

ALL THE COURT'S CASES: A STUDY OF
BURGER COURT CERIORARI POLICY

by

Victoria Stone Howarth

Thesis submitted to the Graduate Faculty of the
Virginia Polytechnic Institute and State University
in partial fulfillment of the requirements for the degree of

MASTER OF ARTS

in

Political Science

APPROVED:

Dr. Robert B. Albritton

Dr. James F. Herndon

Dr. Dorothy B. James

August, 1975

Blacksburg, Virginia

ACKNOWLEDGMENTS

I would like to thank the members of my graduate committee for their assistance on this study, especially Dr. Robert B. Albritton for his insights, editing, and encouragement.

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
REVIEW OF THE LITERATURE	3
The Traditional Approach.	3
Judicial Behavior	5
Caseload Studies.	10
Certiorari Studies.	13
SUPREME COURT JURISDICTION AND PROCEDURE	18
Certiorari v. Appeals	19
Policy and Discretion in Gatekeeping.	23
Docketing and the Jurisdictional Decision	32
Decision "On the Merits".	36
Summary Judgment	36
Formal Disposition	38
THE DATA	40
Hypotheses and Findings	42
CONCLUSIONS AND IMPLICATIONS	56
Bibliography	59
Vita	68

LIST OF TABLES

<u>Table</u>		<u>Page</u>
I.	Decision to Grant Review by Type of Case (1971-1973)	44
II.	Decision to Grant Review by Origin of Cases, by Year.	46
III.	Decision to Grant Review by Type of Case, by Year.	49
IV.	Decision to Grant Review on Civil Liberties Cases, by Year	53
V.	Decision to Grant Review on Tax Cases, by Year	55

ALL THE COURT'S CASES--A STUDY OF SUPREME COURT
POLICY AND PROCEDURE

"The most important thing we do is not doing."¹

...Louis D. Brandeis

INTRODUCTION

Scholars of the Supreme Court have thoroughly considered most of the "leading" or "landmark" cases decided by the Supreme Court in the past. But in the large body of literature on the Supreme Court, there have been very few studies concerning the cases which the Court refuses to hear, or those it decides summarily, without oral argument. Most common access to Court review is by appeal or certiorari, which is either denied or dismissed in over ninety per cent of the applications received. There is very little available data on the body of cases denied full review and, as a result, there has apparently been a general assumption that this group of cases is unimportant to the study of judicial process. It is the methodological concern of this paper to illustrate the importance of the cases in understanding of the Supreme Court's business.

Harper and Rosenthal present the issue well:

¹S. Sidney Ulmer, William Hintze, and Louise Kirklosky, "The Decision to Grant or Deny Certiorari: Further Consideration of Cue Theory," Law and Sociological Review 6 (May 1972): 367.

It may be that the work which the Court doesn't do is as significant for the nation as the work which it does. When it decides a case involving important matters of public interest, it is making national policy. When it declines to review a case involving important issues, is it not also determining policy?²

A close look at various areas of judicial research reveals that scholars have, by and large, made inferences about the judicial process based on a very limited sample; they have concentrated on the "great" cases and sometimes the work of "great justices," ignoring the ordinary Court business that Gressman calls "the essence of the judicial process."³

²Fowler V. Harper and Alan S. Rosenthal, "What the Supreme Court Did Not Do in the 1949 Term--An Appraisal of Certiorari," Univ. of Pennsylvania Law Review 99 (1950-51): 313.

³Jerome J. Hanus, "Denial of Certiorari & Supreme Court Policy-Making," American Univ. Law Review 17 (1967): 41-56.

REVIEW OF THE LITERATURE

The Traditional Approach

The most traditional approach to the study of the Court is the constitutional law or casebook method characterized by definitions "in terms of the meaning attributed to the Constitution by the Supreme Court in selected 'landmark' cases."¹ Glendon Schubert has found it doubtful that this approach is suggestive of "significant insights" since it is not based on the most important universe of information.² It has been said that political scientists have devoted less attention to such case exegesis while attempting in various ways to form conclusions about the Court's total performance.³ Unfortunately, many have based their studies on the constitutionalists' universe of cases even though their emphasis is on judicial process, behavior, or impact rather than points of law.

A much-debated issue within traditional jurisprudence has been judicial activism versus restraint, the latter being characterized by "strict construction." Frankfurter has discredited this theory by pointing out the generality of Constitutional meaning and the necessity

¹Glendon A. Schubert, Constitutional Politics, New York: Holt, Rinehart & Winston, Inc., 1960.

²Ibid.

³William M. Beaney, "The Supreme Court: The Perspective of Political Science," Perspectives on the Court, (Evanston, Ill.: Northwestern Univ. Press (1965):40.

for judicial interpretation and discretion.⁴ Harlan has also spoken on the subject, emphasizing that judicial preferences are more important than precedent.⁵ Schubert has credited the judicial behavioral movement with "substantially debunking the myth of the judicial process' impartiality and rationality"⁶ and Murphy has discussed the contribution of the Legal Realists in overturning the mechanical theory of the judicial function.⁷ There is, however, a remaining problem: few have taken into account more than a small proportion of cases and because of this, any inferences about activism versus restraint or judicial subjectivity may well be biased.

Studies closely related to the "strict construction" school of thought have been carried out recently by several social scientists⁸

⁴James F. Simon, In His Own Image: The Supreme Court in Richard Nixon's America, (New York; David McKay Co., Inc., 1973) p. 6.

⁵Ibid.

⁶Theodore L. Becker, "On Science, Political Science, & Law," American Behavioral Scientist 7 (December 1963) 4:12.

⁷Walter F. Murphy, Elements of Judicial Strategy, (Chicago: Univ. of Chicago Press, 1964), p. 29. Note: Others who have addressed the topic include: Alexander Peckelis, Paul L. Rosen, and Robert A. Horn.

⁸Robert A. Horn, "A Quantitative Study of Judicial Review," American Behavioral Scientist 1 (September 1957):27-30; "The National Court of Appeals: A Dissent," American Bar Association Journal 59 (March 1973), pp. 253-260; Lee Loevinger, "Jurimetrics: The Methodology of Legal Inquiry," in Law and Contemporary Problems, ed. Hans W. Baade (Durham, N.C.: Duke Univ. School of Law, Vol. 28, Winter 1963), 1, pp. 5-36; S. Sidney Ulmer, "Quantitative Analysis of Judicial Processes: Some Practical and Theoretical Applications," in Law and Contemporary Problems, ed. Hans W. Baade (Durham, N.C.: Duke Univ. School of Law, Vol. 28, Winter 1963), 1, pp. 164-184; Franklin M. Fisher, "The Mathematical Analysis of Supreme Court Decisions: The Use and Abuse of Quantitative Methods," in American Political Science Review, Vol. 52, 2, June 1958, (New York: Johnson Reprint Corp.) pp. 321-338.

and are all based on stare desisis. These have attempted to predict Court decisions mathematically. Besides the problem of emphasizing crucial but atypical cases in which something has been declared unconstitutional, the authors have overlooked the possibly more important application of their quantitative tools: prediction of which cases the Court will accept for review. This oversight may be a result of emphasizing prediction over understanding.

Judicial Behavior

Studies of judicial policy-making have concentrated on Court opinions which, it should be noted, are given on the average in six per cent of all cases processed, in order to determine what changes in policy have occurred. These studies by Becker, Wasby, and others have produced analyses of the impact of Court decisions on various sectors of the polity.⁹ The "impact of the Supreme Court" as a distinct area of judicial studies has focused on the so-called "great" cases--which do seem to have the most impact in the form of use as precedents, effect on public opinion, and reactions of lower courts and legislatures.¹⁰ But it seems that the bulk of cases denied hearing, especially when they number over 3,000 as they have in

⁹Jerome J. Hanus, "Denial of Certiorari & Supreme Court Policy-Making," American Univ. Law Review 17 (1967):41.

¹⁰Theodore L. Becker and Malcolm M. Feeley (eds.) The Impact of Supreme Court Decisions, 2nd ed. (New York: Oxford Univ. Press, 1973).

recent terms¹¹ must have more than negligible impact and should be considered in analyses of this type.

Becker has said about the current predominant focus of judicial research: "The great stress of work of the Schubert genre has been in analyzing the pattern of judicial votes and the verbiage of judicial opinion in order to generalize about judicial motivation."¹² In addition to this, there have been numerous articles based on the Justices' backgrounds and effect on judicial decisional output. The result of this kind of study, according to Becker, has been precise description of Constitutional law leading to an increase in quantitative prediction.¹³ Another similar type of research is that which defines judicial voting blocs through voting analysis techniques.¹⁴ Small group analysis also fits in this category.¹⁵

¹¹Harvard Law Review, Vol. 86 (Nov. 1972) and Vol. 87 (Nov. 1973).

¹²Theodore L. Becker, "On Science, Political Science, & Law," American Behavioral Scientist, December 1963, p. 12.

¹³Ibid.

¹⁴Martin Shapiro, Law and Politics in the Supreme Court, (New York: Free Press of Glencoe, 1964) p. 12.

