Transparency and Authority in Appellate Decision-Making

By Paul R. Bernard

Lawyers love to speculate about what happens among the members of an appellate panel in the conference room and chambers. This speculative impulse arises, in part, from the universal desire to gossip about the hidden lives of the celebrated or powerful. But it also arises from an awareness of the unique dynamics of appellate decision-making. Eager to influence the decision-making process to the greatest extent possible, lawyers want to understand the judicial collaborations and the judges' interpretation of the facts and legal theories as much as possible. Some appellate practitioners call for greater transparency in the process of judicial decision-making, some resist shorter or fewer oral arguments to afford maximum opportunity to assess its inclinations and interact with the bench. Some have suggested that, before oral argument, appellate courts should provide the attorneys with any draft opinion or legal memoranda created by court staff. All of these positions emerge from the idea that the process of appellate decision-making should be largely open to lawyers and that openness promotes better decision-making.

But how much transparency is good for us? When does the disclosure of the elements of appellate decision-making illuminate the law? And when does that disclosure obscure the law by distracting the bar and the public about what matters in a decision? The past controversy about the public disclosure of the internal communications at the Michigan Supreme Court provides a way to explore the answers to these questions. When the justices exchanged public statements about whether and under what circumstances their internal debates should be revealed, several justices referred to the concept of a "judicial deliberative privilege" as a foundation for their views.[1] Considering the meaning and purpose of that concept can help explain just how transparent appellate decision-making should be.

Fast Facts:

If the decision-making of an appellate court appears too fragmented, if the seams in the judges' compromise are too apparent, it lacks authority.

Appellate decision-making promotes the integrity of the rule of law when it is cloaked, at least in part, from public inspection. The decisions of an appellate court are more authoritative when we know the legal reasoning behind a decision, but not the personal or institutional dynamics.

The Idea Behind the Judicial Deliberative Privilege

The standard rationale for all legal privileges is well known: privileges protect certain relationships by preserving the confidentiality of communications within that relationship.[2] The confidentiality conferred by the privilege allows participants in that relationship to have the maximum freedom of action, on the assumption that such freedom will produce results that benefit society generally.[3]

The deliberative privilege involves a variation on this theme. It is most commonly invoked to prevent the disclosure of communications among policy makers, especially those in the executive branch and administrative agencies.[4] According to the theory behind the privilege, policy makers will make better decisions when their preliminary judgments or tentative thoughts are free from public scrutiny.[5] The operative concept behind the idea of the privilege is that a veil should be draped over certain relationships, so that any communication "inside" that relationship is protected from the view of "outsiders."

Critics challenge the deliberative privilege because it pulls a cloak of secrecy over government operations.[6] Those critics prefer transparency in government decision-making, assuming that, if officials are publicly accountable for their decision-making process, they are more likely to make rational, justifiable decisions.[7]

Does this argument for transparency apply to appellate courts? Is the appellate decision-making process like the process employed in administrative agencies in the sense that both involve a dialogue among decision makers? A discussion of the nature of law making and of legal authority can help provide an answer to these questions.

The Nature of Legal Authority

All legal rules have authority—the power to command. But their authority comes in different forms. As Professor Joseph Vining has pointed out, power may be authoritative or authoritarian.[8]

Authoritarian power involves the exercise of power for its own sake or to satisfy the whims of those in power. This is "because I say so" authority. To put it another way, authoritarian power is arbitrary and capricious. Its reasons are inscrutable to those subject to it.[9]

In a constitutional democracy, the law must be authoritative. That is, it must invite the assent and willing obedience of the governed. Assent and willing obedience are possible when there can be reasoned agreement with the principle or policy behind a rule of law.[10]

It is easier to give assent and agreement to something that is the product of a single mind rather than a committee. A single decision maker can offer (or, at least, should offer) a coherent opinion justifying the rule—integrating his or her reasons for making that rule and acknowledging opposing reasons.[11]

The Authoritativeness of Appellate Courts

Decision-making in appellate courts is not, of course, the product of a single mind. Thus, appellate panels can be dangerously like committees. I once heard a United States circuit judge explain his frustrations with serving on an en banc court by noting, "It's not a court; it's a convention." This comment aptly summarizes the risk that appellate decision-making can devolve into the sort of thing that bureaucracies often do: making ham-fisted compromises among the competing interests of constituent groups. A ham-fisted compromise has never invited anyone's assent and obedience.

If the decision-making of an appellate court appears too fragmented, if the seams in the judges' compromise are too apparent, it lacks authority. Consider the often-pondered opinion in *Griswold v Connecticut*.[12] There, the United States Supreme Court invalidated a Connecticut statute prohibiting the use of contraceptives, even by married couples. Justice Douglass opined that the ruling was based on a "right of privacy" to be located in a "penumbra" surrounding various elements of the Bill of Rights.[13] Chief Justice Warren and Justices Goldberg and Brennan did not concur with Justice Douglass's incorporationist orientation, locating the constitutional right in the concept of liberty expressed in the Fourteenth Amendment.[14] Justice Harlan had a slightly different approach.[15] And so on.

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Since 1965, generations of lawyers and law students have asked: What does the ruling in *Griswold* mean?[16] To put it another way, what does the ruling in that case command us to do?

