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# Disqualification of Supreme Court Justices: The Certiorari Conundrum

Steven Lubet\*

## I. DISQUALIFICATION OF SUPREME COURT JUSTICES

A recent newspaper series detailed the relationship between Justices of the United States Supreme Court and the nominating committee for the Devitt Award, a prize given annually by West Publishing Company (West) to a member of the federal judiciary.<sup>1</sup> The nominating committee traditionally meets at posh resort locations, where the Justices and their spouses are feted and entertained, with West directly picking up all expenses.<sup>2</sup> As it happens, West had at least five cases pending before the Supreme Court, in various stages of litigation, during the period when Supreme Court Justices were enjoying the publisher's hospitality.<sup>3</sup> While there clearly is nothing improper about Justices serving on the nominating committee for the Devitt Award, the newspaper series suggested that the Justices should have refrained from sitting on West's cases, at least during the period when excursion plans were pending.<sup>4</sup>

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\* Professor of Law, Northwestern University. I am indebted to Professors Stephen Gillers, Jennifer Gerarda Brown, Judith Maute, Stephen Calabresi, Richard Craswell, Ronald Rotunda, Laura Lin, Leigh Bienen, Charlotte Crane, and Lawrence Marshall for their thoughtful comments and assistance, and to Heather Jackson for her conscientious research. An excerpt from this piece was published previously as Steven Lubet, *Recusal Can Deny Cert*, NAT'L L.J., Aug. 21, 1995, at A19.

1. Sharon Schmickle & Tom Hamburger, *U.S. Justices Took Trips from West Publishing*, STAR TRIB. (Minneapolis), Mar. 5, 1995, at 1A. The full title of the \$15,000 prize is the Edward J. Devitt Distinguished Service to Justice Award. *Id.*

2. *Id.*

3. *Id.* During the period 1983-1995, Justices White, Powell, Brennan, O'Connor, Stevens, Scalia, and Kennedy all travelled to meetings of the Devitt Award selection committee. *Id.* at 15A.

4. The suggestion of disqualification was made in interviews with several professors of legal ethics, including myself. *Id.* West subsequently announced that the the American Judicature Society henceforth would administer the Devitt Award, rather than West itself, thus mooting the question of future

Recusal often appears to be the perfect judicial prophylactic in these situations: if there is a hint of bias, disqualify the judge.<sup>5</sup> At the certiorari stage, however, the disqualification of a Supreme Court Justice actually may harm the very party it was intended to protect. Thus, the right of the petitioner to *apparent impartiality* may be secured, but only at the cost of *actual disadvantage* when it comes to obtaining Supreme Court review. I call this paradox "The Certiorari Conundrum" because it arises only when a Justice appears biased *against* the party petitioning for review.

All federal judges, including Justices of the United States Supreme Court, are disqualified from sitting in cases where their impartiality reasonably may be questioned, including situations where the judge has a personal or family financial interest in the proceeding, has personal knowledge of evidentiary facts, or has acted as counsel or a witness in the matter.<sup>6</sup> Justice Felix Frankfurter's classic determination that he could not participate in a case considering a challenge to the playing of music on city busses in the District of Columbia well illustrates the importance of the goal of impartiality.<sup>7</sup> As a frequent rider on the public transit system, Frankfurter detested the music and believed that he could not judge the case objectively.<sup>8</sup> Under the circumstances, he apparently decided that he preferred the disqualification remedy to either buying an automobile or walking to work. It is not known how the parties reacted to Frankfurter's recusal.

Financial interest is probably the most frequent ground for disqualification of a federal judge,<sup>9</sup> although by no means is it

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disqualification by participating judges. Lyle Denniston, *Junkets to Resorts to End for Justices*, BALTIMORE SUN, May 9, 1995, at 1A; *West Co. Won't Run Awards*, NAT'L L.J., May 22, 1995, at A10.

5. See *infra* notes 21-24 and accompanying text (discussing reasons for recusal).

6. 28 U.S.C. § 455(b) (1988).

7. *Public Util. Comm'n v. Pollack*, 343 U.S. 451, 466-67 (1952).

8. *Id.*

9. 28 U.S.C. § 455(b)(4). Disqualification is required whenever the judge, or the judge's spouse, holds a financial interest, "however small," in the subject matter of the controversy or in a party to the proceeding. 28 U.S.C. § 455(a)(4). The statute requires the judge to keep informed of all such personal, fiduciary, or family financial interests. 28 U.S.C. § 455(c). Because disqualification is automatic whenever a judge holds so much as a share of stock in a party to a proceeding, there are few published opinions applying this provision. In the overwhelming majority of situations, the judge no doubt announces the

the exclusive one.<sup>10</sup> For example, the recent nomination of Stephen Breyer to the United States Supreme Court raised the question of his participation as a "name" in a Lloyd's of London insurance syndicate. During the confirmation hearings, Justice Breyer pledged that he would not participate in any cases that implicated Lloyd's financial interests.<sup>11</sup> As a member of the Court, he has declined to sit on cases involving Lloyd's either directly or indirectly.<sup>12</sup> Other nominees in less controversial circumstances have made similar disqualification commitments.<sup>13</sup> Since 1992, there have been over 350 cases, petitions, motions, or applications in which one or more Supreme Court Justices "took no part."<sup>14</sup> By tradition, most Supreme Court Justices do not announce their reasons for recusal. It is therefore impossible to know with any precision what the bases were for the great majority of these disqualifications.<sup>15</sup>

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existence of a financial interest contemporaneously with a *sua sponte* recusal order. The issue tends to be litigated only in unusual circumstances, see *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 861 (1988) (disqualifying a judge on the basis of fiduciary interest, as university trustee, in outcome of proceeding; judge had forgotten about university's holding until after ruling in the case), or where a motion for disqualification is denied, see *Wu v. Thomas*, 996 F.2d 271, 275 (11th Cir. 1993) (explaining that a judge's status as unpaid adjunct professor did not amount to a financial interest in defendant university).

10. See *supra* text accompanying note 6 (discussing other grounds for disqualification).

11. See Lyle Denniston, *Under Fire, Breyer Offers Plan to Avoid Ethics Problems as Justice*, BALTIMORE SUN, July 15, 1994, at 8A (describing Justice Breyer's pledge to avoid ethical problems as a Justice).

