

Strategic Behavior at the Certiorari Stage of the Supreme Court of the United States

by

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### **Abstract**

The Supreme Court of the United States is the most insulated institution in the federal government. Scholars suggest that justices on the Court engage in strategic behavior, rather than sincere judicial behavior. The certiorari stage is a particular point of interest for scholars that believe justices engage in strategic voting. However, prior research has not included cases that were denied, in which strategic behavior is also evident. A logistic regression of individual justice votes to grant or deny certiorari in 499 cases during the 1986-1993 Rehnquist Court terms shows that justices routinely engage in strategic behavior at the certiorari stage. They are responsive to both institutional and external factors when deciding to vote to grant or deny certiorari.

## **Introduction**

The process of certiorari jurisdiction is one in which the proverbial needle in a haystack is found (Breyer 2006). Many scholars have researched the possibility of strategic behavior by Supreme Court justices in the certiorari stage (Shubert 1958; Brenner 1979; Krol and Brenner 1989; Provine 1980; Perry 1991; Epstein and Knight 1998). Certiorari is the first step in the process of the Supreme Court reviewing a case and serves as a gate-keeping point for the justices. This stage is where each justice will decide if he or she believes that a case warrants full review by the Court. The shortcoming of prior research is that it does not include data on cases that were denied. Previous research also considers the Court as a whole when examining strategic behavior instead of looking at each justice as a strategic actor. I propose that using data on individual justices' votes in cases that were both granted and denied will point to strategic behavior by individual justices in the certiorari stage and strengthen the findings of previous research.

## **Literature Review**

### **Writs of Certiorari**

#### Rule 10

Unlike its outline for the other two branches of the federal government, the Constitution of the United States is relatively silent on the judiciary. Article III of the Constitution, in only two sections, provides for one Supreme Court and inferior courts that Congress may establish as it sees fit. Among the many conversations about federalism, a major question was the jurisdiction of the Supreme Court (Hamilton et al. 2009; Borden 1965; Ratner 1981; Amar 1989). Article III, Section 2 limits the authority of the federal courts to cases concerning constitutional questions, laws of the United States, cases in which

the United States is a party, controversies between different states, and controversies between citizens of different states. The Supreme Court of the United States enjoys original jurisdiction over a small subset of matters<sup>1</sup>. These are the only cases that the Court must hear.

The cases included in the the Court's original jurisdiction make up a very small number of cases that they consider. There are four other ways that a case can be heard by the Court: appeal as a matter of right, by a writ of certiorari, writ of certification, or by an extraordinary writ.

Appeal as a matter of right occurs when the parties have a statutory right to review by the Supreme Court without having to obtain permission from the Court. This jurisdiction is found in Title 28 of the United States Code and was severely limited when §1257 was revised in 1988 to remove appeal by right from state court decisions, making certiorari the only avenue for a party to have his case reviewed by the Supreme Court (28 U.S. Code §1257). Chief Justice Rehnquist (1986) noted that Congress, via its passage of the Certiorari Act of 1925, agreed with with the Court that appeal by right was not necessary in cases originating from state courts because the Court had abandoned its role as an error-correcting court in favor of deciding broader legal questions. Instead of simply claiming that a judge made a mistake, cases must present questions that have political or social import.

A writ of certification is the procedure by which a federal appeals court seeks guidance from the U.S. Supreme Court, and an extraordinary writ occurs when the Court exercises unusual or discretionary power (e.g. habeas corpus or writ of mandamus) (Garner and Black 2004). The most popular avenue for cases to reach the Supreme Court and the

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<sup>1</sup> Controversies between two or more states, controversies between the United States and a state, and proceedings involving a citizen of one state against a citizen of another state or foreign aliens.

origin of the majority of the cases heard is by a writ of certiorari, which allows for judicial discretion in the cases that they hear. This so-called gatekeeping power of the Court was granted by the Judiciary Act of 1925 (Witt 1990).

Guidance on a writ of certiorari to the United States Supreme Court can be found in the *Rules of the Supreme Court* (2013). Rule 10<sup>2</sup> deals specifically with certiorari. The rule outlines the Court's position that issuance of a writ of certiorari is a matter of judicial discretion and not a matter of right; writs will be granted only for "compelling reasons." Rule 10 outlines some instances that may be considered compelling reasons (e.g. conflict in the circuit courts or conflict between a state court and a federal court) but notes that the list isn't exhaustive. Though vague as to the circumstances that would warrant approval of a petition for certiorari, the rule points out very explicitly that writs are "rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rhode and Spaeth (1976) mention that criteria for having one's case granted certiorari, such as having "special and important reasons [warranting review]," are simply a baseline. The process of deciding which case gets heard is a process that only the justices themselves understand.

#### Process of Certiorari

Perry (1991) lays out the general process that certiorari cases go through at the Supreme Court. If a petition meets the general guidelines, such as page-length, and number of copies, the petition is assigned a docket number. All of the petitions that are assigned docket numbers are then divided up among the justices who participate in the cert pool.