¹⁵For examples, see: Glendon A. Schubert, Judicial Behavior--A Reader in Theory & Research, (Chicago: Rand McNally & Co., 1964); John D. Sprague, Voting Patterns of the United States Supreme Court, (Indianapolis: Bobbs-Merrill Co., Inc. 1968); Glendon A. Schubert, The Judicial Mind Revisited, (New York: Oxford Univ. Press, 1974); Glendon Schubert and David J. Danelski (eds.) Comparative Judicial Behavior, (New York: Oxford Univ. Press, 1969); American Behavioral Scientist, Vol. 7, 4, December 1963 (Special Issue: "Frontiers of Legal Research"); Glendon A. Schubert (ed.), Judicial Behavior, (Chicago: Rand McNally & Co., 1964); Glendon A. Schubert, "Policy without Law: An Extension of the Certiorari Game," Stanford Law Review 14, (1962), pp. 284-327.

These types of studies must necessarily, in their search for attitudes and blocs, rely on the Court's formal decisions, since they are the only votes that can be readily found. Schubert recognizes the problem in Constitutional Politics:

Since the focus of attention . . . will be upon formal decisions and opinions of the Court, it is important for the student to keep in mind the decision-making context from which formal decisions and opinions emerge. The cases studied do not constitute a representative sample of the work of the Court which spends much, if not most, of its time deciding which cases it does not have time to decide.¹⁶

The above statement becomes even more meaningful if one considers it from the viewpoint of the individual litigants--those who, Harper points out, have been sent to prison, deported, and executed after the Supreme Court refused to hear their serious Constitutional claims, often without stating the reasons for denial of such hearing.¹⁷ After all, no one, not even a government official, has the power to force the court to take a case, or to decide the case on its substantive issues.¹⁸

Chief Justice Burger has expressed the importance behind each certiorari petition by noting the fact that each piece of litigation may have spent several years in trial courts and hundreds of lawyer

¹⁶Glendon A. Schubert, Constitutional Politics, (New York: Holt Rinehart & Winston, Inc., 1960), p. 94.

¹⁷Fowler V. Harper and Edwin D. Etherington, "What the Supreme Court Did Not Do During the 1950 Term," Univ. of Penn. Law Review, Vol. 100 (1951-52):407.

¹⁸Walter F. Murphy, Elements of Judicial Strategy, (Chicago: Univ. of Chicago Press, 1964), p. 19.

hours in preparation.¹⁹ Justice Holmes, in his *Collected Legal Papers*, claimed to be far more interested in "little decisions" which contained some "germ of inner theory," than in so-called great questions and cases.²⁰ Yet scholars have consistently ignored the business the Court has denied review, even though these cases amount to better than ninety per cent of the Supreme Court workload. Hanus credits this oversight to the assumption that attention need not be directed to business denied since it is practically inalterable or because "the Court can be relied on to select only the most important business."²¹ It is unnecessary to argue that all cases are equally important to justify looking at the entire lot of them. In fact, according to Horn,²² there are no clear guidelines for assigning importance to any particular case or group of cases since such criteria as constitutional theory, material interests at stake, and presumptive effects may all influence "importance." Harper presumes in his studies that "all cases which the Court reviews are important." He further states, however, that there is no necessary converse presumption about those denied review, especially since there are numerous reasons, even when an

¹⁹Warren & Burger, "Retired Chief Justice Warren Attacks, Chief Justice Berger Defends, Freund Study Group's Composition & Proposal," American Bar Association Journal 59 (July 1973): 724.

²⁰Eugene Grossman, "The National Court of Appeals: A Dissent," American Bar Association Journal 59, (March 1973): 257.

²¹Jerome J. Hanus, "Denial of Certiorari & Supreme Court Policy-Making," American Univ. Law Review 17 (1967): 41.

²²Robert A. Horn, "A Quantitative Study of Judicial Review," American Behavioral Scientist 1 (September 1957): 29.

"important" question exists in a case, for denial of hearing.²³ Many of these arise from formal procedures and regulations governing Supreme Court jurisdiction, as well as judicial tactical considerations, both to be discussed later.

The purpose of such a critical review of the literature in this area which has ignored the "negative" business of the Court is to justify this study and to suggest possible similar studies which would enlarge our knowledge of the Supreme Court's workings and policy. But it is true that there are reasons why scholars have, by and large, ignored the cases denied review. Hanus cites some reasons for this orientation: the procedure by which cases are accepted or rejected is a cloaked one, or as Gibbs puts it--surrounded by the "doctrine of secrecy."²⁴

Lack of access to observable facts is fatal to most empirically oriented research. An additional impediment has been the realistic observation that the Court must exercise discretion somewhere if it is going to dispose of even a minimum of business.²⁵

Beane, in Perspectives on the Court, reached the conclusion that the numerous gaps which exist in our knowledge of the Court require "careful descriptive studies" before more advanced sorts of studies are attempted.²⁶ One type of descriptive study, which is a source of

²³Fowler V. Harper and Alan S. Rosenthal, "What the Supreme Court Did Not Do in the 1949 Term--An Appraisal of Certiorari," Univ. of Penn. Law Review, 99 (1950-51):312.

²⁴Robert W. Gibbs, "Certiorari: Its Diagnosis & Cure," Hastings Law Journal 6, (Feb. 1955): 131-170.

²⁵Jerome J. Hanus, "Denial of Certiorari & Supreme Court Policy-Making," . . . p. 41.

²⁶William M. Beane, Perspectives on the Court, (Evanston, Ill.: Northwestern Univ. Press, 1965), p. 45.

much useful information, is the Supreme Court caseload analyses.²⁷

Caseload Studies

Two of the more widely known caseload studies are the "Report of the Study Group on the Caseload of the Supreme Court," which is usually called simply the Freund Report (named for its chairman), and Hart's "The Time Chart of the Justices," both of which have sparked much debate. In the latter, the author points out that the volume of the Court's work varies considerably each term in both its total burden and its constituent elements.²⁸ However, Hart does not go into the implications of variety in the constituent elements in terms of content, difficulty, or effects on policy.

The Freund Report emphasizes the importance today of the cases denied review:

²⁷Henry M. Hart, Jr., "The Time Chart of the Justices," from "The Supreme Court, 1958 Term: Foreword," Harvard Law Review 73 (November 1959): 84-125; Paul A. Freund, with Alexander M. Bickel, Peter D. Ehrenhaft, Russell D. Niles, Bernard G. Segal, Robert L. Stern, Charles A. Wright, "Caseload of the Supreme Court," Federal Rules Decisions 57 (December 1972): 596-627; Gerhard A. Casper and Richard A. Posner, "A Study of the Supreme Court's Caseload," The Journal of Legal Studies III (June 1974) 2:339-375; Rowland L. Young, "Supreme Court Report," American Bar Association Journal 59 (January 1973): 71-73; Eugene Grossman, "The National Court of Appeals: A Dissent," American Bar Association Journal 59 (March 1973): 253-260; Warren & Burger, "Retired Chief Justice Warren Attacks, Chief Justice Burger Defends, Freund Study Group's Composition and Proposal," American Bar Association Journal 59 (July 1973): 721-730; Harvard Law Review (October issues since 1957); and The Attorney General's Annual Report.

²⁸Henry M. Hart, Jr., "The Time Chart of the Justices," . . . p. 275.

Over the past thirty-five years, as has been seen, the number of cases filed has grown fourfold while the number of cases in which the Court has heard oral argument before decision has remained constant . . . issues that would have been decided on the merits a generation ago are passed over by the Court today and, second, the consideration given to cases actually decided is compounded by the pressure of processing the inflated docket.²⁹

The cases denied review, then, have an effect on how the Justices handle the formal decisions. In his objection to the Freund Report recommendation for a National Court of Appeals, Grossman states another probable effect--the Court can only get an overview of troublesome areas of the law by seeing how many of the various types of cases are brought before it.³⁰

Kurland, in an article about Supreme Court jurisdiction, criticized the Freund Report for dismissing various possibilities for decreasing the workload without careful examination of them. "Certainly," he wrote, "it should not have been so cavalier in its rejections without a statistical survey revealing exactly what the content of the Court's certiorari business is."³¹ But Kurland himself has not attempted such a study, although Casper and Posner have done so. In their article, the most thorough for content analysis of the total caseload I have found, they have reached some unique conclusions. For instance, they found that by 1957 the Supreme Court

²⁹Paul A. Freund, et al., "Caseload of the Supreme Court," . . . p. 581.

³⁰Eugene Grossman, "The National Court of Appeals, . . ."

³¹Philip B. Kurland, "Jurisdiction of the United States Supreme Court: Time for a Change?" Cornell Law Quarterly 59 (1974): 628-629.

was already mainly a criminal court of appeals.³² They qualify this with the statement: "A different impression, however, is conveyed by an examination of the cases that the Court actually accepts for review and decides with an opinion"33

Hanus' study also goes into Court certiorari policy in considerable depth although only double jeopardy cases are considered over time.³⁴ Gibbs also gives certiorari's relation to caseload a fairly thorough treatment on a theoretical level.³⁵ Douglas has also written about the total workload, especially in relation to in forma pauperis cases received and formal disposition rates.³⁶ It is important that these Court observers have looked at the total workload rather than simply the formal opinion cases, for their studies to be useful in Court administration. After all, it is within the power of the Justices to regulate the number of cases they will formally decide; the overall workload is far more difficult to regulate, especially without disturbing the "prestige" and "legitimacy" of the highest court.

³²Casper and Posner, "A Study of the Supreme Court's Caseload," p. 353.

³³Ibid., f.

³⁴Hanus, "Denial of Certiorari and . . . ," pp. 41-56.

³⁵Gibbs, "Ceriorari: Its Diagnosis & Cure," pp. 131-170.

³⁶William O. Douglas, "The Supreme Court & Its Case Load," Cornell Law Quarterly 45, (1960), 3:401-419.