12. Monroe Freedman, *Justice Breyer Takes Ethics Seriously*, N.Y. TIMES, Nov. 9, 1994, at A26.

13. Robert Bork promised that, if confirmed, he would not sit in cases involving his own prior decisions. *Nomination of Robert H. Bork to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess., pt. 1, at 416 (1987). Justice Scalia indicated that he would not sit in a case similar to one in which he was previously involved. *Nomination of Judge Antonin Scalia: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 2nd Sess. 71-73 (1986). Justice Kennedy stated that a judge must recuse himself if his impartiality reasonably can be questioned. *Nomination of Anthony M. Kennedy to be Associate Justice of the Supreme Court of the United States: Hearings Before the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 217 (1987).

14. A Lexis search conducted on May 30, 1995, revealed 376 instances in which the Court announced that one or more Justices "took no part." Of these, approximately 198 were certiorari petitions and 32 were opinions; the others were applications, motions, and the like.

15. See DAVID O'BRIEN, *STORM CENTER: THE SUPREME COURT IN AMERICAN POLITICS* 226 (3d ed. 1993) (stating that Justices do not have to explain their

So far, so good. Who can argue with a Justice who, for reasons of real or apparent bias, financial interest, or simple caution, has decided that it is best to abstain from participating in a particular matter? In this regard, seven Justices of the Supreme Court have set up a procedure whereby law firms that employ their lawyer-children may notify the Court of their involvement so that the affected Justice may step aside at the earliest possible point in the case.<sup>16</sup> Any why not? Controversy arises when judges hear cases, not when they recuse themselves. We expect Justices to make the hyper-ethical choice and err on the side of disqualification. If there is a pale of recusal that Justices should not cross, does it not make sense to avoid it by a safe margin?<sup>17</sup> Indeed, the once popular concept of a "duty to sit" was repudiated long ago by the American Bar Association's

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reasons for recusal); Tony Mauro, *Stevens Stays Silent on Recusal from Illinois Abortion Case*, AM. LAW., Oct. 10, 1989, at 12 (remarking that Justice Stevens' recusal from an abortion case without an explanation caused speculation). Occasionally, it is possible to infer a Justice's reason for disqualification, as in *Turnock v. Ragsdale*, 503 U.S. 916 (1992), *cert. granted*, 493 U.S. 987 (1989), where Justice Stevens removed himself from a case in which it was known that his niece served as counsel. See Lawrence Marshall, *Family Ties Explain Justices' Recusals*, AM. LAW., Oct. 30, 1989, at 30. From time to time Justices do discuss their reasons for recusal. Justice O'Connor, for example, recently donated all of her "frequent flier miles" to charity so that she could participate in a case involving retroactive restrictions on their use. Justice Scalia, however, chose to keep his miles and disqualify himself from the case, explaining that his children use the mileage awards to visit him. Paul Barrett, *During Court's Recess, Justices Do Seminars With Supreme Style*, WALL ST. J., Aug. 14, 1995, at A1, A7.

16. *Supreme Court Justices Adopt Recusal Policy*, 15, No. 3, JUD. CONDUCT REP. 6, 6 (Fall 1993); Statement of Recusal Policy, Supreme Court Release, Nov. 1, 1993 [hereinafter Statement of Recusal Policy]. The seven participating Justices are William H. Rehnquist, John Paul Stevens, Sandra Day O'Connor, Antonin Scalia, Anthony M. Kennedy, Clarence Thomas, and Ruth Bader Ginsburg.

17. For example, the seven participating Justices, *see supra* note 16, announced that they would disqualify themselves not only when the relative was actually "acting as a lawyer in the proceeding," but also when the relative, though no longer directly involved in the matter, had been "lead counsel" at an earlier stage of the case. *Id.*; *see also* 28 U.S.C. § 455(b)(5)(ii) (1988) (stating that a judge or Justice may sit so long as a relative within the third degree is not "acting as a lawyer in the proceeding"); MODEL CODE OF JUDICIAL CONDUCT, Canon 3E(1)(d)(ii) and Commentary (1990) (stating that "[t]he fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge."); JEFFREY M. SHAMAN, STEVEN LUBET & JAMES J. ALFINI, JUDICIAL CONDUCT AND ETHICS 120 (1990) (explaining that disqualification may be required only if the relative-attorney is actually representing the party in a case before the judge).

*Model Code of Judicial Conduct*,<sup>18</sup> since adopted by the United States Judicial Conference<sup>19</sup> and embraced by Congress in the United States Judicial Code.<sup>20</sup>

## II. THE CERTIORARI CONUNDRUM

Here's the rub. Disqualification is a method of safeguarding a party against some real or seeming disadvantage in litigation.<sup>21</sup> Thus, a judge who owns stock in a party-litigant is disqualified in order to protect the rights of the opposing party.<sup>22</sup> By the same token, a judge must step aside where a close relative "is acting as a lawyer in the proceeding" to safeguard the interests of the party who is not represented by a member of the judge's family.<sup>23</sup> Although many and probably most judges could be fair in these circumstances, we have decided collectively that even the appearance of partiality can undermine our system of justice.<sup>24</sup> The existence of an apparently favored party necessarily implies the existence of what we might call a presumptively disfavored party. The presumptively disfavored litigant is the party who needs the assurance of fairness provided by the disqualification rules.

But what happens when the Justice's disqualification actually harms the very party that it was intended to protect? Imagine the following scenario:

Justice Vera Emet is a substantial investor in the Judson Corporation. The lawsuit *Hinman v. Judson* jeopardizes the very survival of the Judson Corporation, and thus also threatens to wipe out Justice Emet's entire investment. Undoubtedly, Justice Emet may not sit in this case because she has a direct

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18. See MODEL CODE OF JUDICIAL CONDUCT, Canon 3C (1972); see also SHAMAN, ET AL., *supra* note 17, at 101, and cases cited therein (discussing the repudiated duty to sit).

19. SHAMAN ET AL., *supra* note 17, at 4, 376.

20. 28 U.S.C. § 455 (1988); see H.R. REP. NO. 1453, 93rd Cong., 2d Sess. 5 (1974), reprinted in 1974 U.S.C.C.A.N. 6351, 6355 (abolishing duty to sit).