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<sup>2</sup> See Appendix A

The cert pool, first proposed by Justice Lewis Powell, is composed of justices who review petitions for cert and may include as many justices as wish to participate. The cert pool allows the Court to work more efficiently in reviewing every petition that comes to the Court. In the 1986-1993 terms, Justice John Paul Stevens was the only justice who did not participate in the cert pool (Epstein et al 2007).

The law clerks then prepare memos that contain summaries of the case facts, decisions below, opinions, the contentions of the petitioners and respondents, and make recommendations about cert. These memos are sent to the Chief Justice's chambers and then distributed to the chambers of the associate justices.

After distribution, the Chief Justice then adds cases to the discuss list. The other justices may add cases but cannot have cases taken off the list. The cases on the discuss list are discussed at the certiorari conference<sup>3</sup> where the justices vote on whether to grant or deny. Following the so called "rule of four," if a petition receives four votes to grant certiorari, the writ is granted and the Court will hear the case (Perry 1991).

The number of cases that are actually granted certiorari is extremely low. Rhode and Spaeth found that only 10-15% of cases for which petitions for certiorari were filed were actually granted (1976). The high number of denials leads Perry to explain what he calls a "presumption against a grant." In his interviews with clerks and justices, he found that justices generally look for reasons to deny certiorari. This is because there might be a general consensus on the Court that it is better to deny a petition because the issue presented in that petition will almost inevitably be raised to the Court again. Since the Supreme Court is concerned only with clarifying questions and not the facts of a case, it is not necessary for the

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<sup>3</sup> A conference at which only the justices are present.

Court to be concerned with the case on an individual basis (Taft 1925). The facts of a case are already established and the decisions of the Court have implications for the rest of society in similar cases (Scalia 1989). The clearest denials are those petitions that only raise questions of fact (Perry 1991).

It takes only one element of a case to make it uncertworthy, but it takes many things to make one certworthy (Perry 1991). A petition must usually contain some level of conflict at the circuit court level, importance on a national scale, and must concern each individual justice's particular area of interest. Even Supreme Court justices have pointed out that each justice screens cases differently. For example, in his 1973 address to the First Circuit Judicial Conference in defense of the process by which cases are granted certiorari, Justice William J. Brennan explained that different justices who participate in the cert pool have different concerns and particular interests when reviewing cases. Thus the cases that are selected from the thousands of petitions every year should be considered indicative of the issues that the Court has deemed necessary to address. Brennan also mentioned that the number of cases that are granted review by the Supreme Court has remained relatively constant over the past couple of decades. This is not caused by a set number, but because this is the number of cases that are "certworthy." Justice Brennan, being of the view the the Constitution is a living document, also commented that the cases that find their way onto the Court's calendar are illustrative of changes within American society as a whole (Brennan 1973).

#### Certiorari as a Strategic Point for Justices

Many Supreme Court scholars have theorized that justices act strategically in the choices they make (e.g. Caldeira et al 1999; Epstein and Knight 1998; Brenner and Krol 1989). Voting on whether to grant or deny certiorari is arguably the most important decision

a justice can make. Glendon Shubert was one of the first political scientists to look at the certiorari stage as a strategic point for the Court (Shubert 1958). Shubert suggested that since it takes four votes to hear a case, the four justices who vote for certiorari can be organized into a certiorari bloc. The goal of that bloc is to convince one of the other five justices to vote with its opinion, which Shubert found statistically was not very hard to do. According to Shubert, the strategy of the certiorari bloc was to never vote to grant cert in which the petitioner was ideologically divergent from the bloc and to vote for their preferred petitioner in final decision on the merits. He concluded that if the certiorari bloc followed that strategy, their preferred outcome would be achieved 92% of the time.

However, Shubert used the opinions in the decision on the merits to gather information about strategic action at the certiorari stage, and assumed that the justices not voting in his so-called cert bloc had no predisposition either for or against the petitioners, based on the rule of four, thereby dismissing the theory of strategic voting for over half of the Court (Shubert 1958). The problem with Shubert's conjecture is that he was not able to use actual certiorari voting data in his research. This data was not available for the Court terms he researched. He also disregards strategic behavior of other justices by discounting justices' votes that weren't in the cert bloc. Using certiorari voting data for each justice who cast a vote in the certiorari stage would be a more effective method of measuring strategic behavior at this stage.

Baum (1997) makes the case that justices act strategically; one particular point of strategic behavior is the case selection stage. Building on Shubert's theory that the certiorari stage contains strategic behavior, Baum argues that justices might engage in what he calls long-term strategy, resulting in good relations with other justices that may make persuasion

in future cases easier. This strategy also results in establishing good relationships with the other branches to reduce the chance of reversal through policy-making. Long-term strategy is indicative of justices engaging in strategic behavior as a means of advancing their own policy goals. One might consider this to be similar to logrolling in Congress.

