

The chamber of secrets

Arlen Specter

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In light of the recent confirmation hearings on Judge Sonia Sotomayor's nomination to be the next associate justice of the U.S. Supreme Court, the Court has a chance to correct two critical shortcomings that are undermining its productivity and shrouding its deliberations in secrecy at the expense of public understanding and appreciation.

I refer to the more than centurylong decline in the number of cases the Court decides and the ban on television coverage. At a time when the number of cases making their way to the Court has never been higher, the Court's refusal to grant certiorari has reached epic proportions. In 1886, the Court decided 451 cases. A century later, it issued 161 signed opinions. In 2007, the number had fallen to 67.

This shrinking output is hampering the Court's role and function under the Constitution. Hundreds of cases, which merit consideration, are going unheard each year. The public rarely learns why. The Court merely issues one-sentence denials without explanation. This silence adds to the frustration, especially in high-profile major constitutional cases in which there may be good reason to question the court's denial.

In one case, the Court refused to decide the constitutionality of President George W. Bush's warrantless wiretapping program — the Terrorist Surveillance Program — which bypassed the special court established by Congress in 1978 under the Foreign Intelligence Surveillance Act. A U.S. district court in Detroit found the program unconstitutional, and the U.S. Court of Appeals for the 6th Circuit then reversed, finding that the plaintiffs lacked standing. The Supreme Court denied certiorari, in effect dismissing the case on procedural grounds of standing without dealing with the substantive constitutional issue and the challenge to congressional authority.

In another instance, the Court denied certiorari in a case concerning the honest-services provisions in federal criminal law. Dissenting, Justice Antonin Scalia wrote, "In light of the conflicts among the Circuits; the long-standing confusion over the scope of the statute; and the serious due process and federalism interests affected by the expansion of criminal liability that this case exemplifies, I would grant the petition for certiorari and squarely confront both the meaning and the constitutionality" of the statute.

Frequent denial of certiorari on other issues leaves the law in a state of confusion. In June, the Court refused to consider a case in which the families of 9/11 victims sought damages from Saudi Arabian princes for financing Muslim charities implicated in al-Qaeda operations. Despite considerable evidence and substantial damages claims, the Court left unresolved the burning issue of Saudi complicity in arguably the worst act of aggression against Americans in history.

In denying certiorari in these and other cases, the Court is forfeiting its authority to engage in judicial review and its role as interpreter of the Constitution. At a time when the number of law clerks has quadrupled and justices spend their three-month summer break lecturing around the world, one can well ask why the Court's workload continues to decline.

During his Senate confirmation hearings in 2005, Chief Justice John Roberts Jr. said the Court "could contribute more to the clarity and uniformity of the law by taking more cases." So far, it has not happened. At her own hearings, Judge Sotomayor said she recognized the concerns over the Court and its declining workload. Perhaps her ascension to the Court will bring a turn of the tide.

On the separate question of whether to televise open Supreme Court proceedings, my position is simple. The Court is a public institution and should be available to all Americans, not just the select few who can travel to Washington. A recent C-SPAN poll found that 61% of Americans support televising the Supreme Court's oral arguments. Sotomayor said she would convey her "positive experiences" with television in her courtroom to her colleagues on the high court. Great Britain recently opened its highest court to television cameras.

In the era of the shrinking Supreme Court docket, denying petitions for certiorari may seem strategically expedient. But, in the end, the justices should not shirk their responsibility to say what the law is. Similarly, retaining the majesty and mystery of the Supreme Court as an institution may, at first blush, counsel against admitting television cameras. Yet it is only through observation of that venerable institution that an educated public can truly appreciate its significance.

The first test of Justice Sotomayor's willingness to cast votes in favor of certiorari in a paramount case or to turn the tide in favor of ordinary Americans by permitting camera coverage of arguments could come as early as September.

U.S. Senator Arlen Specter (D-Pa.) is a member of the Senate Judiciary Committee.