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Constitutional Law - Certiorari - Integrity of the Rule of Four

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CONSTITUTIONAL LAW—CERTIORARI—INTEGRITY OF THE RULE OF FOUR—In four recent cases involving the Federal Employers Liability Act[1] the Supreme Court of the United States, after granting certiorari, reviewed the facts of the cases to determine if there was sufficient evidence to allow the cases to be heard by a jury.[2] Justice Frankfurter in a lengthy dissent-

[1] 35 Stat. 65 (1908), as amended, 45 U.S.C. (1952) §§51 to 60.

[2] Rogers v. Missouri, 352 U.S. 500 (1957); Webb v. Illinois R., 352 U.S. 512 (1957); Herdman v. Pennsylvania R., 352 U.S. 518 (1957); Ferguson v. Moore-McCormack Lines, 352 U.S. 521 (1957).

ing opinion refused to hear these cases on their merits.[3] He would have dismissed them on the ground that certiorari was improvidently granted, although no new evidence warranted this conclusion. Justice Frankfurter maintained that any justice has a right to refuse to hear a case after certiorari has been granted, and that the rule of four is not inflexible, particularly when a class of cases is systematically taken for review.

An appeal on a writ of error to the Supreme Court of the United States was originally available to all unsuccessful litigants in the federal courts, and to all those in state courts if a federal question was involved.[4] However, since 1891, when circuit courts of appeals were established, the Supreme Court has been allowed an increasing amount of discretion as to which cases it will review.[5] Circuit court decisions were made final in cases of several types in 1911[6] and 1916.[7] Finally, in the Judiciary Act of 1925 circuit court decisions were made final in almost all cases, and, in general, a writ of error from lower federal courts to the Supreme Court was not available.[8] During this period also the number of cases entitled to a writ of error from state courts was drastically cut.[9] The writ of certiorari has thus become the principal means for obtaining review by the Supreme Court.[10] The granting of a writ of certiorari is a discretionary act by the Court,[11] and is without control from any source. On occasions when the Court's certiorari policy was being debated, members of the Supreme Court have testified to Congress, however, that a self-imposed safeguard was present to prevent unduly limiting access to the

[3] Principal case at 524-558. The opinion contains a listing of all cases since 1911 in which the Supreme Court considered the sufficiency of the evidence in cases involving the FELA.

[4] 1 Stat. 81 (1789) gives the Supreme Court appellate jurisdiction over circuit courts, and 1 Stat. 85 (1789) provides a writ of error from decisions of the highest court of the various states.

[5] 26 Stat. 826 (1891). Certiorari was provided for decisions otherwise final. However, a writ of error to the Supreme Court was still available for cases involving capital crimes, prizes, conflict of state laws and constitutions with the United States Constitution, constitutional issues, or construction of federal statutes.

[6] 36 Stat. 1133 (1911) provided that circuit court opinions were final in all diversity cases, and cases involving patents, copyrights, revenue laws, criminal laws, and admiralty questions.

[7] 39 Stat. 726 (1916). Circuit court decisions were made final in all cases involving bankruptcy, Federal Employers' Liability Act, and the Safety Appliance Act.

[8] 43 Stat. 936 (1925). This is essentially the present act. 28 U.S.C. (1952) §§1254, 1257.

[9] 39 Stat. 726 (1916).

[10] See official statement showing number of cases filed, disposed of, and remaining on dockets at conclusion of October Terms 1946, 1947, and 1948 appearing at 337 U.S. 963 (1949). See also, Harper and Rosenthal, "What the Supreme Court Did Not Do in the 1949 Term," 99 UNIV. PA. L. REV. 293 (1950); and similar articles covering the 1950, 1951 and 1952 terms in the Supreme Court: 100 UNIV. PA. L. REV. 354 (1951); 101 UNIV. PA. L. REV. 439 (1953); 102 UNIV. PA. L. REV. 427 (1954).

[11] See Revised Rules of the Supreme Court of the United States, 28 U.S.C. (Supp. IV, 1957) §2071. Rule 19 begins: "A review on writ of certiorari is not a matter of right, but of sound judicial discretion. . . ."

