Justice by the Numbers: The Supreme Court and the Rule of Four-Or Is It Five?

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Justice by the Numbers: The Supreme Court and the Rule of Four—Or Is It Five?*

Ira P. Robbins†

[It is better for the public] to have confidence in the law as a constant, safe in the hands of the judges, than as a set of rules nicely attuned to the sentiments of the day.¹

The knowne certaintie of the law is the safetie of all.²

I. INTRODUCTION

In the early hours of April 14, 2000, Robert Lee Tarver died in Alabama’s electric chair, even though four Justices of the United States Supreme Court had voted to review the merits of his case. This situation is not unique. Each year, practitioners and pro se litigants alike petition the Supreme Court without fully knowing the rules pursuant to which the Court will decide their client’s, or their own, fate. The reason is that the Supreme Court operates under two sets of rules—those that are published and those that are not. The former specify

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1. Lord Radcliffe, The Lawyer and His Times, in NOT IN FEATHER BEDS 265 (1967).
2. EDWARD COKE, INSTITUTES 395 (12th ed. 1738) (Epilogue to Pt. 1, Bk 3).
some Court procedure and purport to guide lawyers and litigants seeking review and relief from the Court. The unpublished set of rules guide the internal decision-making processes of the Court. The Court uses these rules to determine which cases to accept and to manage its docket. Unfortunately, however, the Court closely guards information concerning these rules. Indeed, the very existence of internal rules, as well as the manner in which they function, can be inferred only from an examination of dissenting opinions and from published statistics on how Justices voted in particular cases. This lack of information on the Supreme Court’s internal workings leaves litigants and lawyers, as well as the media, at a loss when attempting to understand the judicial process.

A recent kernel of information on unpublished Supreme Court rules emerged in February 2000, in a case that concerned the gray area between the Court’s Rule of Four and its Rule of Five. Robert Lee Tarver’s bizarre trip through the Supreme Court’s procedural maze left attorneys and Court watchers unsure of how many votes the Court requires to grant an original writ of habeas corpus. In re Tarver presented an opportunity to decipher an important internal Supreme Court procedure; it also highlighted lingering questions concerning

3. These rules include, for example, SUP. CT. R. 10 (outlining certiorari review), SUP. CT. R. 19 (governing certified questions), and SUP. CT. R. 20 (explaining procedure for extraordinary writ petitions). The Supreme Court Rules are published online at http://www.supremecourtus.gov/ctrules/ctrules.html. They are also published as Appendix A in ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 887-919 (7th ed. 1993) [hereinafter SUPREME COURT PRACTICE].
5. See id. at 1067 (stating that Supreme Court “traditionally has been reluctant to make public its inner workings”).
6. The Rule of Four applies to situations in which the votes of four Justices are required to take some action—for example, to grant a writ of certiorari or to hold a case pending the outcome of another case before the Court. See infra note 13; infra notes 65-78 and accompanying text.
7. The Rule of Five applies in situations in which the votes of five Justices are required—for example, to decide a case on the merits or to grant a stay. See infra notes 79-88 and accompanying text.
8. Unpublished Supreme Court rules are problematic not only in the habeas corpus context. In September 2000, the issue arose in the Microsoft antitrust case. United States District Judge Thomas Penfield Jackson granted the government permission to bypass the United States Court of Appeals and take the case directly to the Supreme Court. The government argued that an expedited appeal was necessary and in the best interests of the nation’s economy. But there was a major question about how many Justices’ votes were necessary to accept the case. See James v. Grimaldi, High Court’s Rules Unclear in Microsoft Case, WASH. POST, Sept. 19, 2000, at E1 (commenting that debate had been sparked “among court watchers, scholars and lawyers who are in strong disagreement over how many justices it will take to decide whether to hear the expedited appeal. Some argue that only four are needed, while others say it takes five of the nine justices to take the case or send it back to the U.S. Court of Appeals for the District of Columbia.”). University of Iowa Law Professor Herb Hovenkamp commented that “[t]his debate only exists because the expediting act doesn’t say how many votes it takes.” Id. The question was not resolved, however, because the Supreme Court denied expedited review by a vote of 8-1. Microsoft Corp. v. United States, 530 U.S. 1301 (2000) (denying direct appeal and remanding case to U.S. Court of Appeals for the D.C. Circuit).
the Court's internal rules. Four Justices noted that they would have set the case for oral argument, yet the Court denied review. This outcome suggests that the more rigorous Rule of Five threshold may apply to petitions for an original writ of habeas corpus from the Supreme Court, and perhaps for extraordinary writs in general. However, because the Court has not granted original habeas corpus review since 1925, it is difficult to comprehend the Court's action in Tarver. If the Rule of Four was applied to petitions for the writ of habeas corpus previously, then the Tarver case may be an anomaly. Alternatively, the case may portend a new and stricter rule for extraordinary writs. If, however, the Rule of Four was never applied to extraordinary writs, then Tarver is unusual only for the attention it attracted from Court watchers and scholars. Regardless of the actual meaning of Tarver, its multiple interpretations epitomize the problems that the presence of unpublished procedures pose to the Supreme Court's litigants and observers alike.

Using Tarver as a springboard, this Article discusses the history of the Supreme Court's unpublished internal rules; examines how ambiguity and inconsistent application of these rules leave attorneys, petitioners, and observers confounded; and recommends an end to the era of procedural postulating. For too long, the Supreme Court has followed rules that either are not stipulated by Congress or are not clarified by the Court. Moreover, the Court has adhered to these written but unpublished rules with varying levels of commitment. This Article focuses on how the internal rules are applied to

10. Id. "Petition for writ of habeas corpus denied. Justice STEVENS, Justice SOUTER, Justice GINSBURG, and Justice BREYER would set the case for oral argument. The order of the Court heretofore entered February 3, 2000 [granting stay of execution of sentence of death pending further order of the Court], is vacated, and the application for stay of execution of sentence of death is denied." Id.

11. Typically, a state prisoner's petition for a writ of habeas corpus is filed in the U.S. district court that has jurisdiction over the respondent. See 28 U.S.C. §§ 2241, 2243, 2254(a) (1994). Sections 2241 and 2254(a), however, also authorize the Supreme Court to hear habeas petitions filed as original matters in that Court. See, e.g., Felker v. Turpin, 518 U.S. 651, 658 (1996).

12. See Ex parte Grossman, 267 U.S. 87 (1925) (granting habeas relief to defendant who received presidential pardon but was ordered retained by the district court); see also SUPREME COURT PRACTICE, supra note 3, at 501-04 (explaining that, though seldom granted, applications for original habeas jurisdiction continue to be filed with Supreme Court).

13. This is a possibility. None of the literature actually states that the Rule of Four applies to extraordinary writs. It is typically discussed in the context of the writ of certiorari. During the hearings on the Judges' Bill of 1925, the Rule of Four was discussed by Congress, but only in connection with allowing the Supreme Court greater discretion in selecting cases. See Edward A. Hartnett, Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill, 100 COLUM. L. REV. 1643, 1661 (2000) (discussing the Judges' Bill of 1925, the Rule of Four was discussed by Congress, but only in connection with allowing the Supreme Court greater discretion in selecting cases). See also supra notes 65-67 and accompanying text. There is surprisingly little written about extraordinary writs as a whole. The Rule of Four in conjunction with extraordinary writs may have been assumed, due to the rule's application to certiorari, but it has not been addressed separately.

14. For example, in 1991 the Court voted to change the number of votes required to hold a case from three to four. See Mark Tushnet, "The King of France with Forty Thousand Men": Felker v. Turpin and the Supreme Court's Deliberative Processes, 1996 SUP. CT. REV. 163, 181 (reporting change in procedure and commenting that it was part of post-Brennan push by conservatives to alter Court rules).
various types of cases presented for review and the effect that these rules have on the outcome of the cases the Court accepts.

Part II of the Article discusses the *Tarver* case as an example of the problems created by unpublished Supreme Court rules. Part III examines the two types of petitions that Tarver used in his attempt to have his case heard: the petition for a writ of certiorari and the petition for an original writ of habeas corpus. Although both types of petitions are often filed with the Court, the former follow a well-known path, while the method the Court uses to decide the latter is cloaked in secrecy. Part IV addresses the Rule of Four and analyzes how it applies in different types of cases. The Article compares, as an example, the grant of a writ of certiorari with acceptance of a case on appeal, both of which require four votes. Part V analyzes the Rule of Five standard and compares a Supreme Court decision to vacate a judgment below and remand the case to the lower court, which requires five votes, with a Supreme Court decision to stay an execution, which also requires five votes. Part VI concludes with recommendations for the proper application of the Supreme Court’s internal rules to Court decisions, in order to ensure judicial fairness and procedural clarity as the Court continues to receive thousands of cases for review each year.  

II. *IN RE TARVER*: INTERNAL RULES LEAD TO EXTERNAL QUESTIONS

On April 14, 2000, Robert Lee Tarver was executed in Alabama’s electric chair. He had been on death row in Alabama since 1986, when he was found guilty of murdering a shopkeeper. Although Alabama has had nearly 200 prisoners on death row in recent years, most of the cases have gone relatively unnoticed by the media. Tarver’s case, too, would have received little or no special attention, but for his attempt to have the merits of his case heard directly by the United States Supreme Court on a writ of habeas corpus.

Tarver petitioned the Court for both a writ of certiorari and a writ of habeas corpus. On February 3, 2000, he succeeded in winning a stay only hours before the execution.

15. See, e.g., *Supreme Court Practice*, supra note 3, at 32 (indicating that Supreme Court receives more than 5,000 petitions each year). The number today is closer to 8,000. See, e.g., DAVID M. O’BRIEN, STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS 165 (5th ed. 2000).


18. See infra notes 27-28 and accompanying text (discussing media reports about *Tarver* case). While not central to this Article, Tarver’s claim that use of the electric chair as a means of execution violated the Eighth Amendment also attracted media attention. See, e.g., Kim Cobb, Judges’ Ruling Could End Use of Electric Chair in Nebraska, Hous. CHRON., May 10, 2000, at A7 (noting that Alabama and Nebraska are only states that still use electric chair as a means of capital punishment and that Tarver was most recent death-row inmate to die by electrocution).
his scheduled execution. Several weeks later, on February 22, the Court lifted the stay and denied certiorari review of Tarver’s claim relating to unconstitutional jury composition. In a separate order issued the same day, the Court denied Tarver’s original habeas petition, in which he claimed that the method Alabama used to execute its death-row prisoners, electrocution, violated the Eighth Amendment’s ban against cruel and unusual punishments. The State of Alabama executed Tarver by electrocution on April 14.

