Granting *Certiorari*:
How does the Supreme Court decide which cases to decide?

Virtually all the cases decided by the United States Supreme Court have been granted a *writ of certiorari*. *Certiorari* is a Latin word that means, "to be informed of." Black's Law Dictionary defines a *writ of certiorari* as: "An order by the appellate court to bring the case before them when the court has discretion on whether or not to hear an appeal." The Court does not have to grant *writs of certiorari*, and most of the petitions requesting one are denied. Therefore, it is helpful to consider the criteria used by the Supreme Court to determine whether or not a case is certworthy. The Court's Rule 10 briefly specifies some of the conditions under which the Justices are likely to grant a *writ of certiorari*. These include resolving conflicting rulings between federal appeals courts and/or state supreme courts on important federal questions, and when a lower court "has decided an important question of federal law that has not been, but should be, settled by" the Supreme Court. Other than Rule 10's fairly vague statements that apply to more cases than the Court could possibly address each year, the justices rarely explain why petitions for *certiorari* are granted or denied. However, scholars, lawyers, and journalists have investigated this topic, providing us with some insights.

Certiorari trends

Congress has passed two laws in recent decades that have made it easier for the Court to limit the number of cases it chooses to hear, while making it more difficult for certain groups to file for a *writ of certiorari*. Since 1995, Congress and the courts have prohibited prison inmates from filing civil rights suits in federal court until they have first used up all possible avenues of appeal within the prison system. In 1988, Congress gave the justices increased discretion over whether or not to hear a case. Previously, statutes had required the Court to hear certain types of cases, such as when a state law was deemed unconstitutional by a federal appeals court. As the justices have taken advantage of their greater freedom not to hear cases, the Court's docket has lightened. In 1976, for instance, the Court heard 176 cases. By 1992 that number had decreased to 107. Between 1995 and 2008, the Court issued full opinions in 72 to 83 cases per term. In the 2012 term, the Court issued full opinions in 73 cases.

Petitions from poor people

Among the cases the Court has selected to hear, very few are *in forma pauperis*, or cases filed by people who cannot afford the filing fee. In recent terms, the Court has granted *certiorari* in an average of less than one percent of pauper's petitions compared to an average of 4 to 5% of paid cases during the same terms.

Fundamental aspects of the *certiorari* process

The following criteria have been adapted from: H.W. Perry. Deciding to Decide: Agenda Setting in the United States Supreme Court. Cambridge, Massachusetts: Harvard Univ. Press, 1991.

1. **There is a presumption against granting *certiorari*.** There are three possible reasons for this: **(1)** because there is so little time and there are so many cases, the Court has to reject most of them; **(2)** the Court has plenty of time, but has relatively few worthy cases from which to select; or **(3)** the Court is both strapped for time *and* many of the cases are not worth hearing.
2. **From a legal standpoint, virtually all of the cases that come before the Court are fungible. That is, one may be used in place of another.** This is often a bitter pill for litigants to swallow, but is important to understand. The Court is typically not a place to right wrongs in individual cases, but a place to clarify the law. So, what is important is the legal issue the case raises, not the case itself.

Criteria for judging a case "uncertworthy"

1. **Absurd Claims ("nut cases")**

   One example cited by Perry is a petition that claimed a man had been wronged because his wife got out of bed and left him alone on Christmas Eve. Perry suggests that up to 10% of petitions for *certiorari* fall into this category.

2. **Frivolous Issues**

   These fall into three categories: fact-specific cases (the resolution of which would add nothing to legal doctrine), cases involving insufficient evidence (the claim is there wasn't enough evidence to warrant the lower court's decision), and diversity cases (which involve an interpretation of whether a federal court understands state law).

3. **"Clear Denies"**

   These are cases the Court is simply unwilling to hear. The most frequently mentioned example in Perry's research is ineffective assistance of counsel cases. Common parlance: the Court just isn't going there. (NOTE: In recent years, the Court has accepted a few ineffective assistance of counsel cases, and some of the justices have publicly expressed concern about the quality of legal representation sometimes provided to indigent defendants in capital cases. However, there is still great reluctance to second guess lower court judges who are generally in the best position to determine whether counsel provided ineffective assistance.)

