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Is the "Rule of Four" Fully Intact?

> To abandon the Rule of Four, perhaps in favor of a Rule of Five, might appreciably reduce the argument calendar and some of the Court's decisional workload. But a shift to majority rule would dilute the historic power of a substantial minority of Justices to help determine the makeup of the Court's argument docket, and would decrease 'the likelihood that an unpopular litigant, or an unpopular issue, will be heard in the country's court of last resort.' [citation omitted] Whatever the merits of these contrasting arguments, however, the Rule of Four remains firmly in place.
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> -- Eugene Gressman, Kenneth S. Geller, Stephen M. Shapiro, Timothy S. Bishop, Edward A. Hartnett, Supreme Court Practice (9th ed., 2007), BNA Books, Arlington, VA, at p. 327.

It is a comforting notion that a minority of the U.S. Supreme Court has the capacity to influence strongly the Court's docket, helping to protect access for unpopular individuals, groups or causes. That is why the Rule of Four is so venerated, even though it is not binding and has never been codified.[2] When the Rule is functioning well, it can make a difference, picking out candidates for review from a rising stream of cases, none of which is perfect so none of which is guaranteed a hearing. With so much of the case-selection process a matter of pure discretion, the sturdiness of the Rule is important, as the celebrated authors of that indispensable manual, *Supreme Court Practice*, have aptly noted.

It is appropriate, however, to re-assess the vitality of the Rule of Four in a new era in the Court's history – one in which the decision docket is shrinking, in a seldom-interrupted pattern in recent Terms. One may wonder why the numbers are down, dramatically.[3] What is there about the case-selection process that has changed -- if anything? And where does the Rule of Four fit into the pattern, or does it?

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[1] Supreme Court reporter, scotusblog.com and Radio WBUR-Boston University
[2] By convention, a grant of certiorari requires only the approval of four Justices. For the Court to finally decide almost anything else, it takes five – a majority.
[3] "[T]he Supreme Court's plenary docket has plunged over the last two decades," David R. Stras, "The Supreme Court's Gatekeepers: The Role of Law Clerks in the Certiorari Process," Book Review Essay, 85 Texas Law Review 947, at p. 950. *See, esp.,* Part III of that essay, at pp. 964 ff.

Is it that the Supreme Court now simply is confronted with fewer cases that stand out as obvious, or even arguable, grants? Is the bar failing the Court by not serving up worthy cases in reviewable form? Has the Court tightened its standards for accepting review (perhaps feeling less compelled to resolve Circuit Court conflicts than in the days when Justice Byron R. White would routinely complain when any such case was denied)? Or, regardless of merit, has the Court opted just to do less (in hopes, possibly, of improving the final product on reviewed cases)? Those suggestions, of course, do not exhaust the possibilities.

There is another possibility of interest here: Could it be, for at least some cases, otherwise quite worthy of review, that the Court will not grant unless *five* Justices favor it, thus putting aside, temporarily, the Rule of Four that is said to remain "firmly in place"?

The answer might well be yes, but with this qualification and proposition: the Rule of Four is being set aside, most often, in cases where the prospect is greatest that the Court, in deciding the merits, will be closely divided. When the stakes are great, the issues very difficult, and ideology is quite likely to come into play, the chances are greater that the option of a "defensive denial" may suggest itself.

A "defensive denial" might work this way: four Justices are agreed that review should be granted in a high-profile case, but the issues at stake are of such consequence that they are unwilling to risk losing in the end, they are not sure where they could get a fifth vote on the merits, and so they do not insist on a grant, as the Rule of Four would entitle them to do. Better to leave a questionable result from a lower court intact, with more isolated or at least only regional impact, than to take the chance of having that result become the law of the land.

