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CERTIORARI: ITS DIAGNOSIS AND CURE

By ROBERT W. GIBBS*

A. General Nature and History

Certiorari or a writ of certiorari is an expression of willingness by the United States Supreme Court to review a lower court decision. Cases reviewable only by certiorari are to be distinguished from appealable cases, Supreme Court review of which is obligatory. The bulk of business actually heard by the Supreme Court comes up on petitions for certiorari. Hundreds of these petitions are denied or dismissed each term. Needless to say, an understanding of certiorari is a prerequisite to an understanding of Supreme Court review.

The institution of discretionary review was largely a response to a continually overcrowded Supreme Court calendar. As the business of the Court grew, the review by certiorari steadily displaced appellate review.

In 1891, as part of the program establishing the Circuit Courts of Appeals, statutory certiorari was innovated. In substance its scope was limited to patent, revenue and some admiralty cases. The revision of the Judicial Code in 1911 somewhat broadened certiorari to Circuit Courts of Appeals, by including criminal cases. The 1914 amendment was a landmark in that it spread certiorari to some review of state decisions: state decisions favoring the validity of a federal treaty, statute or authority;


1 I refer to the statutory writ, not the common law or extraordinary writ of certiorari. See Wolfson, Extraordinary Writs in the Supreme Court, 51 Col. L. Rev. 977, 984ff (1951). The Supreme Court is authorized to issue an extraordinary writ of certiorari. 28 U.S.C. § 1651(a) (1946). But it is only used when, though review is desirable, there is no basis for appeal and the technical prerequisites of statutory certiorari have not been fulfilled. House v. Mayo, 324 U.S. 42, 44ff (1945).

2 It has been suggested that the considerations determining the propriety of an appeal are much the same as those relevant to whether a petition for certiorari should be granted or denied. Harper and Pratt, What the Supreme Court Did Not Do, 101 U. Pa. L. Rev. 439, 446 (1953). Cf. HART AND WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 574ff (1953).

3 In the 1952 term the Court reviewed 88 cases brought up on appeal, 36 of which were not on the merits; while it decided 110 certiorari cases on the merits. The Supreme Court, 1952 Term, 67 Harv. L. Rev. 91, 170 (1953).

4 976 were denied or dismissed last term. Ibid. For past statistics, see the Annual Reports of the Attorney-General.


6 36 Stat. 1087 (1911).

7 Id. at 1137.

8 38 Stat. 790 (1914).
against the validity of a state statute or authority; or in favor of a federal title, right, privilege or immunity. In 1915 Circuit Court decisions in bankruptcy cases were placed in the certiorari sphere. The Act of September 6, 1916 follower suit by subjecting cases from the Circuit Courts under the Federal Employers Liability Act, Hours of Service Act and Safety Appliance Act to discretionary review only. The same act extended certiorari review to state decisions holding against the claim of a federal title, right, privilege or immunity.

The great amendment to the Judicial Code in 1925 collected all of the previous developments into one Judicial Code. The certiorari review of state decisions was left essentially the same. But review of Circuit Court decisions was recategorized, and discretionary review was tremendously broadened, all Circuit Court decisions became reviewable by certiorari. The Act also placed all Court of Claims decisions in the same category.

The present revision in substance reiterates the 1925 provisions, but in somewhat more simplified form.

"Sec. 1254. Courts of appeals; certiorari; appeal; certified questions.
Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;
(3) By certifications.

"Sec. 1257. State courts; appeal, certiorari.
Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:
(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity;
(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity;
(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the United States Constitution or treaties or laws of the United States.

9 38 Stat. 804 (1915).
12 Id. at 938.
13 Id. at 939.
Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States.

The importance of review by certiorari has made great strides over its sixty year history. But regardless of this span of years, true understanding of the institution is rare and at best incomplete. In the words of a former Reporter of the Supreme Court's decisions, "Certiorari is to the laymen foolishness and to the lawyers a stumbling block." Aiding lawyers to remain upright in spite of certiorari is a purpose of this paper.

B. Procedure

To comprehend my subsequent analysis, an awareness of certiorari's procedural framework is essential. Perhaps it would be desirable to examine briefly the procedural stages of discretionary review

(a) The Petitioner files his petition and transcript of record and proceedings below. An improvidently taken appeal from a state court decision will be treated as a petition for certiorari; this convenience is not afforded the appellant from a Court of Appeals decision. Thus, the appellant from the federal court is well advised to file both petitions for appeal and certiorari simultaneously, if there is the slightest doubt of the appeal.

16 Butler, A Century at the Bar of the Supreme Court 106 (1952). A neighbor's offhand opinion that "certiorari" was the name of a disease suggested the title to this paper.
17 Including a supporting brief is optional.

A timely motion for rehearing in the court below will toll the period. Gypsy Oil Co. v. Leo Escoe, 275 U.S. 298 (1927). The deadline may be extended as much as sixty days, with the permission of a Justice. In Courts of Appeals criminal cases the maximum extension is thirty days. Fed. R. Crim. P 37(b) (2). In any case the request for extension must have been made before the ninety days has expired. Finn v. Railroad Commission, 286 U.S. 559 (1931).

21 Section 1254(2) (see p.2 of text) states, "appeal shall preclude review by writ of certiorari at instance of such appellant." The 1925 counterpart of this section has been construed to apply only where appeal was properly taken. Bradford Electric Light v. Clapper, 284 U.S. 221, 224 (1931).
(b) Petitioner requests the court below to stay execution of its judgment. If this request be denied, Petitioner may pray that the Supreme Court order the court below to desist from enforcing its mandate.22

(c) The Petitioner serves the Respondent with a "notice of filing" and copies of the petition and supporting brief, subsequently filing a "proof of service."

(d) The Respondent submits to the Court his brief in opposition and serves Petitioner with a copy. Failure to submit a brief in opposition frequently results in a granting of certiorari, followed by a summary reversal of the decision below.23

(e) The Clerk distributes the filed documents, giving24 copies to each Justice.

(f) The Justices separately consider the petition.25

(g) The Justices collectively discuss26 and vote on the petition.27 Rarely is the nature of such vote revealed.28 Traditionally if four Justices are

22 62 STAT. 961 (1948). See Rule 38.6, Magnum Import v. Coty, 262 U.S. 159, 164 (1923). The petition must show that certiorari is likely to be granted and that convenience requires such relief.


24 If the petition and record is in forma paupers, such distribution can not thus occur. The usual procedure is for the Clerk to submit the documents to the Chief Justice. Stone, Functions of the Circuit Conference, 28 A.B.A.J. 519 (1942), Robertson and Kirkham, supra note 23. The Chief Justice then makes a memorandum, which is circulated among the Justices. Occasionally the documents actually submitted accompany this memorandum. Chief Justice Stone's protest to the granting of certiorari in Bailey v. Central Vermont RR, 319 U.S. 350, 359 (1943) demonstrates that the Chief Justice's memorandum is not necessarily decisive.

25 See Furness, Withy & Co. v. Yang Taze Insurance, 242 U.S. 430, 434 (1917). Though this case was decided thirty-five years ago, it retains enough vitality to be cited in Rule 38.2. Also see Stone, Functions of the Circuit Conference, supra note 24.

26 Rarely is there oral argument on the petition, although occasionally the Court issues an order to show cause why the petition should be denied or granted. STERN AND GRESSMAN, SUPREME COURT PRACTICE 128 (1950). See Taft, Jurisdiction of the Supreme Court, 35 YALE L.J. 1, 12 (1925).

27 Under Hughes, the following procedure occurred in conference: the Chief Justice stated the case, the Justices in order of seniority voiced their opinions, and the Justices in reverse order of seniority cast their votes. On an average, three and one-half minutes were required to dispose of each petition. McElwain, Business of the Supreme Court, 63 HARV. L. REV. 5, 14 (1949).

28 See Wilkerson v. McCarthy, 336 U.S. 53, 67 (1949). Though some of the Justices occasionally reveal their vote through recorded dissents or in the opinion on the merits, any statement by one or more Justices objecting to a denial of certiorari is said not to indicate that such Justices were the only ones that unsuccessfully supported the petition. Chemical Bank & Trust v. Group of Institutional Investors, 343 U.S. 982 (1952).
in favor of granting the petition, a writ will issue. Occasionally the "rule of four" is relaxed; and an affirmative vote of three Justices will lead to a granting of certiorari.

(h) The Clerk notifies counsel of record and the court below of the petition's disposition.

(i) If certiorari was denied, Petitioner may petition for rehearing. The petition for rehearing usually stresses new developments, curing of jurisdictional defects or new arguments. Respondent may file a brief in opposition. The Justices then reaffirm or reverse the prior ruling.

If the petition was granted, Respondent may make a motion to dismiss the writ of certiorari. Petitioner may then file a brief in opposition to the motion. The Justices either reject the motion, or dismiss the writ as having been improvidently granted. Apparently a vote of five Justices is all that is necessary to dismiss the writ. That five Justices can cause a writ to be dismissed, which they alone could not cause to be denied, seems quite anomolous. Justice Douglas suggests that, for the "rule of four" to retain its vitality, when none of the Justices who favored granting of the writ would support dismissal, the other Justices should desist from voting for dismissal.

C. Problem: The Why and Wherefore of a Successful Petition

The mental processes of the Justices, when they consider these peti-
tions, is the topic of immediate concern. Within the confines of his own chamber, of what is each Justice thinking when he evaluates the petition? What are the controlling factors determining the success or failure of the petition when it is briefly considered by all of the Justices jointly?

The problem is an important one. Recognition of the controlling considerations could and would have significant effects on the United States Supreme Court bar. Awareness of the factors that are considered would enable practitioners before the Supreme Court to argue more efficiently and persuasively that certiorari should be granted or that it should be denied in a specific case. A better understanding of certiorari well may result in the withholding of nonmeritorious petitions. And finally if the views of the Justices on the merits of a decision below are critical in a substantial number of certiorari denials, denials of certiorari might be entitled to some effect as case precedent.

D. Source Materials and the "Doctrine of Secrecy"

Through a number of different media the United States Supreme Court, from time to time, has made statements of general considerations relevant to rulings on certiorari petitions. The most easily obtainable of these statements is found in the Revised Rules of the Supreme Court, Rule 38.5(a) and (b)

"A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

The filing of nonmeritorious petitions has plagued the Court for years. Sen. Rep. No. 711, 75th Cong., 1st Sess. 39 (1937) (letter from Chief Justice Hughes to Senator Wheeler), 20 A.B.A.J. 341 (1934) (Hughes' address to American Law Institute). Whether a better appreciation of relevant considerations would result in the filing of fewer unworthy petitions may be subject to some doubt. Frankfurter and Landis, Business of the Supreme Court 257ff (1928). Assuming enough transcripts of the record have been printed, the comparatively small expense involved for filing a petition is not prohibitive.

However, the threat of censure by the Supreme Court for a frivolous or poorly executed petition provides some tempering influence. See Taft, Jurisdiction of the Supreme Court, 35 Yale L.J. 1, 4 (1925). An additional coercive measure is the threat of penalty akin to that for frivolous appeals. See Rule 30.2, Frankfurter and Hart, Business of the Supreme Court, 51 Harv. L. Rev. 577, 594 (1938). Moreover, in view of the added expense and counsel fees incurred by the petitioner and the burden on the Supreme Court, it is felt that the counsel for the petitioner is morally obliged to file only petitions having at least a reasonable chance of success. Taft, supra, at 3. Some optimism has been expressed that an educated bar in time may withhold nonmeritorious petitions spontaneously. Frankfurter and Landis, supra, at 289.
(b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; (2) or has decided an important question of local law in a way probably in conflict with applicable local decisions; (3) or has decided an important question of federal law which has not been, but should be, settled by this court; (4) or has decided a federal question in a way probably in conflict with applicable decisions of this court; (5) or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

In appraising a specific case, these general considerations are not too helpful. The following uncertain and flexible terms detract from the informative value of Rule 38.5: "sound judicial discretion," "special and important reasons," "probably in conflict," "important question" and "accepted and usual course of judicial proceedings." The second sentence of the Rule puts the reader on notice that the Supreme Court reserves the right either not to hold as controlling or to discard completely the factors stated in the Rule.