21. SHAMAN ET AL., *supra* note 17, at 99-101.

22. See 28 U.S.C. § 455(b)(4); see also *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847 (1988) (reversing a judgment and disqualifying a judge because of financial interest, as a fiduciary, in prevailing party).

23. 28 U.S.C. 455(b)(5)(ii); LESLIE W. ABRAMSON, JUDICIAL DISQUALIFICATION UNDER CANON 3C OF THE CODE OF JUDICIAL CONDUCT 51 (1986); SHAMAN ET AL., *supra* note 17, at 119 ("This rule seeks to prevent litigants from seeking favoritism from a judge by retaining a judge's relative as counsel.")

24. SHAMAN ET AL., *supra* note 17, at 99-101.

and significant financial interest in the outcome.<sup>25</sup>

Now consider this elaboration. The Judson Corporation prevailed in the lower court, and Hinman is seeking review in the United States Supreme Court. In other words, Hinman, *the presumptively disfavored party*, petitions for a writ of certiorari. A minimum of four affirmative votes from the Court is required to grant a writ.<sup>26</sup> No provision reduces that number<sup>27</sup> or makes any other adjustment<sup>28</sup> when a Justice is disqualified.<sup>29</sup> Thus, Justice Emet's mandatory recusal reduces the available pool of certiorari votes from nine to eight,<sup>30</sup> to the detriment of Hinman, the party who is supposed to be protected by the disqualification. Were Justice Emet to sit, Hinman would need to attract only 4/9 of the Court's votes; without her, the petitioner needs the agreement of one half of the Justices.

In certiorari, only "Yes" votes count. Without four positive votes, a petition will not be granted.<sup>31</sup> An abstention, therefore, is indistinguishable from a "No." The functional result of the disqualification rule thus is to compel Justice Emet to vote against the presumptively disfavored party. On the other hand, if Justice Emet were free to participate in the certiorari decision,

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25. The Justice may not sit where she holds even a *de minimis* financial interest "in a party to the proceeding." 28 U.S.C. § 455(b)(4), (d)(4); *see also supra* note 9 and accompanying text (discussing disqualification for financial interest).

26. The four-vote rule is a matter of Supreme Court practice or tradition; it is not imposed by rule or statute. WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 264 (1987). Nothing apart from self-restraint prevents the court from granting review on the basis of three votes, or even two. It might be more difficult to condition certiorari on a majority vote, as the existence of the four-vote rule was instrumental in persuading Congress to pass the Judiciary Act of 1925, which expanded the Court's discretionary jurisdiction and reduced the burden of mandatory appeals. O'BRIEN, *supra* note 15, at 247.

27. Justice Stanley Reed once suggested that three votes might be sufficient to grant certiorari in certain circumstances. "There is really no absolute rule that four votes are necessary when a full Court sits. Certainly when there are only six [J]ustices sitting, it seems that three should be sufficient to justify a hearing on the merits." O'BRIEN, *supra* note 15, at 247.

28. It currently is not possible to assign a substitute Justice to the Supreme Court, even in cases where the court lacks a quorum and is therefore unable to act. 28 U.S.C. § 2109 (1988); *see infra* note 79 (discussing that if the Supreme Court, by reason of disqualification, lacks a quorum for a particular case, the matter must be affirmed as though by an equally divided court).

29. O'BRIEN, *supra* note 15, at 247.

30. *See* Statement of Recusal Policy, *supra* note 16.

31. *But see supra* notes 26-27 and *infra* text accompanying note 66 (discussing the possibility of granting a writ of certiorari with fewer than four affirmative votes).

at least a possibility exists that she would vote with the petitioner. In individual cases, then, the recusal of the Justice deprives the petitioner, and only the petitioner, of the chance that the disqualified Justice might provide the decisive fourth vote.

The individual petitioner's loss of chance for Supreme Court review is not trivial. Assuming any distribution of certiorari votes and any probability that an individual Justice will vote in favor of a particular petition, the reduction to eight Justices always reduces the already-slight likelihood of obtaining certiorari. This result obtains because only the fourth vote actually matters. In other words, three positive votes bring the same result as none—the petition will be denied. Once there are three positive votes, however, the fourth becomes crucial because it alone operates to allow review. If nine Justices are sitting and three have decided to vote in favor of certiorari, six Justices remain available from whom to gather a single vote. Once a Justice is disqualified, however, only five remain—a 1/6 reduction in the voters from whom to harvest the outcome-determinative "Yes."

To illustrate, assume a 0.1 probability that any Justice will vote to grant certiorari in any case, and that three already have decided to grant a certain petition. If six Justices are yet to vote, the probability of granting certiorari is .47.<sup>32</sup> With only five remaining Justices, however, the probability of review drops to .41, a difference of .06.<sup>33</sup> This relationship remains constant, although the ratios change, for all probabilities less than 1.0.<sup>34</sup>

In fact, the absolute difference between probabilities for certiorari with nine- and eight-Justice Courts increases for

32. Once the petition has garnered three affirmative votes, certiorari will be denied only if all of the remaining Justices vote "No." If the probability of a "No" vote is .9, the probability of  $n$  negative votes is  $.9n$ . Thus, with six remaining Justices, the probability of denying certiorari is .53 and the probability of granting certiorari is .47. For five remaining Justices the numbers are .59 and .41, respectively.

33. The absolute difference in the two probabilities is 0.06 (.47 minus .41). The relative difference, however, is much greater. That is, a petitioner in the described circumstances is almost 15% *more likely* to obtain review from a remaining pool of six rather than five Justices.