Baum, however, posits that logrolling in Congress is a different process than strategic behavior in the Court. Strategic voting in the House and Senate is often sharp and distinct and occurs in defined stages of the policy process, such as amendment voting<sup>4</sup>. Justices, on the other hand, are able to act strategically at some stages of a case's life on the Court while adhering to sincere behavior at other stages and are still able to achieve their desired outcomes.

The long-term strategy is important for justices because it strengthens the institutional influence of the Court. Engaging in long-term strategy also increases the chance that a justice will be able to persuade other justices to join him in future decisions. Individual cases have short-term effects for the parties to the cases but have long-term effects on legal doctrine, so justices accordingly engage in long-term strategic behavior. It is also important to a justice's long-term strategy to make decisions based on their predictions of possible future cases.

In examining the ideology of the Court as a whole as it relates to voting on certiorari, Krol and Brenner (1989) found that the Court employs three specific strategies: error correction, prediction, and majority. They proposed that the error-correcting strategy is employed when a justice voted to grant certiorari with the intention of voting to reverse at the merit stage. However, this requires the presumption that their desired outcome would be

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<sup>4</sup> Perry (1991) also claims that logrolling does not occur. He explains that in his interviews with clerks and justices on the Court none of his informants mentioned the behavior and some even explicitly stated that it does not occur.

achieved in the decision on the merits, creating the need for the prediction strategy. The prediction strategy relies on the individual justice's belief that he will be in the majority opinion at the merit stage. Using this strategy, a justice will vote to grant certiorari if he believes that he will be in the majority, even if the decision below is congruent with his own beliefs, and will vote to deny if he doesn't think his position will prevail.

The last strategy that appears at the certiorari stage is the majority strategy. The majority strategy assumes that a justice sitting on a Court with an overall ideology that is similar to his will be more likely to vote to grant certiorari. A justice who is in the ideological minority of the Court is less likely to vote to grant because there is a smaller likelihood of that justice winning the case. A justice who is in the ideological minority will also find it harder to persuade other justices to agree with his position.

Using data collected from both conservative and liberal courts, Krol and Brenner found evidence of all three strategies being employed by the justices. They found also that liberal justices were generally more prone to vote to grant cert than their conservative colleagues. However, it is important to note that Krol and Brenner only used cases where certiorari was granted in their dataset and did not use cases that were denied review. Granted cases illustrate issues that the Court deems important enough to hear. Similarly, denied petitions point to issues that justices feel are not salient enough to warrant the Court's attention or are not ripe enough for the Court to decide. Using cases that were denied review would offer insight on the particular reasons that justices deny cert. Assuming that justices only behave strategically in the certiorari stage of granted cases is a fallacy and failure to include cases that were denied certiorari doesn't account for the strategic behavior that accompanies voting to deny a case.

Perry (1991) finds that strategic behavior occurs most often within chambers rather than between chambers. Justices do not typically try to persuade other justices to join their vote to grant or deny certiorari. Rather, strategic behavior at the cert stage occurs independently of a justice trying to persuade other justices of voting similarly to him in the cert stage. Justices do not form explicit coalitions in the agenda-setting stage but that “coalitions are sometimes assumed based on anticipated reactions” (214). After conducting interviews with justices and clerks, he explained what scholars of the Supreme Court call defensive denials and aggressive grants. A justice engages in defensive denial when he votes to deny a case because he does not like the predicted outcome on the merits, even if he believes that the case is certworthy. Perry explains that the fear of a case being granted and reversed is a valid one because of the high rate of reversal (two out of three cases that are reviewed). An aggressive grant is a justice voting to grant cert in a case that may not be as certworthy because that case has characteristics that make it more likely for the justice to win the decision on the merits.

This is similar to Provine’s (1980) argument that justices don’t act strategically, but are rather influenced by their perceived proper role of the justice. Boucher and Segal (1995), however, are not convinced that justices only act strategically occasionally<sup>5</sup>. They were the first to examine the strategic voting of justices by analyzing the behavior of the individual justice. Working from a presumption of reversal bias, Boucher and Segal found that the use

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<sup>5</sup> Perry cites Provine’s 1980 work that suggests justices aren’t acting strategically when they make decisions because they are controlled by the perceived role of the justice. Perry feels that the justices may sometimes act strategically but aren’t acting strategically the majority of the time. When the justices are acting strategically, they are more likely to engage in defensive denials (Perry 1981). Shubert also noted that justices were more likely to engage in defensive denials, however Shubert was only able to examine data on the final votes and didn’t have access to cert votes (Shubert 1958).

of defensive denials wasn't a systematic part of certiorari voting on the Vinson Court (1946-1953). However, they found that justices engaged in aggressive grants when they wanted to reverse the lower court's decision. This confirms the theory of reversal bias and proves that justices engage in strategic behavior when voting to grant certiorari. Boucher and Segal came to these conclusions using the votes to grant certiorari as it relates to the justices' final votes on the merits. They were able to comment only on the strategic behavior of the justices in those few cases that were granted. Failing to look at actual cert votes inhibits the ability to test actual strategic behavior at the cert stage. Using votes on the merits to measure strategy at the cert stage also discounts the importance of strategy in voting to deny a case.

