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The Prospect of Open Deliberations in the Wisconsin Supreme Court

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Report from the States

The prospect of open deliberations in the Wisconsin Supreme Court

Recent episodes have underscored a lack of collegiality among the justices on the Wisconsin Supreme Court, including most prominently an alleged assault of one justice by another. In response, Chief Justice Shirley Abrahamson proposed a menu of institutional reforms for her colleagues' consideration, with the stated goal of enhancing collegiality. She expressly called on each justice's commitment "to promoting civility and safety in our workplace; to maintaining personal control in our language, demeanor, temperament, and conduct on and off the bench; to bolstering the public trust and confidence in the Court and our judicial system; and to upholding the Court's long-standing reputation for excellence."

The chief justice's proposals included the issuance of a joint statement pledging greater efforts toward collegiality, the hiring of experts on conflict resolution and small group dynamics, and a number of modifications to the standards and mechanisms related to recusals. But the one that received the most attention was her suggestion that the court open its deliberations to the public.

There are, of course, many ways in which a court might make its deliberations open, and Chief Justice Abrahamson presented a number of options, including holding the court's deliberations in a room open to the public, holding the deliberations in a closed room but streaming live video, or recording the court's deliberations for later release. As most observers expected, the other justices rejected these proposals. Justice David Prosser suggested that open deliberations would "stifle candor." In similar fashion, Justice N. Patrick Crooks alluded to the clichéd parallel between the making of law and sausage.

While open deliberation will not become a reality at the court, Chief Justice Abrahamson's proposal prompts deeper consideration of precisely why closed judicial deliberation is the uniform practice in American appellate courts. After all, courts in some countries do deliberate in public. The Supreme Court of Brazil, for example, holds its deliberations in public and on live

television, and publishes transcripts of the deliberations together with its rulings. (The court also has its own Twitter feed and YouTube channel.) Closer to home, at least in terms of our systemic heritage, English courts have long operated according to a tradition of orality in which every step of the adjudicative process takes place in public. The underlying idea, according to Professor Robert Martineau, is that "[t]he faithful observance of the tradition ... guarantees the accountability of English justice and maintains public confidence in it."

The sense that open deliberations would be problematic seems to rest primarily on the understanding that there is something valuable about secret deliberations that would be lost if the process were opened. The fear is that justices—perhaps especially those in an elective system—would be wary of articulating positions, even tentatively, that might be used against them in a later campaign. While egregious acts of non-collegiality would undoubtedly be deterred, collegiality in a deeper sense might suffer. Whatever legitimate exchanges of ideas take place among the justices would be pushed underground, and would not occur among the whole court.

We might reasonably be skeptical about this reaction, however, given that the available evidence suggests that judicial deliberation is rarely meaningful, even on courts that do not suffer from the collegiality issues currently present on the Wisconsin Supreme Court. Biographies of U.S. Supreme Court justices, for example, consistently relate new justices' disappointment at what takes place (or, more accurately, does not) in the conference room. Judge Posner makes the point more forcefully in the early pages of *How Judges Think*: "The difficulty outsiders have in understanding judicial behavior is due partly to the fact that judges deliberate in secret, though it would be more accurate to say that the fact that they do not deliberate (by which I mean deliberate *collectively*) very much is the real secret. Judicial deliberation is overrated."

The real reason for concern, then, may not be so much that open deliberation would lead to the loss of something valuable, but rather that it would introduce new pathologies. It is fascinating to ponder: what would happen if the Wisconsin Supreme Court, or any American appellate court, held its deliberations in public? The

result might actually be more, rather than less, dialogue, though whether it would be worthy of the name “deliberation” is another matter. A justice may feel compelled to limit his contribution to a prepared statement, rather than to engage in a free-flowing, substantive debate.

At the same time, public deliberation would better enable interest groups to monitor behavior, creating the very real potential for reduced independence and a decreased willingness to back off positions once taken. Advocates might also pay close attention, and could seek to use statements from deliberations as tools of argumentation, suggesting that they somehow shed light on the “true” meaning of an opinion. Courts would, in turn, have to grapple with whether to allow such arguments, which would raise many of the same general issues as were featured in debates over the precedential value of unpublished opinions. While it would strike many as inappropriate to bar advocates from citing statements made in open deliberation,

allowing such citation would arguably create incentives for judges to behave strategically by attempting to stack the deliberative record with statements favoring their preferred perspective.

One might conclude that these effects are real but worthwhile. Open deliberations would certainly provide the interested public with a window into a process that has been off limits, and what it saw through that window might enhance its faith in the rule of law. The examples of Brazil and England suggest that the consequences of open deliberations are not inevitably bad, though context matters, and both legal systems are quite different from our own. Wisconsin may not have provided us with an opportunity to test our intuitions, but it has given us a chance to reconsider a feature of our system that we would otherwise take for granted.

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