Although our Court otherwise operates by majority rule, as would be expected, the granting of certiorari has historically required only the votes of four of the nine justices. In 1925, the year when Congress allowed the Supreme Court a great deal more discretion in the kinds of cases it would review, the practice of the Court was to grant certiorari if four out of the nine justices wished to hear the case, and that practice has continued to this day.

When I get the annotated certiorari memos from my law clerks, I review the memos and indicate on them the way I intend to vote at conference. I don't necessarily always vote the way I had planned to vote, however; something said at conference may persuade me either to shift from a "deny" to a "grant," or vice versa.

I would guess that somewhere between one and two thousand of the petitions for certiorari filed with the Court each year are patently without merit; even with the wide philosophical differences among the various members of our Court, no one of the nine would have the least interest in granting them. As soon as I am confident that my new law clerks are reliable, I take their word and that of the pool memo writer as to the underlying facts and contentions of the parties in the various petitions, and with a large majority of the petitions it is not necessary to go any further

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than the pool memo. In cases that seem from the memo perhaps to warrant a vote to grant certiorari, I may ask my law clerk to further check out one of the issues, and may review the lower court opinion, the petition, and the response myself.

During the time I am away from my chambers in the summer, and there are no conferences, the certiorari memos are mailed to me and I review them there and return them to my chambers. During the summer the petitions for certiorari simply accumulate, and by the time we have our annual September conference, which starts the week before the "first Monday in October," as many as a thousand petitions for certiorari will be waiting. These are disposed of at the September conference in the same manner that petitions for certiorari are disposed of at our regular conferences.

Shortly before each conference at which the Court will consider petitions for certiorari, the chief justice sends out a list of the petitions he wishes to have discussed. After the chief's "discuss list" has come around, each of the associate justices may ask to have additional cases put on this list. If at a particular conference there are one hundred petitions for certiorari on the conference list, the number discussed at conference will range from fifteen to thirty. The petitions for certiorari that are not discussed at conference are denied without any recorded vote.

Whether or not to vote to grant certiorari strikes me as a rather subjective decision, made up in part of intuition and in part of legal judgment. One factor that plays a large part with every member of the Court is whether the case sought to be reviewed has been decided differently from a very similar case coming from another lower court: If it has, its chances for being reviewed are much greater than if it hasn't. Another important factor is the perception of one or more justices that the lower-court decision may well have been both an incorrect application of Supreme Court precedent or of general importance beyond its effect on these particular litigants.

I have on occasion described the certiorari process to groups interested in the work of the Court, and find occasional raised eyebrows at one or more of its aspects. Recently I was asked

whether or not the use of the law clerks in a cert pool didn't represent the abandonment of the justices' responsibilities to a sort of internal bureaucracy. I certainly do not think so. The individual justices are of course quite free to disregard whatever recommendation the writer of the pool memo may have made, as well as the recommendation of his own law clerks, but this is not a complete answer to the criticism. It is one thing to do the work yourself, and it is another thing to simply approve the recommendation of another person who has done the work. But the decision as to whether to grant certiorari is a much more "channeled" decision than the decision as to how a case should be decided on the merits; there are really only two or three factors comprised in the certiorari decision—conflict with other courts, general importance, and perception that the decision is wrong in the light of Supreme Court precedent. Each of these factors is one that a well-trained law clerk is capable of evaluating, and the justices, of course, having been in the certiorari-granting business term after term, are quite familiar with many of the issues that come up. I must say I would feel entirely different about a system that assigned the preparation of "bench memos"—memoranda that summarize the contention of the parties and recommend a particular result in an argued case—to one law clerk in a large pool of law clerks.

Another criticism I have heard voiced is that the great majority of petitions for certiorari are never even discussed at conference and are simply denied without being taken up by the justices as a group. I do not think this is a valid criticism. For the sixty years since the enactment of the Certiorari Act of 1925, there have been significant ideological divisions on the Court, such that one group of justices might be inclined to review one kind of case, and another group of justices inclined to review another kind of case. When one realizes that any one of nine justices, differing among themselves as they usually do about which cases are important and how cases should be decided, may ask that a petition for certiorari be discussed, the fate of a case that is "dead listed" ("dead listing" a case is the converse of putting a case on the "discuss list") is a fate well deserved. It simply means that no one of the nine justices thought the case was worth discussing at conference with a view to trying to persuade four members of the Court to grant certiorari. It would be a totally sterile exercise to discuss such a case at conference since no justice would be a proponent of granting it and it would end up being denied in less time than it takes to write this paragraph.