#### External Factors Affecting Certiorari

Under the strategic model, justices consider factors outside of the Court when they make decisions. Epstein and Knight explain that

“...if the members of the Court wish to create efficacious policy, they not only must be attentive to institutions that govern their relations with their colleagues but also take account of the rules that structure their interactions with external actors” (1998, 138-139).

These external actors can include Congress, the executive branch via the Solicitor General, and entities that are not parties to the case but have significant interest in the outcome who make their concerns and positions known by way of amicus curiae briefs.

Proposing a separation of powers model, Epstein and Knight (1998) find it particularly important to consider the relationships between the Court and the other branches of government. Justices take the wishes of Congress and the president into consideration when making decisions because of Congress' ability to enact legislation that effectively voids

Supreme Court decisions<sup>6</sup> and the president's ability to decide if and how to enforce Court decisions<sup>7</sup>. This combined ability of the other branches to alter the Court's decisions is one of three reasons justices consider the wishes of external actors before making decisions.

Congress also has the ability to affect the justices and the Court negatively, namely by freezing their pay (U.S. Const. Article III, Section 1) or altering their appellate jurisdiction (U.S. Const. Article III, Section 2). In addition, Congress may impeach Supreme Court justices. Furthermore, other governmental institutions can simply refuse to follow their rulings (Brent 1999).

The most notable example of this is *Immigration and Naturalization Services v. Chadha*, 462 U.S. 919 (1983), in which the Court ruled the legislative veto unconstitutional. Congress, however, has continued to use the legislative veto, virtually unopposed, since the Court's decision in *Chadha*, rendering the decision ineffective and calling into question the efficaciousness of the decision. It is because of this that Epstein and Knight argue that the Court will consider the wishes of outside actors. Though they were concerned mainly with the final decision on the merits, it is clear from the literature that scholars find an important link between the decision on the merits and the decision to grant cert.

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<sup>6</sup> Congress has overridden several Supreme Court cases including cases involving what they consider to be bad interpretation of law (*Public Employees Ret. Sys. of Ohio v. Belts*, 492 U.S. 158 (1989) overridden by Pub.L. No. 101-433), cases that Congress deems bad policy (*Gwaltney v. Chesapeake Bay Foundation*, 484 U.S. 49 (1984) overridden by Clean Air Act Amendments), and cases that result in Congress removing Supreme Court jurisdiction (*Finley v. U.S.*, 490 U.S. 545 (1989) overturned by Judicial Improvements Act of 1990). See William Eskridge. 1991, "Overriding Supreme Court Statutory Interpretation Decisions," *The Yale Law Journal*: 331-445.

<sup>7</sup> *Worcester v. Georgia*, 31 U.S. 515 (1832), in which the Court deemed the Cherokee nation a sovereign nation outside the authority of the United States and the State of Georgia. Andrew Jackson is noted as saying, "Marshall has made his decision, now let him enforce it."

The solicitor general holds a position of particular importance in the study of judicial decision making. Many view him as not just a representative of the president's administration but as an experienced player in the Supreme Court process who will faithfully present relevant issues to the Court (McGuire 1998; Bailey et al. 2005). The solicitor general is afforded consideration by the Supreme Court that is not granted to other actors mostly because the solicitor general can offer the bench legal expertise (McGuire 1998). The reason that the solicitor general enjoys success before the Court is because of the reliability of the information that is offered by him to the Court (Bailey et al. 2005). A justice is most receptive to the solicitor general's influence when he files an amicus brief, when he is either ideologically congruent with the justice, or when the amicus brief that he files is ideologically divergent from his own beliefs (Bailey et al. 2005).

An *amicus curiae* brief (literally "friend of the court") is a brief that an interested group, whether private persons or government officials, may file to inform the Court of its concerns. The content of amicus briefs varies widely because the motives for filing them are different and depend on the case and the interested group (Bloch and Krattenmaker 1994). Many scholars have researched the importance of *amicus curiae* briefs in Supreme Court petitions and at the certiorari stage. Working under the assumption of Rhode and Spaeth (1976) that justices are ideologically motivated, Caldeira and Wright (1998) predicted that justices respond to *amicus curiae* briefs as an indicator of cases that will have the most political and social impact. The likelihood of cert being granted significantly increased with the presence of one or more *amicus curiae* briefs either for or against a particular party or outcome of the case.

Ennis (1983) argues that the presence of amicus briefs is perhaps the most important factor for a case, calling it not just the “icing on the cake” but rather “the cake itself.” He explained that amicus briefs are ever-increasing in petitions to the Court, noting that by the 1980 term, over 70% of cases were accompanied by amicus curiae. Amicus briefs are effective in supporting the parties as the briefs allow an argument to be fleshed out in more detail rather than in summary form on the petition for a writ of certiorari. Amicus briefs also allow the Court to become informed about the implications that their decisions may have on public policy. The quality of amicus briefs that are filed is an important factor for justices considering them. Amicus briefs filed by high-profile groups that offer persuasive arguments that add to the litigants’ briefs are more likely to capture the attention of justices and their clerks (Box-Steffensmeier et al. 2013). Similarly, Shubert (1960) notes that it is the actual role of the Supreme Court that governs the importance of amicus curiae briefs. If the Court was simply an error-correcting tribunal, then the only interests that matter should be those of the parties to the case. However, as “formulators of national policy,” Shubert argues that amicus briefs are necessary to inform the Court of the major public policy implications of a case.