The second major source of general considerations requires an examination of the legislative history of the statutory writ of certiorari. The two important dates to remember are 1891 and 1925. In conducting hearings and debates respecting the pertinent bills prior to their becoming law, Congress might have provided some insight. But the attitudes of the Fifty-First and Sixty-Eighth Congresses would tend to discount any such optimism. The pioneering legislators of the nineties were too preoccupied in innovating a whole new system to spend much time on the administrative details of certiorari, which was only one point in a larger program to ease the Supreme Court's burden. But the statesmen of 1924 and 1925 were aware of and were curious respecting the factors that the Court does actually consider. However, this curiosity was shortlived; apparently the 1925

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38 Cf. "Rule 35 (the forerunner of Rule 38.5) indicates with great clarity the character of 'special and important reasons' by which the 'sound judicial discretion' of the court will be guided." Frankfurter and Landis, Business of the Supreme Court 287 (1928). At least one of the authors retrenched within six or seven years. "In the absence of detailed, informing studies of certiorari, such rules together with the Court's own infrequent explanations of its policy constituted expert counsel's sole reliance. Judged by such standard, it may be questioned whether Rule 38 which governs petitions for certiorari is as explicit as it might be." Frankfurter and Hart, Business of the Supreme Court, 48 Harv. L. Rev. 238, 264 (1934). Also see Harper and Pratt, What the Supreme Court Did Not Do, 101 U. of Pa. L. Rev. 439, 440 (1953).

39 The Court seems to be giving less attention to the factors specified in Rule 38.5(b) and greater application to this admonition. Frank, The United States Supreme Court, 17 U. of Chi. L. Rev. 1, 36 (1949).

40 Debate only on general principles was lengthy and thorough. See the various recorded debates on H.R. 9014 in 21 and 22 Cong. Rec. (1890-91).
gess was awestricken by the triumvirate of VanDevanter, McReynolds and Taft. Nevertheless, various Congressional discussions pertaining to these two major acts, and others, do provide some information. Also, the very nature of various bills since 1891, both successful and unsuccessful, provide other clues.

Another important source might be labelled "official statements by the Justices." These appear in a number of forms, all of which are present in the various reports of the United States Supreme Court cases. Occasionally there are memoranda appended to a series of reported rulings on applications for certiorari. Once in a while, either a memorandum or a dissenting opinion has actually accompanied a denial of certiorari. At times lengthy discussions of the problem will appear in an opinion on the merits, but usually the Court will merely include a brief explanation of why certiorari has been granted. I have categorized these official statements as statements of general considerations. This may seem somewhat enigmatic, especially my inclusion of explanations why review was granted or denied in particular cases. Because of the brevity of this type of statement and the usual absence of any effort to relate it to the facts of the pertinent case, I consider my categorization sound. The general nature of the other official statements also leads to the same treatment.

The final source of general considerations may be called "informal statements of by the Justices." These informal statements may be found in testimony before Congressional committees, addresses before bar associations and various periodicals. Seldom do the Justices ever advert to specific cases in these informal statements.

Are these statements of general considerations sufficient to inform the Supreme Court bar of the types of arguments their petitions and briefs in opposition should contain? Undoubtedly they are of some help. But the stock-in-trade of the American lawyer has traditionally been cases, not broad legal principles. The lawyer's art depends largely upon arguing from cases, which are specific applications of general principles. Consistent

In the Senate hearings the question was raised whether Congress should supply standards upon which the Justices must base their rulings on certiorari. Mr. Justice Van Devanter, in opposing this suggestion, said, "When I speak of a discretionary jurisdiction on certiorari I do not mean, of course, that the Supreme Court merely exercises a choice or will in granting or refusing the writ, but that it exercises a sound judicial discretion (emphasis added), gives careful thought to the matter in the light of the supporting and opposing briefs, and resolves it according to recognized principles." (Emphasis added.) With this conclusion, Van Devanter rapidly changed the subject. He was never again pressed to reveal in more detail the nature of what he called, "sound judicial discretion" and "recognized principles." Hearings before Judiciary Committee on S.2060, 68th Cong., 1st Sess. 30 (1924).

42 "The cases are here on petition for writs of certiorari which we granted because of the importance of the questions presented." Sunal v. Large, 332 U.S. 174, 177 (1947).
with this facet of our adversary system, the practitioner before the Supreme Court requires more specific information.43

Statements of considerations specific to particular cases are quite rare. Seldom do the Justices, in a decision on the merits of a case, spell out with sufficient detail the reasons for having granted certiorari. Almost without exception informative explanations of certiorari denials are not published. This calculated taciturnity I have chosen to label the "doctrine of secrecy."

Various members of the Supreme Court have quite candidly verified the existence of the doctrine.44 And members of the bar seem to accept it,45 though on occasion it has been subjected to merciless attack.46 The Justices, however, are reluctant to support the policy with reasons.47 It cannot be accepted that they have no articulable reasons for their respective votes.48 Some suggest that the "doctrine of secrecy" is an effort to create an air of mystery around the Court, the theory being that mystery is conducive to dignity.49 Equally illusory is a reason offered by the Court itself, that secrecy is justifiable since in a particular case a number of Justices are likely to have different reasons for voting as they did.50 Although I question the harmfulness of publicizing such differences among the Justices,51 no such objection would be apropos if only one consideration were

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43 "and no general classification of cases can hope to forecast the specific instances deserving the Court's ultimate judgment." Frankfurter and Hart, Business of the Supreme Court, 48 Harv. L. Rev. 238, 275 (1934).


45 Hearings before Judiciary Committee on S.1392, 75th Cong., 1st Sess. 1944 (1937). Also see Boskey, Mechanics of the Supreme Court's Certiorari Jurisdiction, 46 Col. L. Rev. 254, 259ff (1946).

46 On the Senate floor Senator McKeller said the following: "No one except the members of the Court knows exactly how these certiorari cases are considered. Their proper disposition being challenged by the President of the United States, and the Court deeming it proper to make reply thereto, why did not the learned Chief Justice give the exact method of the Court in dealing with these cases? . . . For some reason he does not choose to do so

"The secret is still with the Court It is seemingly carefully guarded from the rude gaze of the President and of the Congress and of the public. Why this secrecy in a court of justice?" 81 Cong. Rec. 2810ff (1937).

47 Some have even recognized the importance of certainty in this branch of review procedure. "The Court is keenly alive to the importance of having its discretionary reviewing power exercised by the application of well-defined legal criteria." Frankfurter and Landis, supra note 35, at 287.

48 Cf. Brown v. Allen, 344 U.S. 443, 489 (1953) ("But we know best how puzzling it often would be to state why the Court denied certiorari even when we are parties to the denial.")

49 See the testimony of John F. Devaney, President of the National Lawyers Guild, respecting the "reorganization bill." Hearings, supra note 45, at 68.


51 Some commentators advocate the abandonment of the doctrine of secrecy, in order to obtain the "benefits" of public surveillance of the Justices' reasoning underlying certiorari denials. Harper and Pratt, What the Supreme Court Did Not Do, 101 U. of Pa. L. Rev. 439, 442 (1953).
expressed in any given case.\textsuperscript{52}

Another indefensible explanation\textsuperscript{53} is that a contrary policy would subject the Supreme Court to hard and fast rules of when review should be accepted. It is claimed that this condition would defeat the very purpose of statutory certiorari, to confer upon the Court the power to control the number of cases it is to hear. But the policy of stare decisis is no stronger than the Court itself makes it. If the United States Supreme Court should receive a petition for certiorari respecting a case, which previously expressed considerations indicate should be granted, the Court has three alternatives. It may of course grant the petition. If there is a previously unarticulated consideration which renders the granting of certiorari unadvisable, a denial of the petition may be justified by distinguishing the present case from the earlier cases. The distinguishing scheme, not a direct rejection of stare decisis, is not uncommon to the Supreme Court. However, if there is no prospect of distinction, and six Justices still think the petition should be denied, stare decisis may have to be circumvented,\textsuperscript{54} as has occasionally been done in the past.\textsuperscript{55}

More serious reasons have been suggested. The Court will never forget the 1937 campaign to reorganize. It is conceded by most that the lag between the legal philosophies of a number of Justices of the Hughes’ Court and the publicly endorsed New Deal provided the impetus for the packing attempt. The Justices probably now feel that the inclusion of opinions as to why certiorari was accepted or denied would again place them in the political arena.\textsuperscript{56} Thus, if “importance” is a controlling factor, a Supreme Court finding of nonimportance could be a new basis for anti-Supreme Court sentiment. If the Court considered a case not “ripe” for a most effective decision, again it may be subjected to public rebuke. In reply to this fear, I submit that rulings respecting certiorari petitions which might thus prove embarrassing should be issued without opinion. That the conspicuous absence of opinion, among all the other opinions on certiorari petitions, would heighten such embarrassment is a fair rejoinder. However, as I shall expposit later, only a few of these opinions could be written per term, even if the doctrine of secrecy were completely rejected. The fear of conspicuousness drops out, the Supreme Court being subject to no more embarrass-

\textsuperscript{52} Which consideration should actually be reported will be considered below. See note 57 infra.
\textsuperscript{53} BUTLER, A CENTURY AT THE BAR OF THE SUPREME COURT 109 (1942).
\textsuperscript{54} If the otherwise meritorious petition must be denied because the docket happens to be overcrowded with worthier cases, a notation to that effect would even avoid a rejection of stare decisis.
\textsuperscript{56} Harper and Pratt, \textit{supra} note 51, at 444.
ment for any particular ruling on certiorari without opinion, than it now is under the doctrine of secrecy.

Time consumption often has been offered in support of the doctrine of secrecy. Certainly if the Court were to write a detailed opinion respecting each petition, its work would never be done. The time consumption argument is less persuasive if the Court were to issue such opinions only in selected cases. But a selective practice would still consume extra time, thereby diminishing the number of cases that the Court could hear on the merits, assuming that the workload otherwise would remain constant. However, the workload would not otherwise remain constant. In the past two decades the Justices have made both formal and informal statements that a great percentage of the petitions for certiorari are improvidently filed. Since the appellate opinion has always been the tree from which the American lawyer picks his fruit, its absence from the field of certiorari would account for many of the ill advised petitions. Thus, even with a selective discarding of the doctrine of secrecy, it is my contention that the number of unworthy petitions for certiorari would thin out. The end result would be a decrease in the number of petitions filed, accompanied by some increase in the opinion writing workload.

The repercussions of the doctrine of secrecy are quite obvious. I have already mentioned the excessive number of patently unworthy petitions for certiorari that annually come to the Supreme Court. Another consequence is that the draftsman is ill equipped to produce the most convincing petition or opposing brief. Undoubtedly more skillful arguments would have led the Court to grant certiorari in some cases that they otherwise had denied, and vice versa.

Fortunately there have been some departures from the doctrine, some of which are more apparent than others. A few opinions on the merits have included sufficiently detailed statements of why certiorari was granted to amount to statements of specific considerations. More frequently, specific considerations are revealed in opinions accompanying decisions dismissing

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57 Conceivably opinions could be written on cases selected at random. "Of far greater value would be the occasional full opinions upon denial of petitions, where explanation of reasons for denial would illuminate large numbers of cases." Frankfurter and Hart, *Business of the Supreme Court*, 48 Harv. L. Rev. 238, 275 (1934). Another sound standard of selection would be to seek out denials of certiorari most clearly demonstrating significant factors, particularly those denials raising considerations not previously articulated to the bar.

