THE WRIT OF CERTIORARI:
DECIDING WHICH CASES TO REVIEW

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A cartoon from 1885 depicts Supreme Court justices being deluged with petitions to review cases from lower courts.
(Puck Magazine, Library of Congress)

Since the U.S. Supreme Court was established by the Constitution, the justices' caseload has grown exponentially. To ensure that only the most important legal matters reach the nation's High Court, Congress has given the Court increasing authority over its docket. Federal Judge Peter J. Messitte explains how the Supreme Court uses the writ of certiorari to control its appellate caseload and determine which cases to hear.

Messitte has served since October 1993 as U.S. district judge for the District of Maryland. From 1997 to 2003, he served on the International Judicial Relations Committee of the Judicial Conference of the United States, which makes administrative policy for the federal court system, and chaired its Subcommittee for Latin America and the Caribbean.

Article III, Section 2 of the U.S. Constitution gives the Supreme Court original jurisdiction to function as a trial court—but it does so only in a very limited number of cases, such as those involving boundary disputes between states. The Court's principal function is to exercise appellate jurisdiction over lower court rulings on constitutional and ordinary federal law issues. The Constitution authorizes Congress to regulate this appellate jurisdiction. In its early years, the Court was obliged to hear and decide every appeal that came before it, but that became unwieldy as its caseload increased. Over time, the Court secured greater control over its appellate docket, both in the number of cases it hears and in the selection of those cases.

With the Judiciary Act of 1891, Congress for the first time gave the Court authority to accept or reject at least some appeals on a discretionary basis. The act authorized use of the writ of certiorari (or "cert", from the Latin "to be informed"), by which the Court directs an inferior court to certify and transmit for review the record of a particular case. This device solved the problem for a time, but within 30 years the Court was once again burdened with mandatory appeals, for each of which the justices were required to study briefs, hear oral arguments, and issue written opinions. In the words of one justice, this seriously affected the Court's time for "adequate study, reflection, discussion, and learned and impressive opinions."

Accordingly, Congress again substantially reduced the number of mandatory appeals on the Court's docket. Through the Judiciary Act of 1925, Congress simultaneously expanded the Court's certiorari jurisdiction, giving it much greater power to control the volume of its business. In 1988 Congress reduced the Court's mandatory jurisdiction even further, and since then virtually all of the Court's jurisdiction has been discretionary. Today, using the writ of certiorari, the Court considers only cases of "gravity and general importance" involving principles of wide public or governmental interest.
How many petitions for *cert* are filed each year and how many are granted?

In recent terms (a term runs from October to June), petitioners have submitted and paid the filing fee in connection with an average of 1,825 petitions. Of these, an average of 80, or roughly 4 percent, have been granted. At the same time, more than 6,000 *in forma pauperis* [in the form of a pauper], petitions (petitions by persons who cannot afford to pay the filing fee, primarily prisoners) have been filed. On average, only five of these are granted annually.

By granting *cert*, the Court adds a case to its docket. The usual practice is to hold oral argument and decide the case that same term, although as many as 40 cases typically are carried over to the next term.

What are the criteria for granting *cert*?

Given the Court's inability to hear more than a fraction of the cases for which *cert* is requested, it is not surprising that the justices accept only those raising particularly significant questions of law, and/or those where there is a division of legal authority, as where lower courts have produced conflicting interpretations of constitutional or federal law. In such cases, the Supreme Court may grant *cert* for the purpose of establishing a nationally uniform understanding. The Court necessarily accepts relatively few appeals based primarily on alleged error in a trial court's findings of fact or the misapplication of a properly stated rule of law; review of these issues by the intermediate federal or state court typically is final.

Who can petition for review by *certiorari* and how do they go about it?

Any party to a litigation who feels aggrieved by a final judgment of a federal Court of Appeals or by the highest state court, in any civil or criminal case, may file a petition with the Supreme Court. Except where the petitioner demonstrates eligibility to proceed *in forma pauperis* [in the form of a pauper—i.e., without the ability to pay], a petitioner files 40 copies of a properly formatted petition and pays the filing fee (currently $300). The respondent may, but is not required to, file a brief opposing the petition, arguing that the Court should not grant *certiorari*, and the petitioner is permitted to file a response to that reply brief. The Rules of the Supreme Court specify the applicable time frames and procedures.

Much can be said about what makes a petition worthy of a grant of *cert* or "certworthy," as lawyers say. Perhaps the main point of interest is whether and how much the petitioner must argue the merits of his case in his petition. Inevitably, some part of the petition must do this, but, again, the primary showing must be whether there is a split of authority over the legal questions posed by the given case and/or why it is in the public interest that the questions be decided.

POINTS TO CONSIDER

There are a few other points to consider before looking at what happens with petitions for *cert* after they are filed.

What about the record of proceedings in the court below, the court whose decision is being appealed? In appeals from a trial court to an intermediate appellate court, the appellant normally submits a full transcript of the proceedings below. This makes sense, as these appeals represent the losing litigant's opportunity to assert trial court error. As the Supreme Court is primarily concerned with choosing cases that require major interpretations of law, the *cert* petitioner need not—and indeed cannot—file the record with the petition, except for attaching a copy of the opinion of judgment of the court below. The High Court is free to request the record, however, and an attorney may incorporate or quote pertinent parts of the transcript in the body of the *cert* petition.