### **Theory**

Prior research on decision making at the certiorari stage of the Supreme Court has typically been done at the aggregate level, considering the actions of the Court as a whole. This, however, does not explain the behavior of individual justices. Additionally, due to a lack of data, previous studies have only conducted analysis only on cases that were granted certiorari. This fails to consider the strategic behavior that justices exhibit when they vote to deny certiorari. If justices act strategically in the certiorari stage, they will act as strategically in denied cases as granted cases. If defensive denials are a regular element of judicial

decision making, considering the votes in denied cases are important to having a complete picture of strategic behavior at this stage of of the Court process (Perry 1991). Strategic behavior can only be accurately measured when the actions of the Court are considered at the individual justice level in all cases, whether granted or denied.

Departing from Provine's (1980) theory that justices make decisions based on their perceived proper role of a justice, I expect to find that justices behave especially strategically in the certiorari stage, engaging in aggressive grants and, less frequently, defensive denials (Boucher and Segal 1995). Knowing that there is a reversal bias at work, it is a mistake to theorize that a justice will act sincerely even in cases that they know will be decided against their preferences. A strategic justice should base his cert vote on his perceived outcome on the merits will be. This leads to two hypotheses:

*Defensive Denial Hypothesis:* A justice acts strategically when he is in the ideological minority and votes to deny cert.

*Aggressive Grant Hypothesis:* A justice acts strategically when he is in the ideological majority and votes to grant cert.

If a justice acts strategically, it is expected that he will respond to many variables when determining his vote to either grant or deny cert. Following the theory of reversal bias, a justice should be more likely to vote to grant cert if he has the intention of reversing the lower court's decision. Since two out of every three cases are reversed from the lower court's decision, a justice who wants to reverse a lower court decision has a reasonable expectation of achieving that outcome, leading to the hypothesis:

*Reversal Bias Hypothesis:* A justice will vote to grant certiorari if his position is ideologically divergent from the lower court decision.

While acting strategically when considering the vote to grant or deny certiorari, a justice will be concerned with the perceived legitimacy of his decision. Every justice wants to be remembered as making effective decisions in each case. This legitimacy is derived from the response of the public to the outcome of the case. Mishler and Sheehan (1993) show that the Court responds to public opinion and final opinions in cases tend to reflect public opinion. Since the Court responds to public mood in their final decisions on the merits, it is reasonable to believe that justices will consider public mood when voting grant or deny cert, leading to the:

*Public Mood Hypothesis:* A justice will be more likely vote to grant certiorari if his preferred outcome on the merits is expected to be congruent with public mood.

The importance of a case is illustrated by the presence of amicus curiae briefs, especially at the cert stage. Amicus curiae briefs either for or against the granting of certiorari of a certain case shows that groups have an interest in the outcome of the case. Amicus curiae briefs that are against granting certiorari are equally significant as briefs for granting cert because it shows that there is at least one group expressing interest in the Court not reviewing the case (Caldeira and Wright 1988). Amicus curiae briefs could show a justice that a case is particularly certworthy. Since justices aren't concerned with cases on an individual basis, amicus curiae briefs indicate a case that might have greater political or social impact. This leads to the:

*Amicus Curiae Hypothesis:* As the number of amicus curiae briefs filed increases, so too should the likelihood the justice will vote to grant cert.

An individual justice should also be responsive to the other branches of government. Congress has the power to pass legislation to overturn Supreme Court decisions and the

president has the ability to refuse to enforce a decision of the Court (Epstein and Knight 1998). A Congressional override occurs when a statute or amendment completely overrules a Court decision, modifies the decision in a material way that would have made the case be decided differently, or modifies the consequences of the Court decision. Each Congress since 1975 has overridden an average of 15-20 Court decisions each (Eskridge 1991). The president has the power to refuse to enforce decisions, order executive officials to ignore decisions, and can sign or veto override legislation (Owens 2010). Based on the high rate of reversals, Epstein and Knight's theory necessitates the:

*Senate Hypothesis:* A justice will be less likely to vote to grant certiorari if the median member of the Senate agrees with the lower court decision.

*House Hypothesis:* A justice will be less likely to vote to grant certiorari if the median member of the House of Representatives agrees with the lower court decision.

*President Hypothesis:* A justice will be less likely to vote to grant certiorari if the president agrees with the lower court decision.