58 See note 37 supra.


60 Even Justice Jackson, then Assistant Attorney-General, conceded that he was totally unaware of the reasons for the Court's denials of certiorari in a large number of his own cases. *Hearings, supra* note 51, at 59ff.
writs for having been improvidently granted. In recent years several dissenters to denials with dissenting opinions recorded have given some information. These express departures from the doctrine of secrecy have dwelled on the obvious considerations—e.g., conventional jurisdictional defects, cases of extreme national importance, etc. The less apparent departures are more fruitful, but the tediousness and uncertainty accompanying them minimize their analytical value. By "less apparent departures," I mean conclusions that can be deduced from various comparative studies of cases—e.g., dissents to certiorari denials recorded with or without opinions, compared to voting disposition on the same cases after the petition for certiorari was granted on rehearing; recorded dissents to denials, compared to how the dissenting Justices vote on cases with similar issues that are reviewed by the Court on the merits, etc.

Perhaps the continued presence of these frugal departures from term to term may indicate that the doctrine of secrecy is waning. I am not convinced, however, that any such trend has commenced. At the present time, the doctrine of secrecy is in full bloom. Because of this handicap, the task of the analyst of certiorari is of course a difficult one; hence, many of the cases cited in the ensuing discussion are merely illustrative of probable applications of certain principles, certainty of application being unascertainable.

E. Formal Factors

The factors considered by the Supreme Court generally fall into four categories: formal, jurisdictional, tactical and substantive. The Court is considerably more liberal in disclosing factors falling within the first two categories. The tactical factors, though understandable when known, are somewhat difficult of ascertainment. But the fourth class, as my analysis will show, presents the greatest difficulties, both in ascertainability and understandability.

61 Propositions relating to dismissals of certiorari must be regarded with special care. In the interest of producing something for the time spent, the later in the proceeding the improvidence is discovered, the less likely is a dismissal of the writ to follow. At one time this observation would have been dubious. Layne & Bowler v. Western Well Works, 261 U.S. 387, 393 (1923) (Taft, C.J.). But apparently the principle laid down by Chief Justice Taft no longer has its original vitality. Notwithstanding reference by Justices Frankfurter and Rutledge to the language in the Layne & Bowler case, the Court decided on the merits in Stinback v. Mo Hock Ke Lok Po, 336 U.S. 368, 384ff (1949), but cf. N.L.R.B. v Mexia Textile Mills, 339 U.S. 563, 573 (1950).

Hence, some dismissals on these grounds may be regarded as a fortiori cases for simple denials of certiorari. And an opinion, dissenting to a decision on the merits, claiming that certiorari should be dismissed, may be regarded as manifesting controlling considerations, were the pertinent factors evident when the petition was voted upon.

62 Stern, Denial of Certiorari Despite a Conflict, 66 HARV. L. REV. 465, 466 n.3 (1953).
There are two general types of formal requirements. The first might well be called "clerical-technical requirements." They are the type clearly specified in the Rules of the Supreme Court, non-compliance with which will result in a refusal to process the appropriate documents. Thus, the Clerk may refuse to accept the petition, if all the necessary documents are not filed, or the required number of copies are not submitted. The Clerk may reject documents, if they are not the correct size or do not contain the proper print. Failure to comply with the appropriate time limits will also prove fatal.

The other type of formal requirements is applied by the Justices themselves, when they consider the petition. Some of these requirements are expressed in the Rules; others are not. But they all have one central theme: the saving of time. If the petition is drafted in a manner that demands unnecessary time consumption by the reader, it might well be denied.

If the petition is of unreasonable length, the tired eyes of the Justices may compel denial of certiorari. The denial in the Alabama Marble case seems to be illustrative of the formal requirement of brevity. The petition for certiorari was only about thirty-five pages long. But the proportionate allocation of pages to the various components of the petition seemed quite imprudent. Twenty-two pages were devoted to the statement of a basically simple fact situation. Eight more pages contained some thirty "questions presented." Only in the last few pages of the petition was mention

63 Rule 38.2 requires forty copies of the petition. Rule 38.3 demands the filing of proof of service. Rules 38.1 and 38.7 require ten transcripts of the record and proceedings below to accompany the petition, with thirty more to follow if the petition is granted.


65 See Furness, Withy & Co. v. Yang-Tsze Insurance Ass'n, 242 U.S. 430 (1917). This case, involving a dismissal of certiorari improvidently granted, is recognized as the classic statement of the various formal requirements utilized by the Justices.

66 Frequently a word of advice from the Clerk, before the petition is printed in final form, helps the petitioner avoid the drastic effect of many formal defects.

67 Alabama Marble v. N.L.R.B., cert. denied, 342 U.S. 823 (1951). The case involved whether an employer, on reinstating employees who had participated in an unjustified strike, must verbally reserve the right to discharge the ringleaders, in order to be privileged to discharge them for such activity after a subsequent investigation. The court below had held that the employer must go through this verbal formula. 185 F.2d 1022 (5th Cir. 1951).

68 Thirty-five pages does not seem per se excessively long. However, the Solicitor General's Office tries never to go beyond twenty-five pages, and preferably never more than fifteen. Wiener, Effective Appellate Advocacy 240 (1950).

69 The Government felt that this condition of the petition was worthy of mention. Brief in Opposition, p. 1128, supra note 67.

70 Some of the questions were repetitive; many others were exclusively questions of fact. Certiorari was expressly denied for similar defects in Tiger v. Lozier, 275 U.S. 496 (1927).
made of the reasons why it should be granted. The petition's defects are brought into bold relief when it is compared to the brief in opposition.

Clarity and organization is another formal requirement. Perhaps the denial of certiorari in Alabama Marble is indicative of this requirement as well. A petition incomplete is content is also likely to be unsuccessful.

F. Jurisdictional Factors

It is not within the purpose of this paper to examine in any detail the jurisdictional prerequisites to Supreme Court review of state and lower federal court decisions. Suffice it to say that petitions have been denied for lack of final judgment; judgment not of the highest available state court; mootness; federal question improperly raised; adequate non-federal ground; want of a substantial federal question and failure to exhaust remedies.

The statement of reasons in substance contained only several naked assertions, accompanied by a rather lengthy list of case citations, which were purportedly in conflict with the decision below.

Seven page statement of facts; two questions presented, and seven pages of argument against granting of the petition.

Rule 38.2 contains a quite clear statement of the indispensable contents of a petition: statement of the "matter involved" (i.e., statements of facts and proceedings below), jurisdictional statement (See Rule 12.1), questions presented, and reasons for granting the petition.

The same rule specially warns that "A failure to comply with these requirements will be a sufficient reason for denying the petition." I do not refer to defects going to the jurisdiction of the court below. For purposes of determining whether certiorari will be granted, this type of jurisdictional question, see Indianapolis v. Chase National Bank, 314 U.S. 63 (1941) (cert. granted to decide diversity of citizenship issue) Rather I refer to instances where the lower courts had jurisdiction, but the United States Supreme Court does not.

Avance v. Thompson, 323 U.S. 753 (1944).


Paris v. New York, 323 U.S. 753 (1944). Generally if the defect in the Supreme Court's jurisdiction is indicative of a like defect in the jurisdiction of the court below, the Court will grant certiorari and order the judgment vacated, in order not to subject the defendant below to a void judgment or the plaintiff to res judicata. Thus, in moot cases the Supreme Court usually grants certiorari and vacates the judgment; but, if the case involves habeas corpus and the petitioner has been released, certiorari will probably be denied. Boskey, Mechanics of the Supreme Court's Certiorari Jurisdiction, 46 Col. L. Rev. 254, 265 (1946).


Stembridge v. Georgia, 343 U.S. 541 (1952) (cert. dismissed). Moreover, the Court has denied certiorari because it was unable to tell whether or not there was an adequate non-federal ground. Public Service Commission v. Wisconsin Telephone, 309 U.S. 657 (1940). On the other hand, it has continued cases to permit the state court to express whether or not an adequate state ground was present. Hammerstein v. Superior Court, 340 U.S. 622 (1951).


Undoubtedly petitions have been denied for failure to fulfill those statutory conditions defining the very scope of certiorari review jurisdiction. But a petition will not be denied, merely because appeal could have been obtained. The Act of 1925 expressly negated such a possibility respecting a petition for certiorari to a state court. Though an express provision was not included respecting certiorari to Circuit Courts of Appeals, a similar principle is implied by the language in the statute.

G. Tactical Factors

The third category does however bear some deliberation. What are the tactical prerequisites to granting certiorari? None can doubt that tactical factors are considered by the Justices. The importance of this type of consideration is both understandable and justifiable; but the ascertainment of its significance, if any, in past denials of certiorari is a painful task. Generally tactical denials fall within either of two classes: the sin-

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83 Ordinarily a federal district court decision is never reviewable by the Supreme Court on certiorari. But certiorari may be granted to review a federal district court decision, if it is appealable to a court of appeals. 62 Stat. 961 (1948), Rule 39. An appeal must have been taken to the Court of Appeals, even though judgment need not have been entered. The infrequent application of Rule 39 is generally justified because of the national interest in an immediate and authoritative final decision by the highest court of the land. See Youngstown Sheet & Tube v. Sawyer, 343 U.S. 579 (1952). But the Supreme Court may apply Rule 39 as a timesaving device, though there is no urgency to decide the case. For example, the Supreme Court, after having heard a lengthy argument on the merits followed by a dismissal of the appeal, granted the simultaneously filed petition for certiorari and decided on the merits. Stamback v. Mo Hock Ke Lok Po, 336 U.S. 368, 380 (1949). Generally, however, the Court favors waiting for an informative Court of Appeals decision, especially if a question of state law is involved.

84 See 43 Stat. 937 § 237(b) (1925).

85 Section 1254(1) authorizes certiorari in "any civil or criminal case." (Emphasis added.) The same section also states when certiorari to a Circuit Court of Appeals is barred, thereby implying no other instances where discretionary review is not available.

86 "Petitions may have been denied because, even though serious constitutional questions were raised, it seemed to at least six members of the Court that the issue was either not ripe, or too moribund for adjudication; that the question had better await the perspective of time or that time would soon bury the question or, for one reason or another, it was desirable to wait and see; or that the constitutional issue was entangled with nonconstitutional issues that raised doubt whether the constitutional issue could be effectively isolated; or for various other reasons not relating to the merits." Darr v. Burford, 339 U.S. 200, 227 (1950).

87 Perhaps the Justices minimize the import of tactical considerations, depending upon the severity of leaving the decision below as is. Thus, assuming that all other prerequisites for granting certiorari are fulfilled, tactical defects might well be ignored, if otherwise the petitioner would be electrocuted. But cf. Rosenberg v. U.S., cert. denied, 344 U.S. 838; petition for rehearing denied, 344 U.S. 889 (1952).
gular peculiarities of the cases render review inadvisable or the time is inopportune to review the issue.\textsuperscript{88}

The Court is reluctant to grant certiorari when its likely holding\textsuperscript{89} would be subject to excessively broad interpretation. Thus, if the likely holding in the \textit{Baltimore Radio Show} case\textsuperscript{90} was an affirmance of the Maryland Court of Appeals, fear that it would be interpreted as license for the various organs of public expression to impede the administration of justice would have been well founded. On the other hand, the Court might have feared that an affirmance would be too narrowly interpreted.\textsuperscript{91} The peculiar facts of the case revealed that the defendant in the criminal proceeding, the administration of which the Radio Show purportedly disrupted,\textsuperscript{92} probably would not have chosen a trial by jury;\textsuperscript{93} moreover, that defendant could have made a motion to change venue; and finally any jury would probably have been incensed, notwithstanding the radio announcements. The Supreme Court might well have wished to uphold freedom of communication, but feared that a holding for acquittal would be too easily distinguishable, because of the case's extenuating circumstances. It might be argued that the Supreme Court in its opinion on the merits could have avoided subsequent misinterpretation by spelling out its reasoning and holding. But such a technique is usually to no avail. Lawyers have a way of getting around such language. Cases, as precedent, are generally judged on the basis of what the court did, not what it said.