Court.[12] This safeguard is the rule of four.[13] This rule allows a minority of four justices to decide if a particular case is worth being heard on its merits by the Court as a whole. The rule is generally recognized as an established practice of the court.[14] On rare occasions, after granting certiorari and hearing argument, the Court will decide that on the basis of new or undisclosed evidence the writ of certiorari was improvidently granted, and will dismiss the case without deciding it on its merits.[15] In the principal cases, Justice Frankfurter does not argue that there is any new evidence present, but states that these cases should not be heard on the merits because certiorari should never have been granted in the first place. Justice Frankfurter argues that "not four, not eight, Justices can require another to decide a case that he regards as not properly before the Court."[16] He considers the right to dissent paramount, but would respect the rule of four when individual cases were involved. He feels, however, that the rule has no meaning when a class of cases is given what he considers to be a favored position. Justice Frankfurter feels strongly that cases involving the Federal Employers Liability Act, on questions of sufficiency of the evidence to send the case to a jury, have no place in the business of the Supreme Court,[17] and refuses to hear them on their merits. It seems clear that the position of Justice Frankfurter serves to annul the effect of the rule of four and is thus contrary to the established practice of the Court.

[12] Justice Van Devanter testified before the Subcommittee of the Committee on the Judiciary of the Senate on S. 2060 and 2061, 68th Cong., 1st sess., 29 (1924), and explained the certiorari policy of the Court as follows, "For instance, if there were five votes against granting the petition and four in favor of granting it, it would be granted, because we proceed upon the theory that when as many as four members of the court, and even three in some instances, are impressed with propriety of our taking the case the petition should be granted." Justices Van Devanter and Brandeis testified before the Senate Committee on the Judiciary on S. 2176, 68th Cong., 1st sess., 9-10 (1924), and explained the rule of four at that time also. In addition, during the debate on President Roosevelt's plan to increase the size of the judiciary, the certiorari policy of the Court was discussed at length. The rule of four was cited to answer critics who complained about the small number of writs which were granted. See Letter of Chief Justice Hughes to Senator Wheeler, March 23, 1937, and debate involving this letter printed in 81 CONG. REC. 2813 (1937).

[13] For discussion of the rule, see STERN AND GRESSMAN, SUPREME COURT PRACTICE, 2d ed., 145 (1954); WOLFSON AND KURLAND, ROBERTSON AND KIRKHAM JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES §314 (1951).

[14] Chief Justice Stone in Bailey v. Central Vermont R., 319 U.S. 350 at 359 (1943), said, "But as we have adhered to our long standing practice of granting certiorari upon the affirmative vote of four Justices, the case is properly here for decision and is, I think, correctly decided." See also dissenting opinion of Justice Douglas in United States v. Shannon, 342 U.S. 288 at 298 (1951); Burton, "Judging Is Also Administration," 33 A.B.A.J. 1099 at 1164 (1947); 21 TEMP. L. Q. 77 at 84 (1947); Boskey, "Mechanics of the Supreme Court's Certiorari Jurisdiction," 46 COL. L. REV. 255 at 257 (1946).

[15] See STERN AND GRESSMAN, SUPREME COURT PRACTICE, 2d ed., 158 (1954).

[16] Principal case at 528.

[17] Id. at 525-539. For more examples of Justice Frankfurter's views on this subject see particularly his dissenting opinon in Carter v. Atlantic & St. Andrews Bay R. Co., 338 U.S. 430 (1949), and his concurring opinion in Wilkerson v. McCarthy, 336 U.S. 53 (1948).

Seven of the present justices of the Court expressed disapproval of Justice Frankfurter's position on this question. Speaking through Justice Harlan, they stated that it is in respect to classes of cases where established cleavages of the judges are likely to arise that the rule of four becomes most important.[18] The rule of four is not a rule laid down by Congress, but is a working rule of the Supreme Court itself. Determining whether a particular case involves issues important enough to warrant a hearing by the full Court is one of the most subjective decisions which a justice can make. The rule of four basically involves respecting the value judgments of fellow justices. If four justices believe an issue is of such importance that it should be decided by the Court, a due regard for the rule and for the other justices then appears to require each justice not only to decide the case on its merits, but also to attempt to reappraise his own position as to the value of the issue involved. If five justices followed the position of Justice Frankfurter, the rule of four would become meaningless, and a majority would control. The rule is important in that it allows greater flexibility in the types of cases which the Court will review. The existence and integrity of the rule of four demand that each justice decide all cases in which certiorari is granted on its merits.

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[18] Principal case at 561-562. See also Justice Douglas' comments on the "integrity of the rule of four" in his dissent in United States v. Shannon, 342 U.S. 288 at 298 (1951).