Additionally, prior research suggests the United States Solicitor General is afforded consideration by the Court that other entities are not. This is because the solicitor general is perceived by the Court to be an experienced litigator who will faithfully present issues to the Court. The solicitor general's position in a case provides information to justices about the impact of the decisions in cases (Baily et al 2005). When the United States is a party to a case, the solicitor general is the government's counsel. Therefore, it is appropriate to suggest the:

*United States as a Party Hypothesis:* A justice will be more likely to vote to grant certiorari if the United States is a party to a case because of the prior success of the solicitor general in the Court.

Though the ideological direction of the Court as a whole may be classified as conservative, liberal, or moderate, the Court is composed of justices who each have different ideologies. The long-term strategy suggests that justices will make decisions that promote collegiality among justices (Baum 1997). If a justice can persuade the ideologically median justice to join his vote, he will have a better chance of being in the majority at the decision on the merits. Therefore, I test the:

*Median Justice Hypothesis:* A justice will be more likely to vote to grant certiorari if he is ideologically congruent with the ideologically median justice.

### **Data and Methods**

Since the mid-1980s, the Court has received an average of 5,487 petitions for review every year. This includes an annual average of about 2,500 paid cases and an average of some 3,500 *in forma pauperis* (IFP) cases<sup>8</sup>. Of these petitions, an average of 115 paid cases were granted review annually and an average of only 19 IFP cases were granted review (Epstein et al 2007). It is important to measure the votes to grant or deny certiorari in cases that were both granted and denied. If justices behave strategically in the cert stage of granted cases it is reasonable to believe that they also behave strategically in the cert stage of cases that were denied. Though many cases are denied, it is imperative to look at the cases justices deemed important enough to place on the discuss list because that petition had elements that

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<sup>8</sup> In forma pauperis petitions have increased from an average of 2,400 in the 1970s to an average of 6,500 petitions in the 2000s. The number of ifp petitions increases every term (Epstein et al 2007).

made it certworthy enough for at least one justice to consider. Placing a case on the discuss list signals to other justices that at least one of their colleagues deemed it important enough to consider. I take a random sample of 499 cases that were placed on the discuss list during the 1986 – 1993 terms of the Rehnquist Court (Black and Owens 2009). These terms were chosen because they are the terms that are documented in the Blackmun Archives and this is the span of time for which the most relevant comprehensive data is available (Epstein, Segal, and Spaeth 2007).

Justice Harry A. Blackmun kept detailed records during his time on the Rehnquist Court, including votes to grant or deny certiorari and the certiorari pool memos that clerks prepared for the petitions. Using the Blackmun Archives prepared by Epstein, Segal, and Spaeth (2007), I gathered vote data for every justice participating in the cert stage for every case in the sample. For the 13 justices who served on the court during the 1986-1993 terms, a total of 6,485 votes at the certiorari stage were recorded. The archives also provided information on whether cert was granted or denied, and the status of the case (whether paid or filed *in forma pauperis*).

Since the parties to the cases are listed on the cert pool memo, the United States as the petitioner and the United States as the respondent could easily be recorded. For the purposes of coding the United States as a party to the case, only those entities that represent the government as a whole were recorded as the U.S. being a party (See Appendix B for a list of entities that constitute the federal government). Contained in the Supreme Court Database is the ideological direction of the lower court decision (Spaeth et al 2016). This variable is coded as either liberal or conservative. This data is only available for cases that were granted.

In measuring the factors outside of the Court that may affect cert decisions, data on the presence of amicus briefs for granted cases was gathered (Collins 2004). The database lists the number of amicus curiae briefs filed for the petitioner and respondent for every case that was granted review. This information was not available for cases that were denied certiorari. Public opinion was measured using data extended from Stimson's (1999) Public Policy Mood measure.

Data for the ideological direction of the median justice for each term was collected using the Martin-Quinn Scores of Justice Ideology (Martin and Quinn 2002). This analysis provides the ideological value of the median justice on the Court for a specific term and allows for a changing ideology throughout terms. The Martin-Quinn Scores place each justice on an ideological continuum and provide data for the median justice in each term, along with that justice's ideological score using data based on voting patterns of each justice. Similarly, the ideological score for the median member of the United States Senate and the United States House of Representatives, as well as the ideological score of the president can be recorded using the Common Space Scores of the 75<sup>th</sup> – 110<sup>th</sup> Congresses. These scores are assigned on a scale of liberal to conservative based on voting patterns of each house of Congress (Poole 2009; Epstein et al 2007).

## **Results**

In 499 cases, there were 6,485 recorded votes to grant or deny certiorari from thirteen justices serving between the years 1986 and 1993. In Table 1 there is evidence that justices behave strategically when engaging in both aggressive grants and defensive denials. The analysis complements Boucher and Segal's (1995) findings that justices engage in aggressive

grants more often than defensive denials. Boucher and Segal found evidence that justices on the Vinson Court didn't engage in defensive denials but did engage in aggressive grants.