What made this case unusual was not the fact that the Court had issued and then lifted a stay of execution and denied relief, but rather the manner in which this process unfolded. In its order denying Tarver’s habeas corpus petition, the Court wrote: “Justice STEVENS, Justice SOUTER, Justice GINSBURG, and Justice BREYER would set the case for oral argument.” In other words, even though the application process that Tarver had used to petition the Supreme Court for relief had honored the known, published rules of the Court, the Court’s unpublished rules played a vital role in the outcome of his case. While the Supreme Court Rules do state that direct habeas corpus relief from the Supreme Court “is rarely granted,” there is nothing in the Court’s rules, or anywhere else, indicating that more than four votes were required to entertain Tarver’s petition. The Rule of Five—which the Court apparently had never before applied to original habeas corpus applications—trumped the Rule of Four, which attorneys and others have long known applies to petitions for a writ of certiorari. The Court denied Tarver the opportunity to present his argument. Yet had Tarver raised the same argument in a petition for a writ of

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21. U.S. CONST. amend. VIII. The Eighth Amendment provides, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” Id. The Cruel and Unusual Punishments Clause has been made applicable to the states via the Due Process Clause of the Fourteenth Amendment. See Robinson v. California, 370 U.S. 660, 666 (1962).
22. Tarver, 528 U.S. at 1152.
23. See SUP. CT. R. 20 (“Procedure on a Petition for an Extraordinary Writ”). In particular, the procedures that govern habeas corpus applications to the Supreme Court are found in Rules 20.2 and 20.4.
25. See SUPREME COURT PRACTICE, supra note 3, at 230 (stating that Supreme Court has followed practice of granting review to certiorari petitions if four Justices vote to grant the petition). “The vitality of the Rule of Four is evidenced by numerous denials of certiorari over the recorded dissents of three Justices but not of four.” Id.; see also Joan Maisel Leiman, The Rule of Four, 57 COLUM. L. REV. 975, 976 (1957) (discussing Rule of Four and stating that “the Rule of Four means that once four Justices have voted to grant a petition the case is properly before the Court, and in the absence of intervening factors it is the business of the Justices, individually and collectively, to decide it”); David M. O’Brien, Join-3 Votes, the Rule of Four, the Cert. Pool, and the Supreme Court’s Shrinking Plenary Docket, 13 J.L. & POL’Y 117, 184 (1997) (calling Rule of Four an “informal” rule adopted by Court earlier in century); John Paul Stevens, The Lifespan of a Judge-Made Rule, 58 N.Y.U. L. REV. 1, 10 (1983) (article by Associate Supreme Court Justice Stevens, stating that “[w]henever four justices of the United States Supreme Court vote to grant a petition for a writ of certiorari, the petition is granted even though a majority of the Court votes to deny”). Justice Stevens has written that “the origins of this so-called Rule of Four are somewhat obscure.” See id.
certiorari, there would have been a sufficient number of votes to consider it.26

The reports by various Supreme Court correspondents exemplify how the Tarver case confounded Court watchers and muddied the procedural landscape. While the reporters wrote mostly similar stories about Tarver’s constitutional claims and agreed about the ultimate disposition of the case, there were large differences in how they interpreted the importance of the decision. Some articles suggested that the case heralded a new rule for original habeas corpus petitions,27 while at least one article hinted that the Rule of Five had been applied previously.28

Was the procedure that the Court used in Tarver a new one? Or was it a routine procedure simply forgotten because of the rarity of successful Supreme Court review of applications for an original writ of habeas corpus? To answer these questions, one must examine the histories of certiorari review, extraordinary writs, the Rule of Four, and the Rule of Five.

III. THE WRITS OF CERTIORARI AND HABEAS CORPUS

A. History

The historical developments of the writ of certiorari and the writ of habeas corpus are very different. While there exists a common law writ of certiorari that can be considered an extraordinary writ29 and which is rarely granted, most writs of certiorari that the Supreme Court considers are statutory, created by Congress in 1891.30 After its enactment, as the Court attempted to keep up

26. One might speculate that the four Justices dissented from habeas review instead of voting to grant certiorari to avoid allowing an immovable majority to use the case to set bad precedent. Cf. Drake v. Zant, 449 U.S. 999 (1980) (four Justices dissenting from denial of certiorari in cases relating to death penalty).

27. See Joan Biskupic, Death Row Inmates May Face New Procedural Trap, WASH. POST, Feb. 23, 2000, at A2 (stating that most intriguing aspect of Tarver case, particularly for future cases, is that Court’s order is “the first in which the Court intimated that more than four votes are needed to accept a petition for a writ of habeas corpus”); Linda Greenhouse, Supreme Court Roundup, N.Y. TIMES, Feb. 23, 2000, at A19 (“Ordinarily, four votes are all that are required for the Court to hear a case. But Mr. Tarver’s case was procedurally unusual, seeking a writ of habeas corpus directly from the Supreme Court rather than as an appeal from a lower court. Although the Supreme Court has not disclosed its internal rules for acting on habeas corpus petitions, and did not do so today, the Court evidently regards five votes rather than four as necessary to grant such a petition.”); Tony Mauro, Rule is Changed for Habeas Corpus Cases from Death Row, N.Y.L.J., Feb. 23, 2000, at I (reporting that Court experts believed Tarver “was the first time that the Court had spelled out a Rule of Five in considering original habeas petitions”); Richard Willing, Appeal of Ala. Execution Denied by High Court, USA TODAY, Feb. 28, 2000, at 5A (stating that the Tarver case was “the first time the Court had signaled that its internal rules require five votes to approve a habeas petition”).

28. Willing, supra note 27, at 5A (“[Mr. Tarver] needed a writ of habeas corpus. The rarely granted writs require five votes from the justices.”).

29. See SUPREME COURT PRACTICE, supra note 3, at 491 (grouping common law writ of certiorari, codified at 28 U.S.C. § 1651, with other extraordinary writs).

30. See Dallin H. Oaks, The “Original” Writ of Habeas Corpus in the Supreme Court, 1962 SUP. CT. REV. 153, 184 (“There is, of course, a significant difference in the source of the Court’s authority to issue the statutory and the common-law writ [of certiorari], and in the prescribed conditions under which each can be
with all of the cases that it received, the statutory writ of certiorari changed to allow the Court increased discretion over which cases it chose to hear. From the time the Supreme Court began to hear cases until the creation of discretionary review, it was obliged to consider a great variety of topics that arrived on appeal. The Court was seen as "the ultimate guardian of individual rights," and the view of the Court as the "vindicator of all federal rights" became entrenched. The Judges' Bill of 1925 broadened the Supreme Court's discretionary docket and aimed to refocus the Court on issues of national and constitutional importance. While this goal has never been completely attained, the Court today has enormous discretion in its certiorari practice, and chooses to hear only those cases it finds sufficiently important to consume its time. Cases in which the Supreme Court grants certiorari

issued."). The more frequently used writ of certiorari is statutory, 28 U.S.C. §§ 1254, 1257, and was created by Congress with the Circuit Court of Appeals (Evarts) Act, 26 Stat. 826 (1891). See Oaks, supra, at 184. The seldom used common law writ is now codified in the All Writs Act, 28 U.S.C. § 1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."); see also William Howard Taft, Possible and Needed Reforms in the Administration of Civil Justice in the Federal Courts, 57 Am. L. Rev. 1 (1923). Taft described the discretionary jurisdiction of appellate courts as follows:
The Act of 1891 introduced in to the appellate system a discretionary jurisdiction of the Supreme Court over certain classes of cases. It proceeded on the theory that so far as litigants were concerned, their rights were sufficiently protected by having one trial in a Court of first instance and one appeal to a court of appeal, and that an appeal to the Supreme Court of the United States should only be allowed in cases where consideration would be in the public interest. Id. at 5-6, quoted in Leiman, supra note 25, at 979.

1. See Leiman, supra note 25, at 979-80 (discussing Court's expansion of discretionary review and resulting flood of cases that overwhelmed Court); see also James F. Blumstein, The Supreme Court's Jurisdiction—Reform Proposals, Discretionary Review, and Writ Dismissals, 26 Vand. L. Rev. 895, 903 (1973) (discussing Court's efforts to manage its workload, including "placing docket control largely in the hands of the Justices").

2. See Leiman, supra note 25, at 979 (explaining that "the burden on the Court had become too heavy for careful, efficient work" and that "the Court was increasingly being called upon to decide questions of federalism and national power important not only to the parties, but to the life of the nation").


4. Id. at 903 (quoting Felix Frankfurter & James M. Landis, The Business of the Supreme Court: A Study in the Federal Judicial System 260-61 (1928)).


6. Blumstein, supra note 31, at 903. Blumstein described the goals of the Judges' Bill as follows: At the heart of the [1925] proposal was the conservation of the Supreme Court as the arbiter of legal issues of national significance. . . . Litigation which did not represent a wide public interest was left to state courts of last resort and to the circuit courts of appeals, always reserving to the Supreme Court power to determine that some national interest justified invoking its jurisdiction. Id. (quoting Frankfurter & Landis, supra note 34, at 260-61).

7. See Blumstein, supra note 31, at 910 (discussing Supreme Court's trend toward addressing primarily national issues, including error correction, in decisions to grant review). Chief Justice Earl Warren, for example, "acknowledged explicitly that rendering 'summary justice' where the Justices deem it 'appropriate' is an essential function of the Court." Id. (citing Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal, 59 A.B.A. J. 721 (1973)).

8. See O'Brien, supra note 15, at 165-66 (observing that, out of approximately 8,000 cases that the Court receives each year, "only about 100 get the Court's full attention").
typically have national significance; the outcome for the individual petitioner is often secondary.

The writ of habeas corpus, or the "Great Writ,"\(^3\) evolved over centuries\(^4\) and is a symbol of society's commitment to the principle that the government should not imprison an individual without just cause.\(^4\) The purpose of habeas corpus is to ensure that the procedural rights and, more recently in United States history, the constitutional rights of persons held by the state have not been violated.\(^4\) Thus, the goal of the writ of habeas corpus is much more individualized than the writ of certiorari.\(^4\) When a prisoner petitions for habeas corpus relief, he or she is requesting review of the case in the hope that the court will order the prisoner released, retried, or resentenced.\(^4\) While a petition for a writ of certiorari also seeks review of the facts of a particular case, and the outcome of that case is just as important to the individual, the issues that the Supreme Court encounters in a petition for a writ of certiorari are generally of greater national significance to the society at large.