Certiorari Studies

A few studies have dealt primarily with certiorari policy. One is a series of articles concerning "What the Supreme Court Didn't Do" in four consecutive years by Harper et al.³⁷ They have been concerned with how the Court controls substantive policy by denying petitions for certiorari even when a substantial issue and formal prerequisites for hearing exist. Their work has been criticized for arbitrary selection of "denied" cases for closer analysis to show why the Court should have accepted them for review, or what Hanus calls the "element of personal selectivity."³⁸ He also says about the Harper articles, ". . . there was no effort to place issues in a social or political context in order to illustrate the broader policy implications of the Court's actions."³⁹

Another study which deals with Court certiorari policy is by Tanenhaus et al.⁴⁰ One major argument is that certiorari petitions are sorted according to some method, according to seriousness or

³⁷Fowler V. Harper and Alan S. Rosenthal, "What the Supreme Court Did Not Do in the 1949 Term--An Appraisal of Certiorari," Univ. of Penn. Law Review 99 (1950-51):293-325; Harper and Edwin D. Etherington, "What the Supreme Court Did Not Do During the 1950 Term," Univ. of Penn. Law Review 100 (1951-52):354-409; Harper and George C. Pratt, "What the Supreme Court Did Not Do During the 1951 Term," Univ. of Penn. Law Review 101 (1953):439-479; Harper and Arnold Leibowitz, "What the Supreme Court Didn't Do in 1952," Univ. of Penn. Law Review (1953-54): 427-463.

³⁸Hanus, "Denial of Certiorari and . . . ," p. 43.

³⁹Ibid.

⁴⁰Joseph Tanenhaus, Marvin Schick, Matthew Muraskin and Daniel Rosen, "The Supreme Court's Certiorari Jurisdiction: Cue Theory," in Supreme Court & Public Policy, Martin M. Shapiro (Glenview, Ill.: Scott, Foresman & Co. 1969).

frivolity. The authors found that when certain "cues" were present, such as dissension in courts below or the presence of a civil liberties issue, certiorari was granted more often than when there were no cues. Hanus criticizes the authors for not making clear the implications of their findings for public policy.⁴¹ Hanus' own study differs from Tanenhaus' in this respect.

Schubert's article on "the Certiorari Game" deals mainly with game theory and strategy within the Court about what will be heard rather than the total decisions, and as such it focuses more on judicial role-playing than certiorari policy,⁴² especially in regard to petitions not accepted.

In the Federal Courts as a Political System, Goldman and Janige present a useful model of the judicial process (systems theory). They also comment upon some of the other judicial literature:

This demand flow/gatekeeping model of what cases and issues ultimately become formal output following Supreme Court review illuminates some empirical characteristics of Court policy making. . . . These policy proclivities of the Court are often explained in terms of judicial attitudes, backgrounds, or political sensitivities. However, as just suggested, an understanding of Court output also requires consideration of the nature of the demands made on the system as well as the nature of gatekeeping at any one period in time.⁴³

⁴¹Hanus, "Denial of Certiorari and . . . ," p. 44

⁴²Glendon A. Schubert, "Policy without Law: An Extension of the Certiorari Game," Stanford Law Review 14 (1962), pp. 284-327.

⁴³Sheldon Goldman and Thomas P. Janige, The Federal Courts as a Political System, (New York: Harper & Row, Publishers, 1971), p. 212.

The only main flaw I can find in these authors' work is their lack of empirical findings to support the model's contentions. Ulmer, it seems, has made a valid point in writing, "in studying the United States Supreme Court, quantitative methods appear to be most useful in establishing existing facts and their interconnections."⁴⁴ He qualifies this by recognizing that both generalization and verification are necessary for accumulation of knowledge.⁴⁵ Kort has stated that a quantitative method overcomes some limitations of a traditional qualitative appraisal of judicial action by illuminating relationships which cannot be fully explored by an exclusive reliance on qualitative interpretation.⁴⁶ This seems to be an important distinction: one reason cases denied review or those summarily decided are ignored by many scholars is that their large numbers require some quantification for careful study. A quantitative approach is necessary in order that systematic observation and measurement may be attained in studies of decisions of the Court as a whole.⁴⁷ This is especially true, Schubert contends, for examination of the total

⁴⁴S. Sidney Ulmer, "Homeostasis in the Supreme Court," in Judicial Behavior, Ed. by Glendon A. Schubert (Chicago: Rand McNally & Co., 1964), p. 163.

⁴⁵Ibid., p. 164.

⁴⁶Fred Kort, "The Quantitative Content Analysis of Judicial Opinions," The American Behavioral Scientist III (March 1960), 7:11-15. [Formerly--Political Research: Organization and Design.]

⁴⁷Glendon A. Schubert, Constitutional Politics, (New York: Holt, Rinehard & Winston, Inc., 1960), p. 9.

universe of the Court's cases in its increased workload.⁴⁸ Hanus expresses some limitations on quantitative investigation of the certiorari process and judicial strategy:

While some data is offered in Court opinions, law review articles, and a few studies which have been done on the certiorari process, it should be emphasized that inferential judgments are necessary because of a lack of information in this area.⁴⁹

Even judicial behavioralists who have utilized empirical data have, according to Becker, extended theoretical social science concepts beyond operational boundaries. He also faults them for failing to show theoretical import of their empirical work--especially involving overgeneralization from acquired data.⁵⁰ It is true that many studies have claimed to describe or explain the Court's work from the formal signed opinions, which do not form a random sample of all those handled. But a proper analysis of a random sample of all cases considered or refused by the Court would yield information about the true relative importance of various factors in relation to gate-keeping.⁵¹ The appellate process may be viewed in terms of facilities and their utilization in practice including the universe of cases

⁴⁸Schubert, Constitutional Politics, p. 9.

⁴⁹Hanus, "Denial of Certiorari and . . .," p. 42.

⁵⁰Theodore L. Becker, Political Behavioralism & Modern Jurisprudence, (Chicago: Rand McNally & Co., 1964), p. 9.

⁵¹Franklin M. Fisher, "The Mathematical Analysis of Supreme Court Decisions: The Use and Abuse of Quantitative Methods," American Political Science Review 52 (June 1958), 2:330

available for decision along with procedures for decision-making.⁵² The latter is impossible to study in its entirety because the Supreme Court Justices refuse to allow direct observations. Looking at the universe of all cases available for decision also presents problems. Hanus acknowledged in his article that there may be other ways of finding and studying such cases, but that the only feasible one he has found is time-consuming use of The United States Law Week.⁵³ Casper and Posner also found Law Week to be their only available source for substance of cases without signed opinions.⁵⁴ However, even Law Week does not contain case summaries of those on the Miscellaneous Docket.⁵⁵ Furthermore, Goldman and Janige have found that:

. . . with virtually all the Court statistics examined where there is more than one source reporting . . . there are almost always minor and sometimes major discrepancies in the figures. For example, in trying to determine cases filed, cases disposed of and cases left pending for the Supreme Court's 1966 term, the Harvard Law Review, the Statistical Abstract, Law Week, and Congressional Quarterly Almanac were checked. No two agreed on all figures.⁵⁶

Although this may seem to be overemphasis on approach, Sprague seems to have a valid point in his contention that methodological considerations are unavoidable in judicial studies.⁵⁷

⁵²James Herndon, "The Role of the Judiciary in State Political Systems," in Judicial Behavior--A Reader in Theory & Research by Glendon A. Schubert (Chicago: Rand McNally & Co., 1964), p. 155.

⁵³Hanus, "Denial of Certiorari and . . .," p. 45. Law Week is published by the Bureau of National Affairs, Inc., Washington, D.C.

⁵⁴Casper & Posner, "A Study of the Supreme Court's Caseload," p. 373.

⁵⁵Ibid., p. 374.

⁵⁶Goldman and Janige, The Federal Courts as . . ., p. 32 fn.

⁵⁷John D. Sprague, Voting Patterns of the United States Supreme Court, (Indianapolis: Bobbs-Merrill Co., Inc., 1968), p. 3.

SUPREME COURT JURISDICTION AND PROCEDURE

In keeping with Charles Hyneman's appraisal of the current state of political science research into the judicial process,¹ this section--on how the Court handles its business--will be an attempt to place description within a theoretical framework, using general systems concepts, since systems analysis is suggestive for research on judicial conversion.² The judicial process as a whole seems to gain meaning when observed through the structure of systems theory, although inputs are stressed in this study.

Several classes of inputs for the Supreme Court may be distinguished. Demands from litigants are the most direct and literal source of input.³ But a second general source is the case record and briefs and may be, at a later stage, oral argument before the Court.⁴ Demands also may be viewed as actions resulting from lower court decisions which may have originated in legislative or executive actions.⁵

¹Theodore L. Becker, "On Science, Political Science, and Law," American Behavioral Scientist 7 (December 1963) 4:11-12.

²Sheldon Goldman and Thomas P. Janige, The Federal Courts as a Political System, (New York: Harper & Row, Publishers, 1971) p. 274.

³Glendon A. Schubert, Judicial Policy-Making. Rev. ed. (Glenville, Ill.: Scott, Foresman & Co., 1974), p. 144.

⁴Ibid., p. 148.

⁵Joel B. Grossman and Richard S. Wells, Constitutional Law and Judicial Policy-Making, (New York: John Wiley & Sons, Inc., 1972), p. 34.