If the "statement of the matter involved"\textsuperscript{94} reveals that Supreme Court review of issues, that would otherwise justify a granting, could be avoided

\textsuperscript{88} There may be a few miscellaneous tactical considerations, but seldom could they be controlling. Justices might be reluctant to grant certiorari, when a decision on a pertinent issue would impair the dignity and esteem of the Court. A few Justices might vote to deny review, fearing the potential holdings of the other Justices on the merits, if the petition were granted. Harper and Rosenthal, \textit{What the Supreme Court Did Not Do}, 99 U. of Pa. L. Rev. 293, 300 (1950). Similarly, a Justice might vote to deny certiorari to a Circuit Court case, where appeal would lie, fearing a decision by the other Justices on the nonfederal questions raised. Note that no such consideration would affect certiorari to state courts, since the scope of permissible review on certiorari and appeal to state courts do not differ.

\textsuperscript{89} In most of these tactical considerations, the predicted effect of the "likely holding" plays an important part. That the Justices contemplate their likely holding suggests that they appraise the merits of the holding below, when considering certiorari petitions. At a later point this will be discussed in great detail.

\textsuperscript{90} Maryland v. Baltimore Radio Show, \textit{cert. demed}, 338 U.S. 912 (1950). The case involved a conviction of the defendant for impeding the administration of justice in a criminal proceeding by several provocative radio announcements. The conviction was reversed by the Maryland Court of Appeals, 193 Md. 390, 67 A.2d 497 (1949).

\textsuperscript{91} This seems the more likely tactical consideration.

\textsuperscript{92} I.e., by inciting the jury to prejudice.

\textsuperscript{93} The case involved the heinous murdering of a female child.

\textsuperscript{94} \textit{Supra} note 74.
without prejudice to the parties, certiorari would very possibly be denied. This policy is but an application of the broader principle stated by the Court in the Ashwander case that it should avoid deciding Constitutional questions when the case may otherwise be disposed of.

Inadvisability of review based on the unseasonable timing of the petition is the other tactical factor. The Stuyvesant Town case is conveniently exemplificative of this consideration. Immediately prior to the case, the United States Supreme Court had spearheaded great reforms against color discrimination. The Stuyvesant Town case definitely presented a more extreme situation, harder to decide in favor of non-discrimination. In the preceding cases the enforcability problem was difficult, though not insurmountable. But to bar discrimination in all private-publicly owned housing, before the factions of intolerance became accustomed to the earlier decisions, was no doubt considered to be a fruitless step. I submit that the Supreme Court looks to the enforcability of the likely holding, as a tactical consideration.

It seems to me that the Stuyvesant case also illustrates a denial of certiorari in order to avoid detrimental social repercussions that the likely holding would have caused at that time. A holding in favor of the injunction might have been the proverbial straw that broke the camel’s back. The losing interests in the previous discrimination cases had swallowed the anti-discrimination decisions, though reluctantly. A holding for the Plaintiff in the Stuyvesant case by the highest court in the land might not have been swallowable by these same interests. Non-compliance with such a holding, with carryover to delayed rejection of the prior Supreme Court holdings, was far from a whimsical prediction. Needness to say, the Court wanted to avoid such a self-defeating result at any cost, in the interest of effective social reform, as well as a national need for private, public and all other kinds of housing.

It would be sheer frivolity to suggest that a holding for an injunction in the Stuyvesant case could have been made effective through the normal channels, without the voluntary cooperation of realty owners and landlords everywhere. Moreover, to say that the United States Supreme Court should have granted certiorari and affirmed, because of the exigencies of the times, would certainly be to advocate a step in the wrong direction and

98 It is well to note that these tactical considerations are often quite close to “political question” jurisdictional limitations.
99 I.e., contempt procedure.
a rejection of the notion that the highest court is to lead and not be led. It was incumbent on the Supreme Court to deny review, as it did.\textsuperscript{100}

If there had been prospects of an imminent change in relevant public sentiment, perhaps a tactical delay by the Court in deciding Mr. Dorsey's petition would have been more appropriate than a tactical dismissal thereof. The technique of "tactical delay" is particularly useful when a pending decision is likely to facilitate review of the case for which the petition has been filed.\textsuperscript{101}

\section*{H. Substantive Factors}

Thus far we have seen three broad types of considerations that the Supreme Court frequently and overtly holds to be controlling. But none of these truly falls within the general considerations enumerated in Rule 38.5, those relating to the nature of the issues raised by the decision below\textsuperscript{102}

In comparison to the more specific material available pertaining to the previously discussed factors, there is even a more noticeable dearth of specificity respecting this one. Because of the Doctrine of Secrecy's more severe toll on an analysis of the substantive factors, method is a genuine problem. The great bulk of opinions, records, petitions, and briefs makes naked induction quite impossible. Construction of hypotheses followed by examination of the available sources for verification is in my opinion the most effective approach.

One common theory is that the Supreme Court has varied certiorari policies, depending upon the nature of the lower court. Thus, different treatment is given certiorari to Courts of Appeals, to the Court of Appeals of D.C., to state courts, and to the Court of Claims. Underlying this theory is the premise that there are clear distinctions between the nature of cases handled by each class of courts. Realistically, however, aside from the more specialized courts, there is a great deal of overlapping in subject matter. Moreover, the Justices cannot very readily blow hot and cold,

\textsuperscript{100} One can merely speculate that the Court would well have preferred to avoid review of Brown v. Board of Education, 98 F Supp. 797 (1951), which came up last term on appeal. 20 U.S.L.WEEK 3325 (1952) (probable jurisdiction noted). A number of current Supreme Court cases involve segregation in secondary schools. All, however, except the Brown case, contained examples of unequal treatment. But with the Brown case, the Court is forced to face the problem of segregation though equality, at a time when the "separate but equal" doctrine has only dubious enforceability.

\textsuperscript{101} The tactical delay may result from motion by a party Murray v. City of New York, 308 U.S. 528 (1940). Or it may be ordered by the Court \textit{sua sponte}. Manufacturers Trust v. Prudence Securities Advisory Group, 312 U.S. 649 (1940). In the latter case, certiorari was granted and the decision below was reversed, the Court having held up the ruling on certiorari pending the decision in Reconstruction Finance Corporation v. Prudence Securities Advisory Group, 311 U.S. 579 (1941).

\textsuperscript{102} Hereafter, referred to as the "substantive factors."
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depending on the name of the lower court. Probably the substantive considerations are quite similar, regardless of the lower court. But, if a pluralistic analysis has any validity, suffice it to say that I intend to appraise only the factors common to certiorari rulings from all lower courts.

1. Conflict-Importance Theory

Perhaps the most popular hypothesis is the "conflict-importance theory." It largely parrots the language of Rule 38.5. The assumption of the theory is that the Supreme Court will always grant certiorari when there is a conflict of authority among Courts of Appeals, between Courts of Appeals and state courts, etc.; while the Court will grant certiorari in non-conflict cases only if they raise issues of "importance."

Undoubtedly, the proposition that the Supreme Court invariably grants certiorari in "conflict cases" has overwhelming support in all of the sources of general considerations. One of the very reasons for allowing certiorari to circuit courts and to state courts was to circumvent the existence of conflicts of authorities.

Very early in the history of certiorari, the Supreme Court restricted the meaning of a "conflict," largely limiting it to the more embarrassing conflict situations. Hence, a mere conflict in general principles is not a "conflict." What would otherwise be a conflict is not such, if one of the authorities is quite antiquated. A conflict among Courts of Appeals respecting a question of state law is also not sufficient.

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103 Generally thought not included are conflicts between Courts of Appeals and federal district courts. ROBERTSON AND KIRXHAM, JURISDICTION OF THE SUPREME COURT 637 (Wolfson and Kurland ed. 1951). A Court of Appeals decision is superior to that of a district court in its own circuit. If the district court lies in another circuit, the Supreme Court considers the conflict not to be substantial, since the Court of Appeals superior to the district court involved may yet remove the conflict. But, if the district court decision was appealable directly to the Supreme Court, it is apparently felt that such conflicts are not likely to be resolvable in the future; hence certiorari might well be granted. See Shapiro v. United States, cert. granted, 331 U.S. 801 (1947); 335 U.S. 1, 4 (1948). Certiorari was granted to resolve conflict with United States v. Hoffman, 68 F.Supp. 53 (1946).

104 Of course, in many cases of apparent conflict, a denial of certiorari can be explained as a finding by the Supreme Court that there in fact was no conflict. Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 392 (1923) (cert. dismissed).

105 Justice Van Devanter has said, "Whenever we find such a conflict that, without more, leads to the granting of the petition, . . ." Hearings before Committee on Judiciary on S.2060, 68th Cong., 1st Sess. 29 (1924). Also 66 CONG. REC. 2753 (1925).

106 21 CONG. REC. 10222 (1890) and 52 CONG. REC. 276 (1914).

107 "Certiorari is granted . . . in cases where there is a real and embarrassing conflict of opinion and authority . . ." N.L.R.B. v. Pittsburgh Steamship, 340 U.S. 498, 502 (1951).

108 STERN AND GRESSMAN, SUPREME COURT PRACTICE 100 (1950).


110 Since the Erie case, this can not even be said to be a real conflict.
But apparently not all "conflict cases," even when so narrowly defined, are reviewed on certiorari. 111 For reasons other than formal and tactical defects, certiorari may be denied despite a "conflict." 112 The Justices may vote for denial, because the critical issue upon which there is a conflict may not be of national significance. 113 The conflicting case may be deemed insufficient to compel review, because its holding below was manifestly correct. 114 The nonrecurring nature of the issue, respecting which there is a conflict, is also thought to be a consideration, detracting from the likelihood of certiorari being granted. 115

A case, the petition for certiorari of which came up recently, 116 illustrates the Supreme Court's views respecting conflicts. A veteran wished to purchase a house, priced at $10,195. He needed a Veterans' Administration guaranteed bank loan. The VA would withhold their guarantee, unless the purchase price was $9,150 or less. 117 Defendant real estate broker, the veteran and owners, in order to close the deal, agreed that $9,150 would appear on the VA loan application, while the balance would take the form of a separate purchase money mortgage on fixtures, which the VA thought were included in the realty transaction. The Defendant, as well as the others, was prosecuted for fraud under one federal penal statute. 118 He was fined $5,000 and given two years probation.

The Defendant claimed that prosecution was under the wrong penal statute, that a less severe one was exclusively apropos. 119 He also claimed the indictment contained a defect, the failure to allege that he and the others had knowledge of the falsity of the statements made. The indictment—

111 This may be a new development in Supreme Court certiorari policy. Stern, Denial of Certiorari Despite a Conflict, 66 Harv. L. Rev. 465, 470 (1953). The legislative history seems to be consistent with such a policy. The original draft of the Circuit Court of Appeals Act provided for automatic review of conflict cases. 21 Cong. Rec. 3402 (1890) (H.R. 9014, Sec. 9). Though H.R. 9014 was almost completely redrafted before the ultimate act was produced, this provision never survived. Another bill was later introduced in the Senate, again providing for obligatory review in any conflict situation. 34 Cong. Rec. 2432 (1899). See 46 Cong. Rec. 1542 (1911) for text of the 1899 bill. We can speculate that it was deemed unwise to so restrict the Supreme Court, since all conflict cases were not necessarily intended to be reviewed.

112 Frankfurter and Hart, Business of the Supreme Court, 48 Harv. L. Rev. 238, 268 (1934).

113 Id., supra note 111, at 469.

114 Id. at 466. The Court would probably be more willing to grant certiorari in a conflicts case, where the holding below is the erroneous one. In this manner, the Court can effect justice in the specific case and resolve the conflict, as well.

115 Id. at 467. Mr. Stern makes reference to cases raising non-moot conflict constructions of statutes, which have expired or have been repealed.