Especially in a Court whose work, on the most controversial cases, is often decided by a swing voter – Justice Lewis F. Powell, Jr., in his time, Justice Sandra Day O'Connor, in hers, and, now, Justice Anthony M. Kennedy -- it is more likely than not

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Also see Lyle Denniston, "The Shrinking Supreme Court and Its Dwindling Press Corps," 59 Syracuse Law Review 417 (2009).

that "defensive denials" occur often enough to raise doubts about the vitality of the Rule of Four when the crunch comes.[4]

It is true, of course, that the Rule of Four is valuable even when it is occasionally displaced, functionally, by a Rule of Five. The point here, however, is that a weakened Rule of Four could be contributing to a comparative waste of this unique judicial resource. If, in fact, that Rule gives way with some frequency in major cases to a Rule of Five, that might be taken as an indication that anticipated outcomes are more often controlling than objective assessments of how the Court should be using its available time and resources at the case-selection stage.

There is no way to track, either the actual occurrence or the rate of "defensive denials." Even when it seems obvious that it has occurred, it may not have, even in such a case. Consider an example, one that might cut both ways.

After three earlier decisions by the Supreme Court resulting in actual losses or at least partial disappointments for the United States Government on its authority to wage the so-called "war on terror,"[5] and after Congress and President George W. Bush had sought to reduce significantly the judiciary's opportunity to further curb Executive war powers,[6] the stakes were very high when lawyers for a group of Guantanamo Bay detainees petitioned for review in a new, more serious constitutional dispute. The lead case was *Boumediene v. Bush*.[7]

The detainees were seeking to challenge a ruling by the U.S. Circuit Court of Appeals for the District of Columbia Circuit,[8] finding that Congress had stripped the federal courts of any authority to hear the Guantanamo cases. There were reasons, of course, for the Supreme Court not to hear the case; the most compelling, perhaps, was

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[4] The temptation is strong to suggest that, with the deterioration of comity in the Supreme Court nomination and confirmation process, the deep divisions on display before the Senate Judiciary Committee are quite likely to contribute later to ideological division within the Court after nominees have run that gauntlet. Is the dynamic within the judicial process enough different that those divisions can be left entirely behind? Perhaps not.

[5] *Rasul v. Bush*, 542 U.S. 466 (2004), *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) and *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). The Bush Administration also could not have been pleased with some aspects of the Court's disposition in 2006 of *Padilla v. Hanft* (see, for example, Justice Kennedy's statement, available at http://www.supremecourtus.gov/opinions/05pdf/05-533Kennedy.pdf.).

[6] Most recently, in the Military Commissions Act of 2006, 10 U.S.C.A. sec. 948a et seq. (Supp. 2007).

[7] Supreme Court docket 06-1195, certiorari filed March 5, 2007.

[8] *Boumediene v. Bush*, 476 F.3d 981 (2007).

that Congress had created an alternative detention review mechanism at the Circuit Court, under the Detainee Treatment Act of 2005[9], and the process established there perhaps ought to have been given a chance to work. So said the Justice Department in advising against review.

There were three definite votes to grant review of the detainees' constitutional claims: Justices Stephen G. Breyer, Ruth Bader Ginsburg and David H. Souter. And there is no reason to doubt that Justice John Paul Stevens would have been willing to provide a fourth vote for a grant; his record of skepticism about war-on-terror claims was abundantly clear. When the Court denied review on April 2, 2007, the Court's order and an accompanying statement supported the impression that Justice Anthony M. Kennedy, in particular, preferred to allow the DTA alternative process to go forward in the Circuit Court. Justice Stevens, in what seemed to be a tactical gesture, joined Kennedy in a statement largely to that effect.[10]

The detainees' counsel asked the Court to reconsider its denial, and the Court did so, then granted review on June 29, 2007, in *Boumedien*e and a companion case, *Al Odah v. U.S*.[11] Little had happened in the interim, although the detainees' counsel had informed the Court of a declaration by an Army Reserve officer involved in detainee processing suggesting that the system was seriously flawed..[12] That may have been enough to make a difference. The more likely explanation is that the Rule of Four had, in essence, morphed into a Rule of Five, with Kennedy – perhaps at the urging of some of his colleagues – becoming willing to take the case, after all. (And, of course, Kennedy would eventually write for the Court, ruling broadly for the detainees and establishing the constitutional right to pursue habeas challenges to Guantanamo detention because of the fundamental defects found in the existing detention-review processes.[13])

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[9] 119 Stat. 2742 (2005).
[10] All of the Court's actions on the case are detailed on the docket sheet, available at *http://origin.www.supremecourtus.gov/docket/06-1195.htm*. The statements of the Justices are available *at http://www.supremecourtus.gov/opinions/06relatingtoorders.html*.
[11] *http://www.supremecourtus.gov/orders/courtorders/062907pzor.pdf*. The *Al Odah* case was docketed as 06-1196.
[12] The so-called "Abraham declaration" is available at *http://www.scotusblog.com/wp/wp-content/uploads/2007/11/sub-new-abraham-declaration.pdf.*
[13] *Boumediene v. Bush*, 128 S.Ct. 2229 (2008).