The inputs the Court receives vary in proportions of subject matter, it would seem, in accordance with the types of actions the other branches of government are engaged in as well as with the "mood of the times" on certain issues. An example, in the words of former Chief Justice Earl Warren:

I have heard a great many people say to me, "Well, I agree with your opinions on these civil rights, all right, but don't you think you are going too fast?" Of course, the answer to that is "We haven't anything to say about how fast we go." We go with the cases that come to us, and when they come to us with a question of human liberties involved in them, we either hear them and decide them, or we let them go and sweep them under the rug, only to leave them for future generations.⁶

Another distinction in inputs is that of type of access the case has to Court judgment. The series of rules which regulate the demands, or inputs, are formal and informal (i.e., dictated by practice) and may be called the Court's jurisdiction.⁷ There is an important area of jurisdiction in which the formal and working rules are in conflict, at least at present: the distinction between certiorari and appeals.

Certiorari v. Appeals

Technically, the writ of certiorari is an order to a lower court directing it to transmit case records to the Supreme Court.⁸ Since

⁶ James F. Simon, In His Own Image: The Supreme Court in Richard Nixon's America, (New York: David McKay Co., Inc., 1973), pp. 63-64.

⁷ Grossman & Wells, Constitutional Law and . . ., p. 34.

⁸ Glendon A. Schubert, Constitutional Politics, (New York: Holt, Rinehart & Winston, Inc., 1960), p. 89.

1925, certiorari has been the main route of access to the highest court's judgment. Ninety percent of the cases the Court is asked to decide now come to it by writ of certiorari, mostly from federal courts of appeals and state appellate courts.⁹ Rule 19 is the most important official statement of Court standards for granting or denying certiorari. It gives the following jurisdictional guidelines for the types of cases the court will review:

1. A Court of Appeals decides a point of local law contrary to local statutes or decisions
2. A Court of Appeals departs from the usual standards for judicial proceedings.
3. A conflict between a Supreme Court and a lower court's rulings
4. A conflict in circuits
5. An important decision on which the Court has not ruled.¹⁰

The Justices have absolute discretion over which certiorari cases it will hear.

But, also in the 1925 Judges' Bill is the provision that the Court must accept jurisdiction in certain types of cases. In federal jurisdiction it must hear an appeal from a circuit court claiming that a state statute violates the Constitution, or U.S. treaties or laws. It must also hear direct appeals from lower federal courts on any decision that finds an act of Congress unconstitutional. And it must

⁹Schubert, Constitutional Politics, p. 91.

¹⁰Schubert, Judicial Policy-Making. p. 70.

answer questions on decisional rules from appeals courts.

"Finally, in the exercise of its supervisory role over the state courts, the Supreme Court must hear an appeal first when a state tribunal has declared an act of Congress or treaty unconstitutional, and second, when a state law has been attacked as violating the United States Constitution and has been sustained by the appropriate state court."¹¹

Schubert has stated that the Court now dismisses a majority of the appeals filed, making appeals jurisdiction almost as discretionary as certiorari jurisdiction. "Appeal dismissed for want of jurisdiction" now means essentially the same thing as "certiorari denied."¹² Part of the similarity in handling probably arose from the fact that a certiorari petition is essentially the same in form as an appeals jurisdictional statement. The Court cited authority to the merits in appeals dismissals before 1946, but has seldom cited any authority since then--just as it cites none when certiorari is denied.¹³

The Clerk of the Supreme Court, who Schubert credits with disguising the gap between Court appellate practice and the "black letter of the law,"¹⁴ has even acknowledged the similarity in present handling

¹¹John Pearson Roche, Courts and Rights, 2nd ed. (New York: Random House, 1966): 42.

¹²Schubert, Constitutional Politics, p. 93.

¹³Harvard Law Review 69, "Supreme Court per Curiam Practice: A Critique," 1955-1966, p. 711.

¹⁴Schubert, Judicial Policy-Making, p. 80.

of certiorari and appeals. He is cited as saying that "jurisdictional statements and petitions for certiorari now stand on practically the same footing," with the qualification that dismissal for lack of substantial federal question in an appeal "usually entails some consideration on the merits."¹⁵ Like denials of certiorari, appeals dismissals are now most frequently disposed of in brief per 16

In the American Bar Association Journal, August 1973, Justice Brennan is quoted as saying there seems to be "overall agreement between Study Group members, scholars of the law, and Supreme Court Justices that the existence of two distinct lines of access to the Supreme Court, appeal and certiorari, can no longer be justified." The Freund Study Group, appointed by Chief Justice Burger, recommended eliminating obligatory appellate jurisdiction.¹⁷ But, according to Posner and Casper the proposal is not expected to reduce the Court's workload very much, since there does not appear to be any real difference in the present Court's treatment of appeals and certiorari petitions.¹⁸

¹⁵Harvard Law Review 69, "Supreme Court Per Curiam . . . ," pp. 711-712.

¹⁶Fowler V. Harper and Alan S. Rosenthal, "What the Supreme Court Did Not Do in the 1949 Term--An Appraisal of Certiorari," Univ. of Penn. Law Review 99, (1950-51):283.

¹⁷Paul A. Freund et al., "Caseload of the Supreme Court," Federal Rules Decisions 57 (December 1972): 587.

¹⁸Gerhard Casper and Richard A. Posner, "A Study of the Supreme Court's Caseload," The Journal of Legal Studies III (June 1974), 2: 342-343.

There are other types of writs: the extraordinary writs of mandamus, prohibition, habeas corpus, and certiorari but during the period from 1945 to 1956 these amounted to only five cases out of 1658,¹⁹ and practice concerning them has not changed. Certification is not a usual process of appellate review by the court.²⁰

Policy and Discretion in Gatekeeping

The importance of the discretionary nature of Supreme Court jurisdiction is that the Court controls itself by regulating all inputs.

It is difficult to predict when the Court will accept a case, but merely agreeing to hear a dispute is a vital stage in the development of legal policy. The Supreme Court cannot process all social disputes, and it may refuse to handle even those which it could adjudicate. The Constitution itself provides the justification for certain judicial rules to avoid inputs.²¹

This has important implications for Court policy. Policy, as described by Easton, is the authoritative allocation of values, which may work to deprive a person of an already possessed value, or one which might have been attained, or thirdly, it may give some persons access to values while denying them to others.²² Hanus elaborates

¹⁹Schubert, Constitutional Politics, p. 89.

²⁰Ibid.

²¹Jay A. Sigler, An Introduction to the Legal System, (Homewood, Ill.: The Dorsey Press, 1968), p. 90.

²²David Easton, A Framework for Political Analysis, (Englewood N.J.: Prentice-Hall, 1965), p. 50.

on the nature of Court Policy:

Analysis of policy vis-a-vis certiorari denial requires recognition of only two characteristics of policy. First, policy is usually understood to be a consistent pattern of conduct relative to a particular type of subject matter. Its second characteristic is the intent of the policy-makers to maintain or implement this conduct.²³

Policy, as such, may function either positively or negatively to achieve value allocation in consistent patterns. Harper, using a slightly different term, has recognized that if the Court declines to consider a particular set of cases for a number of years, it may be that the Court has a strategy.²⁴ Casper and Posner, looking at the more "positive" policy aspect note that the creation of new rights or the expansion of existing legal rights will increase inputs to the Court.²⁵ This, to some extent, contradicts the volume of judicial studies that place the Court in a passive role as far as positive input is concerned. They also include the regulation of demands by power of review in their discussion of policy.²⁶

Goldman and Janige call Supreme Court discretion in jurisdiction "gatekeeping."²⁷ They discuss empirical dimensions of gatekeeping

²³Jerome J. Hanus, "Denial of Certiorari and Supreme Court Policy-Making," American Univ. Law Review 17 (1967):46.

²⁴Harper & Rosenthal, "What the Supreme Court Did Not Do . . . ," Univ. of Penn. Law Review, p. 317.

²⁵Casper and Posner, "A Study of the Supreme Court's Caseload," p. 348.

²⁶Ibid.

²⁷Goldman and Janige, The Federal Courts as a . . ., p. 205.

in connection with how the judicial system protects itself from "demand input overload" and observe that "if gatekeeping were carried out in a completely random manner, then these processes would be of no greater interest than an economical way by which vast numbers of cases are disposed of with minimal expenditure of judicial time, energy, or resources."²⁸ This is a critical distinction: either the Court does have a gatekeeping policy or it essentially chooses a random sample--no one has effectively demonstrated either possibility. Goldman and Janige, in review of cue theory, found that the Supreme Court control of demand input via certiorari was not policy neutral--that the cues Tanenhaus studied are policy oriented.²⁹ Although such a study is certainly useful in its attempt to see if the Court does have a policy, the cues studied represent only a few of the possible gatekeeping devices used by the Justices, as the authors recognized: ". . . the norm enforcement/policy-making dichotomy is at the heart a qualitative distinction. An analysis of gatekeeping, however, suggests that the real distinction is more properly a quantitative one."³⁰

A single quantitative study would look at the proportions of

²⁸Goldman & Janige, The Federal Courts as a . . ., p. 205.

²⁹Ibid., p. 131; Glendon A. Schubert, Judicial Behavior--A Reader in Theory & Research, (Chicago: Rand McNally & Co., 1964); and Sigler, An Introduction to Legal System.