117 I.e., the "reasonable value" appraisal under 38 U.S.C. § 694(a).


ment did contain allegations that the statement was false, that the parties agreed to submit such statement to the VA and that they intended to induce the agency to guarantee the loan. The Court of Appeals affirmed the conviction.\(^\text{120}\)

The Defendant's petition for certiorari contained almost exclusively contentions of conflict, as reasons for granting certiorari. Petitioner argued that the Court of Appeals decision conflicted with prior cases, holding that later general penalty statutes supersede earlier ones. The Justices probably ignored this argument, since it only suggested a conflict of general principles. The petition then stated that other Courts of Appeals opinions had held that the less severe statute was the exclusive penalty for so defrauding the VA. A cursory examination of the cases cited reveals that the other courts merely held that Section 715 was an appropriate penalty, not that it was exclusive; hence, the Court evidently saw through this illusory claim of conflict. The petition then included an argument that a conviction in spite of the pleading defect conflicted with other Courts of Appeals decisions. Probably the Justices rejected this contention summarily, feeling a resolution of such a trivial conflict would not even justify spending time to examine the opinions cited as conflicting.

2. Importance Theory

An appreciation of the definitional and other qualifications accorded to conflict situations suggests the inappropriateness of any absolute statement about them. Something more than a mere conflict of authorities is required to assure a granting of certiorari. The magnitude of importance of the case raising the conflict seems to be that extra something. By a sort of dialectic, the two premises of the "conflict-importance theory" merge into the unitary "importance theory."

It is said that the Supreme Court will grant certiorari, if the case is "important." This simple statement is quite innocuous; but is it helpful? Like the terms "negligence" or "due process," "importance" evidently depends upon the number of certain qualities that are present, and the degree thereof, in the case being considered.\(^\text{121}\) As a carryover from the "conflict-importance" theory, whether there is or is not a conflict of authority must necessarily be a critical factor in determining "importance." The fact that

\(^{120}\) The Court of Appeals recognized § 80 as applicable. It rejected the claim of the indictment's insufficiency, feeling that the defendant had been given adequate notice of the charge by the other allegations. 191 F.2d 980 (7th Cir. 1951).

\(^{121}\) The fact that the tribunal below may have thought the case to be "important," though not a factor constituting "importance," may be indicative of the nature of the case. Thus, the petitioner might mention appropriate language in the opinion below or stress that the Court of Appeals below sat in banc, when it heard the case.
there is a conflict among, say, Courts of Appeals contributes to the importance of the case.122

A second factor, constantly reiterated, is that the case must be of national importance, as opposed to private importance.123 At one time there was some doubt as to whether this distinction should be recognized,124 but, because of the great number of certiorari petitions filed each year, this factor cannot be ignored under our present unichamber Supreme Court system.

Despite the everpresent remonstrances that, in considering petitions for certiorari, the Justices do not examine the merits of the case,125 most commentators126 would concede that the correctness or the erroneousness of the decision below is a factor.127 Certiorari will tend to be denied, if the holding below is patently correct, particularly if it is consistent with a prior and enduring Supreme Court opinion. And certiorari is more likely to be granted if the holding below appears to be erroneous, especially if it is contrary to a prior decision of the Supreme Court.128 Probably the Justices appraise the likelihood of error in the decision below in two ways: one by considering the issues represented,129 the other by superficially examining the opinion or opinions below, giving special attention to the presence or absence of accord among and within the various tribunals.130

123 Taft, Jurisdiction of the Supreme Court, 35 Yale L.J. 1, 2 (1925).
124 See 66 Cong. Rec. 2928 (1925) and 81 Cong. Rec. 3320 (1935).
126 Stern and Gressman, Supreme Court Practice 113, 115 (1950).
127 And there is little doubt that this consideration is an extremely important one, seeming at times to actually be controlling. Illustrative is the occasional review of cases raising construction questions under such overworked statutes as the FELA and the Federal Safety Appliance Act, though the issues have long been settled.

In Carter v. Atlanta & St. Andrews Bay RR, cert. granted, 336 U.S. 935, 338 U.S. 430 (1949), the Court granted certiorari despite Mr. Justice Frankfurter's obviously valid contention that the case involved nothing of national importance, the issues no longer being open. The Fifth Circuit had affirmed the trial court's holding that negligence was a prerequisite to liability under the FSAA and that contributory negligence was a defence under the FELA. 170 F.2d 719 (1948). The holding was obviously contrary to the statutory provisions. Certiorari was apparently granted for no other reason than to impeach an incorrect decision below.
128 Rule 38.5(b) (4).
129 I shall discuss this in detail later.
130 If there is unanimity among the judges in the lower tribunal or among the hierarchy of tribunals through which the case has come, most likely the decision below is correct. And
A fourth consideration is the uniqueness or recurring nature of the issue among past, present and future cases.\footnote{131} If a decision on the merits stands to affect numerous pending and future cases, the Justices would tend to consider it incumbent upon themselves to grant review.

Where the issue in question is of the recurring variety and the decision below is in favor of the Plaintiff, the Court is quite likely to grant review,\footnote{132} as was the case in \textit{Hiatt v. Brown}.\footnote{133} There, a soldier had been sentenced to prison by a court-martial. He petitioned for habeas corpus, claiming that the military tribunal "lacked jurisdiction." Under the Articles of War, the court-martial must have contained at least one member of the Judge Advocate General, unless such a member was "not available."\footnote{134} The prisoner, contending a JAG officer was available but not included, maintained that the military court lacked jurisdiction. The federal district court found for the prisoner, the Respondent on certiorari;\footnote{135} and the Fifth Circuit affirmed.\footnote{136} On review the Supreme Court reversed, saying that the question of "availability" was to be left to the discretion of the appointing officer; thus, the issue was not open to the federal district court, unless an abuse of discretion could be shown. In retrospect it was not surprising that certiorari was granted. If the Court had denied review in this case, a multitude of sentences by court-martial would have been affected; and the non-unanimity in the opinion below has apparently been recognized as a factor itself raising sufficient doubt to compel review. N.L.R.B. v. Rockaway News, 345 U.S. 71, 72 (1953). The more times the case has been reviewed and the same result has been achieved, the less likely is there error. The validity of such an assumption and its application to granting or denying certiorari seems to have been contemplated by Congress. H.R. REP. No. 1182, 63rd Cong., 2d Sess. 2 (1914).

On the other hand, if there is dissenison among the judges below, the Justices will examine more carefully for error. If tribunals below differed in their treatment of the case, or only one tribunal examined the merits of the case, direct observation of the merits must be undertaken. The Justices also give some consideration to the number of consistent holdings by other courts on the same issue. At least the Government believes this to be a consideration. In \textit{Ann Arbor Press v. N.L.R.B.}, \textit{cert. denied}, 342 U.S. 859 (1951), the Fifth Circuit's opinion had rejected the employer's contention that the Board must show the union's compliance with sections 9(f), (g) and (h), as part of the charge of an unfair labor practice. On page four of the Government's brief in opposition to certiorari, it is pointed out that three circuits have come to the same conclusion; and that no circuit has a dissenting view.

\footnote{131} This factor is related to another, that certiorari is more likely to be granted, the more parties there are to the action. It would seem feasible that the Court is more likely to grant certiorari and dispose of the rights or duties of several thousand persons in a class action, that it would be respecting a suit involving only one member of the class.

\footnote{132} A decision in favor of the plaintiff coupled with the fact that a recurring question is involved opens the door to much future litigation.

\footnote{133} 339 U.S. 103 (1950).

\footnote{134} 41 STAT. 788 (1920).

\footnote{135} 81 F.Supp. 647 (1948).

\footnote{136} 175 F.2d 273 (1949).
courts would have been cluttered with an equal number of habeas corpus petitions.

If the Fifth Circuit had reversed the trial court in the Hiatt case, a denial of certiorari would not have had the aforementioned repercussions, hence, discretionary review by the Supreme Court would not have been so certain. Thus, if a decision below was for the defendant, the fact that a recurring issue is raised is still significant;\textsuperscript{137} but the greater compulsion to grant review is not present. The Court's denial of certiorari in \textit{American Elastics, Inc. v. United States}\textsuperscript{138} may demonstrate this view In that case the Plaintiff sued the Government on a war surplus contract, claiming the goods were not up to specifications, notwithstanding the existence of an "as is clause" on the reverse side of the contract. \textit{American Elastics} claimed that the "as is clause" was invalid. The Court of Appeals had held for validity If the decision had gone the other way, thousands of war surplus contracts would have been affected, and thousands of prospective plaintiffs would have rubbed their hands in glee. But since the Court of Appeals had held for the Government, the Supreme Court did not feel the pressure, which was probably present in the court-martial case.

On the other hand, if the case below is quite unique, the Justices are more likely to deny review Some doubt of this proposition was raised in the recent case of \textit{United States v. Shannon},\textsuperscript{139} involving an application of the Anti-Assignment Act,\textsuperscript{140} which prohibits litigating a claim against the United States by a pre-judgment assignee of such claim. The assignee in the Shannon case had joined the assignor as a party, thereby contending that the purposes of the Anti-Assignment Act were satisfied, and hence the statute was inapplicable. The Fourth Circuit held for the assignee. Certiorari was granted.\textsuperscript{141} After argument the Supreme Court reversed, notwithstanding Mr. Justice Frankfurter's claim that certiorari should have been dismissed, having been improvidently granted. Justice Frankfurter contended that the case presented such a non-recurring issue that a dismissal was the only sensible treatment. The Court at no point denied this contention of uniqueness.\textsuperscript{142} Other cases would tend to confirm what Justice Frankfurter argued in the Shannon case, that the Supreme Court is

\textsuperscript{138} 187 F.2d 109; \textit{cert. denied}, 342 U.S. 829 (1951).
\textsuperscript{139} 342 U.S. 288 (1952).
\textsuperscript{140} 51 U.S.C. 203 (1952).
\textsuperscript{141} 342 U.S. 808 (1951).
\textsuperscript{142} 342 U.S. 288, 294 (1952). Perhaps Justice Frankfurter's view of the case merely reveals a failure on his part to appreciate the policy, previously mentioned, in favor of deciding the case on the merits, once a substantial part of the argument has been heard.
abandoning non-recurrability as a factor compelling denials of certiorari.

One could not be intellectually honest, if he failed to recognize that certiorari is more likely to be granted when the case is easy to consider. The purpose of statutory certiorari was basically to save the time of the Supreme Court. Granting certiorari for a case that can be rapidly considered and decided does not subvert this purpose, and it does give justice to the parties. The Court's willingness to grant review when a case raising identical or related questions is already on review illustrates this factor.\(^1\) Its reluctance where the facts are complicated or the record, the reading of which is indispensable to deciding, is inordinately long\(^2\) exemplifies the corollary.

Several *caveats* should be stated. It cannot be doubted that the Supreme Court generally strives for consistency in certiorari policy.\(^3\) Moreover, the Justices are probably more willing to review cases raising issues which the Court has neither generally nor specifically resolved previously.\(^4\) And the Court is less willing to review an issue which they have previously labored, unless the decision below is inconsistent with the earlier decision; or the earlier decision bears reexamination.

The case coming up on certiorari must not be just of current importance.\(^5\) In the interest of preserving the dignity of the Court and promoting consistency in certiorari policy, this seems to be a sound qualification. But perhaps the soundest justification is the desirability of avoiding the distorting influence on the corpus juris, that frequently results from deciding cases of immediate but fleeting importance. A granting of certiorari in such cases runs the danger suggested by Justice Holmes in the *Northern Securities* case.\(^6\) "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well set-

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\(^1\) Roberton and Kirkham, *supra* note 103, at 672. Sometimes the Court prefers to hold up the decision on certiorari, pending decision of the other case on the merits.

\(^2\) The denial in Mollonee v. Fahey, 345 U.S. 952 (1953), which involved the longest record in the U.S. Court of Appeals for the Ninth Circuit, in recent years, may be illustrative.

\(^3\) Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923).


\(^5\) Certiorari has been denied in cases raising important questions of validity and construction of a statute, because the statute had since been repealed. District of Columbia v. Sweeney, 310 U.S. 631 (1940).