To petition for a writ of habeas corpus, the petitioner typically must argue that the detention complained of results from the violation of a federal constitutional right.\(^4\) The petitioner's guilt or innocence theoretically is

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40. See, e.g., YACKLE, supra note 39, § 4, at 7 (providing thorough history of writ of habeas corpus).

41. See id. § 4, at 11 (recounting that, in 1628, the English Parliament passed the "Petition of Right," which "embraced the critical principle that no person shall be imprisoned except on good cause shown in a return to the writ of habeas corpus. When Charles II grudgingly accepted [the Petition of Right], that principle was embedded in English law.").

42. See id. § 3, at 11; see also ROBBINS, supra note 39, ch. 3.

43. "Unlike appellate review, habeas corpus does not in theory address a state court judgment directly. Instead, it operates upon the body of the petitioner and speaks to 'detention simpliciter.' " YACKLE, supra note 39, § 139, at 528-29 (quoting Fay v. Noia, 372 U.S. 391, 430 (1963)).

44. See, e.g., ROBBINS, supra note 39, § 4.05 (addressing types of relief available on habeas corpus). In most death penalty cases in which the prisoner challenges procedures that occurred in the penalty phase of the proceedings, the relief typically sought is life imprisonment. Robert Lee Tarver, for example, in arguing that Alabama's means of execution—electrocution—violated the Eighth Amendment, see supra notes 16-21 and accompanying text, hoped to be resentenced to life in prison.

45. See 28 U.S.C. § 2241(c)(3) (1994) (general habeas corpus provision) ("The writ of habeas corpus shall not extend to a prisoner unless... [h]e is in custody in violation of the Constitution or laws or treaties of the United States...")); id. § 2254(a) (addressing habeas corpus relief for state prisoners) ("The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."); id. § 2255 (addressing the equivalent of habeas corpus relief for federal prisoners) ("A prisoner in custody under sentence of a court
irrelevant,46 at least for first habeas petitions.47 The issues that prisoners

established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence.

46. See, e.g., Kimmelman v. Morrison, 477 U.S. 365, 380 (1986) (per Brennan, J.) ("The constitutional rights of criminal defendants are granted to the innocent and the guilty alike."); Mackey v. United States, 401 U.S. 667, 694 (1971) (separate opinion of Harlan, J.) ("[A]dherence to precedent . . . must ineluctably lead one to the conclusion that it is not a principal purpose of the writ to inquire whether a criminal convic[t] did in fact commit the deed alleged."); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 170 (1951) (Frankfurter, J., concurring) ("The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy."); United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting) ("It is a fair summary of history to say that the safeguards of liberty have frequently been forged in cases involving not very nice people."); Hill v. Texas, 316 U.S. 400, 406 (1942) (per Stone, C.J.) ("Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving as well as the most virtuous."); Moore v. Dempsey, 261 U.S. 86, 87-88 (1923) (per Holmes, J.) ("[W]hat we have to deal with [on habeas corpus] is not the petitioners' innocence or guilt but solely the question whether their constitutional rights have been preserved."); Frank v. Mangum, 237 U.S. 309, 334 (1915) (per Pitney, J.) ("[T]he essential question before us . . . is not the guilt or innocence of the prisoner, but whether the state . . . has deprived him of due process of law."); Ex parte Milligan, 71 U.S. (4 Wall.) 2, 132 (1866) (separate opinion of Chase, C.J.) ("The laws which protect the liberties of the whole people must not be violated or set aside in order to inflict, even upon the guilty, unauthorized though merited justice."); see also id. at 119 (per Davis, J.) ("The power of punishment is, alone through the means which the laws have provided for that purpose, and if they are ineffectual, there is an immunity from punishment, no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety. By the protection of the law human rights are secured . . . .") ; King v. Lynaugh, 850 F.2d 1055, 1061 (5th Cir. 1988) (Rubin, J., dissenting) ("That [petitioner] is a savage criminal has been proved beyond reasonable doubt. Yet even he is entitled to due process when society imposes its sentence on him."); Walberg v. Israel, 766 F.2d 1071, 1078 (7th Cir. 1985) (per Posner, J.) ("Guilty as [petitioner] undoubtedly is—unworthy member of the community as he undoubtedly is—he was entitled to a better procedure."); see also United States v. Wolf, 787 F.2d 1094, 1097 (7th Cir. 1986) (Judge Posner wrote, in the direct appeal context: "[Appellant] is a disgusting person. But even disgusting people are entitled to appellate review of their convictions.").

Second Circuit Judge Henry Friendly took a contrary position in 1970:

After trial, conviction, sentence, appeal, affirmance, and denial of certiorari by the Supreme Court, in proceedings where the defendant had the assistance of counsel at every step, the criminal process, in Winston Churchill’s phrase, has not reached the end, or even the beginning of the end, but only the end of the beginning. Any murmur of dissatisfaction with this situation provokes immediate incantation of the Great Writ, with the inevitable initial capitals, often accompanied by a suggestion that the objector is the sort of person who would cheerfully desecrate the Ark of the Covenant. My thesis is that, with a few important exceptions, convictions should be subject to collateral attack only when the prisoner supplements his constitutional plea with a colorable claim of innocence.


A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—all the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Id. The habeas petitioner’s innocence may also be relevant on the question of whether to hold a federal evidentiary hearing. See id. § 2254(e)(2).
(particularly pro se prisoners) raise on habeas corpus are typically narrower in scope than those raised on petitions for writs of certiorari. Indeed, the individual-oriented nature of the writ of habeas corpus may help to explain why the Supreme Court has accepted jurisdiction over so few original habeas corpus petitions.  

B. Practice

Regardless of which writ they pursue, when litigants decide to petition the Supreme Court to review their cases, they must carefully follow prescribed procedures. These procedures often reach amazingly detailed levels of specificity. For example, litigants must use particular colors for the covers of their documents; the documents must not exceed a specified number of pages; and the documents must comport with an exacting format. The Court hears cases largely pursuant to rules set by Congress, and follows the

48. See 2 Hertz & Liebman, supra note 39, § 40.3, at 1700 & n.2 (noting that Supreme Court wholly adjudicated only four original habeas petitions during entire twentieth century); see also supra note 12 (discussing Ex parte Grossman).

49. See Supreme Court Practice, supra note 3, at 906-19 (providing compilation of Supreme Court procedures).

50. See Sup. Ct. R. 33(1)(g) (prescribing, for example, a white cover for a Petition for Writ of Certiorari, id. R. 33(1)(g)(i), an orange cover for a Brief in Opposition, id. R. 33(1)(g)(ii), a tan cover for a Reply to Brief in Opposition, id. R. 33(1)(g)(iii), and a cream cover for a Brief for Amicus Curiae at the Petition Stage, id. R. 33(1)(g)(x)).

51. See Sup. Ct. R. 33(1)(g) (prescribing, for example, 30 pages for a Petition for a Writ of Certiorari, id. R. 33(1)(g)(i), 30 pages for a Brief in Opposition, id. R. 33(1)(g)(ii), 10 pages for a Reply to Brief in Opposition, id. R. 33(1)(g)(iii), and 20 pages for a Brief for Amicus Curiae at the Petition Stage, id. R. 33(1)(g)(x)). However, “[t]he page limits do not include the question presented, the list of parties and the corporate disclosure statement, the table of contents, the table of cited authorities, or any appendix.” Id. R. 33(1)(d). Moreover, “[v]erbatim quotations required under Rule 14.1(f) [referring to citation in a Petition for a Writ of Certiorari of “[t]he constitutional provisions, treaties, statutes, ordinances, and regulations involved in the case”], if set out in the text of a brief rather than in the appendix, are also excluded.” Id.

52. See, e.g., Sup. Ct. R. 33(1):

1. Booklet Format: (a) Except for a document expressly permitted by these Rules to be submitted on 8 1/2- by 11-inch paper, . . . every document filed with the Court should be prepared in a 6 1/8- by 9 1/4-inch booklet format using a standard typesetting process . . . . The text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(b) The text of every booklet-format document, including any appendix thereto, shall be typeset in Roman 11-point or larger type with 2-point or more leading between lines . . . . Increasing the amount of text by using condensed or thinner typefaces, or by reducing the space between letters, is strictly prohibited . . . . Quotations in excess of 50 words shall be indented. The typeface of footnotes shall be 9-point or larger with 2-point or more leading between lines . . . .

(c) Every booklet-format document shall be produced on paper that is opaque, unglazed, and not less than 60 pounds in weight, and shall have margins of at least three-fourths of an inch on all sides. The text field, including footnotes, may not exceed 4 1/8 by 7 1/8 inches. The document shall be bound firmly in at least two places along the left margin (saddle stitch or perfect binding preferred) so as to permit easy opening, and no part of the text should be obscured by the binding. Spiral, plastic, metal, or string bindings may not be used . . . .

Id.

53. While the Constitution vests judicial power in the Supreme Court, see U.S. Const. art. III, § 1, the
requisite procedures carefully. The Court's strict rules are published and attorneys who appear before the Court must adhere carefully to those rules. When it comes to the Court's internal rules, however, much less has been written and much less is known.

Although the internal rules that apply to petitions for certiorari are reasonably well understood, the manner in which the Court disposes of extraordinary writs is much more murky. These extraordinary writs are so deemed because they tend to be used only in cases with unusual issues that have not been resolved within normal appellate procedure. On occasion, the Court receives petitions requesting mandamus, prohibition, or habeas corpus relief. The Supreme Court can issue extraordinary writs only in its appellate capacity, and seldom exercises its authority to grant these writs. Consequently, as the conflicting reports from Supreme Court correspondents demonstrated, when Robert Lee Tarver petitioned the Court for a writ of habeas corpus, even observers well-versed in Supreme Court procedure were unsure what rules governed disposition of the petition.