34. For example, assume a probability of only 0.05 that any Justice will vote to grant certiorari in any case. Once there are three votes for a particular petition, the likelihood that it will be granted is .265 on a nine-Justice Court, but only .226 on an eight-Justice Court—a relative difference of about 17%.



higher probabilities.<sup>35</sup> In other words, the more certworthy the case, the more keenly the petitioner will feel the loss of Justice Emet's participation, even if Justice Emet is actually biased against the petitioner. To understand this, we must assume that a Supreme Court Justice only rarely, if ever, will self-consciously cast a vote in pursuit of naked self-interest. Any other presumption leads to the conclusion that Justices intentionally, and therefore dishonestly, might vote to enrich themselves. If so, disqualification is a futile remedy. A corrupt Justice will figure out a way to hide his or her financial interests and to continue to participate in lucrative cases. The true danger is that the Justice will try to be fair, but, due to human frailty, will fail to overcome her partiality. In these circumstances, some possibility always exists that the Justice will be able to put aside her interests and vote on the merits. It follows that there always will be some possibility that even an overtly-biased Justice Emet will vote to grant certiorari to the presumptively disfavored petitioner.

In our illustration, once three other Justices have decided to vote in favor of certiorari, even a small possibility of a "Yes" from Justice Emet becomes overwhelmingly important. A .05 probability of a "Yes" from Justice Emet results in at least a 5% likelihood that certiorari will be granted, subject to increase by the potential votes of the remaining Justices. A 0.2 probability of a favorable vote from Emet raises the petitioner's chances to at least 20%, and so on.<sup>36</sup> Thus, assuming that Justice Emet is anything other than an outright hypocrite or thief, her recusal in a meritorious case may decrease significantly the petitioner's chances for certiorari. Indeed, even assuming that Justice Emet is so biased that she is only half as likely to vote for certiorari as are the other Justices, the availability of her biased vote nonetheless increases the probability that the Court will grant

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35. Thus, if the chance that a Justice will vote favorably is 0.2, the likelihood of a fourth positive vote is about .738 on a nine-Justice Court, but only .672 when there are eight Justices. Compare this absolute difference of .066 with a difference of .06 for a favorable certiorari vote probability of 0.1, *supra* note 33, and a difference of .039 for a favorable certiorari vote probability of .05, *supra* note 34.

36. The ultimate increase in the probability of certiorari also depends upon the probabilities that any of the other Justices will cast a favorable vote. *See supra* notes 32-35 and accompanying text (explaining the probability calculations).

the petition.<sup>37</sup>

During the only period for which such statistics are available, between 23% and 30% of all certiorari petitions granted attracted only the minimum four positive votes.<sup>38</sup> With no votes to spare in those cases, the disqualification of a single Justice therefore could affect dramatically a petitioner's access to review.<sup>39</sup>

### III. WAIVER: A FURTHER CONTRADICTION

Even under current rules, recusal is not always a one-way street. In some situations, the parties may remit or waive a Justice's disqualification.<sup>40</sup> Accordingly, an applicant who is concerned about the diminished possibility of certiorari conceivably could cure the problem by waiving the disqualification of the affected Justice. Unfortunately, three factors eliminate waiver as an effective remedy to the certiorari conundrum.

First, all parties must agree to waive the disqualification of

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37. For example, if there is a 0.2 probability that an unbiased Justice will vote in favor of a certain certiorari petition, the probability of garnering Justice Emet's presumably biased vote would be only 0.1. If three Justices favor the writ, the likelihood of certiorari *without* Justice Emet's participation is roughly .67. With Justice Emet voting, the probability of certiorari *increases* to about .70, even assuming that her partiality halves her inclination to vote for the petition. If Justice Emet is able to put aside her biases successfully and vote on the same basis as the other Justices, the petitioner's chance of certiorari increases to .74.

38. O'BRIEN, *supra* note 15, at 250. The period was 1979-1981; figures were gathered by examining Justice Stevens' docket books. *Id.*

39. The same infirmity infects the process of obtaining *en banc* review in the federal appellate courts. Rehearing *en banc* may not be granted unless it is "ordered by a majority of the circuit judges of the circuit who are in regular active service." 28 U.S.C. § 46(c) (1988). That is, only an absolute majority of the judges, not a majority of those who vote, can grant rehearing. Abstentions and recusals, then, become the equivalent of "No" votes. The possible result of this rule can be odd, depending upon the number of judges authorized and appointed to the particular circuit. The First Circuit, for example, has only six authorized judgeships. 41 U.S.C. § 44(a) (1988). Thus, the recusal of three judges would render it impossible for the remaining three—even if unanimous—to grant rehearing *en banc*. The existence of an unfilled vacancy would exacerbate this problem. In the Eighth Circuit, which has 11 active judges, the recusal of one would require a 60% majority of the rest to grant rehearing; the recusal of two would require a positive vote of two-thirds. *Id.* Pointedly, 28 U.S.C. § 46(b), (c) allow the designation of substitute judges to the initial three-judge panels, but not to rehearing *en banc*. Regarding possible remedies, see discussion *infra* part IV.

40. 28 U.S.C. § 455(e) (1988).

a judge; the consent of a single party is not sufficient.<sup>41</sup> Thus, even if the petitioner in our example is willing to waive Justice Emet's disqualification, the respondent might make the strategic choice to refrain from consenting in order to diminish the possibility of certiorari. Of course, such a contrivance seems unlikely because we presume that Justice Emet is biased (consciously or otherwise) in favor of the respondent, who therefore should be willing to allow the Justice to sit in the case. This, however, brings us to a second, more significant problem.

The waiver of disqualification is an all-or-nothing proposition. Federal judges are disqualified from "proceedings," defined as including the "pretrial, trial, appellate review, or other states of litigation."<sup>42</sup> Because there is no provision for partial disqualification, there can be no partial waiver. Consequently, if Justice Emet is allowed to participate in the certiorari decision, she also will be able to hear the case on the merits. A petitioner may remit the Justice's recusal in order to increase the chance of Supreme Court review, but only at the risk of having the presumably biased Justice decide the case should review be granted. This is, at best, a Hobson's choice. The petitioner, who is supposed to be protected by the disqualification rules, either must accept the diminished likelihood of certiorari, or must accede to the full participation of a judge who, by statute, is considered partial to the other side.

Finally, many bases for disqualification are unwaivable.<sup>43</sup> For example, under the terms of the United States Judicial Code, a Justice may not sit in a case where she has "a financial interest in the subject matter in controversy or in a party to the proceeding,"<sup>44</sup> regardless of the consent of the litigants. "Financial interest" is defined as a legal or equitable interest, "however small," or a relationship as director, advisor, or other active participant in the affairs of a party.<sup>45</sup> The irrevocable disqualification obtains whether the holder of the "interest," individually or as a fiduciary, is the Justice, the Justice's spouse, or a minor child residing in the Justice's home.<sup>46</sup> In our

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41. "No justice . . . may accept from the *parties* to the proceeding a waiver . . ." 28 U.S.C. § 455(e) (emphasis added).

