

"The more cautious approach, the approach that can get the most justices to sign on to it, is the preferred approach," he [said](#) in 2006.

As it happens, his project has not been particularly successful. Two of the Roberts court's five terms ranked among the top 10 since 1953 in the average number of dissenting opinions per case, according to

an analysis by Lee Epstein of [Northwestern University](#) and Andrew D. Martin of [Washington University](#) in St. Louis. None of 19 terms overseen by Chief Justice [William H. Rehnquist](#) from 1986 to 2005 made the top 10.

But it is in the area of faux unanimity that the Roberts court is really making its mark.

In the last term, there was at least one concurring opinion in 77 percent of unanimous rulings. That is a record.

Concurrences present the bench and bar with a particular difficulty.

“A dissent tends to be a clear signal that this is one justice who is not on board with whatever scheme his or her brethren are concocting,” Sonja R. West [wrote](#) in *The Michigan Law Review* in 2006. “Things become murky” where concurrences are involved, she went on, as “closer inspection is needed to fully understand the justice’s position.”

Concurrences, except when they provide the court with a crucial vote, are not binding. But it is a rare judge or law clerk who pays them no heed, as they can explain, limit or amplify aspects of the court’s decision.

At his [confirmation hearing](#), Chief Justice Roberts said he would put a premium on clarity and accessibility.

“I hope we haven’t gotten to the point where the Supreme Court’s opinions are so abstruse that the educated layperson can’t pick them up and read them and understand them,” he said.

In a forthcoming [study](#), two political scientists used linguistic software to analyze the complexity of the usage and concepts in some 5,800 Supreme Court opinions from 1983 to 2008. “Unanimous opinions are the most complex,” the study, by Ryan J. Owens of [Harvard](#) and Justin Wedeking of the [University of Kentucky](#), found, while majority opinions in 5-to-4 decisions are the clearest.

The clearest writers on the court were Justices Scalia and [Stephen G. Breyer](#), and the most complex was Justice [Ruth Bader Ginsburg](#).

But every single justice in the study wrote clearer dissents than majority opinions. That is almost certainly because dissents tend to be more direct and personal. The more votes an opinion needs to command, the more likely it will read as if written by a committee.

When More Can Be Less

The court decides perhaps 75 cases a term these days, down from about 150 in the mid-1980s.

Yet the number of words per decision has been climbing. The Roberts court set a record last term, issuing majority opinions with a median length of 4,751 words, according to data collected by two political scientists, James F. Spriggs II of Washington University in St. Louis and Ryan C. Black of [Michigan State](#). The lengths of decisions, including the majority opinion and all separate opinions, also set a record, at 8,265 words.

In the 1950s, the median length of decisions was around 2,000 words.

The opinions in [Citizens United v. Federal Election Commission](#), the January decision that lifted restrictions on corporate and union spending in candidate elections, spanned 183 pages and more than 48,000 words, or about the length of “The Great Gatsby.” The decision — ninth on the list of longest majority opinions — was controversial, but the questions it addressed were not particularly complicated.

Long opinions are perilous, said Edward H. Cooper, a law professor at the [University of Michigan](#). “The more things you say, the more chances you have to be wrong and the more chances you have to mislead the lower court,” he said.

There was a time when justices were keenly sensitive to keeping it short. Justice Lewis F. Powell Jr. wrote a memorandum to his law clerks in 1984 saying that “a frequent and justified criticism of this court is that opinions are too long” and “are overburdened with footnotes.” This can, he said, “leave lower courts and lawyers in doubt as to the law.”

These days, the writing emanating from the court can be bureaucratic and unmemorable.

“They just don’t make great movie lines the way they used to,” said Fred R. Shapiro, an associate librarian at [Yale](#) Law School and the editor of *The Oxford Dictionary of American Legal Quotations*. “They also don’t make great Supreme Court passages the way they used to.”

With the declining docket, justices have more time to hone their writing. But the available evidence suggests they rely on their clerks to produce first drafts, which the justices then edit.

“Although today’s Supreme Court opinions are no more poorly written on average than opinions from the era in which the justices wrote their own opinions, there is nonetheless a loss when opinions are ghostwritten,” Judge [Richard A. Posner](#) of the United States Court of Appeals for the Seventh Circuit wrote in *The New Republic* in 2006. “Most of the law clerks are very bright, but they are inexperienced; and judges fool themselves when they think that by careful editing they can make a judicial opinion their own.”