Court does not have original jurisdiction in all cases. In cases for which the Constitution does not specify that the Supreme Court has original jurisdiction, it has appellate jurisdiction, which Congress has the power to regulate. Article III, Section 2 of the Constitution states:

> In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original jurisdiction. In all the other cases before mentioned, the supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

U.S. CONST. art. III, § 2, cl. 2. Today, most cases that the Supreme Court receives come via a petition for writ of certiorari and are reviewed under its appellate jurisdiction. See SUPREME COURT PRACTICE, supra note 3, ch. 4 ("Factors Motivating the Exercise of the Court's Certiorari Jurisdiction").

54. See generally SUPREME COURT PRACTICE, supra note 3, ch. 6 ("Procedure in Connection With Petitions for Certiorari").

55. See id. at 493-501 (discussing bases for issuing extraordinary writs).

56. "In general, the writ of mandamus is sought to compel a lower court to do something it has refused to do . . . ." Id. at 493.

57. "[T]he writ of prohibition [generally is sought] to prohibit [a lower court] from doing something it otherwise will do." Id.

58. See supra notes 39-48 and accompanying text (discussing the development and use of the writ of habeas corpus). The common law writ of certiorari, see supra notes 29-38 and accompanying text, also falls into the category of extraordinary writs and is seldom granted. This writ "orders the lower court to certify the record to the Supreme Court. This rarely used writ has been used to bring the Court for review, in exceptional circumstances, otherwise non-appealable orders." SUPREME COURT PRACTICE, supra note 3, at 493.

59. In Marbury v. Madison, 5 U.S. (1 Cranch) 137, 146 (1803), Chief Justice Marshall explained that Article III of the Constitution did not give the Supreme Court power to issue a writ of mandamus pursuant to its original jurisdiction, thus ruling against the petitioner and invalidating a portion of the Judiciary Act of 1789. Instead, the Court could issue such writs only when acting in an appellate capacity. See id.

60. See supra notes 27-28 and accompanying text.
As Tarver makes clear, when the Court receives a petition for an extraordinary writ, such as a writ of habeas corpus, the petitioner must carefully comply with laws codified by Congress governing Supreme Court jurisdiction, the Supreme Court's published rules, and precedent dating back to Marbury v. Madison in 1803. These procedures dealing with extraordinary writs can be arduous, and the internal rules that the Court uses for its decision-making process with respect to these writs are a total mystery. This problem is most pronounced in the Court's application of the Rule of Four and the Rule of Five to extraordinary writs.

IV. THE RULE OF FOUR

The Rule of Four has no clear origin. It was mentioned publicly for the first time during hearings on the Judges' Bill of 1925. Supreme Court Justice Willis Van Devanter informed the House Judiciary Committee of the rule in an effort to assure Congress that increased control over its own docket would not lead to the arbitrary dismissal of cases. Justice Van Devanter stated:

We always grant the petitions when as many as four think that it should be granted and sometimes when as many as three think that way. We proceed upon the theory that, if that number out of the nine are impressed with the thought that the case is one that ought to be heard and decided by us, the petition should be granted.

The Rule of Four vests substantial authority in the minority, giving it the power to mandate the review of a case, even though a majority of the Court does not wish to do so. When four Justices vote to review a case, all nine of the Justices are required to consider its merits absent any intervening factors that were not known or appreciated at the time the petition was granted. Certiorari

61. See Supreme Court Practice, supra note 3, at 26-27.
63. 5 U.S. (1 Cranch) 137 (1803); see supra note 59 and accompanying text (discussing Marbury).
64. The number of votes required for an expedited appeal is yet another mystery of the Court. See Grimaldi, supra note 8, at E1 (quoting Donald Falk of Mayer, Brown & Platt, commenting that he thought that four votes were necessary but that he doesn’t “think anybody knows”).
65. See Hearings on H.R. 8206 Before the House Comm. on the Judiciary, 68th Cong., 2d Sess. (1924). The Judges' Bill, which became the Judiciary Act of 1925, 43 Stat. 936, significantly expanded the Supreme Court's certiorari jurisdiction. The bill was drafted by a committee of Justices under the leadership of Chief Justice William Howard Taft; hence the name Judges' Bill. See Hartnett, supra note 13, at 1662 (surveying debate and passage of Judges' Bill); see also Leiman, supra note 25, at 981-82 (stating that "[r]esearch has yielded no evidence of [the rule's] origins or early history" and noting that the evidence that does exist suggests that the rule had been developed by the Court itself after 1891, when the Court first received discretionary jurisdiction in the Court of Appeals Act of 1891, 26 Stat. 826).
66. See Hartnet, supra note 13, at 1674-82 (discussing Justice Van Devanter's testimony before Senate Judiciary Committee); Revesz & Karlan, supra note 4, at 1070 (same).
67. See O'Brien, supra note 15, at 211-12 (quoting Justice Van Devanter's testimony before Senate Judiciary Committee).
petitions granted with only four votes have comprised approximately twenty-five to thirty percent of the cases accepted for review.68

While the Rule of Four is a fixed aspect of Supreme Court procedure,69 its application in certain types of cases has been a source of discussion and disagreement among writers and Supreme Court Justices alike.70 The Justices use the Rule of Four with certiorari petitions when deciding whether to grant review and set a case for oral argument.71 By allowing four Justices to control which cases to accept, the Court recognizes the value of the judgment of a substantial minority of its members and gives them the opportunity to impress upon the others the ultimate worth of the case.72 When the Court uses the Rule of Four, however, is not always clear in situations other than those the Court chooses to reveal.

In addition to deciding whether to grant certiorari, the Court uses a Rule of Four to hold a case pending the outcome of another case in which the Court has granted certiorari.73 If four Justices vote to hold one or more cases pending the resolution of an issue or issues raised in another case, then those cases will not be dismissed. Rather, the Court will postpone a decision on whether to grant full review. The decision to hold, therefore, is not a decision on the merits of the case, but instead on whether the issues are worthy of further consideration by the Court.

The Supreme Court also uses a Rule of Four in deciding whether to accept or dismiss questions certified to it by a lower court,74 as well as in appeals over which the Court retains mandatory jurisdiction.75 The decision to dismiss an

68. See Stevens, supra note 25, at 16-17 (indicating that more than 25% of certiorari petitions in the 1946 and 1947 Terms, more than 23% in the 1979 Term, more than 30% in the 1980 Term, and about 29% in the 1981 Term were granted with only four votes).
69. See Blumstein, supra note 31, at 919 (observing that Justice Douglas viewed Rule of Four as a "legally binding procedure governing screening").
71. See O'BRIEN, supra note 15, at 211 ("During conference, at least four justices must agree that a case warrants oral argument and consideration by the full Court.").
72. In addition, Justice Douglas thought that Congress may not have intended to allow the Court such discretionary control over its docket without the Rule of Four, which acts as a "safeguard of minority control over access to the Court." Blumstein, supra note 31, at 919. Justice Douglas believed that the Rule of Four was a compromise by the Court to gain congressional approval of the Justices' desire for an increase in discretionary review. See id. (citing Harris v. Pennsylvania R.R., 361 U.S. 15, 18 & n.3 (1959) (Douglas, J., concurring)); see also Hartnett, supra note 13, at 1661 (discussing Justices' testimony before Senate Judiciary Committee, assuring senators that Rule of Four was used to limit Court's arbitrary discretion).
73. See Tushnet, supra note 14, at 181 (discussing how Court voted to change so-called Hold Rule from a Rule of Three to a Rule of Four on May 23, 1991, and explaining that the Court will hold a case, or a number of cases, when a previously granted case addresses the same or similar issues).
74. See SUPREME COURT PRACTICE, supra note 3, at 451 (discussing form and content of certificates from lower courts). But see Hartnett, supra note 13, at 1712 (noting that between 1946 and 1985 Court accepted only four certifications from lower courts).
75. The existence of a Rule of Four regarding appeals was not made public until 1959. In Ohio ex rel.
appeal is a vote on the merits of a case. Yet decisions on the merits of a case require a majority. A Rule of Four for appeals, therefore, is inconsistent with decisions requiring five votes, such as rehearings or full dispositions on the merits of cases granted certiorari. The question of whether the Rule of Four has exhausted its worth periodically arises when the Court dismisses a case as improvidently granted. Generally, however, the Justices refrain from dismissing cases in this manner, so as not to undermine the Rule of Four.  

Eaton v. Price, 360 U.S. 246 (1959), Justice Brennan indicated that the Rule of Four applies to appeals as well as to certiorari petitions:  

[If] four Justices or more are of opinion that the questions presented by the appeal should be fully briefed and argued orally, an order noting probable jurisdiction or postponing further consideration of the jurisdictional questions to a hearing on the merits is entered. Even though this action is taken on the votes of only a minority of four of the Justices, the Court then approaches plenary consideration of the case anew as a Court..., and every member of the Court brings to the ultimate disposition of the case his judgment based on the full briefs and the oral arguments. Because of this, disagreeing Justices do not ordinarily make a public notation, when an order setting an appeal for argument is entered, that they would have summarily affirmed the judgment below, or have dismissed the appeal from it for want of a substantial federal question. Research has not disclosed any instance of such notations until today.

Id. at 246-47; see also Revesz & Karlan, supra note 4, at 1133 n. 173 (pointing out that use of a Rule of Four for appeals is "surprising because the dismissal of an appeal, unlike the denial of certiorari, is a disposition on the merits").

There is some question whether a Rule of Four applies to expedited appeals. See supra note 8 (discussing issue in context of the recent Microsoft antitrust litigation).

76. See Hicks v. Miranda, 422 U.S. 332, 344 (1975) (stating that votes to dismiss for want of substantial federal question are votes on merits of case).

77. Typically the Court will not dismiss a case as improvidently granted absent intervening factors that were not known to or appreciated by the Court at the time the certiorari petition was granted. See Blumstein, supra note 31, at 925-26 (commenting that dismissing petition is uncontroversial in situations in which facts may have been misrepresented in initial petition, but reasons for dismissal are unclear in other situations); see also SUPREME COURT PRACTICE, supra note 3, at 231 ("Most members of the Court have felt that the other five Justices who did not vote to grant [certiorari] are thereafter precluded from voting to dismiss the petition as improvidently granted in the absence of additional intervening factors ....").

78. But see Burrell v. McCray, 426 U.S. 471 (1976) (noting dissenting Justices' objection to dismissal of case as improvidently granted). In his dissent, Justice Brennan wrote:  

Following the grant of the writ of certiorari, the parties fully briefed and orally argued these questions. The result of their efforts is today's one-line order dismissing the writ of certiorari as improvidently granted. That order plainly flouts the settled principles that govern this Court's exercise of its unquestioned power to dismiss writs of certiorari as improvidently granted.  