42. 28 U.S.C. § 455(d)(1).

43. 28 U.S.C. § 455(e).

44. 28 U.S.C. § 455(b)(4).

45. 28 U.S.C. § 455(d)(4).

46. 28 U.S.C. § 455(b)(4). The United States Judicial Code provides a small exception by allowing the Justice to continue sitting in certain circumstances

example, then, Justice Emet's investment in one party irrevocably disqualifies her from the case. The petitioner has no choice but to seek certiorari from an eight-Justice Court.<sup>47</sup>

#### IV. WHAT MIGHT BE DONE

There are three possible responses to this dilemma. The first requires congressional action, while the second could be implemented solely by the Court. The final and most promising solution could be effectuated either by legislation or by Court rule.

##### A. LIMITED WAIVER

One solution would be for Congress to amend the United States Judicial Code to allow a "certiorari-only" waiver of disqualification, regardless of the ground. Under such a provision, a presumptively disfavored litigant could consent to a Justice's participation in the certiorari vote without having to agree to the Justice's full involvement should the writ be granted. In one stroke, all of the shortcomings of the current law of waiver could be resolved: "unwaivable conflicts" would be suspended for purposes of certiorari, the consent of the apparently favored party no longer would be necessary, and the all-or-nothing consequences of waiver would be eliminated. Though reasonably simple to apply, however, this approach raises numerous problems.

First, it would become necessary to recognize and define the concepts of "apparently favored" and "presumptively disfavored" parties, if only to determine whose consent is necessary for the partial waiver. Without such a definition, a crafty respondent could withhold consent as a strategy for decreasing the petitioner's chances of Supreme Court review. In many cases, it will be quite simple to determine the identity of the disfavored party. For example, where a Justice's spouse or child is "acting

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where a financial interest was discovered after "substantial judicial time has been devoted to the matter," and where the Justice promptly divests the interest. 28 U.S.C. § 455(f).

47. Recusal also is unwaivable when it is occasioned by actual bias or prejudice, where the Justice previously served as a lawyer in the matter, where the Justice participated in the matter in some governmental capacity, where a close relative of the Justice is a party or a lawyer in the proceeding, or where "a lawyer with whom [the Justice] previously practiced law served during such association as a lawyer concerning the matter." 28 U.S.C. § 455(b).

as a lawyer in the proceeding,<sup>48</sup> the presumptively disfavored party will be the one who is not represented by the Justice's kin. Other grounds for disqualification, however, will not lead to such clear results. Consider, for instance, Justice Frankfurter's decision not to sit in *Public Utilities Commission v. Pollack*<sup>49</sup> because of his distaste for the radio music played on District of Columbia busses. The case itself involved both the permissibility of playing radio broadcasts on the busses *and* the nature of the restrictions to be imposed, such as limiting volume or the frequency and duration of commercials.<sup>50</sup> As a radio-hater, it would appear that Justice Frankfurter would tend to favor the original plaintiffs, transit patrons like himself who had challenged the entire broadcast effort as infringing on their privacy.<sup>51</sup> On the other hand, as a committed bus commuter, it seems that Justice Frankfurter also should have an interest in upholding the defendant Commission's limitations on commercials,<sup>52</sup> which he probably would have considered even more annoying than the music. Although the Justice felt that he had to recuse himself, he did not have to identify the apparently favored party. It is not hard to imagine other situations where the designations would be even less distinct.

The participation of the otherwise-disqualified Justice in the certiorari deliberations presents a second problem. A presumptively disfavored litigant who sees the benefit of having Justice Emet vote on a petition for certiorari nonetheless might be less sanguine about having the Justice actively persuade her colleagues to vote against it. This difficulty arises from the nature of the cert-granting process itself. Although the overwhelming majority of certiorari petitions are denied following their circulation among the various chambers,<sup>53</sup> a petition can be placed on the "discuss list" and scheduled for the Court's weekly conference at the request of a single Justice.<sup>54</sup> The

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48. See 28 U.S.C. § 455(b)(5)(ii) (describing the instances when a Justice has a statutorily recognized bias in favor of one party).

49. 343 U.S. 451 (1952).

50. *Id.*

51. See *supra* text accompanying note 8 (discussing Justice Frankfurter's reasons for recusal in *Pollack*).

52. See *supra* text accompanying note 8 (same).

53. Failing to attract the interest of even a single Justice, the great majority of certiorari petitions are "dead listed," and therefore never scheduled for conference. REHNQUIST, *supra* note 26, at 266.

54. O'BRIEN, *supra* note 15, at 239; REHNQUIST, *supra* note 26, at 265.

Court's conferences are confidential,<sup>55</sup> so it is not known how many of the "discuss list" petitions are truly debated, as opposed simply to being voted upon.<sup>56</sup> Given the magnitude of the workload, however, it seems likely that real dialogue is by far the exception. By one estimate, the Justices would have to average fewer than four minutes on each petition to discuss all petitions actually brought to conference.<sup>57</sup> Justice Antonin Scalia has called the concept of discussion at the Court's conferences "a misnomer,"<sup>58</sup> and other Justices have remarked that the members of the Court usually come to the conferences with their votes already firmly in mind.<sup>59</sup> Nonetheless, despite these generalizations, some certiorari petitions must become the subject of genuine deliberation. The outcome on these petitions could be influenced by Justice Emet's biased argumentation,<sup>60</sup> even though it cannot be affected by her biased vote.<sup>61</sup>

Of course, it might be possible to avoid the potential problem by framing a certiorari-only waiver in such a way as to allow the

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55. REHNQUIST, *supra* note 26, at 254.

56. Chief Justice Rehnquist once estimated that between 15% and 30% of the "discuss list" petitions are actually discussed at conference. REHNQUIST, *supra* note 26, at 265.