Examination of the certiorari process naturally brings up the question of the precise role of the Supreme Court of the United States in our country's legal system. Many would intuitively say that the task of the "highest court in the land" is to make sure that justice is done to every litigant, or some similarly general and appealing description. The Supreme Court of the United States once played a role in the federal system corresponding fairly closely to that description, but the days when it could do so are long gone.

The first Congress in 1789 established the Supreme Court of the United States, and lower federal courts which were essentially trial courts. In the lower courts witnesses testified, documents were received in evidence, and at the close of the trial the judge or the jury ruled in favor of one of the parties and against the other. Congress provided that appeals from these decisions should lie to the Supreme Court of the United States, and the task of the latter Court in these early days was to do what any other appellate court traditionally does: make sure that the trial was fairly conducted, that the judge correctly applied the law, and that the evidence supported the result reached by the lower court. In its earlier days, as I have previously indicated, the Supreme Court did not have a great deal to do as an appellate court—for several decades it sat in Washington for only a few weeks a year, hearing appeals from the lower federal courts and from state supreme courts. Indeed, the justices spent far more of their time circuit riding to sit as trial judges in the geographic circuits to which they were assigned than they did as appellate judges in Washington.

But this rather easygoing picture changed before the Civil War, and the Supreme Court justices had to spend more of their time sitting as appellate judges and still found themselves falling behind in their docket. After the Civil War, court congestion increased. Congress expanded the jurisdiction of the lower federal

courts, so that they could hear types of cases they had previously been denied the authority to hear. Congress began to enact regulatory legislation, which created new kinds of lawsuits that could be brought in the federal courts. Finally, both the commercial activity and the population of the United States continued to increase dramatically, and both of these kinds of growth naturally caused more litigation. By 1890 it took three and one half years between the time a case was first docketed in the Supreme Court and the time it was orally argued before the justices. Court congestion is not often a major concern of Congress, but these extreme delays caused the legal profession to rise up in righteous indignation, and in 1891 Congress responded by creating the federal circuit courts of appeals.

The federal circuit courts of appeals were regional federal appellate courts. Congress provided that in cases where the federal trial courts had jurisdiction not because of a federal question involved in the case but only because one of the parties was a citizen of one state and the other a citizen of another, appeal from the decision of the trial court would lie not to the Supreme Court of the United States, but to the federal court of appeals in the geographic region in which the trial courts lay. Review of the decision of the court of appeals could not be had automatically in the Supreme Court, but only if the Supreme Court agreed to review the decision.

Other acts of Congress in the early part of this century, culminating in the Certiorari Act of 1925, further limited the access of parties to Supreme Court review. After 1925, review not only of diversity cases but of most federal-question cases decided by the federal trial courts was to be had as a matter of right not in the Supreme Court but in the federal courts of appeals. Further review by the Supreme Court was made to depend on the discretionary decision of that court to hear the case. Chief Justice William Howard Taft was one of the architects of the Certiorari Act of 1925, and his biographer, Henry F. Pringle, summarizes his view of the role of the Supreme Court in these words:

> It was vital, he said in opening his drive for the Judges' Bill, that cases before the Court be reduced without limiting the

> function of pronouncing "the last word on every important issue under the Constitution and the statutes of the United States." A supreme court, on the other hand, should not be a tribunal obligated to weigh justice among contesting parties.
>
> "They have had all they have a right to claim," Taft said, "when they have had two courts in which to have adjudicated their controversy." [Pringle, Vol. II, pp. 997–998]

There are thousands of state-court judges in this country at the present time, and hundreds of federal judges. Each of these has sworn to uphold the Constitution and laws of the United States, and the overwhelming majority of these judges are capable of applying settled law to the facts of the cases before them, and eager to do so. Occasionally, these trial judges make mistakes, but the federal courts of appeals sit to correct these mistakes within the federal system, and state appellate courts sit to do the same in every state system. It would be a useless duplication of these functions if the Supreme Court of the United States were to serve simply as an even higher court for the correction of errors in cases involving no generally important principle of law. The Supreme Court, quite correctly in my opinion, instead seeks to pick, from the several thousand cases it is annually asked to review, those cases involving unsettled questions of federal constitutional or statutory law of general interest.

Ever since I have been on the Court, we have heard somewhere around one hundred fifty cases each year on the merits, and I know of no member of the Court or student of the Court who feels that we ought to try to hear more cases than this. Each year we find more than enough cases to meet the demanding standards for Supreme Court review, and must turn down many that several of the justices, although not a sufficient number to grant certiorari, think do meet the standard for review. We are stretched quite thin trying to do what we ought to do—in the words of Chief Justice Taft, pronouncing "the last word on every important issue under the Constitution and the statutes of the United States"—without trying to reach out and correct errors in cases where the lower courts may have reached an incorrect result, but where that result is not apt to have any influence beyond its effect on the parties to the case.