... If four can grant and the opposing five dismiss, then the four cannot get a decision of the case on the merits. The integrity of the four-vote rule on certiorari would then be impaired.

Id. at 473, 475 (Brennan, J., dissenting). Justice Brennan further noted:  

[Impermissible violence is done the Rule of Four when a Justice who voted to deny the petition for certiorari participates after oral argument in a dismissal that, as here, is not justified under the governing standard, but which rather reflects only the factors that motivated the original vote to deny.

Id. at 474-75 (Brennan, J., dissenting); see also BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN 423-25 (1979) (recounting Justice Stewart's suggestion to dismiss certiorari in Burrell as improvidently granted and subsequent deliberative process that occurred among Justices).
V. THE RULE OF FIVE

A. Application of the Rule of Five

Like the Rule of Four, the Rule of Five has played a prominent role in the Supreme Court's decision-making process. It operates when deciding certiorari cases on their merits, as well as when the Court votes to issue a stay of execution. It is also used when the Court grants a petition for a writ of certiorari and simultaneously vacates the decision below and remands the case to the lower court. Further, the Rule of Five is employed in decisions on rehearings, as well as for further motions to the Court.

The Rule of Five makes sense in many situations that the Supreme Court encounters. Adjudication on the merits when five Justices agree allows the case to be concluded in a democratic manner through simple majority rule. The Court is composed of an uneven number of Justices because clear majority decisions allow the appearance of the fairest outcome in particular cases. Majority rule also leads the nation to believe that the Court fairly addressed the issues adjudicated in each case. The process is much the same when citizens who vote for a losing candidate accept the view of the majority of voters. The Rule of Five thus makes good sense when applied to adjudication on the merits of a case, as well as in situations in which the Court makes a dispositive ruling.

The Rule of Five, however, is not ideal for every decision the Supreme Court must make. As long ago as 1925, the Justices realized that there were situations in which a Rule of Four should prevail. During the congressional hearings on the Judges' Bill, the Justices made it clear that they chose to grant certiorari when a substantial minority of their number so voted. But a vote to grant certiorari is not a vote on the merits of the case, and applying a substantial minority rule to nondispositive decisions is markedly different from applying such a rule in situations that generally need the support of the majority. In situations in which a vote must be taken on a matter that is not outcome

79. On the latter point, see, for example, Tushnet, supra note 14, at 168 (stating that five Justices are required to issue stay of execution under Court's internal rules).
80. See Revesz & Karlan, supra note 4, at 1129 (noting that "the decision to [grant, vacate, and remand] . . . is a majority rule").
81. See Supreme Court Practice, supra note 3, at 626:
   The "Rule of Four," by which the vote of four Justices will suffice for a grant of certiorari, does not apply at the rehearing stage. A majority of the participating Justices must agree to rehear a decision denying certiorari, just as a majority is required to rehear a decision on the merits.
Id.
82. I will leave a discussion of Bush v. Gore, 531 U.S. 98 (2000)—a controversial and, no doubt, aberrational case—to another time. My textual commentary refers to the typical cases that come before the Supreme Court.
83. See supra note 82.
84. See supra notes 65-67 and accompanying text.
determinative, use of the Rule of Four is often optimal.\textsuperscript{85}

As important as the Rule of Four is, the Rule of Five is still used by the Court to make the vast majority of its decisions. In most situations, there is no occasion to utilize the Rule of Four and, for dispositive rulings, the Rule of Five is more appropriate. But there are some situations in which the Rule of Five is warranted, even absent a truly dispositive ruling. It is appropriately used, for example, to grant certiorari and immediately vacate the lower court’s decision and remand the case for further proceedings. This decision to grant, vacate, and remand (sometimes referred to as GVR),\textsuperscript{86} which is not necessarily a decision on the merits of the case,\textsuperscript{87} nevertheless removes the case from the Supreme Court’s docket and vests responsibility for determining the ultimate outcome on the lower court.

The Rule of Five is also used when the Court votes on whether to rehear a case. In this situation, the Justices vote only on the rehearing, and do not decide the final outcome of the case. The Rule of Five is vital in such cases to avoid creating a revolving door through which a case is decided on the merits by a majority of five Justices and subsequently a minority of four Justices votes to rehear the already determined case, thereby further crowding the already overloaded Supreme Court docket.\textsuperscript{88} Using the Rule of Five in this type of interlocutory decision is therefore an appropriate exception to the broader logic

\textsuperscript{85} Justice Stevens, however, has suggested requiring five votes for grants of certiorari as a way to reduce the Court’s caseload. See Bernard Schwartz, Decision: How the Supreme Court Decides Cases 13 (1996) (noting that, although such a standard would “cut down on the number of cases taken by the Court,” it would also “eliminate important cases which the Court should decide”). Professor Schwartz is critical of the Stevens position:

If a five-vote rule had been in effect during the Warren Court years, at least one of that Court’s most important decisions, Baker v. Carr, the famous legislative apportionment case, . . . would never have been decided. Though it was never made public by the Court, only four justices voted to hear that case.

\textsuperscript{86} See Revesz & Karlan, supra note 4, at 1127, 1129; see also Heather K. Gerken, Elections and Democracy: Morgan Kousser’s Noble Dream, 99 Mich. L. Rev. 1298, 1331 n.107 (2001) (book review) (“The Supreme Court routinely grants, vacates, and remands after it issues any major decision related to the lower court opinion being reviewed. It does so to allow the lower court to apply the newly announced standard in the first instance.”). See generally Arthur D. Hellman, “Granted, Vacated, and Remanded”—Shedding Light on a Dark Corner of Supreme Court Practice, 67 Judicature 389 (1984).

\textsuperscript{87} The same can be said about summary reconsideration orders. See Supreme Court Practice, supra note 3, at 249-50:

[A] summary reconsideration order does “not amount to a final determination on the merits.” . . .

[S]uch an order is proper only when the Justices are “not certain that the case [is] free from all obstacles to reversal on [the] intervening precedent,” and the order merely “indicate[s] that we [find the intervening precedent] sufficiently analogous and, perhaps, decisive to compel reexamination of the case.”

\textsuperscript{88} See Supreme Court Practice, supra note 3, at 620 (observing that, with the Rule of Five in force, “the Supreme Court seldom grants a rehearing of any kind of order, judgment, or decision. In the seven years running from 1976 to 1982, six petitions for rehearing were granted out of an average of over 100 per year [filed] in nonindigent cases”)}
suggesting that the Rule of Four should apply to nondispositive rulings.

**B. Stays of Execution: Internal Inconsistencies and the Rule of Five at Its Worst**

An extreme, yet real, example of the unprincipled application of the Rule of Five is its use in requests for a stay of execution. Stays in proceedings are periodically necessary to allow the Court to review a case before the state court or lower federal court takes further action. The importance of stays is most critical in death penalty cases in which the Court finds the case compelling enough for review through a writ of certiorari. In this situation, the Rule of Four is applicable to the certiorari petition. While four Justices may vote to review the case, however, those four alone cannot successfully issue a stay of execution because the Supreme Court will issue a stay only if at least five Justices agree. Thus, if four Justices vote to grant certiorari and four vote to stay the execution, the prisoner may well be executed, thus rendering moot the certiorari petition and the issues contained therein. There is a striking injustice between a rule that grants four Justices the power to review a case, yet requires five Justices to keep the inmate alive pending that review. Either a fifth Justice must vote to issue the stay—this vote is sometimes referred to as a "courtesy fifth"—or the Rule of Four is rendered worthless in the given case.

The two best examples of this point are **Herrera v. Collins** and **Hamilton v. Texas**. In **Herrera**, the Supreme Court granted certiorari on February 19, 1992—the date of Leonel Torres Herrera's scheduled execution—to address the question of whether it was unconstitutional to execute an innocent person who raised no independent constitutional claim. The same day it granted certiorari, however, the Court denied Herrera a stay of execution. Four Justices—Blackmun, Stevens, O'Connor, and Souter—voted to grant the stay, but they could not secure a courtesy fifth. Fortunately for Herrera, the Texas Court of Criminal Appeals, also on February 19, vacated the scheduled execution date. On March 9, the Texas trial court set an execution date of April 15. Two days before the scheduled execution, the Texas Court of Criminal Appeals granted a second stay. The majority wrote:

... This Court finds itself in the unenviable position of having a Texas death row inmate scheduled to be put to death while his case is pending review by the highest court in the land, the Supreme Court of the United States of America.

92. Id.
93. See Ex parte Herrera, 828 S.W.2d 8, 9 (Tex. Crim. App. 1992) (en banc) (noting "applicant's dilemma").
94. See id.
95. Id. (5-3 decision).
Because of the "rule of five," that Court, which agreed to hear the case on the vote of four justices, but refused to stay the execution, once again creates the ultimate dilemma regarding a Texas death row inmate. Once again a death row inmate needlessly has a carrot dangled before him.

The State and the dissenters on this Court apparently believe that this issue should be decided as a matter of "turf war" i.e., protecting one's jurisdiction.

If the Supreme Court had a simple rule that required the same number to agree to hear as to agree to stay, all problems would be solved. They do not and as a result a Texas death row inmate is in the position of having to ask the highest court in Texas for criminal matters to delay his date with death until they decide his case.

Accordingly, we find under the present circumstances that it would be improper for this Court to allow applicant's execution to be carried out before his petition for writ of certiorari is fully reviewed by the Supreme Court.

Therefore, applicant is granted a stay of execution pending further orders by this Court.

While the Supreme Court in Herrera did not have to confront the ultimate issue of an execution mooting the grant of certiorari, that precise issue was before the Court several years before, in Hamilton v. Texas. On June 26, 1990, the Court voted to deny a stay of execution to James Edward Smith, whose mother had submitted a next-friend application on his behalf.

Justice Brennan, joined in dissent by Justice Marshall, wrote:

I would grant the petitions for certiorari and the corresponding applications for stay of execution. Indeed, four Members of this Court have voted to grant certiorari in this case, but because a stay cannot be entered without five votes, the execution cannot be halted. For the first time in recent memory, a man will be executed after the Court has decided to hear his claim.