³⁰Goldman & Janige, The Federal Courts as a . . ., p. 213.

certain subject matter in the inputs to the Court, and compare these proportions with those in the output. In such a conceptual scheme the conversion process is divided into two parts: the decision to grant review (or gatekeeping) and, if review is granted, the decision on substantive issues.³¹

Grossman and Wells underplay the impact of the gatekeeping policy role, however, in their distinction between the two parts of the conversion process: ". . . vastly more cases are 'decided' by denying review than after a full hearing on the merits. Most important policy making takes place in the second stage, although by establishing a particular pattern of denials of review the Court may indeed have a policy impact."³² As a result of this (subjectively) improper de-emphasis of gatekeeping the authors failed to include cases denied review in their analysis of output. Again, who can say, without thorough study, which decisions are more "important?" Gatekeeping processes determine which cases will be the subject of Court output--in the form of judgments and opinions as well as non-judgments.

Non-judgment may well be a misnomer. According to the formal rules, certiorari is granted only in cases where there will be a settlement affecting the public rather than just the parties involved,

³¹ Joel B. Grossman and Richard S. Wells, Constitutional Law and Judicial Policy-Making, (New York: John Wiley & Sons, Inc., 1972), pp. 34-35.

³² Ibid., p. 35; Note: the same problem is encountered in Joel B. Grossman, "A Model for Judicial Policy Analysis," In Frontiers of Judicial Research, eds. Joel B. Grossman and Joseph Tanenhaus, (New York: John Wiley & Sons, Inc., 1969), p. 418.

where there is "real injury," and where there is a conflict between courts.³³ Sigler states that the Court often ignores "real injury" if it especially wants to hear a particular case.³⁴ He also has found that a case accepted for review will usually involve a fundamental and unresolved issue, often constitutional in nature, or if an individual right is involved. If the case involves a fresh interpretation of a statute or there has been a lower court deviation from a Supreme Court decision, a case will more likely be heard.³⁵ Although the importance of issues in a case is officially cited by the Court most frequently as reason for accepting a case, it is not very useful for an understanding of the Court's jurisdiction. This is because the Court has carefully avoided providing standards for determining "importance"--other than the fact that four justices believe the case should be decided.³⁶ True, it does appear necessary that the record of the case be adequate, that the issue(s) be presented clearly and that it meet certain standards, such as time limits in filing, for a case to be seriously considered.³⁷ But discretion plays a large part in the granting or denying of certiorari or appeals.

The Court gives very few reasons for denial of hearing.

³³Harry G. Fins, *Federal Jurisdiction and Procedure*, (Chicago: The Bobbs-Merrill Co., Inc., 1960), p. 184 n.

³⁴Sigler, An Introduction to the Legal System, p. 191.

³⁵Ibid., p. 193.

³⁶Joseph Tanenhaus, Marvin Schick, Matthew Muraskin, and Daniel Rosen, "The Supreme Court's Certiorari Jurisdiction: Cue Theory," in The Supreme Court and Public Policy by Martin M. Shapiro, (Glenview, Ill.: Scott, Foresman & Co., 1969), p. 34

³⁷Grossman & Wells, Constitutional Law . . . , p. 150.

Frankfurter's opinion in Maryland v. Baltimore Radio Show, 338 U.S. 912, in 1950, is the "classic" Court statement on reasons for denial of hearing:

The sole significance of . . . denial of a petition for writ of certiorari . . . simply means that fewer than four members of the Court deemed it desirable to review a lower court decision. A variety of considerations underlie denials of the writ, and as to the same petition different reasons may lead different Justices to the same result. Narrowly technical reasons may lead to denials. Review may be sought too late; the judgment of the lower court may not be final; it may not be the judgment of a state court of last resort; the decision may be supportable as a matter of state law. A decision may satisfy all these technical requirements and yet may commend itself to fewer than four members of the court.

The Court has always rigorously insisted that a denial of hearing implies anything about the Justices' views on the merits of a case.³⁸ Functionally, though, a denial of hearing has the same effect as an affirmation of lower court judgment. Because of the Court's secrecy it is difficult to challenge the contention that the Justices do not consider the merits at all in gatekeeping. Only occasionally does the Court allude to reasons for granting review; even less frequently is any reason given for denial and then must be inferred from a dissenting opinion in a per curiam denial or dismissal--and even if a Justice feels strongly enough to dissent, grounds for opposition are rarely stated.³⁹

³⁸Schubert, Constitutional Politics, pp. 111-112.

³⁹Harper & Rosenthal, "What the Supreme Court Did Not Do . . . ," p. 315.

Harper and Pratt, however, have carefully observed the Court and have somewhat penetrated the "purple curtain" of secrecy. They hypothesize that it may be true that any specific denial may mean nothing about the Court's view on the merits, but if the cases are viewed as a whole, hearing is granted most often in cases where the Court disapproved of the lower court decisions involved. Conversely, this implies some degree of approval of a decision below if the case is denied hearing.⁴⁰ Or, in the words of Schubert:

The Court has available and utilizes three alternative forms of mandate in order to signify summarily its agreement with the decisions of lower courts. Which form it invokes depends upon the type of review process (certiorari or appeal) and the type of lower court (state or national) associated with the case. In certiorari cases, the Court frequently expresses summary agreement by denying the writ; in appeals from state courts, the Court accomplishes the same purpose by dismissing the jurisdictional statement, and in appeals from U.S. District Courts, the Court summarily affirms, on the merits, the decision of the lower court.⁴¹

Dahl, likewise, has studied the record and arrived at the same conclusion as Harper and Schubert. However, he goes further to hypothesize that the reason the Court insists its decisions are made purely on constitutional grounds, rather than on the basis of the Justices' policy views, is in order to protect its legitimacy.⁴²

⁴⁰Fowler V. Harper and George C. Pratt, "What the Supreme Court Did Not Do During the 1951 Terms," Univ. of Penn. Law Review 101 (January, 1953):446.

⁴¹Glendon A. Schubert, Judicial Policy-Making, Rev. ed. (Glenville, Ill.: Scott, Foresman & Co., 1974), pp. 70-71.

⁴²Robert Dahl, "The Supreme Court and Judicial Review," In The Impact of Supreme Court Decisions, 2nd ed. Eds. Theodore L. Becker and Malcolm M. Feeley (New York: Oxford Univ. Press, 1973) p. 48.

Grossman has said that the essence of the Court's jurisdiction in certiorari matters lies not in the rules, but in the subjective concerns, and interests, and feelings of nine individual justices.⁴³ He backs this contention with Justice Harlan's 1958 statement: "Frequently the question whether a case is 'certworthy' is more a matter of 'feel' than of precisely ascertainable rules."⁴⁴ And in reading the literature on judicial policy one may quickly tire of reading the phrase "reviewability is solely a matter of sound judicial discretion," in relation to Rule 19.

In connection with discretion, scholars have pointed out other likely possibilities that the Justices routinely take into account in their gatekeeping practice. These include: whether substantial litigation is tied up in lower courts in anticipation of a Court decision on an issue, whether the Solicitor General requests hearing, where an obvious miscarriage of justice exists, where the death penalty is involved, and where a respected judge has publicly denounced a certain lower court decision.⁴⁵ Gibbs notes, in addition: whether a case has become moot, improperly raised federal questions where an adequate non-federal ground exists, whether all other remedies have been exhausted, and which lower court last heard the case.⁴⁶

⁴³Eugene Grossman, "The National Court of Appeals: A Dissent," American Bar Association Journal 59 (March 1973): 256.

⁴⁴Ibid.

⁴⁵Paul Abraham Freund, The Supreme Court of the United States, (Cleveland: World Publishing Co., 1961) p. 150.

⁴⁶Robert W. Gibbs, "Certiorari: Its Diagnosis and Cure," Hastings Law Journal 6 (February 1955): 148.

Within the Court there are individual policy attitudes that may well be very important. The judicially timid, it has been said, may seek to avoid hearing cases in areas "too actively political."⁴⁷ Furthermore, if a Justice feels a case may be decided adversely, to his viewpoint, he may vote against review to avoid adding the Court's authority to a decision he dislikes.⁴⁸ The Court may refuse to hear a certain body of cases in order to postpone a controversy until feelings about the issue have cooled or to allow time for its own views to develop.⁴⁹ Similarly, various Washington Post editorials have suggested that the "conservative" Nixon appointees on the Court are delaying action on civil rights and environmental issues in expectation of Justice Douglas' probable retirement.

Delay, then, or what the Court often calls the consideration of "ripeness" of a case, is frequently given as another aspect of the Court's gatekeeping policy. There appears to be room for debate on the relative potencies of the various factors which may (or may not) influence the Court in its gatekeeping practice. No one can know for sure what these are, however, given the secrecy, past and present, of the Justices. It may be that the Supreme Court, for reasons of legitimacy, prefers not to call any attention to the fact that it does, in fact, deny hearing to such a large proportion of the cases that

⁴⁷ Sigler, Introduction to the Legal System, p. 191.

⁴⁸ Harper & Rosenthal, "What the Supreme Court Did Not Do . . .," p. 317.

⁴⁹ Sigler, Introduction to the Legal System, p. 192.

come to it for decision. The variability of gatekeeping procedures, both formal and informal, is important in distinguishing the differences between these cases denied full hearing and those which are accepted. The essential difference between the two categories of cases comes down to the simple distinction of whether the Justices did grant hearing; no other distinction holds consistently.

Besides the discretion clearly present in the first part of the conversion process, there is an area which lies between outright acceptance and rejection of a case, and formal hearing per se. This is the area of docketing, which has important implications for the treatment a case will receive from the Supreme Court.