\(^6\) *Northern Securities v. United States*, 193 U.S. 197, 400 (1904).
tled principles of law will bend.” Thus, this *caveat* really serves to protect the Court from its own infirmities.

Another more frequently articulated limitation is that the issue must not be one of mere fact, with all parties substantially in accord respecting the controlling principles of law. The Supreme Court is no more competent to decide questions of fact than the lower review tribunals, while it has a peculiar competency regarding issues of law. As one would expect, to distinguish between an issue of law and fact is often difficult. Moreover, I suspect that, even in the absence of palpably unjust findings below, the Justices occasionally disregard the distinction. Federal Employers Liability Act cases, especially those where the holding below was for the employer, are conveniently typical of this tendency. Such departures may manifest Court sympathies toward certain categories of losing parties. Or the Justices may be attempting to minimize the effects of a settled legal principle, which is considered by them to be undesirable. This may be particularly true in the FELA cases, where a number of Justices consider the negligence prerequisite of employer liability to be outmoded in the new era of workmen’s compensation statutes, and hence tend to make this statutory requirement almost meaningless in some instances.

At this point it might be well to recapitulate. There are a number of factors relevant to a finding of “importance” or “unimportance” in a given case. Some are more influential than others. Traditionally “conflict” and “national importance” have been thought to be at the top of the scale. But, as has been mentioned, the mere presence of a conflict is not invariably controlling. “National importance” is thought to be the most decisive factor. All of the other considerations have heretofore been recognized as having only marginal significance. If the national importance of a non-conflict case is not patent, certiorari is more likely to be granted if any of the following conditions are present: recurrence of the issue, manifest in-
correctness of the decision below or simplicity of the case. And the petition is less likely to be granted if the marginal factors are present in their negative extremes, or if any of the caveats are transgressed. But what if the petition presents a case where the marginal factors, as well as the national importance criterion, are not illuminating?

3. "Tentative Examination Theory"

At the outset of my consideration of the "importance theory," I queried whether the theory is helpful. Awareness of the factors constituting "importance" almost always discloses whether the Supreme Court will grant or deny certiorari in the obvious cases. Thus, most members of the Supreme Court Bar would have predicted that certiorari would be granted in the Gold Clause cases, Ashwander v. Tennessee Valley Authority, and Williams v. North Carolina.

And obviously unimportant cases generally are not reviewed on certiorari. Hence, the Supreme Court refused to grant review in American Elastics v. United States. In that case, involving a war surplus contract, the plaintiff had waived a condition broken by accepting delivery of the goods. The plaintiff, however, sued for rescission of the contract and restitution of the amount paid. The Court of Appeals said that the plaintiff's only remedy was for contract damage recovery; and since he had neither so pleaded nor proved damages below, the district court's holding for the defendant was affirmed. Probably the nice procedural issue of whether the case should have been dismissed or remanded for trial on damages was not considered worthy of review.

In appraising a petition, the Justices will see through a baseless contention that issues, indisputably of "obvious importance," are actually raised.

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154 Its non-utility is first suggested by the very purpose underlying statutory certiorari, the limiting of the Supreme Court's business. If the Court is to be kept busy but not overworked, the freedom with which it grants certiorari must vary almost directly with the number of petitions that are annually filed, the complexity of the cases involved and the burden of the Court's other chores. The denotations of "important" must necessarily vary from year to year. Frankfurter and Hart, Business of the Supreme Court, 48 HARv. L. REV. 238, 241 (1934). See also Hearings before Committee on Judiciary on S.1392, 75th Cong., 1st Sess. 176 (1937) (testimony of Professor Edward Corwin).


156 It has frequently been contended that the amount of money at issue is not relevant to "national importance." Hearings before Committee on Judiciary on S.2176, 74th Cong., 1st Sess. (1935) (testimony of Chief Justice Hughes). But it would probably be conceded that such contentions are merely democratic gestures, since the disposition of great amounts of monetary resources is indisputably of national importance. See Dalchite v. United States, 346 U.S. 15 (1953).


158 See note 138 supra.
by the case.  Though the case raises an obviously important issue, the fact that the decision below was manifestly correct nullifies the likelihood of certiorari being granted.

The certainty of forecast provided by the “importance theory” for the “obvious cases” brings out in bold relief the theory’s failings. Most of the cases coming before the Supreme Court are not within the “obvious” category; they fall somewhere in between cases where certiorari should undoubtedly be granted and cases where denial is almost certain. In these “middleground cases,” distinctions between “nationally important” and “privately important”, between “simplicity” and “complexity”, between “questions of fact” and “questions of law”, et al. are not fruitful. If these were the only factors that the Court considers, their innate indefiniteness would nullify any chances of sensible predictability as to whether certiorari will be granted or denied. The practitioner would be unable to determine at all accurately the prudence of going through the certiorari application procedure.

Fortunately the Justices consider another distinction. the correctness

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160 In Betterman v American Stores, 367 Pa. 193, cert. denied, 342 U.S. 827 (1951), whether the Interstate Commerce Commission trucking rate schedules provided a maximum, as well as a minimum, rate was raised. The Pennsylvania Court held that the ICC schedule only set a minimum. The importance of the issue was unquestionable; but the obvious correctness of the decision, in light of the legislative history of the whole Interstate Commerce Act program, was manifestly correct.
161 Stern and Gressman, supra note 108, at 177
Respecting this principle, Chief Justice Taft said the following: “It is a mistake to suppose that the mere suggestion of a constitutional question is something that should require the case going right through. The court ought to be able shortly to say whether the suggestion has any real substance when tested by recognized constitutional principles. You can cite the Fourteenth Amendment and the Fifth Amendment and you can get up a great deal of fog, which it is the business of the court, and which it ought to have a prompt opportunity to clear away by saying, ‘This case, although it purports to involve a constitutional question, really does not, and we cut it off.’ 81 Cong. Rec. 3325 (1937) (reproduction of testimony before House Judiciary Committee in 1924)
162 Another issue was raised in the Betterman case, supra note 160, which exemplifies the “middleground case.” In that case a trucker was suing the chain store on a contract. Illegality was used as a defense. I have discussed the defendant’s first basis for claiming illegality, that the contract provided for rates above those in the ICC rate schedule. A second basis was that the contract was not filed with the ICC, as required by statute. 54 Stat. 925 (1940). The 1940 amendment directed the filing of rates “actually maintained and charged.” The plaintiff had filed, prior to the 1940 amendment, documents showing that he was at least charging the minimum rates. Admittedly this did not fulfill the new directive. The Pennsylvania court held that though the statute was technically violated, the policy of the Interstate Commerce Act was not sufficiently offended to deny the plaintiff recovery. The Supreme Court denied certiorari. The case does not fall within any of the extremes of the standards suggested. How does the Supreme Court tackle such a case? How can the Court bar provide suitable arguments for such a case? How can the decisions of the Justices be predicted?
or erroneousness of the decision below. Like the other factors, if the decision below is obviously erroneous, absent other determinative circumstances, the rulings on certiorari can be predicted with considerable confidence. But this factor achieves a degree of individuality in the "middleground case." I submit, that not only do the Justices appraise the correctness of the decision below but that, the views of the Justices, when considering a certiorari petition in the "middleground case," are largely dominated by such an appraisal. Moreover, their evaluation of the merits of the decision is much more predictable than their thoughts respecting the other factors. If the views of the Justices on the merits are both predictable and controlling, the repercussions might be far reaching. There would be a fairly accurate standard to determine the advisability of petitioning for certiorari in a given case. The draftsman of the petition or opposing brief would be certain to clarify the propriety or impropriety of the decision below. And finally, the directional change in the petition and briefs would better aid the Justices in making their respective rulings on certiorari.

Let us examine the soundness of the three premises. Do the Justices appraise the merits of the case below when considering a certiorari petition? A practice of abstention is publicized as the policy of the Supreme Court. The result has been what I call the "non-merit myth." It has been reiterated countless times, especially in recent years. Two reasons have been offered to support this abstention policy. The seldom expressed one is that, if the Justices examined the merits of the petition and then granted certiorari, they could not hear a subsequent full dress argument without

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163 If a case is most obviously incorrect, the order granting certiorari will be accompanied by a summary reversal. See N.L.R.B. v. Mena Textile Mills, 339 U.S. 563, 571 (1950).
164 "If the case be one in which obviously the decision below is right and there is no ground for debate or cavil about it, it is very much better that that be said at once and that the litigants be freed from the vexation of further delay and uncertainty, and also that the court be relieved from further attention to that case and be permitted to give attention to other cases calling for deliberate hearing and consideration." Hearings before Committee on Judiciary on S.2060, 68th Cong., 1st Sess. 36 (1924) (testimony of Justice Van DeVanter).
Professor Zechariah Chafee has suggested that this principle applies in a most extreme manner. He offers an explanation for one denial of certiorari, though there was an obvious deprivation of procedural due process in the trial court, that the substantive holding of the court below was obviously correct. CHAFFEE, SOME PROBLEMS OF EQUITY (1950).

165 A clearer treatment of the correctness of the decision below by the petition and briefs would not only assure more accurate and consistent rulings by the Supreme Court; but it would also increase the predictability of the rulings on certiorari, since the chance factor is minimized when all of the arguments are consciously put before the tribunal.
166 I.e., that the Justices examine the merits of the decision below, that their views on the merits are predictable, and that such views are controlling.
preconceived prejudices. The more commonly advanced reason is that the time consumption required to examine the merits on each petition would be prohibitive. 168 This reason is unimpeachable, even if the Justices were thoroughly to consider the merits relating only to petitions that cannot be disposed of on formal, jurisdictional or tactical grounds or do not present "obvious cases."

But if the examination of the merits is merely cursory, rather than thorough, the time consumption argument can have no validity. I maintain that the Justices, in examining a "middleground case," make a quite brief "tentative examination" of the merits; but of this I shall speak more thoroughly later. Suffice it to say at present that each Justice briefly examines the merits and comes to what he considers to be a tentative conclusion. If the Justice tentatively considers the decision below to be incorrect, he will vote for granting certiorari; 169 or, if tentatively correct, he will vote for denial. 170 If certiorari is granted, bias in the later hearing would be unlikely, since the Court would realize that their prior views were only tentative. Thus, the first-mentioned reason supporting the "non-merit myth" is also not too convincing. Not only are the reasons underlying the purported non-merit policy insubstantial, but the plausibility of the policy is questionable. Can an individual examine opinions, petitions and briefs, and sometimes a record, to see if there are any formal or jurisdictional defects, to consider any jurisprudential tactics, and to determine if the case is "important" without considering the correctness or the erroneousness of the decision below? 171

A few statements of specific considerations have considerably undermined the "non-merit myth." 172 The inclusion of certain language in the Baltimore Radio Show case provides an inference that the merits are considered and do influence the final outcome of the petition for certiorari, at least in many cases. 173 The majority opinion in Darr v. Burford 174 seems

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169 This process was intimated by the language of White v. Ragen, 324 U.S. 760, 762 (1945), where the court pointed out that certiorari had been granted, since the petitioner had made out a "prima facie" case that habeas corpus was improperly denied in the state court below. See Isserman v Ethics Committee, 345 U.S. 927 (1953) (dissent to denial of certiorari).
171 Chief Justice Hughes candidly endorsed the advisability of consciously examining the merits while considering the petition. McElwain, Business of the Supreme Court, 63 HARV. L. REV. 5, 13 (1949).
173 "The one thing that can be said with certainty about the Court's denial of Maryland's petition in this case is that it does not remotely imply approval or disapproval of what was said by the Court of Appeals of Maryland." 338 U.S. 912, 919 (1950). (Emphasis added.)
to support this inference. The opinion pointed out that the federal district courts are free either to recognize a refusal to review a state criminal decision on certiorari as an affirmance on the merits or as not on the merits at all.\textsuperscript{175} Whether such certiorari denials are or are not recognitions of the correctness of the state court decisions was a problem of construction before federal district courts not infrequently. But, even under these circumstances, the majority opinion only advised that, if the case is not on the merits, words to that effect might be appended to the denial of certiorari.\textsuperscript{176} Hence, where there was a good chance that the denial of certiorari would be considered an affirmation of the decision below, the Supreme Court was willing to leave this impression, unless it expressly negated it.\textsuperscript{177}