4. **Lack of Percolation**

   Cases that involve issues that are too new (that haven't "percolated below") are typically not chosen. In general the Court will put off rendering a decision on an issue for as long as possible. The rationale for delaying is that the Court can benefit from the analysis of others (including law professors who write articles in law review journals, and the decisions and reasoning of judges in lower courts).

5. **Cases with Bad Facts/Cases that Serve as a Bad Vehicle**

   Cases must present the issue clearly to be granted a *writ of certiorari*. They don't want "bad" (messy or overly complicated) facts that muddy the legal issue being decided. For example, Perry quotes a clerk who said "If they are going to rule on an insanity case, they wouldn't want to use Charles Manson to make a decision on that issue" (p. 236).

6. **Pipeline Considerations**

   The Court may avoid a case that is more complicated, even if it raises an important issue, if it feels that a better, cleaner case is coming up through the judicial pipeline. Remember that the justices view the cases as fungible (essentially interchangeable).

7. **Intractable Issue**

   If the Court just doesn't know what to do about an issue and can't see a solution, they may decide not to take on the case.

Criteria for judging a case "certworthy"

It takes a combination of these criteria for the Court to grant *certiorari*.

1. **Circuit Conflict**

This is the premier criterion used by the Court. The criterion is utilized when there is a conflict among the lower federal (occasionally, the state) courts about an issue. The conflict must be intolerable and current. The reputation of the lower courts that are in conflict is a variable when applying this criterion. If the lower court is generally considered of low quality then the Supreme Court will often not take the case, figuring that the system will "cleanse itself" eventually with other judges.

2. **Importance**

   There are a number of different ways that a case can be important enough to attract the Supreme Court's attention. Unusual or "one of a kind" cases like *United States v. Nixon* (concerning the Watergate tapes) are somewhat more likely to be heard. Likewise, cases that are important to the polity because of the political and societal impact of their resolution, such as *Brown v. Board of Education* and *Roe v. Wade*, can attract the Court's attention. Finally, cases of substantial legal significance, such as a clarification of a rule of evidence or an administrative procedure, can be important enough to merit the Court's involvement. Their importance stems from the confusion that has been created in the legal system by different rules in different circuits.

   As a general rule, two other factors affect the Court's assessment of the importance of a case: breadth (potential impact on many people) and the effect on the federal government. If the Solicitor General of the United States urges the Court to grant *certiorari* because a case is extremely important to the federal government, the Court pays close attention.

   Public pressure can work to encourage the Court to either grant or deny *certiorari*. The Court took no cases involving gay rights until the late 1980s and waited more than twenty years to take a case about the constitutionality of anti-miscegenation statutes (which prohibited people of different races from inter-marrying).

3. **Areas of Interest to the Justices**

   Some justices may have a particular "hobby horse" that can influence whether the Court grants *certiorari*. A justice's area of interest is often determined by personal history and geographic origin. For example, justices from the West may favor granting *certiorari* in water rights cases. Another example: a justice whose earlier law practice involved representation of large corporations may believe the Court should accept more business cases.

4. **Egregious Legal Errors in Lower Courts**

   Flagrant abuses of justice or flagrant disregard for accepted legal doctrine will sometimes lead the Court to grant *certiorari*. However, the justices do not see their overall role as correcting errors of lower court judges.

A study of the 1982 term of the Court (by Caldiera and Wright) identified several variables associated with the granting of *certiorari*. The top three variables, in order of importance, from that study were:

1. The U.S. was the petitioner in the case;
2. There were more than three *amicus* briefs filed in support of *certiorari*; and
3. There was an actual (not just alleged by petitioner) conflict (either between federal circuit courts, between state courts of last resort, between a federal court and a state court, or between the court below and existing Supreme Court precedent).

This study adds to the Perry materials by suggesting that "importance may be measured by the Court, in part at least, by the number of *amicus* briefs filed at the *certiorari* stage" (i.e., not just at the merits stage, after cert has been granted).

References

- Perry, H.W. Deciding to Decide, Agenda Setting in the United States Supreme Court. Cambridge, Massachusetts: Harvard Univ. Press, 1991.
- Caldiera and Wright, "Organized Interests and Agenda Setting in the U.S. Supreme Court," 82 American Political Science Review 1109, 1118 (1988) as reported in Brenner, "Granting *Certiorari* by the United States Supreme Court: An Overview of Social Science Studies," 92 Law Library Journal 193, 198 (2000).