Docketing and the Jurisdictional Decision

The docketing procedures the Court uses seem to be part of the early conversion process in that it serves as a first step in the actual decision process, when the Court is sifting through the cases and selecting issues for serious consideration. Because of the large volume of cases that must be docketed, the first step requires staff assistance, or the law clerks' summarizing of cases.⁵⁰ Rehnquist has noted the considerable potential influence the clerks may exert in the "decision to decide."⁵¹

⁵⁰ Henry M. Hart, Jr., "The Supreme Court, 1958 Term; Foreword," Harvard Law Review 73 (November 1959): 273.

⁵¹ Schubert, Constitutional Politics, p. 141.

Until 1970, there were three dockets: the Original (composed of only a few cases), the Appellate, and the Miscellaneous. The Miscellaneous Docket, until it was consolidated with the former Appellate Docket four years ago,⁵² consisted of all appeals and certiorari cases in forma pauperis and extraordinary writs. According to Schubert, only a handful of these cases are removed to the Appellate Docket in any term; the proportion of the cases on the former Miscellaneous Docket (now the 5000 series of the Appellate Docket) that are denied review is generally between ninety-seven and one hundred per cent. Before the cases on this docket have any reasonable chance of obtaining hearing, they must be transferred within the Appellate Docket and be given new docket numbers.⁵³

The cases in the 5000 Series are nearly impossible to study, according to Harper and Rosenthal, because the clerk does not compile a list of them and consequently the Court reports contain only the docket numbers and names of the parties; there is ordinarily no citation to the case below.⁵⁴ Part of this is undoubtedly due to the fact that so many of the in forma pauperis cases are improperly filed and are, according to various Court observers, frivolous.

At least 95 per cent of unpaid cases are denied or dismissed,

⁵² Schubert, Judicial Policy-Making, p. 126.

⁵³ Schubert, Constitutional Politics, p. 95.

⁵⁴ Harper & Rosenthal, "What the Supreme Court Did Not Do . . . ,"
p. 302.

according to Schubert⁵⁵ and of those that are placed on the "discuss list," many are decided summarily on the merits with no opportunity for oral argument.⁵⁶ Unlike the Appellate Docket cases, those in the 5000 Series are sorted out in the Chief Justice's office, by his clerks, and those concerning important issues may be brought up for hearing. A justification of this process has been that frequently only one copy of an in forma pauperis petition is filed with the Court.⁵⁷

There has been the expectation, in principle, that the Court will hear oral argument and reach a formal decision on the merits for those cases jurisdictionally placed on the Appellate Docket. In practice, over seventy-five per cent of these cases are disposed of on procedural or jurisdictional grounds (on second hearing) rather than on the merits⁵⁸ and argument sometimes may reveal that the grounds on which hearing was granted do not exist or on an apparent conflict of decisions--and the Court usually dismisses these writs as improvidently granted, making them equivalent to initial denial of review.⁵⁹ Like the 5000 Series, the Appellate Docket is often difficult to

⁵⁵Schubert, Judicial Policy-Making,

⁵⁶Ibid., p. 126

⁵⁷Harper & Rosenthal, "What the Supreme Court . . . ," p. 296.

⁵⁸Schubert, Constitutional Politics, p. 95.

⁵⁹Bennett Boskey, "Mechanics of the Supreme Court's Certiorari Jurisdiction," Columbia Law Review 46 (1946) p. 264; Abraham L. Davis, The United States Supreme Court and the Uses of Social Science Data, (New York: MSS Information Corp., 1973): 921.

analyze; only Law Week cites the official substance of the case, and this brief summary frequently is inadequate for use in determining the issues on which the Court ruled, according to Harper.⁶⁰

Unlike the in forma pauperis cases, those on the Appellate Docket are granted or denied hearing by the Court, sitting as a whole. The guidelines for granting review commonly called the "Rule of Four" are as follows:

1. Regardless of the number of Justices sitting, four must vote in favor of scheduling a case for oral argument on the merits.
2. The group of the Court controlling the grant of certiorari can define which questions in a case it will decide.
3. Justices may concur or dissent--in written opinion or without opinion--about the grant for oral argument.
4. After granting review, the Justices are obliged to vote on the merits of the questions the Court accepted for decision.⁶¹

The Court refuses to explain why it accepts or rejects cases for hearing as a matter of policy. The Administrative Officer of the United States Courts in 1971 did not, as was formerly customary, publish the number of Appellate Docket grants, denials, and dismissals. Schubert has called this deliberate policy, since it was brought to the attention of the Administrative Office.⁶²

⁶⁰Harper & Rosenthal, "What the Supreme Court . . . ," p. 302.

⁶¹Schubert, Constitutional Politics, pp. 99-100.

⁶²Schubert, The Judicial Mind, p. 72; Schubert, Judicial Policy-Making, p. 72.

Decision "On the Merits"

A second part of the conversion process, when the cases have been selected for formal decision, is the stage where hearing and oral argument actually occurs. Although this part of the conversion process, where demands become formal output, concerns only a small number of the total cases, it is the step in the process that is most publicized. The Washington Post regularly prints summaries of the cases heard at this point, and the general public's image of Supreme Court decision-making is probably for the most part an image of this one small facet of the Justices' work. This simplified viewpoint does not take into account formal cases in the form of Summary or per curiam decisions.

Summary Judgment

These decisions, according to Harper, are misunderstood; they are considered, often even by lawyers and judges, to be a "disposition on the merits," since the Clerk includes them in the compiled Official Statistics.⁶³ It used to be assumed that summary action on an appeal only occurred when there was a technical problem in filing, or a lack of federal question, but today per curiam practice includes "disposition of formal cases on the merits without motion, argument, or briefs."⁶⁴ Schubert has stated that such summary judgment is

⁶³Harper & Pratt, "What the Supreme Court . . .," p. 451.

⁶⁴Harvard Law Review 69, "Supreme Court Per Curiam Practice: A Critique," (1955-56): 708.

being rendered in an increasing percentage of the cases decided "on the merits."⁶⁵

The mechanics of summary hearing vary: sometimes a case will be decided summarily on the merits at the same time the statement of jurisdiction is made.⁶⁶ In other cases, during their scheduled time for hearing, the Justices look only at the certiorari briefs and lower court records because the issues involved are clear enough that further argument is unnecessary. The most important function of this type of hearing is for decision on "satellite cases"--those cases which are docketed at nearly the same time and which raise the same policy issue as another case which the Court has chosen to decide with a written opinion.⁶⁷

Per curiam decisions are characterized by an anonymous opinion (one not assigned to be written by a particular Justice) for the whole Court. They are most often used to dismiss state appeals and to affirm appeals from federal district courts and for jurisdictional disposition in appeals cases, since the fiction that all appeals are heard "on the merits" apparently must be protected.⁶⁸ There is disagreement within the Court about the increasing use of these short statements of decision that are often without a citation of authority

⁶⁵Schubert, Constitutional Politics, p. 93.

⁶⁶Schubert, Judicial Policy-Making, p. 69.

⁶⁷Ibid., p. 70.

⁶⁸Ibid., p. 72.

for the judgment; but per curiams seem to provide a compromise between an absolute decision not to hear a case, and a reasoned formal disposition with signed opinion.⁶⁹ These cases, most of which are disposed of jurisdictionally or as "satellite cases" are generally ignored first because it is difficult to find details about them, such as their substance, and second, because so many are non-controversial, with neither concurring nor dissenting opinions.

Formal Disposition

A discussion of the formal opinion disposition is unnecessary here, I believe, except for definitional purposes, because so much of the work in judicial research has concentrated on this step in the conversion process and its output. A formal decision is, simply, one in which oral argument is heard by the Court, after which a vote is taken and the Court's opinion is assigned to be written by a Justice voting with the majority. Often these cases are accompanied by one or more concurring and/or dissenting opinions written by Justices voting in the minority who want to clarify their position(s) on the case. The output of the Court in this form seems to be the output that the Court wants to publicize, especially since it is the product of more thorough processing and judicial reasoning than the cases which are disposed of in a perfunctory manner. This output is the most readily available source of clues about the nature of the

⁶⁹Harvard Law Review, "Supreme Court Per Curiam . . . ," p. 707.

conversion process, because of the secrecy maintained by the Court, stated earlier. But in looking at policy norm patterns, it is important that all outputs of the conversion process be studied, rather than simply a small percent of the total--the formal opinion cases.

THE DATA

The data for the study are from U.S. Law Week, which generally is considered to be the only source readily available for determination of case substances for the bulk of cases reaching the Supreme Court. Even though Law Week is the best possible source of data, it has a serious limitation in that it does not include summaries of the 5000 Series, or in forma pauperis cases. This is probably because of the difficulties in obtaining useful information about them, as stated earlier.

Casper and Posner found that in 1971, 83 per cent of the cases in the 5000 Series involved criminal litigation.¹ They suggest that, due to the homogeneous nature of the unpaid cases, random sampling might be a possible strategy for studying them.² A large majority of these cases are claims of violation of due process, and only a few are ever transferred to the Appellate Docket for hearing on the merits; the proportion denied review for four consecutive years ranged from 98.7 to one hundred per cent.³ Even though this group of cases cannot

¹Gerhard Casper and Richard A. Posner, "A Study of the Supreme Court's Caseload," The Journal Of Legal Studies III (June 1974) 2:352.

²Ibid., p. 372.

³Glendon A. Schubert, Constitutional Politics, (New York: Holt, Rinehart & Winston, Inc., 1960), p. 95.

be considered here, it should be kept in mind that, were they included in the data, they would almost certainly inflate the numbers of 1) criminal litigation denied review and 2) civil liberties cases denied review.