57. The Supreme Court meets for two days, from 10:00 in the morning until 4:30 in the afternoon, before the beginning of each term. If, as the available statistics indicate, they schedule about 100 certiorari petitions each day, they would be able to spend no more than 3.6 minutes on each one, excluding their lunch break but including time spent on other administrative matters and social interaction. The same estimate holds roughly for the Justices' Friday conferences during the term. If anything, the time spent on certiorari petitions would have to be reduced for conferences during the term because of the need to discuss and vote upon cases argued the previous week. See O'BRIEN, *supra* note 15, at 237-46 (discussing the number of petitions reviewed and the time allotted); REHNQUIST, *supra* note 26, at 254, 265 (explaining the time, process, and number of petitions for review).

58. O'BRIEN, *supra* note 15, at 244.

59. *Id.* (quoting Justice White). In the words of Justice Black: "Frequently I'll mark at the top [of a petition] 'Denied—not of sufficient importance.' 'No dispute among the circuits,' or something else. And I'll go in and vote to deny it. Well, I've considered it to that extent. And every judge does that same thing in [our] conference." *Id.* at 269.

60. Per Chief Justice Rehnquist, "[S]omething said at conference may persuade me either to shift from a 'deny' to a 'grant,' or vice versa." REHNQUIST, *supra* note 26, at 264. Cases, including certiorari petitions, also may be discussed privately among two or more Justices, as well as in conference. See O'BRIEN, *supra* note 15, at 241 (noting pre-conference meetings between Justices Warren and Brennan).

61. See *supra* note 37 and accompanying text (discussing the impact of Justice Emet's biased vote).

Justice to vote on the issue without participating in deliberations. It is unlikely, however, that a Supreme Court Justice would be willing to accept such an affront.<sup>62</sup> Most Justices probably would prefer to abstain completely, as would be their option,<sup>63</sup> rather than endure restricted participation. Moreover, a statute prohibiting a Justice from joining deliberations is likely to be unconstitutional, since it would invade the inner processes of a coordinate branch of government.<sup>64</sup>

## B. THREE-VOTE CERT

A second option would be for the Justices themselves to relax the four-vote requirement for certiorari in situations where one or more of their number is disqualified. Four-vote certiorari is simply a product of Supreme Court tradition; there is nothing magic or even statutory about it.<sup>65</sup> Indeed, it appears once to have been the case that fewer votes were sufficient to grant review. In the words of Chief Justice Hughes, "*certiorari* is always granted if four justices think it should be, and not infrequently, when [three], or even [two], justices strongly urge the grant."<sup>66</sup> The current rigid insistence on four votes thus seems to be more a response to the pressures of an increasing caseload rather than the product of principle.

As noted above, the four-vote rule now effectively turns

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62. As Justice William O. Douglas once remarked, "I, for one, could not agree to give anyone any more control over when I vote than over how I vote." O'BRIEN, *supra* note 15, at 231.

63. A Justice whose recusal for bias was waived nonetheless retains an inherent right to abstain from the certiorari vote. O'BRIEN, *supra* note 15, at 226. Justice Frankfurter, however, was known to vote against allowing certiorari petitions, and then to abstain on the merits if he believed that the Court had erroneously granted the petition. O'BRIEN, *supra* note 15, at 251 (citing David N. Atkinson, *Opinion Writing on the Supreme Court, 1949-1956: The Views of Justice Sherman Minton*, 49 TEMP. L.Q. 105 (1975)).

64. See U.S. CONST. art. III, § 1. Nor could the Supreme Court itself adopt a rule to the same effect, as it would run afoul of 28 U.S.C. § 455 as it is now written. It is conceivable, but farfetched, that Congress might amend § 455 to allow certiorari-only waivers, to be followed by the Court's adoption of a non-deliberation rule or custom.

65. See *supra* note 26 (explaining the four-vote certiorari requirement as a product of Supreme Court tradition).

66. O'BRIEN, *supra* note 15, at 247 (quoting from a speech delivered by the Chief Justice to the American Law Institute on May 6, 1937 entitled *Reason as Opposed to the Tyranny of Force*, in VITAL SPEECHES OF THE DAY 458, 459 (1937)).

abstentions into "No" votes.<sup>67</sup> The institution of a three-vote rule would do the opposite, essentially turning the first recusal into a "Yes." In the abstract, there is no reason to prefer one result over the other. Any requirement of an absolute number dictates that all votes ultimately will be counted, one way or the other. Following recusals, the Court has no choice but to select a default. The choice of that default rule ought to be based on considerations of fairness and efficiency.

If reduction of caseload is the exclusive and overriding goal of the certiorari process, then it obviously makes sense to continue counting recusals as "Nays" by requiring four affirmative votes in all cases. On the other hand, although important to the outcome on individual petitions,<sup>68</sup> it is likely that the shift to a three-vote rule in recusal situations would have only a slight impact on the Court's overall caseload. In most years, over three-fourths of certiorari petitions are denied unanimously, being placed on the "dead list" without a single favorable vote.<sup>69</sup> According to Chief Justice Rehnquist, up to 85% of the petitions that do make it onto the "discuss list" nonetheless are denied summarily.<sup>70</sup> Of the petitions that are granted, in some years as many as half receive eight or nine votes, and as many as 80% receive five or more.<sup>71</sup> Thus, although there exist some cliff-hanger petitions that teeter on the edge of being granted, they are relatively few. A wholesale shift to three-vote certiorari no doubt would lead to a significant increase in the Court's caseload. A recusal-only shift to three votes, in contrast, probably would have no measurable impact at all. And, of course, any cases that were added as a result of the change would be those that were favored by three Justices—in other words, the most certworthy of the lot.

There is another reason to consider shifting to a three-vote

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67. See *supra* text accompanying note 31 (stating that only "Yes" votes are counted for certiorari).

68. See *supra* notes 32-37 and accompanying text (illustrating the reduced probability of obtaining certiorari with less than a nine-Justice Court).

69. See O'BRIEN, *supra* note 15, at 245-46 (pointing out that as many as 79% of petitions were unanimously denied in 1973, while another 4% received a single vote); REHNQUIST, *supra* note 26, at 264-65 (stating that between one and two thousand petitions are patently without merit; no Justice would have the least interest in granting them).