The State of Texas executed Smith that same day. Nearly four months later, on October 9, 1990, the Supreme Court dismissed the certiorari petition as moot. Justice Marshall, joined by Justice Blackmun concurring in the denial of certiorari, wrote: "It is already a matter of public record that four Members of
this Court voted to grant certiorari before petitioner was executed. . . . According to established practice, this fact should have triggered a fifth vote to grant petitioner's application for a stay of execution."  

This injustice of requiring five votes for a stay of execution is especially clear when one considers the reasons for using the Rule of Four in the first place. As discussed above, the Rule of Four affords a substantial minority of the Justices the opportunity to persuade one other Justice of the wisdom of their view. The value of the Rule of Four was explained at the hearings on the Judges' Bill in 1925, and the Court has used the Rule of Four ever since.  

In effect, if the Rule of Five for stays trumps the Rule of Four for grants of certiorari, then the goal of the Rule of Four is not fulfilled; the death of the petitioner prevents the full Court from hearing the views of the four, as well as from hearing a presentation of the merits of the case after briefing and argument from counsel. This problem with stays in death penalty cases is well-known to the Court. In fact, some Justices have proposed changing the rule, not only because it is "arbitrary," but also because it portrays the Supreme Court as "intellectually and morally bankrupt." Nonetheless, nothing has yet

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99. Hamilton v. Texas, 498 U.S. 908, 908-09 (1993) (Marshall, J., concurring in denial of petition for writ of certiorari). Justice Marshall added a footnote citing cases in which, when four Justices had voted to grant certiorari, a fifth Justice would typically vote in favor of the stay of execution. See id. at 908 n.4. One of the cases cited was Straight v. Wainwright, 476 U.S. 1132, 1134-35 (1986) (Brennan, J., dissenting from denial of stay, joined by Marshall and Blackmun, J.J.) ("When four vote to grant certiorari in a capital case, but there is not a fifth vote to stay the scheduled execution, one of the five Justices who does not believe the case worthy of granting certiorari will nonetheless vote to stay; this is so that the 'Rule of Four' will not be rendered meaningless by an execution that occurs before the Court considers the case on the merits."). See generally Tony Mauro, Death in Texas: Why Cert Didn't Work, LEGAL TIMES, Nov. 19, 1990, at 10 (discussing Hamilton v. Texas). Regarding the lack of a courtesy fifth vote to grant the stay, Reverend Joe Ingle, director of the Nashville-based Southern Coalition on Jails and Prisons, said: "Justice Powell used to be a gentleman about it. I guess there are no gentlemen left up there." Id.; see also infra note 152 (discussing denial of a stay of execution to Napoleon Beazley on a 3-to-3 vote).

100. See supra notes 65-67 and accompanying text; Hartnett, supra note 13, at 1674-81 (discussing the Justices' testimony at the hearings).

101. See Stevens, supra note 25, at 17 (stating that Rule of Four was used in approximately thirty percent of cases in the 1979, 1980, and 1981 Terms).

102. The Court has discussed the dilemma without agreeing on whether or how to change the status quo. Justice Brennan proposed changing the rule for stays to a Rule of Four, without success.

Brennan . . . [agreed with Justice Lewis Powell] that the Court's procedures should be reexamined because they "exposed the Court to criticisms that its own decisions are arbitrary." The real problem, he suggested, was the tension between the rule of four and the requirement of five votes to stay an execution. "We are all indebted to Lewis," he wrote, "for twice sparing the Court and the petitioner" the fate of being executed even though four Justices thought he presented serious claims. He proposed that the Rule of Four be extended to applications for stays, at least in cases . . . where the defendant was trying to get review of his first habeas corpus action. Blackmun agreed. "The Court as an institution would surely appear intellectually and morally bankrupt if we were to announce that a petitioner's claims are worthy of review but that we would abandon our responsibility to perform such review if the state chooses to execute in the meantime."

Hartnett, supra note 14, at 175 (citation omitted). Justice Powell frequently and consistently provided the fifth vote necessary to issue a stay in situations in which four Justices voted to grant certiorari. See id. at 176-77 ("Powell made it a practice 'solely for institutional reasons' to provide the fifth vote for a stay when four
been done to cure this injustice.\textsuperscript{103}

In his petition for a writ of habeas corpus, Robert Lee Tarver raised a constitutional issue that applied to all death row inmates in three states.\textsuperscript{104} While he ultimately failed to convince a majority of the Supreme Court that his claims were sufficiently compelling to merit review, four Justices found those claims worthy of further consideration. It is possible that these four Justices believed that the constitutionality of electrocution as a method of execution was an issue of national importance, while the five Justices who voted against oral argument believed that, since Tarver’s claims affected only three states, the claims did not rise to that level.\textsuperscript{105} If that is the case, the Court approached Tarver’s petition for a writ of habeas corpus looking for an issue of national importance, as it does with most certiorari petitions, and a majority of the Court did not see one. This approach demeans the historical importance of assessing
habeas corpus cases as individual requests for relief.\textsuperscript{106}

VI. RECOMMENDATIONS, CONCLUSIONS, AND SPECULATIONS

\textit{A. Publish or Perish}

Whether in given circumstances the Supreme Court employs a Rule of Four or a Rule of Five, the rule should be published, for several reasons. First, knowing in advance how many votes are needed with regard to a particular filing helps litigants to understand the Court and its processes. Particularly in the case of prison inmates, who typically are untutored in the law, clarity of process may help them understand how their pleadings are likely to be handled once filed.

Second, a clearer understanding of Court processes by potential habeas corpus petitioners might reduce the number of frivolous petitions. As two commentators have written, “the Court’s operating rules have a significant impact on . . . the behavior of various actors in our legal system.”\textsuperscript{107} If seekers of original habeas writs knew, for example, not only that the Supreme Court has not granted such a writ since 1925,\textsuperscript{108} but also that the Supreme Court used a Rule of Five for these writs rather than the Rule of Four that the Court uses for writs of certiorari, perhaps they would realize that the latter route was potentially more advantageous to them.

Third, if the Supreme Court received fewer petitions that are doomed to failure, then presumably the Court would have more time to devote to other types of filings, including those seeking certiorari relief.\textsuperscript{109}

Fourth, clarity in and notice of the Supreme Court’s internal rules would aid Court commentators and others in their attempts to understand the Court’s

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\textsuperscript{106} Indeed, even some habeas cases that obtain full Supreme Court review via the certiorari route do not have nationwide significance. See, e.g., Lee v. Kemna, 534 U.S. 362 (2002) (holding that certain state supreme court procedural rules do not constitute state grounds adequate to bar federal habeas corpus review). In particular, the Lee case held that Missouri Supreme Court Rule 24.09, which requires that motions for continuance be in writing and accompanied by an affidavit, and Rule 24.10, which sets out the showings a movant must make to obtain a continuance due to a witness’s absence, were not adequate state grounds on the facts of this case. \textit{Id.}; Charles Lane, \textit{Full Court Press: Justices Grant Convict’s Long-Shot Appeal}, WASH. POST, Feb. 6, 2002, at A17 (discussing \textit{Lee v. Kemna}). Lane states, “[t]he highest court in the land sits to decide issues of national importance, not to correct every purported error of the lower courts. But, once in a while, as if to confirm the notion that each American has a right to appeal all the way to the Supreme Court, the justices spot a gross injustice in the stack of paper and pluck it out.” \textit{Id.}

\textsuperscript{107} Revesz & Karlan, \textit{supra} note 4, at 1068. The authors continued: “[The operating rules] affect . . . the incentives faced by litigants.” \textit{Id.}

\textsuperscript{108} See \textit{supra} note 12 and accompanying text (discussing \textit{Ex parte Grossman}).

\textsuperscript{109} Of course, the possibility also exists that, if the Supreme Court announced clear application of the Rule of Four to habeas cases, instead of the stricter Rule of Five, the result might be to increase the number of original habeas applications. This is not likely, however, considering the rarity of Supreme Court grants of original writs. My point here is that certainty in judicial rules is preferable to ambiguity, and not merely that habeas corpus rules ought to be relaxed.
decisions.

B. A New Rule of Application

The Rule of Four is methodically applied to certiorari petitions and should be applied to original writs of habeas corpus as well. If the Supreme Court were to apply the Rule of Four to all writ petitions—extraordinary writs as well as petitions for certiorari—then whenever at least four Justices voted to grant the writ, the writ would issue. The case typically would then proceed to oral argument and decision on the merits. Alternatively, if the standard is the more difficult Rule of Five, requiring the vote of a majority of the Justices simply to grant the writ, then necessarily fewer petitions will be granted and the theory upon which the Rule of Four rests—vesting power in a substantial minority that believes an issue merits further consideration—will be weakened.

The fact that writs of habeas corpus are extraordinary writs should not affect the process used to determine whether they should be heard. A petition should either merit further attention from the Court or lack important attributes that would cause the Court to spend time on it. The Justices surely will not be so swayed by the personal plight of particular petitioners that they would routinely vote to accept for review cases that do not justify expenditure of the Court's scarce resources. If the Justices were so easily persuaded, then matters of constitutional and national importance would not get the attention they deserve. Since correcting lower court errors is not the primary purpose of Supreme Court review, Justices can simply vote against the many petitions alleging individualized error. To employ the Rule of Five for these petitions only adds an unnecessary barrier for petitioners and presumes that the view of four Justices in habeas corpus petitions is less important than the view of four Justices in certiorari petitions.

When the Supreme Court receives an original habeas corpus petition, as it did from Robert Lee Tarver, the Court's initial decision to grant or deny the writ is not an adjudication on the merits, but instead is comparable to the decision to grant or deny certiorari. The grant of a writ of certiorari is not an adjudication of the merits of a case; so, too, with a grant of a habeas writ.