From all appearances, the original refusal to hear the *Boumediene* case was probably a "defensive denial," although that has to be conjectured, since there no doubt are alternative explanations, not known to outsiders. Still, the correlation of a seeming "defensive denial" and a less than robust Rule of Four is quite compelling.[14]

It is unusual, indeed quite rare, for the public record regarding a denial of certiorari to be as complete as it was in *Boumediene*. Dissents from denial of certiorari are very much the exception, rather than the rule, so multitudes of cases, possibly, have failed because of 'defensive denials," and that possibility would never have been known with any certainty beyond the Court.

In any given Term of the Court, however, any knowledgeable observer can go through the cases that were quite clearly meritorious, and therefore potentially deserving of review, and locate those that – at least arguably – were turned aside for defensive reasons. If this is even close to what is really going on, it perhaps means that, in a Court closely divided along ideological lines in some of the most important cases of the day and areas of the law, the Rule of Four is, indeed, being weakened.

Consider a recent experience, looking for "defensive denials" in the 2008-2009 Term of the Court.

The author of this article prepared fairly detailed case notes on 142 cases that were denied review over the full course of the Term. Their preparation was not done with any expectation that *all* of them would be granted. But each of them, culled from a much larger group of filings, was sufficiently worthy to persuade the author that there was a reasonable chance that each might be granted. (These, of course, were in addition to the author's preparation of case notes on each of the 75 cases that were granted and decided during the Term. Except for a handful of those granted cases,[15] the author had prepared them in advance of the Court's action on them. The Court does sometimes make surprise grants, often in cases that – on examination -- might well have been denied, at least in comparison with many that were, in fact, denied.)

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[14] Some day, when the internal working papers of some of the Justices who were on the Court for the *Boumediene* case become publicly available, this thesis might be tested against the record. Until then, conjecture is defensible.

[15] Most of the cases on which the author was not prepared were on the "pauper" docket – mainly, prison inmate petitions, in which the lottery effect of case selection is much more pronounced.

Among the 142 cases closely examined by this author before they were denied, it is quite easy to pick out some in which denial could well have been the result of defensive responses, and some of them, surely, could well have been granted if the Rule of Four was actually "firmly in place" and fully functioning.

Perhaps the most compelling among this selection of cases are those involving criminal sentencing, in both state and federal cases. Since, in particular, the decision in *Apprendi v. New Jersey*,[16] the Court has remained widely splintered, and not just along the usual ideological lines, on the law of sentencing, especially in constitutional cases.

In the especially volatile context of capital punishment, the Court has declined to spell out what the *Apprendi* line of decisions means to the allocation of functions between judge and jury in sentencing. A particular example of the Court's refusal to address those questions came in the cases of *McLaughlin v. Missouri* and *Anderson v. Louisiana*; considered separately, both were denied review on April 6, 2009.[17]

The convoluted jurisprudence that now surrounds the federal Sentencing Guidelines in *Apprendi*'s wake has left much undecided, and some of those issues reach the Court often. For example, courts across the Nation are divided on whether federal judges must treat amended Guidelines as binding, rather than advisory, when imposing a new sentence, even though the Court has said the Guidelines are advisory only.[18] The Court's latest refusal to consider that question came in *Dunphy v. U.S.*, denied on May 18, 2009.[19]