70. REHNQUIST, *supra* note 26, at 264-65.

71. O'BRIEN, *supra* note 15, at 245-46, 248. *But see supra* note 38 and accompanying text (discussing the number of petitions granted with only four votes during 1979-1981).



rule in cases where a Justice is disqualified. Under the four-vote system, there is a risk that a petition will be denied erroneously due to the nonparticipation of a single Justice.<sup>72</sup> Such a lapse precludes all further review of the case, denies the aggrieved litigant a day in court, and may result in perpetuating inaccurate or mistaken law. In other words, the risk of non-certiorari is a risk on the merits. On the other hand, an erroneous grant of certiorari means only that the subject case will be briefed and argued. The Justices presumably will still decide the case correctly on its merits. Hence, the risk of over-certiorari is only one of process. Of course, there will be an incremental burden on the Court, but it is not likely to amount to more than a case or two each term. Importantly, there is no fixed quota or ceiling on the number of cases that the Court will agree to hear. In other words, the certiorari derby is not a zero-sum competition among petitioners. Thus, a slightly precipitous grant to one litigant will not preclude another case from being heard.

Still, three-vote cert presents problems, chief among them the difficulty of determining when it ought to come into play. Applying the three-vote alternative whenever a Justice has been disqualified is inappropriate, because that approach would benefit both apparently favored and presumptively disfavored petitioners. A three-vote rule would have the effect of casting the disqualified Justice's ballot in favor of certiorari. Allowing the benefit to inure to the party who is the beneficiary of the Justice's supposed bias defeats the entire purpose of the remedy. The goal is to relieve a presumptively disfavored party from the impediment of seeking certiorari from an eight-Justice Court, not to give additional assistance to a financially or familiarly related litigant.<sup>73</sup>

Indeed, if a three-vote certiorari rule were to be employed in every instance of recusal, some would-be petitioners would no doubt maneuver vigorously to obtain the disqualification of a Justice, any Justice. Certain relatives of members of the Court could guarantee that their names on a certiorari petition would carry the promise of at least a one-vote equivalent. Thus, a three-vote rule clearly could be applied only to petitions brought by a presumptively disfavored party. This application would

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72. See *supra* notes 32-37 and accompanying text (illustrating reduced probability of obtaining certiorari with fewer Justices voting).

73. See *supra* notes 21-24 and accompanying text (discussing the importance of safeguarding against disadvantage in the judicial system).

avoid most of the strategic ploys described above, since it would be impossible for a party intentionally to create such disqualifying interests.<sup>74</sup> As we have seen, however, attempting to identify the apparently favored and presumptively disfavored parties is a daunting task.<sup>75</sup> In cases involving multiple parties, cross complaints, or other complexities, the job becomes still harder. It is even possible for a Justice to be disqualified where there is neither an apparently favored nor a presumptively disfavored party, as might be the case where the Justice has a "financial interest in the subject matter in controversy."<sup>76</sup> To be useful at all, then, a three-vote default rule would have to be applied on a bright-line basis. Since the necessary designations seem indistinct at best, such an approach is not practicable.

### C. SUBSTITUTE JUSTICES

A more promising alternative is for Congress to enact a "substitute-Justice" provision allowing for the temporary replacement of a disqualified Justice, perhaps with the Chief Judge of the District of Columbia Circuit.<sup>77</sup> Many states already have comparable provisions,<sup>78</sup> as do the federal appel-

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74. You cannot force a Justice to buy stock in the opposing party, 28 U.S.C. § 455(b)(4), force the other side to retain the Justice's daughter or nephew, § 455(b)(5)(ii), or make the Justice or a former partner of the Justice a material witness. § 455(b)(2). A party, or its lawyer, could engage in conduct that would cause a Justice to become prejudiced, but courts generally hold that bias produced by the proceedings is not disqualifying. *Liteky v. United States*, 114 S. Ct. 1147, 1155 (1994); *United States v. Phillips*, 664 F.2d 971, 1003 (5th Cir. 1981). There is one possible exception. The Justices must all file financial disclosure statements. § 455(c). It, therefore, would be possible for a crafty lawyer to sue or implead a company whose stock is owned by a Justice of the Supreme Court, thereby requiring disqualification and insuring the benefit of three-vote certiorari. Such a tactic seems unlikely, though, since it would have to be triggered at the trial court level, long before one reasonably could begin strategizing toward certiorari.

75. See *supra* text accompanying notes 48-52 (discussing a case where the favored and disfavored party designations are not readily apparent).

76. 28 U.S.C. § 455(b)(4).

77. The use of a non-Supreme Court judge would require legislative authorization and subsequent confirmation by the Senate of any judge who might be enlisted. See U.S. CONST. art. III, § 1 (giving Congress the power to "ordain and establish" inferior courts); U.S. CONST. art. II, § 2, cl. 2 (giving power to appoint Supreme Court Justices to the Senate as well as the President).

78. For state constitutional provisions, see, e.g., CAL. CONST. art. VI, § 6 (providing for the assignment of judges to other courts); DEL. CONST. art. IV,

late courts,<sup>79</sup> so that courts seldom decide cases with less than a full complement of judges.<sup>80</sup>

There may be constitutional or normative reasons, beyond the scope of this essay, to oppose the institution of a temporary

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§ 12 (same); GA. CONST. art. VI, § 6 (same); IDAHO CONST. art. V, § 6 (same); KY. CONST. art. VI, § 110(3) (same); N.J. CONST. art. VI, § 1, ¶ 2 (same); N.M. CONST. art. VI, § 6 (same); TEX. CONST. art. V, § 11 (same); UTAH CONST. art. VIII, § 2 (same). For state statutory provisions, see for example, HAW. REV. STAT. § 602-10 (1993) (providing for the assignment of judges to other courts); IND. CODE ANN. § 33-2.1-2-5 (Burns 1992) (same); NEV. REV. STAT. § 1.225(5) (1986) (same); N.J. REV. STAT. ANN. § 490:3 (1983) (same); S.C. CODE ANN. § 14-3-60 (1977) (same); S.D. CODIFIED LAWS ANN. § 16-1-5 (1987) (same).