Coding of the cases followed the explanatory guidelines set down in Law Week for determining the type of review each case received:

"Grant of Review," as used in the following summary of orders, is evidenced in appeal cases by the Court's action 1) noting probable jurisdiction to the hearings on the merits or 2) postponing the question of jurisdiction to the hearing on the merits; in certiorari cases, by the granting of certiorari. In all cases where review is granted, oral argument will follow.

"Disposal by summary action" in appeals cases is evidenced by a per curiam order affirming, reversing or vacating the appeal; in certiorari cases, by a per curiam order granting the petition for certiorari and simultaneously affirming, reversing, or vacating the judgment below.

"Denial of review" relates only to certiorari cases and is evidenced by denial of certiorari.⁴

In this study "denial of review" will include dismissal of appeals since the consequences are equivalent to denial of certiorari.

Formal hearing is treated as a sub-category of "grant of review," and this classification consists of those cases argued orally and including signed opinions. The reasons for distinguishing between a grant of review and formal disposition are as follows: there may be a difference in Supreme Court gatekeeping policy for access to formal versus summary hearing, and if no differences exist, this will lend legitimacy to the study of only formal decisions. If, however, a

⁴United States Law Week, Washington, D.C.: Bureau of National Affairs.

difference is found, it may contribute to an understanding of the entire gatekeeping and review process.

The cases listed in the Law Week indexes for the 1971 through 1973 terms comprise the universe of cases. This time period begins with the 1971 term since only then did the Court become the distinctive Burger Court, with its full number of Nixon-appointees. Casper and Posner, among others, have suggested that this new Court may curtail a number of substantive and procedural rights established by the Warren Court, which may affect the nature of inputs in the civil liberties area,⁵ as well as criminal litigation. Although it was impossible to employ cross-tabulation to check the figures in this study, they compare favorably to corresponding statistics compiled by Law Week and Harvard Law Review.

Hypotheses and Findings

Whether the Court follows a basic policy for its selection of cases may be tested by examination of the following hypotheses:

Hypothesis A

Distribution of inputs to the court in the form of petitions for appeal or certiorari (I) differs from the distributions of cases granted review (R) according to the origin or type of case involved,

or $I \neq R$

⁵Casper & Posner, "A Study of the Supreme . . . ," p. 361.

Hypothesis B

These demands (I) differ in distribution from the distribution of types of cases granted formal hearing $R(f)$,

or $I \neq R(f)$

Support for these hypotheses will be considered to be a .001 level of significance for chi square values arrived at from testing distributions of different types of cases in the categories of review granted, denied, and formal hearing granted and denied. The large numbers of cases involved require this level of significance, since high level chi squares are often achieved when computing large samples.

If distribution of inputs to the Court (I) are approximately equal to the distribution of cases granted review (R), and likewise for formal hearing [$R(f)$], chi square tests will provide support for the null hypothesis:

$$I = R, \text{ and}$$

$$I = R(f)$$

that the court does not exercise a policy-making role in gatekeeping but simply hears a representative sample of the litigation addressed to it. If the analysis supports the null hypothesis, gatekeeping is of little interest except as an economical method for disposing of large numbers of cases.

The operational hypotheses were chosen because comparable ones have been suggested and studied by others, particularly Tanenhaus,⁶

⁶Joseph Tanenhaus, "The Application of Social Science Methods to the Study of the Judicial Process," In Judicial Behavior--A Reader in Theory and Research by Glendon Schubert (Chicago: Rand McNally & Co., 1964).

Table I

Decision to Grant Review by Type of Case (1971-1973)

Type Case	1971		1972		1973	
	Per cent Granted Review	Per cent Heard Formally	Per cent Granted Review	Per cent Heard Formally	Per cent Granted Review	Per cent Heard Formally
From State Courts	11	7	17.5	5	13	4
From Lower Federal Courts	20	9	26	9.5	21	8
Civil litigation	18.5	8	25.5	9.5	20	8
Criminal Cases	16	9.5	21	5.5	15.5	4
Tax Cases	25.5	4	19	13.5	13.5	3.5
Civil Liberties Cases	18	10	27	8	20.5	6
Total	18	8.5	24	8	14	6
	Total N = 1324		Total N = 1828		Total N = 2118	

Harper,⁷ Ulmer,⁸ et al. One proposition suggests that the Court has varied certiorari policy depending on the nature of the lower court from which a case may come. Gibbs has questioned this idea, however, since he has found no clear distinctions between the nature of the cases handled by each class of courts.⁹ Origin of a case in state or lower federal courts provides one plausible explanation of a factor that may influence the decision to grant review. This possible factor in gatekeeping might be dependent upon the difference in jurisdiction and type of case predominantly handled by the two different categories of court, or upon the nature of the relationship of the Supreme Court to the different lower courts from which cases arise.

Table II shows that a distinctly greater proportion of cases from lower federal courts are given consideration and formal hearing by the Court. For the entire period (1971 through 1973 terms) as well as the individual years, the difference is significant at the .001

⁷Fowler V. Harper and Alan S. Rosenthal, "What the Supreme Court Did Not Do in the 1949 Term--An Appraisal of Certiorari," Univ. of Penn. Law Review 99 (1950-51):293-325; Fowler V. Harper and Edwin D. Etherington, "What the Supreme Court Did Not Do During the 1950 Term," Univ. of Penn. Law Review 100 (1951-52):354-409; Fowler V. Harper and George C. Pratt, "What the Supreme Court Did Not Do During the 1951 Term," Univ. of Penn. Law Review 101 (January 1953):439-479; Fowler V. Harper and Arnold Leibowitz, "What The Supreme Court Did Not Do in 1952," Univ. of Penn. Law Review 112 (1953-54):427-463.

⁸S. Sidney Ulmer, William Hintze, and Louise Kirklosky, "The Decision to Grant or Deny Certiorari: Further Consideration of Cue Theory," Law and Soc. Rev. 6 (May 1972):637-644.

⁹Robert W. Gibbs, "Certiorari: Its Diagnosis and Cure," Hastings Law Journal 6 (February 1955):148.

Table II

Decision to Grant Review by Origin of Cases, by Year

	1971		1972		1973		1971-1973	
	Granted Review	Review Denied	Granted Review	Review Denied	Granted Review	Review Denied	Granted Review	Review Denied
From State courts	195	766	356	1003	321	1229	872	2998
From Lower Federal Courts	40	323	83	386	76	492	199	1201
	$\chi^2 = 15.0235$		$\chi^2 = 14.1245$		$\chi^2 = 14.2464$		$\chi^2 = 44.392$	
	Significance level = .001		Significance level = .001		Significance level = .001		Significance level = .001	
	Formal Review	Formal Review Denied	Formal Review	Formal Review Denied	Formal Review	Formal Review Denied	Formal Review	Formal Review Denied
	Formal Review	Review Denied	Formal Review	Review Denied	Formal Review	Review Denied	Formal Review	Review Denied
From State courts	90	871	128	1231	122	1428	340	3530
From Lower Federal Courts	25	338	24	445	22	546	71	1329
	$\chi^2 = 2.706$		$\chi^2 = 8.4642$		$\chi^2 = 10.9090$		$\chi^2 = 19.5524$	
	Significance level = .1		Significance level = .01		Significance level = .001		Significance level = .001	

level of significance. It is notable, though, that for 1971 a chi square value of 2.7253 was obtained (significant at .1) for the comparison between input and formal consideration. But this deviation did not alter the direction of the relationship; lower federal court petitions still received a greater proportion of formal hearing than one might expect from chance.¹⁰

Goldman and Janige suggest a reason for this finding: the Supreme Court may feel fewer inhibitions arising from considerations of federalism when dealing with federal rather than state courts, because of its established supervisory role over lower federal courts. Also, in federal cases, the Court ordinarily is involved in statutory interpretation as opposed to constitutional adjudication. "Members of the Court feel fewer qualms about the legitimacy, informational base, or ability to do irreparable harm in modifying federal rules than they do with state rules."¹¹

Since judicial review of administrative action is primarily handled by lower federal courts,¹² issues such as civil liberties may stand a better chance of achieving review if they come from lower federal courts in suits enjoining state officials from certain actions than if the civil liberties claim is in relation to an individual's

¹⁰ See Tables I and II.

¹¹ Sheldon Goldman and Thomas P. Janige, The Federal Courts as a Political System, (New York: Harper & Row, Publishers, 1971), p. 218.

¹² Glendon A. Schubert, Judicial Policy-Making, Rev. ed. (Glenville, Ill.: Scott, Foresman & Co., 1974), p. 76.

state-level trial, for instance, since it is easier to convince the Court that the former type of action will affect a large number of individuals.

Another possible reason that the Court grants review to a considerably larger proportion of cases from federal courts is that due to the formal rules concerning Supreme Court appeals jurisdiction, the Court very frequently disposes of them by affirming federal district courts and dismissing those appeals originating in state courts,¹³ which are both equivalent in their effect to denial of review.

Another distinction that might account for variance in Court gatekeeping procedure is that of civil and criminal litigation. Differences in the rate of hearing accorded these two categories of cases by the Court is, at least to a small extent, linked with the origin factor. Few state cases are reviewed by the Court, and this is especially true of state civil litigation where large areas of state judicial activity and law are beyond federal jurisdictional power.¹⁴

As may be seen in Tables I and III, civil litigation is consistently granted summary and formal review in greater proportions than in criminal litigation. For the three year period, civil cases were granted review significantly more frequently ($\chi^2 = 11.4639$, significant at .001) but formal hearing was granted to a slightly less

¹³Glendon Schubert, Quantitative Analysis of Judicial Behavior, (Glencoe, Ill.: The Free Press, 1951), pp. 56 and 65.