By dividing the number of votes to deny when in the minority (233) by the total number of votes to deny (311), Table 1 shows that justices voted to deny certiorari 75% of the time that they were in the minority in the decision on the merits. Similarly, by dividing the number of votes to grant when in the majority (405) by the number of total votes to grant (499), justices voted to grant certiorari 81% of the time that they were in the majority. Therefore, there is strong evidence to support the *Defensive Denial Hypothesis* and the *Aggressive Grant Hypothesis*. However, the support is stronger for justices engaging in aggressive grants than in defensive denials. This implies that justices are more likely to vote to grant cert in a case that they want to overturn versus voting to deny cert in a case in which their desired outcome may not be achieved. Justices are not worried about hearing a case in which their desired outcome may not be achieved. They are more concerned with pursuing cases in which they know they are in the majority and that the majority will vote similarly to them on the decision on the merits.

A logistic regression with standard errors centered by justice shows support for the idea that justices respond to the Senate and to the president, and strong support for the position that the Court responds to lower court decisions and to the United States as a party. As seen in Table 2, a significant negative coefficient for the median member of the Senate shows that a justice is less likely to vote to grant certiorari in a case where the median member of the Senate agrees with the lower court decision. This indicates justices are responsive to the Senate when considering the outcome of a case. The same holds true for the president. When a justice is considering granting or denying certiorari, the significant

negative coefficient proves that a justice is less likely to vote to grant certiorari if it is perceived that the president agrees with the lower court decision. Therefore, the *Senate Hypothesis* and the *President Hypothesis* can be accepted. This implies that justices are more responsive to the Senate and the president than they are to the House of Representatives.

This is expected because because members of the Senate and the president serve longer terms than members of the House of Representatives. Additionally, justices may be more responsive to the president and the Senate because the president nominates each justice and the Senate confirms the nomination. This causes the justice to perceive a duty to vote similarly to these offices. The justices are less likely to be responsive to the wishes of the House because members of the House do not play a significant role in the nomination process and members of House serve shorter terms than either senators or presidents. It also implies that a case with a lower court decision with which the Senate or president agrees has a lesser chance of being reviewed by the Supreme Court.

The strong positive coefficient for lower court congruence provides evidence for a reversal bias and presence of the error-correction strategy. When a justice is ideologically divergent from the lower court decision, there is a very strong likelihood that he will vote to grant certiorari in that case. This is shown by the strong positive coefficient for lower court divergence in Table 2. These factors lead to the acceptance of the Reversal Bias Hypothesis.

Similarly, when the United States is the petitioner in a case, a justice is very likely to vote to grant cert. The lack of statistical significance proves that the same does not hold true when the United States is the respondent to a case. When considering all cases that were on the discuss list, there is a strong correlation between a vote to grant certiorari and the United States being present as the petitioner. Based on this, it is appropriate to accept the *United*

*States as a Party Hypothesis*, with the caveat that it is only true when the U.S. is the petitioner. This strengthens the implications that the United States petitions the Court to review cases that are important to political or social issues. The lack of a strong correlation between the United States as a respondent and votes to grant cert probably stem from the increased access of federal prisoners to the Court through IFP petitions. Under the Warren Court (1953-1969), prisoners were granted increased access to the courts with decisions like *Gideon v. Wainwright*, 372 U.S. 335 (1963) and *Jones v. Cunningham*, 371 U.S. 236 (1963). Vort (1986) mentions that a majority of IFP petitions filed by prisoners present frivolous cases. A large number of IFP petitions are filed by federal prisoners, so the respondent will be the United States. Knowing most IFP petitions are frivolous, justices can dispose quickly of many cases in which the United States is the respondent.

Table 3 shows factors influencing cert only in granted cases. A strong negative coefficient for lower court congruence in Table 3 shows further evidence that cases in which a justice disagrees with the lower court decision are more likely to be granted.

A justice needs only three other justices to agree with him for a case to be heard. However, a justice must have four other votes to achieve his desired outcome in the decision on the merits. The prediction and majority strategies suggest that a justice will be more likely to grant certiorari if they will be in the majority in the decision on the merits (Krol and Brenner 1989). This is proven along with the theory that justices are more likely to vote in a similar fashion as the ideologically median justice. With a very significant negative coefficient, Table 3 shows a correlation between the likelihood of a vote to grant cert and the justice's ideological distance from the median justice, leading to the acceptance of the Median Justice Hypothesis.

Examining cases that were granted allows more variables to be added to the analysis. Amicus curiae information is only available for granted cases. Additionally, a justice's position in the decision on the merits allows an analysis of the relationship of that justice to the median justice that couldn't be measured by neglecting granted cases.

### **Conclusion**

Rhode and Spaeth (1976) found that only 10-15% of cases seeking review by the highest court in the United States were actually granted certiorari. Shubert (1958) was the first academic to study strategic behavior at the certiorari stage of a case. Many scholars have since expanded the research on strategic cert behavior (e.g. Caldeira et al 1999; Epstein and Knight 1998; Brenner and Krol 1989). However, these scholars have only been able to examine the 10-15% of cases that the Court reviews each year. This leaves a significant gap in the study of strategic behavior in this stage. The previous research also fails to consider individual justice behavior by examining only the Court as a whole.