110. But see supra note 105 (discussing situation in which four Justices might vote in favor of oral argument but against granting certiorari, or against oral argument but in favor of granting certiorari and summarily vacating decision below).
111. See supra text accompanying note 67 (quoting testimony of Justice Van Devanter before Senate Judiciary Committee).
112. See supra note 106.
113. See SUPREME COURT PRACTICE, supra note 3, at 507-08 (discussing general procedures for handling habeas corpus petitions).
114. See 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 128-34 (G. Sharswood ed. 1861) (describing writs of habeas corpus ad respondendum, ad prosequendum, ad testificandum, ad deliberandum, cum causa, and ad subjiciendum, and noting that these writs do not involve determinations of merits of case).
The same Rule of Four should apply to both. Indeed, this was the assumption of many Supreme Court reporters and observers—until the *Tarver* case.\textsuperscript{115}

Since the Supreme Court’s decision in *Tarver*, petitioners and others have been left to guess about the Court’s internal rules in original habeas corpus cases. Indeed, the Court’s ruling prompted several respected Supreme Court commentators to announce that a new rule had been applied.\textsuperscript{116} It may well be that, in the *Tarver* case, the Court heralded a new standard for processing applications for habeas petitions. It is also possible, however, that the rule for Supreme Court review of habeas petitions has always been a Rule of Five, and that the lack of published information about the Court’s rules had merely led observers to assume that the Rule of Four applied not only to certiorari petitions, but also to petitions for the extraordinary writs.\textsuperscript{117} We simply do not know.

The byzantine rules that the Supreme Court uses to dispose of the thousands of cases it receives annually have gone largely unquestioned for many years.\textsuperscript{118} Aside from the concern that arose in the 1970s and 1980s regarding the number of Supreme Court filings,\textsuperscript{119} until *Tarver* little has been said about the Supreme Court’s internal rules. As exemplified in *Tarver*, the Court’s use of internal rules has become unprincipled.\textsuperscript{120} Habeas corpus doctrines are difficult enough to comprehend, particularly for pro se prisoners.\textsuperscript{121} They, and others, should

\begin{footnotes}
\item 115. See supra notes 25-27 and accompanying text.
\item 116. See supra note 28 and accompanying text.
\item 117. Based on a conversation with the Clerk of the Supreme Court, Professor Stephen Wermeil, former Supreme Court Reporter for the *Wall Street Journal*, reports that some Court watchers suspected that a Rule of Five applied to habeas petitions because, before 1980, a party first had to file a motion to file a petition for a writ of habeas corpus; those motions were only granted on a vote of five or more Justices. After 1980, petitioners were no longer required to file the motion to file the petition. It is possible that this Rule of Five carried over to post-1980 petitions for the writ itself. Interview with Stephen Wermeil, Associate Professor, American University, Washington College of Law, in Washington, D.C. (Nov. 7, 2000).
\item 118. The paucity of law review articles and sections in books addressing the Supreme Court’s internal rules is indicative of this point.
\item 119. In the 1970s and 1980s, the Court’s quickly expanding plenary docket, as well as the sheer number of filings, led both to studies on how to alleviate the Court’s burden and to scholarly articles (including by Supreme Court Justices) on the options that were available should the burden become unbearable. The idea that Congress could create a National Court of Appeals was advanced in various forums. In addition, some writers suggested that changes be made to the Court’s internal rules to make review more difficult. See, e.g., Blumstein, supra note 31; Stevens, supra note 25; see also Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court (1972) (also known as the Freund Study), reprinted in 57 F.R.D. 573 (1972); United States Commission on the Federal Court Appellate System, Structure and Internal Procedures: Recommendations for Change (1975) (also known as the Hruska Commission Report).
\item 120. I do not intend to restrict this comment to the lack of a clear rule for original habeas corpus petitions only. For example, discussing the Rule of Four and the then-Rule of Three for holds, two commentators wrote: “[T]he Justices’ views on the scope of these rules exhibit a remarkable degree of inconsistency and incoherence. Their disregard for these essential attributes of adjudication, albeit in a procedural context, raises serious questions about their respect for substantive legal doctrines.” Revesz & Karlan, supra note 4, at 1068.
\item 121. See, e.g., Edwards v. Carpenter, 529 U.S. 446, 454, 458 (2000) (Breyer, J., concurring in the judgment) (“I believe the Court of Appeals correctly decided the basic question: ‘Whether a federal habeas
not have to guess about what should be the simplest of matters: how many votes it takes to grant review.

C. Speculations

One major question remains to be addressed: if there is a general consensus that the Supreme Court ought to clarify its internal rules, how might this change be brought about? There are at least three possibilities: first, the Court might consider changing its internal rules on its own motion; second, Congress might consider enacting legislation to specify the number of votes needed with regard to particular types of Supreme Court filings; and third, one might consider suing the Supreme Court.

The first possibility is pure speculation. How and when the Supreme Court modifies its own rules is itself a matter of mystery. Sometimes the court is barred from considering an ineffective-assistance-of-counsel claim as ‘cause’ for the procedural default of another claim when the ineffective-assistance claim is itself procedurally defaulted.” The question’s phrasing itself reveals my basic concern. Although the question, like the majority’s opinion, is written with clarity, few lawyers, let alone unrepresented state prisoners, will readily understand it. The reason lies in the complexity of this Court’s habeas corpus jurisprudence—a complexity that in practice can deny the fundamental constitutional protection that habeas corpus seeks to assure. . . . I concede that this system of rules has a certain logic, indeed an attractive power for those who like difficult puzzles.”); Coleman v. Thompson, 501 U.S. 722, 758-59 (1991) (Blackmun, J., dissenting) (“[D]isplaying obvious exasperation with the breadth of substantive habeas doctrine and the expansive protection afforded by the Fourteenth Amendment’s guarantee of fundamental fairness in state criminal proceedings, the Court today continues its crusade to erect petty procedural barriers in the path of any state prisoner seeking review of his federal constitutional claims. . . . I believe that the Court is creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights . . . .”); Murray v. Carrier, 477 U.S. 478, 497 (1986) (Stevens, J., concurring in the judgment) (“The heart of this case is a prisoner’s claim that he was denied access to material that might have established his innocence. The significance of such a claim can easily be lost in a procedural maze of enormous complexity . . . .”); Lee v. Kemna, 213 F.3d 1037, 1048 (8th Cir. 2000) (Bennett, J., dissenting) (“This case, in no small measure, reflects the current status of federal habeas corpus jurisprudence. Judicial interpretation of the Great Writ during the past three decades has spun a cascading web of confounding and labyrinthine procedural obstacles . . . .”), vacated and remanded, 534 U.S. 362 (2002); Singleton v. Norris, 108 F.3d 872, 876 (8th Cir. 1997) (Heaney, J., concurring) (“Recent changes in our federal habeas corpus rules have only compounded the difficulty of the federal courts to adjudicate federal claims in capital cases. As a result of this complex legal morass, many persons sentenced to death have legitimate constitutional claims that will never be addressed on the merits by any court.”); Gonzalez v. Sullivan, 934 F.2d 419, 424-26 (2d Cir. 1991) (Oakes, C.J., concurring) (“What a marvelous Catch-22 the law of federal habeas corpus now is! You lose in state court because your counsel did not make a timely objection. Your federal habeas petition is barred because no ‘objective factor external to the defense impeded [your] counsel’s efforts to comply with the State’s procedural rule,’ . . . and you therefore cannot show ‘cause’ and ‘prejudice’ . . . . And, since you have not raised the point that your trial counsel’s default was incompetency, that issue cannot be considered by the federal court. But if it is raised in a subsequent petition, it will be considered an abuse of the writ . . . because it was not raised previously. The dialogue between federal and state courts . . . is now in a very real sense a monologue . . . . [A]s long as the state courts approve, a conviction will more often than not be immune from federal court scrutiny, even where federal constitutional rights have clearly been violated. . . . I join in the result of the majority’s opinion because I am bound to follow the Supreme Court. Whether I do so happily, the reader may be the judge.”) (citations omitted). See generally IRA P. ROBBINS, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES 57-58 (1990) (discussing difficulties faced in habeas cases even by lawyers).
modification is known only when one sees a change in practice. Other times it is known only through published dissents from the treatment of modified rules in individual cases. One might even speculate facetiously that the Supreme Court guards its internal processes so jealously that it might take a Rule of Nine to change them.

The second possibility is also pure speculation. To persuade Congress to enact legislation that affects the Supreme Court's internal administrative processes would be no mean feat. Indeed, taking this speculation to the extreme, in the current climate it would be nothing short of political suicide for a member of Congress to vote to make it easier either to obtain a stay of execution in a death penalty case or to obtain further review of a criminal conviction or sentence.

The third possibility—bringing suit against the United States Supreme Court—is the mother of all speculations. One might argue, for example, that the failure to publish its internal rules violates one's right to due process of law. A problem clearly arises, however, when a case is ultimately forced to come before the very court against which the suit has been brought. If, for instance, Tarver had initiated suit against the Supreme Court in a federal district court, that case could ultimately reach the docket of the Supreme Court itself, thus perhaps raising awkward conflict-of-interest issues for the Justices.

Typically, any judge who may be partial or who is a party to a suit will recuse himself or herself from the proceeding, pursuant to 28 U.S.C. § 455. The disqualified judge steps aside, and the case is assigned to another judge or court. What happens, however, when all of the judges who would normally be qualified to hear the case have a stake in the outcome? Some state constitutions or statutes expressly provide for such a situation. For example, the Tennessee Constitution contains a provision that authorizes the governor to appoint a special panel to hear and determine the outcome of a case in which the entire Tennessee Supreme Court recuses itself.

122. As I am now roaming in the realm of conjecture, I shall leave aside for purposes of this discussion immunity and other defenses to such a lawsuit.
123. See, e.g., Tapia-Ortiz v. Winter, 185 F.3d 8 (2d Cir. 1999) (reviewing complaint against twenty judges of Second Circuit); Hansel v. United States Supreme Court, No. 97-6107, 1998 WL 88045 (2d Cir. Jan. 29, 1998) (hearing case in which Second Circuit itself was defendant).
124. Conceivably a petitioner might seek a writ of mandamus, pursuant to 28 U.S.C. § 1361 (1994): "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Id.
125. The question of whether such a suit might be frivolous is incidental. As many defendants know, defending even a frivolous lawsuit can consume valuable time and resources.
128. TENN. CONST. art. VI, § 11 ("In case all or any of the Judges of the Supreme Court shall thus be disqualified from presiding on the trial of any cause or causes, the Court, or the Judges thereof, shall certify the
At the federal level, 28 U.S.C. § 291 provides that "[t]he Chief Justice of the United States may, in the public interest, designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon request by the chief judge or circuit justice of such circuit." In one case, Chief Justice Rehnquist designated a new Seventh Circuit panel—comprised of senior circuit judges from the Sixth, Tenth, and Eleventh Circuits—because all of the judges of the Seventh Circuit had disqualified themselves after the "United States Seventh Circuit" had been named as a defendant in the lawsuit. In an interesting twist that lends credence to the awkwardness of these types of proceedings, the judges of the Seventh Circuit petitioned the new panel for a writ of mandamus, prompting the panel to write the following memorable line: "This case presents the perhaps unprecedented situation of a court, as litigant, petitioning itself, as court, for relief." In another interesting twist, the visiting panel noted that the circuit court need not have recused itself from hearing the case, due to the "Rule of Necessity." Traditionally, the Rule of Necessity states that a judge has no obligation to disqualify himself or herself, notwithstanding the judge’s partiality, if no other judge or court could hear the case. As one court has aptly stated, "where all are disqualified, none are disqualified." Although the origin of the rule is unknown, it can be traced through English common law at least to the year 1430. Both state and federal courts in the United States have adopted and

same to the Governor of the State, and he shall forthwith specially commission the requisite number of men, of law knowledge, for the trial and determination thereof:); see State ex rel. Hooker v. Thompson, No. 01S01-9605-CH-00106, 1996 WL 570090, at *1 n.6 (Tenn. Oct. 2, 1996) (appointing a special panel in accordance with the Tennessee Constitution).