On reading the language in various opinions that seem to betray the "non-merit myth," one feels that the relevant statements were accidentally made, or were at least mentioned with some reluctance. The same absence of straightforwardness is present in the occasional statement of more general considerations exposing the "non-merit myth."\textsuperscript{178} Why all of the concealment? Why the publicity for the "non-merit myth" and the obscuring of the tentative examination practice? The "doctrine of secrecy" would of course account for concealment of the operation in specific cases.\textsuperscript{179} Our attention must be focussed on statements of general considerations. The lengthy discussion in the \textit{Darr} case is perhaps the best statement of the reason, particularly Justice Frankfurter's dissent.\textsuperscript{180} The Justice hypothesizes that if word got around that the Supreme Court considers the merits, all sorts of misinterpretations of rulings on certiorari petitions would

\begin{itemize}
  \item \textsuperscript{175} The recent case of Brown v. Allen, \textit{supra} note 170, which will be discussed below, has overruled this aspect of the \textit{Darr} decision; but the inferences of the \textit{Darr} opinion nevertheless remain.
  \item \textsuperscript{176} \textit{Darr v. Burford}, 339 U.S. 200, 215 (1950). "If this Court has doubts concerning the basis of state court judgments, the matter may be handled as in \textit{Burke v. Georgia}, 338 U.S. 941, with an express direction that the petitioner may proceed in the federal district court without prejudice from the denial of his petition for certiorari."
  \item \textsuperscript{177} See \textit{Pippun v. Nierstheimer}, 337 U.S. 942 (1949).
  \item \textsuperscript{178} Justice Van DeVanter, stressing the benefits of a denial to review a non-meritorious, dilatory attempt to obtain review, unwittingly revealed that the Justices do examine the merits. See note 164 \textit{supra}.
  \item \textsuperscript{179} A simultaneous rejection of both the "doctrine of secrecy" and the "non-merit myth" has some inherent difficulties. A denial of certiorari accompanied by the explanation, "because we thought the decision below was correct," may seem harmless; but irate counsel and law professors, who have spent considerably more than a few minutes to examine the petition, might well pulverize the Court. However, rather than reject the suggested reform, the Court should carefully phrase its explanation, stressing the tentativeness of the decision, thereby appeasing critics and avoiding unfounded precedent overtones. And the Court should sensibly use its discretion in determining to just which cases they should add an opinion explaining the denial. An abandonment of the "doctrine of secrecy" is not advocated to supply the petitioner with information why he lost his case, rather it is to improve certiorari practice.
  \item \textsuperscript{180} 339 U.S. 200, 224ff (1950).
\end{itemize}
result. A denial of certiorari would indicate to many an affirmation of the decision below. Such an impression might well be erroneous, since the denial may have been based on some other consideration, previously mentioned in this paper, or a combination thereof.

Mr. Justice Frankfurter’s fears may be well founded. But from such a thesis to conclude that the Supreme Court should not consider the merits is a non sequitur. The Justice probably recognizes this logical fallacy; but he may feel that constant reiteration of the “non-merit myth” serves to avoid any possibility of misunderstanding. This deception may in part be justified by the potentially disastrous effects of any misinterpretation of a denial of certiorari, particularly in habeas corpus cases. The prudence of Justice Frankfurter’s ruse is now only academic, at least pertaining to habeas corpus cases. The recent case of Brown v Allen took the position that federal district courts must never treat denials of certiorari in habeas corpus cases as affirmation of the state decision. As one

181 “Mr. Justice Reed’s opinion (that a denial of certiorari may or may not indicate an affirmation of the decision below) makes a Delphic disposition of this issue, which will inevitably create confusion among federal judges.” Ibid.

182 Regardless of the “non-merit myth,” denials of certiorari have some weight as precedent in the eyes of the judiciary and the bar. Harper and Pratt, What the Supreme Court Did Not Do, 101 U. of Pa. L. Rev. 439, 444 (1953). And the Supreme Court is well aware of the weight given denials of certiorari. Mr. Justice Rutledge has stated, “Although denial of certiorari is not to be taken as expression of opinion on any case, it would be idle to claim that it has no actual or reasonable influence upon the practical judgment of lawyers” Sunal v. Large, 332 U.S. 174, 192 (1947).

183 For this reason the Supreme Court does not tolerate citing of a denial of certiorari as indicative of the views of that Court on the merits of a decision. Peacock, Purpose of Certiorari, 15 A.B.A.J. 681 (1929).

184 Despite the observations in note 182 supra, the “non-merit myth” ruse has been eminently successful in this regard. Inappropriate would be a current article complaining of the magnitude of precedent effect given to denials of certiorari by lower courts, as was written in the late twenties. See Moore, Right of Review by Certiorari, 17 Geo. L.J. 307 (1929).

185 As was pointed out in the Darr case, an interpretation by the federal district court that the Supreme Court affirmed the merits of the state holding by denying certiorari could easily lead to a denial of habeas corpus solely on such possibly erroneous ground. Justice Reed attempted to dispel such fears by pointing out that res judicata has no place in the law of habeas corpus. Moreover, the federal district courts are aware that the Supreme Court may not have based the denial on the merits. As Justice Reed made clearer in a more recent case, he only wanted to condone federal district court refusals to hear the habeas corpus petition, when the record revealed that the Supreme Court demed certiorari because of the obvious non-meritoriousness of the petitioner’s claim. Brown v Allen, 344 U.S. 443, 457 (1953).

186 Ibid.

187 Thus, the Reed forces have capitulated to those of Frankfurter. It might be noted that their differences were not great, disagreement only dealing with federal district court treatment of a denial of certiorari where the record presents an obviously non-meritorious claim. Even this victory may prove to be an empty one. The practice of federal district courts to refuse habeas corpus to the petitioner on a cursory examination of the record and opinions of the state courts, without giving weight to a denial of certiorari intervening, is condoned by the opinion. Ibid.
would expect, the language of Mr. Justice Frankfurter in the Brown case has wavered from his tenacious support of the "non-merit myth" in earlier cases. The Justices seem more willing to abandon the myth, when they are assured that its protection is less necessary.

In a case, where neither the national importance or unimportance nor the correctness or erroneous of the decision below, nor any of the other factors, are near obvious, why should the Supreme Court's views as to the latter distinction be more predictable than as to the former? The connotation of "nationally important" is in flux. Most would contend that change is also characteristic of American constitutional law. Variation in the meaning of "nationally important" is a product of changes in history, economics, politics, science, etc. Some would say that shifts in the law are likewise attributable to these factors. But none would deny that the doctrine of stare decisis acts as an insulator, thereby greatly minimizing the effects of alegal mutations in our society on the law. The meaning of "nationally important" has no such insulation. Various sociological imponderables forever are changing "nationally important," while "legal correctness" tends to be sheltered from these influences. Thus, "nationally important" is a more elusive target for the practitioner, as well as for the Justice. Few would dispute that the Justices of the United States Supreme Court are students experienced in the field of American constitutional law. Few would contend that the Justices have equal competence in the fields upon which the meaning of "nationally important" depends. Behavior of the relatively uninformed is quite less predictable, than that of the well trained subject. Moreover, because the average attorney also is better trained in the law than in the other sciences, he is best able to anticipate the thought processes of the Justices respecting legal correctness, rather than respecting denotations of "nationally important."

What technique can be utilized to take advantage of this predictability? A two-stage method seems feasible. Primarily, the patterns of judicial behavior of each Justice must be ascertained. And secondly, the certiorari petition in question must be applied to these predetermined patterns. If it can be estimated that at least four of the Justices are traditionally not sym-

188 "It is within the experience of every member of this Court that we do not have to, and frequently do not, reach the merits of a case to decide that it is not of sufficient importance to warrant review here." Id. at 4170. Thus, at least equally as frequently, the Justices do consider the merits.

189 The Brown case prohibited any res judicata effect to a denial, but it did not substantially disrupt the stare decisis or precedent effect of a denial of certiorari.

190 I am limiting my comparison to the national importance or unimportance distinction, since this is the one that is popularly thought to be all controlling.

191 Frankfurter and Hart, Business of the Supreme Court, 51 Harv. L. Rev. 577, 598 (1938).
pathetic with the holding in the middleground case below, certiorari is likely to be granted.

The first stage is perhaps the easier of the two. Certain patterns of opinion for certain Justices are immediately evident. Let us take a much discussed problem, the pre-preliminary hearing confession in state criminal proceedings. The Court is unanimously of the opinion that physically coerced confessions pursuant to a state criminal proceeding amount to a denial of due process. Moreover, merciless interrogation with inadequate food and sleep for long periods of time, all agree is a similar denial. But here the accord ends. When the conditions during the interrogation are not excessively bad, at least four Justices—Jackson, Vinson, Reed and Burton—think that a resultant confession is perfectly within the Fourteenth Amendment. Of the other five Justices on the Vinson Court, at least two—Black and Douglas—believe that such confessions are per se denials of due process. But what are the views of the other three Justices—Frankfurter, Minton and Clark? In the Agoston case Douglas and Black dissented to the denial of certiorari, claiming that the lower court's decision was in conflict with the Supreme Court's view in the Turner and Harris cases, hence, certiorari should have been granted. The two Justices claimed that the earlier decisions held that pre-preliminary hearing confessions were per se denials of due process. If at least two of the three remaining Justices had shared this view, certiorari in the Agoston case would probably have been granted, at least four Justices recognizing a conflict with a prior Supreme Court decision. Since certiorari was denied, evidently at least two of the triumvirate are members of the "anti-per se doctrine group." As the recent decision in Brown v. Allen shows, Justice Clark, for one, does not align with Justices Douglas and Black.

From observing four reported cases, we have determined the views of seven Justices and have a good idea of the other two. If a state court were to reverse a conviction on Fourteenth Amendment grounds under the "per se doctrine" or if a state court were to reject the "per se doctrine," we are able to predict the views of the Justices respecting such cases. Moreover, we have some insight as to the degree of depravity that each Justice individually considers necessary before the Fourteenth Amendment is violated. Hence, we may better be able to predict how each Justice will react to a petition for certiorari, involving a pre-arraignment confession situation.

196 344 U.S. 443, 488 (1953).
Fitting a given case into its appropriate pattern may be a little difficult, particularly the categorization of a unique question. Though the task may be laborious, fortunately the diversity of the Supreme Court’s past opinions affords a wealth of analogous situations from which to draw.

Equally fundamental to the “tentative examination theory” is the third premise, that the votes of the individual Justices on a petition for certiorari in “middleground cases” are largely a product of their views respecting the propriety of the decision below.\(^{197}\)

A quite unimpeachable axiom is that voluntary behavior, to the extent that it is consciously controlled, is a product of the familiar, rather than the strange. Hence, the theatergoer may desist from going to a play because he dislikes G. B. Shaw, rather than because unbeknown to him an enemy will be lurking in the audience. And again, the fact that a longlost friend, instead of an enemy, was to be in the audience, information of which he is ignorant, will not change his mind. This homely illustration suggests that our theatergoer will act in response to information with which he is acquainted. Perhaps he would act differently if he knew more; but he is impervious to other facts. The analogy extends to the mental processes of the Justice, when voting on a middleground case. If he had the historical, political and economical insight required to appraise the national importance or unimportance of a case, he might well come to one conclusion. But since he does not, he is forced to suspend judgment or be arbitrary.\(^{198}\) Since he has something familiar upon which to grasp, he can well afford to suspend judgment on the “importance” issue. The Justice’s training in the law is responsible for the familiarity that I suggest. Because of his qualifications for things legal, he need neither act arbitrarily nor completely suspend judgment. A cursory examination of a given decision seldom leaves a scholar of law without at least a tentative opinion as to its legal merits or demerits. Just as the theatergoer refuses to go to a play because of his previous acquaintance with Shavian wit, rather than a consideration of the contents of the audience, the Justice denies certiorari because of his previous acquaintance with legal problems, rather than a consideration of historical-political-economical considerations, with which he is comparatively unfamiliar.