Just as confused, because of conflicting rulings in the lower federal courts, is whether it is permissible for a judge in imposing a Guidelines sentence to take into account so-called "acquitted conduct" – that is, conduct that formed the basis of an earlier criminal charge, on which the jury had acquitted. The Court has refused repeatedly to confront that issue since its pre-*Apprendi* decision in *U*.S. *v. Watts*.[20] The most recent denial: *Magluta v. U.S.* on April 27, 2009.[21]

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[16] 530 U.S. 466 (2000).
[17] *http://origin.www.supremecourtus.gov/docket/08-822.htm* and *http://origin.www.supremecourtus.gov/docket/08-948.htm*
[18] *U.S. v. Booker*, 543 U.S. 220 (2005).
[19] *http://origin.www.supremecourtus.gov/docket/08-1185.htm*
[20] 519 U.S.148 (1997).
[21] *http://origin.www.supremecourtus.gov/docket/08-731.htm*

The Court has several times opted not to be drawn into the not-uncommon practice, in some criminal juries' deliberations, to consult the Bible to help in deciding on a verdict or a sentence, including the death penalty.[22]

There are other areas, outside the criminal law, where the Court studiously denies review in the face of deep and abiding conflicts in the lower courts. The most conspicuous example involves repeated pleas for the Court to reconsider its 1985 decision in *Williamson County Regional Planning Commission v. Hamilton Bank*[23] requiring an individual or company seeking to challenge a government "taking" of private property to first try to get compensation in state court before pursuing a federal constitutional claim in federal court – a precedent that has withstood withering criticism from within the Court itself.

There are other examples of issues that regularly get bypassed: constitutional challenges to state taxation of out-of-state companies with little or no physical presence in the state;[24] the validity of certification of a nationwide class to sue over a claimed product defect when many states' laws differ on the substance of such torts and on the definition of class interests,[25] the constitutionality of states' approval – or disapproval – of controversial messages imprinted on auto license plates.[26] The list can, and does, go on.

By no stretch of legal imagination are all of these questions outside the mainstream of what the Court can, or should, be deciding. And by no means can it be argued that there was no Justice, or no group of Justices, who would have given any one of those cases as much as a second look.

Two things are striking about these specific cases, singly and as a group.

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[22] *Oliver v. Quarterman*, denied April 20, 2009, *http://origin.www.supremecourtus.gov/docket/08-833.htm*
[23] 473 U.S. 172.
[24] Most recently, *Dell Marketing LLP v. New Mexico Tax Department*, denied March 23, 2009, *http://origin.www.supremecourtus.gov/docket/08-770.htm*, *Capital One Bank, et al., v. Commissioner of Revenue of Massachusetts*, denied June 22, 2009, *http://origin.www.supremecourtus.gov/docket/08-1169.htm*, and *Godfrey Inc. v. Commissioner of Revenue of Massachusetts,* also denied June 22, 2009, *http://origin.www.supremecourtus.gov/docket/08-1207.htm*
[25] *General Motors v. Bryant, et al*., denied January 12, 2009, *http://origin.www.supremecourtus.gov/docket/08-349.htm*
[26] *Stanton, et al., v. Arizona Life Coalition, et al*., denied October 6, 2008, *http://origin.www.supremecourtus.gov/docket/07-1366.htm*

First, in no instance did any Justice publicly dissent from the denial of review. .

Second, in each instance the issue in the denied case was notably controversial, at least for some social or cultural constituency, and, in most if not all of these cases, the Court very likely would have been closely divided had it undertaken to rule.

Together, those two points suggest, though do not prove, that a Rule of Five could have been at work in at least some of the cases.

Why dissent if the Rule of Five had been controlling, but there were only four votes to grant? What would such a dissent say – "We had four votes, but could not get a fifth"? That would be a public confession that the Rule of Four had not prevailed, and why would minority Justices want to put that on public display? (Three Justices can dissent from denial of review in such a case, as happened in *Boumediene*, but four simply would not. Indeed, where the Rule of Five controlled, the incentive to write dissents from denial of review is probably reduced.)

And, if the issue in a case like those discussed here was one of significant controversy, it almost certainly is part of the case-selection process to accept a denial of review when a fifth vote is elusive and the costs of losing on the merits may be intolerably high.. Accepting a displacement of the Rule of Four is more tolerable, even if it is weakened in the process.