129. 28 U.S.C. § 291(a) (1994). In addition, the chief judge of a circuit or the circuit justice may designate a circuit court judge to sit on the district court within that circuit. See id. § 291(b).

130. See In re Skupniewitz, 73 F.3d 702 (7th Cir. 1996).

131. Id. at 704. The panel continued: As unusual as that situation may be, it is the necessary consequence of the peculiar posture of this case. The circuit court itself has been sued, and a district court within the subordinate territorial jurisdiction of the circuit [i.e., the federal district court in Wisconsin] has refused to entertain the case. Although the judges appointed to the Seventh Circuit have all recused, this panel of outside judges, serving by designation of the Chief Justice of the United States, is the appropriate body to consider the mandamus petition. Id. at 704-05 (footnotes omitted).

132. Id. at 705 n.2.

133. See, e.g., Atkins v. United States, 556 F.2d 1028, 1036-37 (Cl. Ct. 1977) (explaining Rule of Necessity). The Atkins court stated: "[I]f we were to disqualify [ourselves] from hearing the matter on the ground urged by the defendant, there would be few, if any, federal judges who could hear the trial and none in this circuit." Id.; cf. Bolin v. Story, 225 F.3d 1234, 1238 (11th Cir. 2000) ("At least two courts have found ... that where a plaintiff indiscriminately sues all of the judges in a circuit, the fact that it is possible to convene a panel of disinterested judges outside the circuit does not require transfer of the case or preclude the application of the rule of necessity.").

134. Pilla v. American Bar Ass’n, 542 F.2d 56, 59 (8th Cir. 1976) (invoking Rule of Necessity) (citation omitted).

applied the rule, despite the inception of disqualification statutes. Although the rule appears to contradict these statutes, legislative history of the federal statute does not indicate that Congress sought to modify or repeal the Rule of Necessity. It may seem unorthodox that a court can hear a case in which it is involved; even the United States Supreme Court, however, has upheld the validity of the rule.

In United States v. Will, the Supreme Court reviewed a class action suit initiated by thirteen federal district court judges. The suit had been brought on behalf of all Article III judges and concerned the repeal of cost-of-living increases for federal employees, including judges. The Justices of the Supreme Court, as Article III judges, could be affected by the outcome of the case. While typically judges or Justices in such a situation would disqualify themselves, pursuant to Section 455, the Supreme Court invoked the Rule of Necessity to enable it to preside over the proceeding. The Court noted that the purpose of Section 455 is to guarantee the parties a fair forum in which their claims can be heard. Writing for the Court, Chief Justice Burger stated: "Far from promoting this purpose, failure to apply the Rule of Necessity would have a contrary effect, for without the Rule, some litigants would be denied their right to a forum." Since the decision in Will, courts in analogous situations have routinely applied the Rule of Necessity.

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136. See Will, 449 U.S. at 214 (mentioning application of rule in state and federal courts); McKevitt, supra note 135, at 830 (same). Section 455 is an example of a disqualification statute that has not affected application of the Rule of Necessity. See supra notes 126-27 and accompanying text.

137. See Will, 449 U.S. at 217 ("The congressional purpose so clearly expressed in the Reports gives no hint of altering the ancient Rule of Necessity, a doctrine that had not been questioned under prior judicial disqualification statutes. The declared purpose of § 455 is to guarantee litigants a fair forum in which they can pursue their claims. Far from promoting this purpose, failure to apply the Rule of Necessity would have a contrary effect, for without the Rule, some litigants would be denied their right to a forum."); Atkins, 556 F.2d at 1036-37 (discussing the lack of express intent that the disqualification statute should undermine the rule of necessity and stating: "It is not presumed that the common law is changed by the passage of a statute which gives no indication that it proposes such a change.").


139. See id. at 210-17.

140. See id. at 217.

141. Id.


143. See, e.g., Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825 (1985) (rejecting appellants' allegations that justices of Alabama Supreme Court should disqualify themselves, because doing so might require recusal of every judge in state); Maldonado v. Sand, No. 99-6250, 2000 WL 730403 (2d Cir. June 2, 2000) (invoking Rule of Necessity in case in which plaintiff sued all active and senior judges of court); Switzer v. Berry, 198 F.3d 1255, 1258 (10th Cir. 2000) ("We hold that under our duty to sit and the rule of necessity, a lawsuit brought indiscriminately against all the active and senior judges on the Tenth Circuit Court of Appeals does not operate automatically to render the court unable to hear and decide an appeal brought by the plaintiff/petitioner."); Tapia-Ortiz v. Winter, 185 F.3d 8 (2d Cir. 1999) (holding that, although court was a
If the Supreme Court declines to invoke the Rule of Necessity and several of the Justices recuse themselves, the controlling statute is 28 U.S.C. § 2109. Pursuant to this statute, if there is an absence of a quorum of qualified Justices, the Court does not review the case. Instead, if the case is on direct appeal from a district court, the Chief Justice may remit the case to the court of appeals that encompasses the district from which the case came. In any other case brought to the Supreme Court in which there is an absence of a quorum of qualified Justices,

if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court.

If someone in Tarver's position sought to sue the Supreme Court for not publishing its own rules, it is unclear whether the case would reach the Court through the direct appeal process or through the usual certiorari review process. No matter which path the case might take to the Supreme Court, the ultimate choice among the three alternatives would lie with the Court itself. It could decide to use the Rule of Necessity, to invoke Section 2109, or merely to

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144. 28 U.S.C. § 2109 (1994) ("Quorum of Supreme Court justices absent").

145. See id. If the case is remitted, it will be heard by the court sitting in banc or by a panel consisting of the three circuit judges with the greatest seniority. See id.


147. See 28 U.S.C. § 1253 (1994) (authorizing Supreme Court in certain circumstances to hear direct appeals from decisions of three-judge district courts); see also 17 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4040 (2d ed. 1988). Unfortunately, application of § 1253 has its own problems of lucidity: "Section 1253 of the Judicial Code, regulating jurisdiction of appeals from three-judge district courts, cannot be explained with any confidence or clarity. Its language appears simple enough. . . . Despite this apparent simplicity, a labyrinthian and even bizarre body of jurisdictional rules has grown up around § 1253." Id. at 134.
deny certiorari.\textsuperscript{148}

Considering my speculations, it would make most sense for this case to come up on certiorari, for the irony would be irresistible. Literally, the Latin word certiorari means "to be more fully informed"\textsuperscript{149} or "to be made certain in regard to."\textsuperscript{150} Information and certainty are precisely what this Article is all about. Unfortunately the inquiry would not end with the certiorari petition, however, for if there were some recusals the Supreme Court might not have the requisite six Justices to constitute a quorum.\textsuperscript{151} Thus, if more than three Justices recused themselves, there would be no quorum. If only three Justices recused themselves, there would be a quorum. The next question, however, would be: How many votes are needed to grant certiorari when there are fewer than nine Justices voting? We simply do not know.\textsuperscript{152} The game of justice by the numbers (or Justices by the numbers) would continue—perhaps not \textit{ad infinitum}, but undoubtedly \textit{ad nauseam}.

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148. \textit{See, e.g.}, Sagan v. United States Supreme Court, 464 U.S. 962 (1983) (denying certiorari in case in which Supreme Court was defendant).
151. \textit{See} 28 U.S.C. \textsection{} 1 (1994) ("The Supreme Court of the United States shall consist of a Chief Justice of the United States and eight associate justices, any six of whom shall constitute a quorum.").
152. \textit{See} Revesz & Karlan, \textit{supra} note 4, at 1070 n.9:

Justice Douglas's papers reveal that in 1969, when the Court was operating with only eight Justices as a result of the resignation of Justice Abe Fortas, it held cases in which three Justices had voted to grant certiorari pending a possible fourth vote by Justice Fortas's replacement. But it did not grant certiorari based only on three votes. It is not clear whether three out of seven votes are sufficient to grant certiorari.

\textit{Id.} (citations omitted). Nor do we know how many votes it would take to grant a stay of execution when there are fewer than nine justices voting. Napoleon Beazley was scheduled to be executed on August 15, 2001. On August 13, the Supreme Court denied a request for a stay. Only six Justices voted; because Justices Scalia, Souter, and Thomas were acquainted with Fourth Circuit Judge J. Michael Luttig, the son of the victim in the case, they recused themselves. Despite the fact that three of the six remaining Justices—Stevens, Ginsburg, and Breyer—voted to grant the stay, the Court denied the request. Beazley v. Johnson, 533 U.S. 969 (2001). On August 15, the day of the scheduled execution, the Texas Court of Criminal Appeals granted a stay of execution on a 6-to-3 vote. \textit{See} Jim Yardley, \textit{Texas Execution Is Halted By State Court of Appeals}, N.Y. TIMES, Aug. 16, 2001, at A10. "The ruling in Texas ... means that the United States Supreme Court will avoid what could have been an awkward last-minute vote in Mr. Beazley's case." \textit{Id.}
Justice is not a game. It should not be cloaked in secrecy. It is time for the Supreme Court to rethink some of its internal rules and, equally importantly, to publish them for all to see. While clouded and confounding internal rules may suit the Justices' personal and professional predilections, clarity and directness are essential for development of the law, for understanding of the judicial process, and for respect for the legal system itself. Knowledge of the law and legal rules is just as safe in the hands of the public as it is in the hands of the Justices.