Of course, one may answer with the old reliable evasion: assert that *Griswold*'s authority is limited to its facts and hope that another opinion comes along to clarify what the law is. But recourse to this maneuver demonstrates the problem of fragmented opinions. If a fragmented opinion cannot be applied to resolve any other cases, then the opinion lacks authority. An opinion that contains a jumble of voices is merely cacophonous and lacks the power to command. For those subject to it, such an opinion "does not have authority for them. They react to it, and are interested in what it might *do* to them. But they do not internalize its purposes or listen really to what it *says* to them."[17] A fragmented, bureaucratic opinion certainly *does something* to the people who must follow it. But it is not at all clear that such an opinion *says anything* that they can internalize.

Thus, the judiciary—especially the appellate judiciary—loses its authority to the extent that it appears to be a bureaucracy, or committee of disparate individuals that reaches decisions through something other than a reasoned dialogue in which all members are equally engaged. For this reason, courts generally, and especially the highest appellate courts, create rituals and symbols designed to convey the impression that their decisions are the product of a unified entity—"this Court"—and not the products of bargaining and backroom deal-making among its constituent judges or justices. A recent commentator on the United States Supreme Court has pointed out that "the justices understand that familiarity breeds contempt and inaccessibility promotes authority.... Unlike the president and members of Congress, who increasingly govern by personality, leaks, and the illusion of intimacy, the justices of the Supreme Court have generally resisted public demands for personal exposure."[18]

The Judicial Deliberative Privilege as a Solution to the Problem of Authority in Appellate Courts

The idea behind the deliberative privilege for appellate jurists responds to the necessity of properly conveying and commanding the judiciary's authority. The deliberative privilege is constructive to the extent that it fosters the perception of "nine judges in dialogue with one another, trying to come to common ground and setting out in writing their agreements and disagreements with a special sense of the representative quality of their thinking."[19]

In this respect, the deliberative privilege is unlike the other privileges. It is not meant only to protect those who are inside the privileged relationship. It is also designed to protect the relationship between those inside the judiciary and those outside of it. When the appellate decision-making process is too transparent to outsiders, the product of that process—the law—seems flimsier and less authoritative to those who must conform themselves to it. To the extent that a judicial decision seems to be the product of something other than principled legal reasoning, it becomes authoritarian, commanding rather than inviting obedience.

In this connection, the arguments for transparency do not apply to appellate decision-making in the same way that they would to the decision-making of an administrative agency. Indeed, in the context of appellate courts, the arguments for transparency are turned upside down. To a significant degree, appellate decision-making promotes the integrity of the rule of law when it is cloaked, at least in part, from public inspection. The decisions of an appellate court are more authoritative when we know the legal reasoning behind a decision, but not the personal or institutional dynamics.

There are also implications for judges in these ideas about the deliberative privilege, transparency, and the preservation of authoritative decisions. Just as these ideas promote circumspection among lawyers and the public about making inquiries into the appellate decision-making process, they also promote reticence

among appellate jurists. The principle about deciding cases—and writing opinions—on the narrowest grounds is not only about judicial economy. It is also about preserving the authoritativeness of appellate decision-making. Narrowly crafted decisions preserve their ability to compel assent by focusing only on dispositive issues and will exclude anything extraneous to the process of legal reasoning. When an appellate opinion expresses the author's personal animosities or attributes illegitimate motives to those who disagree with it, the opinion alienates itself from those who are obliged to follow it. A lawyer or party can assent, with reluctance or enthusiasm, to a legal reason, but not to a judge's thinly veiled personal concerns.

In the end, if we must not peer too closely into the judges' conference room or chambers, the judges must not provide unsolicited glimpses, either. This circumspection and reticence is not just a matter of decorum or propriety. It is a matter of preserving the law's ability to be authoritative rather than authoritarian. ■

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FOOTNOTES

1. Administrative Order No. 2006-8.
2. *People v Stanaway,* 446 Mich 643, 658; 521 NW2d 557 (1995), cert den 513 US 1121 (1995) (discussing evidentiary privileges generally).
3. *Id.*
4. See, e.g., Wetlaufer, *Justifying secrecy: An objection to the general deliberative privilege,* 65 Ind L J 845, 885–86 (1990); see also Jensen, *The reasonable government official test: A proposal for the treatment of factual information under the federal deliberative privilege,* 49 Duke L J 561 (1999).
5. *NLRB v Sears, Roebuck & Co,* 421 US 132, 151; 95 S Ct 1504 (1975) ("Manifestly, the ultimate purpose of this long-recognized privilege is to prevent injury to the quality of agency decisions."); see also *Bureau of Nat Affairs v US Dept of Justice,* 239 US App DC 331, 343; 742 F2d 1484 (1984).
6. See Jensen, *supra;* see also Wetlaufer, *supra.*
7. See Jensen, *supra* at 563.
8. Vining, *The Authoritative and the Authoritarian* (Univ of Chicago Press, 1986).
9. See *id.*
10. See *id.*
11. See Vining, *Justice, bureaucracy, and legal method,* 80 Mich L R 248 (1981).
12. *Griswold v Connecticut,* 381 US 479; 85 S Ct 1678 (1965).
13. *Griswold, supra* at 481–486.
14. *Griswold, supra* at 486–499 (Warren, CJ, with Goldberg, J and Brennan, J, concurring).
15. *Griswold, supra* at 499–502 (Harlan, J, concurring).
16. This also seems to be a popular question at judicial confirmation hearings in the United States Senate.
17. *Id.*
18. Rosen, *The Supreme Court: The Personalities and Rivalries That Defined America* (Times Books, 2006), p 5.
19. Vining, 80 Mich L R at 251.