Another item worth mentioning is the *amicus curiae* or "friend of the court" brief. Filed by individuals, but more typically by organizations, these bring to the Court's attention matters possibly not raised by the parties yet relevant to its *cert* determination. *Amicus* briefs may enable the Court to select high-stakes cases, ones whose legal significance transcends the interest of the actual litigants. The Court has said that briefs of this type "may be of considerable help," but that those that simply restate the arguments of the parties are "burdens" and are "not favored." An example of a helpful *amicus* filing occurred in *New Mexico v. Reed*, a 1998 case involving one
state's duty to honor another's extradition request. There the amicus brief filed by 40 states set forth practical reasons for granting cert and for reversing a state supreme court decision.

Once the Court has the petition for cert and any opposition or amicus briefs, what happens?

Before 1925, each of the nine justices would examine these pleadings and prepare a memorandum indicating his view of what should be done. With the expansion of the Court's cert jurisdiction and the consequent increase of cert petitions (from 300 to 400 per term to eventually four to five times that number), this became very difficult if not impossible. Accordingly, with the occasional exception, it is no longer true that each justice actually reviews each cert petition. Instead, the task of reading the hundreds of petitions that circulate each week is assigned to the justices' law clerks (each justice has four law clerks, except for the chief justice, who is entitled to five). These clerks, acting as a pool, divide up the cases and prepare memoranda for each case. Distributed to all the justices participating in the pool, these memoranda summarize the facts, the lower court's ruling, and the parties' contentions. They also contain the clerks' recommendations as to whether the justices should grant or deny review. Of course, each justice in the end must exercise his or her personal judgment as to each case. As Justice Byron White once remarked, this is "not as hard as it might sound." It has been estimated that more than 60 percent of the paid cert cases and more than 90 percent of the in forma pauperis cert cases turn out to be "utterly without merit for review purposes."

CASES FOR DISCUSSION

Another device to focus the justices' attention on the most certworthy cases is the "discuss list." This list, prepared and circulated by the chief justice, identifies the cases that any justice believes worthy of discussion in a conference of the justices. The discuss list is never made public.

Counsel are not permitted to make any oral argument or in any way contact a justice to attempt to support or object to a petition for cert. Ordinarily, action on the petition is taken within the next eight weeks, though this is not a firmly fixed deadline.

What happens at the Court's conference?

The practice is for the Court to consider every petition on the discuss list at its regular Friday conference and then announce its decisions on the following Monday, unless consideration of the petition is deferred to the following conference. Only justices attend this conference. There are no law clerks, secretaries, tape recorders, or the like present.

The justices operate by what is known as the "Rule of Four"; that is, cert will be granted if a minimum of four of the nine justices favor the grant. This is not a written rule, but rather a long-standing tradition. Accordingly, cert has been denied even when as many as three justices have favored it. The philosophy is that if a "substantial minority" feels the case should be heard and decided (not necessarily that it should be decided a certain way), the Court should consider the merits and decide the case.

The Court does not ordinarily give reasons for granting a cert petition, although it may state that it will review only certain questions raised in the petition or only questions that the Court itself reformulates based on the petition. Nor does the Court usually give reasons for a denial. As Justice Felix Frankfurter once observed, the writ may be denied for a number of reasons. They may be narrow technical reasons, such as untimeliness, lack of finality of the order appealed from, or the existence of independent and
adequate state grounds that justify the lower court decision. It may also be that the case involves a settled question of law, but the lower court simply misstated or misapplied the law. For just such reasons, the Court has emphasized on numerous occasions that denial of the writ has no significance. Denial means only that the Court has refused to take the case. Denial cannot be cited as approval of the lower court's decision, even though its effect is that the decision of the lower court remains in effect.

It is true, however, that a justice will occasionally record publicly his or her dissent from the decision of the Court to deny cert. This may be a simple registration of dissent or it may take the form of a more elaborate opinion. These dissents, as one might suppose, do not so much discuss how the case should be decided as why the issues are sufficiently important to merit a grant of cert and why the decision below should be reviewed for that reason. Such a dissent may signal that in the future the dissenting justice likely will be responsive to the claims raised in the petition.

If the Court grants a petition for cert, the clerk of the Court prepares and signs an order to that effect and notifies the attorneys and the court whose judgment will be reviewed. If the record below has not already been filed with the Supreme Court, the clerk will request the clerk of the lower court to certify and transmit it.

Once cert is granted, the Court can pursue several options. First, it may dispose of the case summarily on the merits without calling for briefing or oral argument. The Court has done this in an average of about 50 cases annually in recent terms. Summary disposition does not necessarily mean that the judgment of the lower court will be affirmed. In fact, summary reversals are more common. The implication of such a reversal is that a Court majority deems the lower court opinion so erroneous that briefing and argument would be a waste of time. Summary affirmances are less common and are issued, for example, when a number of related petitions are pending and a new decision of the Court will control the outcome of all. (Note: An affirmance after a grant of cert does have value as precedent.) After a grant of cert, the Court also may simply vacate, or set aside, the lower court decision and send the case back for reconsideration in light of an intervening Supreme Court ruling.

Alternatively, the Court may dispose of a case summarily by what is known as a per curiam (Latin for "by the court") opinion. This may occur even before the parties have filed briefs or argued the case; they may not even be warned that their case may be decided on this basis. In these cases, the Court usually reverses the lower court—that is, decides in favor of the petitioner—but goes on to discuss the facts and issues of the case before deciding the case on its merits. The Court issued only five per curiam decisions in the 2003-2004 term.

In the remaining cases in which cert is granted each term, there will be formal briefing, oral argument, and eventually a decision by the Court. The cases the justices do decide to hear each year, those in which it grants certiorari, invariably result in decisions that have a profound impact on America and, for that reason, are followed by the public with the greatest interest.

The opinions expressed in this article are those of the author.