An examination of the cases lends some support to this analogy, although the “doctrine of secrecy” rather clouds the vista. Recorded dissents without opinion to denials of certiorari in “middleground cases” curiously

\(^{197}\) One can hardly dispute that in a “middleground case,” where all other considerations are not enlightening, the Justice’s decision must have been influenced to some degree by his tentative opinion of the correctness or erroneousness of the decision below. The question, however, is how much this tentative opinion influences the Justice.

\(^{198}\) I speak only of the “middleground case.”
seem to reflect characteristic dissatisfaction with the merits of the decision below, revealed by the same Justices in opinions respecting similar cases where review was granted. The occasional dissenting opinion to a denial of certiorari is frequently even more valuable in indicating that at least the dissenting Justices were controlled by their belief in the incorrectness of the decision below. In the *Agoston* case, Justices Douglas and Black dissented to the denial, claiming the decision below to be contrary to earlier Supreme Court decisions; but the contention of such a conflict was manifestly unfounded. Hence, Justices Black and Douglas did not mean that the *Agoston* case was in conflict with the other cases. Rather they had voted to grant certiorari because they thought the Pennsylvania Court's rejection of the "per se doctrine" wrong, and hoped to convince the rest of the Supreme Court to reverse on the merits.

A problem related to when certiorari should be granted reveals the great influence of the Justices' views on the merits of the decision below. I refer to the problem of the scope of review once certiorari has been granted. Like the considerations relating to voting on certiorari, it is traditionally stated that no consideration will be given to claims of improper findings of fact. Mr. Justice Frankfurter has been a leading exponent of this view. But even he violated his own cardinal rule for no other reason apparently, than his belief that the holding below was erroneous.

Another phenomenon that seems to support the premise in question is the usual granting of certiorari in "conflict cases," particularly those of the middleground variety. In addition to the Supreme Court's desire to retain an orderly court system, such practice can be explained as an application of the "tentative examination theory." When two cases conflict, obviously

199 See note 195 *supra*.
200 See page 164 of the text.
201 "The same considerations that should lead us to leave undisturbed, by denying certiorari, decisions of the Courts of Appeals involving solely a fair assessment of a record on the issue of unsubstantiality (i.e., of the evidence), ought to lead us to do no more than decide that there was such a fair assessment when the case is here, as this is, on other legal issues." N.L.R.B. v. Pittsburgh Steamship, 340 U.S. 498, 502 (1951).
203 *Standard Oil v. United States*, 340 U.S. 54, 61ff (1950). In that case the meaning of "all consequences of warlike operation," a common provision in war risk insurance policies, was being litigated. The Second Circuit had rejected the English rule that the showing of actual causation is alone sufficient to render the insurer liable; rather the damage must also be shown to be a proximate cause of warlike operations. 178 F.2d 488 (2d Cir. 1949). The Court of Appeals also found that in fact there was no proximate cause, a finding generally considered to be a finding of fact. Six Justices conclusively rejected the English rule, and affirmed, following the usual practice of not going into the questions of fact. Justice Douglas dissented, advocating the English rule. But Justices Jackson and Frankfurter dissented, going into the question of whether or not the facts manifested proximate cause or not, and concluding that proximate cause was present.
one is erroneous, either the one up for immediate review or the case with which it conflicts. Hence, the situation is a natural for the Supreme Court to grant certiorari and clear up an error put forth by one or more inferior courts.

Occasionally language in the opinions intimates that a consideration of the merits was the factor controlling a vote by the writing Justices, respecting the disposition of the certiorari petition.204

The Supreme Court's treatment of two recent cases certainly seems to give substance to the "tentative examination theory." Both involved the meaning of "taking" under the Fifth Amendment, as a basis for a just compensation claim. Aleutian Livestock v. United States205 was an action in the Court of Claims206 for the fair price of more than six thousand sheep that had perished on the island of Umnak in the Aleutians. The United States military authorities, when the Japanese had occupied Attu and other nearby islands, had ordered evacuation of all civilian personnel on Umnak, in order to expedite military operations. As a result of the evacuation, the untended sheep died of starvation and other avoidable causes. The Court of Claims denied relief, stating that the Fifth Amendment's provisions did not apply when the property loss was the result of emergency military operations and the government did not actually use the property involved. The Supreme Court denied certiorari.207

The second case is the Caltex case.208 Here, the retreating American Army in the Philippines destroyed the claimant's oil production and refining property, to prevent it from falling into Japanese hands. The Court of Claims permitted recovery in this case. The United States petitioned for certiorari. The big question was whether certiorari would be granted in light of the denial in the Aleutian case. Clearly there was no conflict of decision, since both cases came up from the same court. It could not be said that Caltex was an "importance" case, while the Aleutian case was not; both cases raised substantially the same issues.209 The Supreme Court did grant certiorari in the Caltex case.210 If the Court would affirm the de-

204 Justice Reed apparently sees little distinction between an express affirmance of the decision below and a denial of certiorari. In Stembridge v. Georgia, 343 U.S. 541, 548 (1952), involving a dismissal of certiorari improvidently granted, he said in a concurring opinion, "While I think the better course would be to affirm the decision of the Georgia courts, I join in the judgment of this Court."
206 The same considerations applying to certiorari to other courts of general jurisdiction also apply to certiorari to the Court of Claims. Rule 41.3.
207 342 U.S. 875 (1951).
208 Caltex (Philippines), Inc. v. United States, 100 F.Supp. 970 (1951).
209 The sheep company so contended in their petition for rehearing, which was denied in 342 U.S. 907 (1952).
210 343 U.S. 955 (1952).
cision, little could be said in defense of the same Court’s refusal to review the Aleutian case. But the Court reversed Caltex, apparently for those reasons articulated by the Court of Claims in its Aleutian case opinion.

How can the treatment of the two certiorari petitions be reconciled? The most visible distinction is that the Aleutian decision was right, and the Caltex decision was wrong. From the tenor of the certiorari documents in both cases and the decisions of the Court of claims, as well as the Supreme Court opinion, it could not be said that the Aleutian case was obviously correct, while the Caltex case was obviously wrong. Hence, the two cases can be labelled as “middleground.” I submit that the Aleutian case was thought to be “tentatively correct,” while the Caltex case was considered to be “tentatively erroneous.” The net effect was a denial of certiorari in the former and granting in the latter.

I. The Diagnosis and Cure: A Summary

The mental processes of the Justices upon examining a petition for certiorari in substance involve the answering of four questions.

(1) Is there a formal or jurisdictional defect?
(2) Is the granting of the writ tactically advisable?
(3) Is this an "obviously important" or "obviously unimportant" case?
(4) Is the decision below "tentatively correct" or "tentatively erroneous"?

Affirmatively answering any of the first three questions disposes of the petition. If all three are answered in the negative, the Justices must utilize the “tentative examination” procedure to answer the last question.

211 344 U.S. 149 (1952)

Few would rationally contend that the Supreme Court favors government petitioners, rather than private ones. It has, however, been observed that the percentage of government petitions for certiorari granted far exceed that of the non-governmental petitions. 95 Cong. Rec. A4943ff (1949) This condition has variously been attributed to the competence of the government petition-writers, the discretion of the Justice department in selecting the cases for which certiorari will be applied, and the high correlation of government cases with the quality of “importance.” I suspect all of these are factors. But one additional reason might be recognized. The various legal staffs of the government undoubtedly have less of the predatory-adversary instinct, and more of the desire to reach a just result, than private counsel. The result is that the government will settle for an apparently correct though adverse decision below, while it will certainly petition for certiorari if the decision below is apparently wrong. This again suggests that the Supreme Court is likely to grant certiorari, where the holdings below are apparently incorrect.

212 One other, though I think illusory, explanation may be suggested. The Government in the Aleutian case only indirectly caused the loss; that is, the army did not slaughter the sheep directly. In Caltex army personnel actually set off the dynamite. If such a distinction can be made, the Caltex facts are the strongest ones for the claimant. Hence, a holding for the Government in the Caltex situation would be the a fortiori case; while a holding for the Government in the Aleutian case would conceivably have been distinguishable from the Caltex facts. Perhaps the Supreme Court, through tactical considerations, was waiting for the better case.
An apparent vulnerability to a theory of "tentative examination" is that of time consumption in so appraising the merits of the holding below. I submit that the word "tentative" dispels any such objection. As I have mentioned before, the word "tentative" connotes flexibility and temporariness; but it also implies brevity. And it is not implausible that a Justice can come to a tentative conclusion after only a brief examination of the merits of the holding below. The law school examination has served to instill this faculty in the American Bar.

Various factors influence just how much time is to be given to the "tentative examination" of a specific case. Probably the fact that there were a comparatively large number of hearings on the merits below, all of which held one way, would tend to minimize the length of the examination. Perhaps the quality of the court immediately below might be another factor. Certainly more time must be given to a case complex in law and/or fact, than one with simple facts and well defined issues.

But why has not the "tentative examination" process been articulated? The "doctrine of secrecy" would largely account for the lack of publicity relating to specific cases. The "non-merit myth" seems to be responsible for little mention of the process in the multitude of general statements by the Justices.

In the light of this analysis, it would seem desirable that petitioners and respondents should draft their petitions and briefs with the "tentative examination" in mind. However, I do not recommend that a petition or opposing brief resemble briefs on the merits. In appreciation of the formal prerequisites and time consumption, only the substantive highlights should be hit; recognition of such a practice is particularly necessary in the complex case. But procedural and substantive technique in drafting these documents.

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215 A number of current articles have criticized the Supreme Court for lightening its workload. One explanation might be that the Justices have decided to make the tentative examination more thorough than had previously been done. If this explanation be valid, the Court now more carefully decides a great number of cases each term, rather than restricts itself to a few more full dress reviews. And, under this theory, it is not surprising that more grantings of certiorari do not result, since experience shows that the bulk of decisions of Courts of Appeals and highest state courts are correct. Hearings before Committee on Judiciary on H.R. 8206, 68th Cong., 2d Sess. 12 (1924), also in 81 Cong. Rec. 3325 (1937). The only effect of this suggested new certiorari policy would be that more deserving cases are reviewed on certiorari.

Dean Green of Northwestern Law School has suggested that a fulltime committee of Justices should be devoted to ruling only on petitions for certiorari. Hearings before Committee on Judiciary on S.1392, 75th Cong., 1st Sess. 258 (1937). Thus, in a manner reminiscent of the now defunct French Chambre des Requêtes, thoroughness could be accomplished, without the handicap of additional time consumption.

216 At present not only are vast numbers of petitions deficient in technique, but apparently many of them are critically incomplete in their coverage of the merits. Brown v. Allen, 344 U.S. 443, 493 (1953).
ments can only reach their optimum, when the United States Supreme Court overtly abandons the "doctrine of secrecy." 217

I hope I have been persuasive that an efficient and intelligible certiorari procedure is possible. All that is necessary is the frank cooperation of the Justices and a greater degree of conscientiousness by the practitioner on petitions for certiorari. 218

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217 A renunciation of the "non-merit myth" by the Court would also seem to be necessary. In a speech given before the American Bar Association in 1949, Chief Justice Vinson said: "Lawyers might be well advised, in preparing petitions for certiorari to spend a little less time discussing the merits of their cases and a little more time demonstrating why it is important that the Court should hear them. If it (the petition) only succeeds in demonstrating that the decision below may be erroneous, it has not fulfilled its purpose." St. Louis Daily Record, p. 6, column 1 (Sept. 8, 1949). Though the Chief Justice was apparently not contemplating the "midground case," such unclarified statements by the Justices can only be obstacles to the filing of model petitions and briefs.

218 See Hughes, Address at ALI Meeting, 20 A.B.A.J. 341 (1934).