I propose that studying the individual justices' votes in the cert stage for both granted cases and denied cases will provide a clear picture on the strategic behavior of the Court at the certiorari stage. I believe that justices behave strategically and consider both institutional and external factors when deciding how to vote in the certiorari stage. A logistic regression of a sample of 499 cases from the 1986-1993 terms that were placed on the discuss list shows that justices do behave strategically in many cases.

There is clear evidence from this sample that justices behave strategically by engaging in both defensive denials and aggressive grants. As with Boucher and Segal (1995), I find Supreme Court justices engage in aggressive grants more often than defensive denials.

I also find justices respond to the wishes of members of the Senate and the President. They do not, however, pay particular attention to the wishes of the House of Representatives.

Boucher and Segal (1995) also worked from a presumption of a reversal bias, and an analysis of my sample shows justices are more likely to vote to grant cert when they disagree with the lower court decision. Petitions for certiorari are also more likely to garner a vote to grant review when the United States is the petitioner. No evidence is found, however, to show that a case is more likely to be granted when the U.S. is the respondent. There is also no evidence to show that Supreme Court justices respond to public mood when voting to grant or deny certiorari.

In an effort to promote collegiality on the Court, justices are responsive to the ideology of the median justice on the Court. It is clear that justices are strategic actors and strategic behavior is especially important in the certiorari stage. This research is important in showing that justices do not engage strictly in sincere behavior and that there are both institutional and external factors important to a justice when he or she is deciding to grant or deny certiorari.

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Table 1  
Justices Engaging in Aggressive Grants and Defensive Denials, 1986-1993

Cert Vote	Vote to Deny When in Minority	Vote to Grant When in Majority	Total
Deny	233	78	311
Grant	94	405	499
Total	327	483	810

Table 2  
Factors Influencing Cert Decision for all Cases, 1986-1993

	Coefficient	(Std, Error)	<i>p</i> -value
Lower Court Divergence	4.43**	(0.33)	0.00
Public Opinion	0.02	(0.02)	0.15
Median Member of the Senate	-12.9**	(7.13)	0.04
Presidential Ideology	-0.65**	(0.35)	0.03
Median Member of House	19.40*	(14.67)	0.10
United States as the Petitioner	0.91**	(0.25)	0.00
United States as the Respondent	0.02	(0.11)	0.43

N=6,485

\* $p \leq 0.1$ ; \*\* $p \leq 0.05$ ; standard errors clustered by justice; all tests one-tailed

Table 3  
Factors Influencing Cert Decision for Granted Cases, 1986-1993

	Coefficient	(Std. Error)	<i>p</i> -value
Lower Court Congruence	-3.41**	(1.64)	0.02
Public Opinion	-0.001	(0.06)	0.49
Median Member of the Senate	13.72	(23.08)	0.23
Presidential Ideology	-3.88	(4.25)	0.18
Median member of House	-55.58	(45.65)	0.11
Amicus Briefs (total)	0.01	(0.03)	0.39
United States as Petitioner	1.28**	(0.27)	0.00
United States as Respondent	0.44	(0.41)	0.14
Distance from Median justice	-0.10**	(0.03)	0.00
N=348			

\* $p \leq 0.1$ ; \*\* $p \leq 0.05$ ; standard errors clustered by justice; all tests one-tailed

## Appendix A

### “Rule 10. Considerations Governing Review on Writ of Certiorari

A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court’s discretion, indicate the character of reasons that will be considered:

- (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court’s power of supervision.
- (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.
- (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

The same general considerations outlined above will control in respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals.

A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”

## Appendix B

### Parties to cases coded as representing the U.S. Government as a whole

Attorney General of the United States  
House of Representatives  
U.S. Senate  
United States  
U.S. Air Force  
Department of Agriculture  
U.S. Army  
Civil Aeronautics Board  
Commodity Futures Trading Board  
Department of Commerce  
Comptroller of Currency  
Consumer Product Safety  
Civil Rights Commission  
Civil Service Commission  
Departments of Defense, Energy, Interior, Justice, Labor, State, Transportation, Treasury,  
and Education  
Equal Employment Opportunity Commission  
Environmental Protection Agency  
Federal Aviation Agency  
Federal Bureau of Investigation  
Federal Communications Commission  
Food and Drug Administration  
Federal Deposit Insurance Corporation  
Federal Energy Administration  
Federal Election Commission  
Federal Energy Regulatory Commission  
Federal Housing Administration  
Federal Home Loan Bank Board  
Federal Labor Relations Authority  
Federal Maritime Board and Commission  
Federal Power Commission  
Federal Reserve System  
Federal Trade Commission  
Comptroller General  
Health and Human Services  
Immigration and Naturalization Services  
Internal Revenue Service  
National Aeronautics and Space Administration  
United States Navy  
Offices of Management and Budget, Price Administration, Personnel Management, and  
Workers Compensation  
U.S. Public Health Service

Securities and Exchange Commission  
Social Security Administration  
Selective Service System  
Tennessee Valley Authority  
U.S. Forest Service  
Postal Service  
Veterans' Administration  
Transportation Security Administration