Delegating actual drafting to law clerks who are typically just two years out of law school, critics say, can be an abdication of judicial authority or at least an invitation to uneven and ambiguous prose.

A forthcoming [study](#) from two professors at the University of Toronto tried to identify the amount of ghostwriting on the court by developing software to analyze how justices' writing styles varied from opinion to opinion and term to term.

“A justice who wrote her own opinions would presumptively possess a less variable writing style than a justice who relied heavily on her law clerks,” wrote Jeffrey S. Rosenthal and Albert H. Yoon, the authors of the study.

The opinions of Chief Justice Roberts and Justices Scalia and Breyer were less variable in this sense, and those of Justices Thomas, Ginsburg and Kennedy more so. The highest level of variability among justices who served since 1941 was in the opinions of Justice [Sandra Day O'Connor](#), who retired in 2006.

Two Seventh Circuit judges known to write their own opinions, Judge Posner and Chief Judge Frank H. Easterbrook, have variability rates much lower than those of any current member of the Supreme Court.

Supreme Court opinions can also be a sort of pastiche, with passages borrowed from the parties' briefs. Using antiplagiarism software, Pamela C. Corley, a political scientist at Vanderbilt, [found](#) in a 2007 study in *Political Research Quarterly* that about 10 percent of the prose in majority opinions from the three terms that concluded in 2005 came from the parties' briefs.

Not every decision is opaque, but even clear and unanimous decisions these days can provoke caustic concurrences.

In February, for instance, the court considered whether police officers could resume questioning a man who had invoked his Miranda rights more than two years before.

By a 9-to-0 vote, the justices said [yes](#). Justice Scalia, writing for seven justices, added that the court should do more than merely decide the question before it.

“Law enforcement officers need to know, with certainty and beforehand, when renewed interrogation is lawful,” he wrote.

How long, then, must the police wait after they have released a suspect? Two weeks, Justice Scalia said, sounded about right.

Justice Thomas concurred, but he quarreled with Justice Scalia. “To be sure,” he wrote, “the court's rule has the benefit of providing a bright line.” But he said picking two weeks out of the air was arbitrary and unprincipled and could just as easily have been “0, 10 or 100 days.”

Justice [John Paul Stevens](#), on the other hand, would have said only that two years was enough time in the case before the court.

Head Scratchers

In the privacy case that infuriated Justice Scalia and mystified Judge Hull, [City of Ontario v. Quon](#), the Supreme Court ruled that a California police department had not violated the constitutional privacy rights of a member of a SWAT team when it audited the text messages on a pager the city had issued him.

Justice Kennedy took the unusual step of accepting three important points in the case only for the sake of argument, and he spent much of his opinion explaining that the court had taken pains to decide as little as possible.

“Cellphone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification,” Justice Kennedy went on. “On the other hand, the ubiquity of those devices has made them generally affordable, so one could counter that employees who need cellphones or similar devices for personal matters can purchase and pay for their own.”

Given that, he said, the case should be decided on grounds so narrow that the decision would have almost no precedential effect. “The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear,” he wrote.

In his concurrence, Justice Scalia decried this approach.

“Applying the Fourth Amendment to new technologies may sometimes be difficult, but when it is necessary to decide a case, we have no choice,” he wrote. “The-times-they-are-a-changin’ is a feeble excuse for disregard of duty.”

Many scholars say there is an important place in Supreme Court jurisprudence for incremental rulings, purposeful ambiguity and the delegation of discretion to lower court judges.

“If the goal is to clear up any conflict in the lower court opinions, then you may want a clearer opinion,” Professor Spriggs said. “But a real bright line may create some injustices in the system.”

The lines in many Roberts court opinions are faint.

Consider [Philip Morris USA v. Williams](#), an important 2007 decision on punitive damages, in which Justice Breyer gave lower courts guidance about how to present juries with evidence concerning harm

to people not involved in the case. He said juries may consider that evidence in assessing the reprehensibility of the defendant's conduct but not to punish the defendant for harm caused to others.

Even Justice Breyer's colleagues had trouble making sense of the distinction.

"This nuance eludes me," Justice Stevens wrote in a dissent.

Justice Ginsburg, joined by Justices Scalia and Thomas in a second dissent, asked what a jury was supposed to do on hearing an instruction based on the majority opinion. "The answer," she wrote, "slips from my grasp."