California presents a particularly interesting case because the state constitution requires the concurrence of four participating justices in every judgment of its supreme court. CAL. CONST. art. VI, § 2. Thus, upon the disqualification of two justices, a 3-2 vote of the remaining five would be insufficient to enter judgment. This problem will not arise in practice, however, because the chief justice of California is empowered to appoint substitutes for recused justices. CAL. CONST. art. VI, § 6. In *Mosk v. Superior Court*, 601 P.2d 1030 (Cal. 1979) (per curiam), all seven justices of the California Supreme Court were disqualified from participating, and a substitute panel of seven appellate court justices was constituted by lot; that panel subsequently upheld its own authority to preside. Substitute state supreme courts also were empaneled in *State ex rel. Langer v. Kositzky*, 166 N.W. 534 (N.D. 1918), *Yelle v. Kramer*, 520 P.2d 927 (Wash. 1974), and *State Bd. of Law Examiners v. Spriggs*, 155 P.2d 285 (Wyo. 1945).

79. A circuit court of appeal must decide cases in panels of three, "at least a majority of whom shall be judges of that court, unless such judges cannot sit because recused or disqualified," in which case a judge from another appellate or district court may hear the case by designation. 28 U.S.C. § 46(b) (1988). In contrast, should the Supreme Court, by reason of disqualification, lack a quorum for a particular case, the matter must be affirmed as though by an equally divided Court. 28 U.S.C. § 2109 (1988); see also *Chrysler Corp. v. United States*, 314 U.S. 583 (1941) (per curiam) (dismissing case for want of a quorum).

80. Allowing for substitute judges at the Supreme Court level not only would solve the certiorari conundrum, but also would avoid the unsatisfactory result of affirmance by an equally divided Court. See *Laird v. Tatum*, 409 U.S. 824, 837-38 (1972) (mem.) (explaining a decision not to recuse, in part, on the undesirability of four-four affirmances). The problem is not insignificant. From the beginning of 1992 until the end of May 1995, the Supreme Court decided 32 cases without the participation of at least one Justice. Significant social issues such as abortion rights and public religious displays have been the subject of four-four decisions. See *Hartigan v. Zbaraz*, 484 U.S. 171, 172 (1987), *affg per curiam* 763 F.2d 1532 (7th Cir. 1985) (involving abortion rights); *Board of Trustees v. McCreary*, 471 U.S. 83 (1985), *affg per curiam* 739 F.2d 716 (2d Cir. 1984) (involving a creche display in a public park). Other recent examples of four-four affirmances include *Morgan Stanley & Co. v. Pacific Mutual Life Ins.*, 114 S. Ct. 1827 (1994) (per curiam); *Trans World Airlines v. Independent Fed'n of Flight Attendants*, 485 U.S. 175 (1988) (per curiam); and *Pension Benefit Guar. Corp. v. Yahn & McDonnell, Inc.*, 481 U.S. 735 (1987) (per curiam).

"tenth Justice."<sup>81</sup> Some of these objections could be answered by utilizing the services of retired Supreme Court Justices, where available.<sup>82</sup> In addition, it might be possible to empanel the substitute solely for the certiorari vote, with an eight-Justice Court deciding the merits should review be granted. Indeed, current law provides that a retired Supreme Court Justice may continue to receive full salary only if he or she performs substantial judicial duties, which may include courtroom participation, motion decisions, or administrative duties.<sup>83</sup> Temporary certiorari assignment easily fits the description of "substantial judicial duties not involving courtroom participation,"<sup>84</sup> and therefore might be a desirable form of activity for a retired Justice. Since a retired Supreme Court Justice may "retain the office,"<sup>85</sup> there should be no constitutional or statutory impediment should the Chief Justice occasionally ask a retired Justice to vote on certiorari petitions. If no retired Justice is available or willing to substitute for the certiorari vote, the Court would have to proceed, as now, with eight members.

### CONCLUSION

As often as not, courts implement judicial disqualification to maintain the appearance of impartiality.<sup>86</sup> It is vexing, however, to invoke that principle when the palpable consequence is to damage the prospects of the very litigant whose interests ought to be protected. Yet this is exactly what occurs as a result of the certiorari conundrum. Of the possible remedies to this anomalous situation, the best seems to be the judicious use of

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81. Chief Justice Warren Burger once suggested the creation of a panel of senior judges to review certiorari petitions and make recommendations for acceptances to the Supreme Court. According to David O'Brien, there was "vehement opposition" to the proposal. O'BRIEN, *supra* note 15, at 236. "The Justices refused to give up control over their docket and agenda setting." *Id.*

82. A Justice may "retain the office but retire from regular active service." 28 U.S.C. § 371(b)(1) (Supp. V 1993). Thus, there would appear to be no statutory impediment to a Court rule (or practice) that calls upon retired Justices to participate in certain votes. As of this writing, there are four retired Justices of the United States Supreme Court: Lewis F. Powell, William Brennan, Harry Blackmun, and Byron White.

83. 28 U.S.C. § 371(f)(1).

84. *Id.*

85. 28 U.S.C. § 371(b)(1).

86. *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988); *Aetna Life Ins. v. Lavoie*, 475 U.S. 813, 825 (1986); SHAMAN ET AL., *supra* note 17, at 100; Steven Lubet, *Legal Ethics: Judicial Impropriety and Reversible Error*, CRIM. JUST., Spring 1988, at 26-27.

retired Supreme Court Justices, at least for certiorari votes if not for the entire proceeding.

In truth, though, it seems unlikely that anyone will tinker with the procedures of the Supreme Court. While the certiorari conundrum undoubtedly results in some transient unfairness to a distinct group of petitioners, it does not interfere with the Court's overall ability to resolve or clarify federal and constitutional legal issues. Perhaps the denial of a particular certiorari petition means that an important question will not be addressed this term, but there is always next term. Does this detract from individual justice? Of course. The entire structure of the certiorari system, however, makes individual justice a low priority.

So why pay any attention to the certiorari conundrum? There are two reasons. First, it is important to recognize the unique costs of disqualification at the certiorari stage. Once aware of the phenomenon, Supreme Court Justices might choose not to err on the side of disqualification, particularly if the recusal issue is close or based only on remote appearances. Second, once a Justice has been disqualified, at least one of the other eight now or then might be more inclined to vote for certiorari in an individual case, cognizant of the extra hurdle facing the petitioner.