¹⁴Goldman and Janige, The Federal Courts as . . ., p. 21.

Table III

Decision to Grant Review by Type of Case, by Year

	1971		1972		1973		1971-1973	
	Granted Review	Review Denied	Granted Review	Review Denied	Granted Review	Review Denied	Granted Review	Review Denied
Civil litigation	155	680	304	892	290	1135	749	2707
Criminal Cases	80	409	135	497	107	586	322	1492
	$\chi^2 = 1.0875$		$\chi^2 = 3.8410$		$\chi^2 = 7.4469$		$\chi^2 = 11.4639$	
	Significance level = .3		Significance level = .05		Significance level = .01		Significance level = .001	
	Formal		Formal		Formal		Formal	
	Formal Review	Formal Review Denied	Formal Review	Formal Review Denied	Formal Review	Formal Review Denied	Formal Review	Formal Review Denied
Civil litigation	69	766	116	1080	115	1310	300	3156
Criminal Cases	46	443	36	596	29	664	111	1703
	$\chi^2 = .6660$		$\chi^2 = 9.1337$		$\chi^2 = 10.9793$		$\chi^2 = 10.5367$	
	Significance level = .5		Significance level = .01		Significance level = .001		Significance level = .01	

significant proportion ($X^2 = 10.5367$, significant at .01). Only one deviation in this pattern exists in the rate of formal hearing for cases in 1971; the proportion of criminal cases heard was larger, to an insignificant degree, than the proportion of civil cases heard in that term.

In actual numbers, if in forma pauperis petitions are considered, many more criminal petitions than civil petitions are filed. According to Casper and Posner, if one judges by applications for review, the Supreme Court's criminal caseload had increased to such an extent that by the 1957 term the Court had become primarily a criminal court of appeals.¹⁵ But they note, and findings presented in Table III confirm, that a different impression is obtained by an examination of the cases the Court actually reviews, with or without opinion.¹⁶ A large number of criminal petitions, especially those from state courts, raise constitutional issues, and many of these claims may be patently frivolous because ". . . the assumed decline in the willingness of the Court to review non-constitutional cases may induce applicants to attempt to clothe the issues they raise in a constitutional garb: these cases would show up in statistics as constitutional cases."¹⁷ If the declared issue is actually absent in these criminal cases, it might be expected that the Court would deny review.

¹⁵Casper & Posner, "A Study of the Supreme . . . ," p. 353.

¹⁶Ibid., p. 353 f.

¹⁷Ibid., p. 352.

It is reasonable that petitioners have attempted to prove the existence of civil liberties issues in their claims, since it is widely believed that the inclusion of such issues does increase the probability that a case will be granted review by the Court. Hanus has shown a connection between grant of review and the presence of one civil liberties issue--double jeopardy,¹⁸ while Schubert, Harper and Tanenhaus and their associates have found that the relationship holds for civil liberties as a whole. Ulmer, et al., however, found no statistically significant relationship between the Court's gatekeeping decision and the presence of a civil liberty question in his replication of the Tanenhaus study.¹⁹

Civil liberties in this study were coded according to Schubert's guidelines, in which they are defined as claims to personal (as distinguished from property) rights and freedoms, including freedoms of speech, press, religion, assembly and petition, as cited in the First Amendment. Included also are the fair procedure rules for criminal trials found in the fourth through eighth Amendments, as well as the fourteenth. "In short, any case for which the major question . . . related to a claim of personal freedom was classified as a civil

¹⁸Jerome J. Hanus, "Denial of Certiorari and Supreme Court Policy-Making," American Univ. Law Review 17 (1967) pp. 41-56.

¹⁹S. Sidney Ulmer, William Hintze, and Louise Kirklosky, "The Decision to Grant or Deny Certiorari: Further Consideration of Cue Theory," Law and Soc. Review 6 (May 1972) p. 641.

liberties case."²⁰

An inconsistent pattern emerged in the chi square values testing civil liberties questions as a possible "cue" signalling the Justices to grant review, and because of this the figures are included in the text in Table IV.

Only two of the possible six tests for this relationship achieved the .001 level of significance; and the fact that one, the 1972 data, is a subject of the other, 1971-73 data, indicates that the high 1972 chi square value influenced the value for the total period. Schubert cites as a reason for the large number of civil liberties cases granted review in the 1972 term the fact that 139 summary decisions based on the Court's capital punishment ruling inflated the number of certiorari grants for the term.²¹ These so-called "trailers" involved the civil liberties issue of "cruel and unusual punishment" and almost doubled the usual number of certiorari grants for any given term. No other figures suggest a significant relationship between the presence of a civil liberties question and grant of review, or formal hearing. In fact, for 1973, there was a somewhat larger proportion of non-civil liberties cases formally considered than one would expect from chance. The authors of the studies which found civil liberties to be granted review more frequently than other types of cases,

²⁰Glendon A. Schubert, The Judicial Mind, (Evanston, Ill.: Northwestern University Press, 1965), pp. 101-102.

²¹Robert W. Gibbs, "Certiorari: Its Diagnosis and Cure," Hastings Law Journal 6 (February 1955):78-79.

Table IV

Decision to Grant Review on Civil Liberties Cases, by Year

	1971		1972		1973		1971-1973	
	Granted Review	Review Denied	Granted Review	Review Denied	Granted Review	Review Denied	Granted Review	Review Denied
Civil liberties cases	121	536	264	708	211	814	596	2058
Non-Civil liberties cases	114	553	165	691	186	907	475	2141
	$\chi^2 = .3310$		$\chi^2 = 15.8525$		$\chi^2 = 4.4811$		$\chi^2 = 15.2301$	
	Significance level = .7		Significance level = .001		Significance level = .05		Significance level = .001	
	Formal Review	Formal Review Denied	Formal Review	Formal Review Denied	Formal Review	Formal Review Denied	Formal Review	Formal Review Denied
	Formal Review	Formal Review Denied	Formal Review	Formal Review Denied	Formal Review	Formal Review Denied	Formal Review	Formal Review Denied
Civil liberties cases	64	596	81	891	59	966	204	2450
Non-Civil liberties cases	51	616	71	785	85	1008	207	2409
	$\chi^2 = 2.0666$		$\chi^2 = 0$		$\chi^2 = 3.6095$		$\chi^2 = .0949$	
	Significance level = .2				Significance level = .1		Significance level = .8	

considered enlargement of rights by the Warren Court to be a probable cause, along with increased subsidization of legal services to criminal defendants. Apparently the differences in their findings and this study arise from the time differences; Tanenhaus, Harper, and Hanus all studied the middle-to-late Warren Court, not the Burger Court. If the trend continues toward increased review to non-civil liberties cases, and toward denial of Warren-era rights, one might expect an eventual decline in applications.²²

Schubert and Harper have looked at tax cases in relation to Supreme Court gatekeeping policy. These cases showed no discernible pattern nor statistically significant relationship to the review process, which is important in that a complete lack of policy is indicated by the figures shown in Table V. This illustrates that while the Court may follow a gatekeeping policy in relation to one group of cases it may have no coherent plan for acceptance of other types of litigation for hearing and argument.

²²Casper and Posner, "A Study of the Supreme Court's Caseload," p. 361.

Casper and Posner state ". . . the value of filing an application with the Supreme Court is a function in part of the probability review will be granted."

Table V

Decision to Grant Review on Tax Cases, by Year

	1971		1972		1973		1971-1973	
	Granted Review	Review Denied	Granted Review	Review Denied	Granted Review	Review Denied	Granted Review	Review Denied
Tax cases	20	58	24	101	19	121	63	280
Non-tax cases	215	1031	415	1288	378	1600	1008	3919
	$\chi^2 = 3.3319$		$\chi^2 = 1.6947$		$\chi^2 = 2.4770$		$\chi^2 = .9409$	
	Significance level = .1		Significance level = .2		Significance level = .2		Significance level = .5	
	Formal Review	Formal Review Denied	Formal Review	Formal Review Denied	Formal Review	Formal Review Denied	Formal Review	Formal Review Denied
	Formal Review	Formal Review Denied	Formal Review	Formal Review Denied	Formal Review	Formal Review Denied	Formal Review	Formal Review Denied
Tax cases	3	75	17	108	5	135	25	318
Non-tax cases	112	1134	135	1568	139	1839	386	4541
	$\chi^2 = 2.6677$		$\chi^2 = 5.7025$		$\chi^2 = 2.8925$		$\chi^2 = .1719$	
	Significance level = .2		Significance level = .02		Significance level = .1		Significance level = .8	

CONCLUSIONS

In relating the operational hypotheses to the major hypotheses, it seems there is evidence that the Supreme Court's control of demand input by use of the gatekeeping process was to some extent policy-oriented, particularly in relation to origin and type (civil or criminal) of case. Gatekeeping policy in relation to origin of case seems to be primarily related to administrative policy standards while the Court's policy on type of case may be a combination of many factors, including origin of the case, seriousness of the question raised, and the real or alleged civil liberties claim. It is quite possible that the apparent lack of gatekeeping policy with regard to civil liberties cases is due to the fact that the Burger Court appears to be in a transition period with regard to civil liberties questions and a new policy is not yet fully implemented. As discussed earlier, due to the "rule of four" it may be the strategy of individual Justices--in this case the liberal Justices still on the Court--to attempt to deny hearing to cases they feel their conservative brethren might decide contrary to their viewpoints when argued on the merits. The fact that it was only in the civil liberties area that a notable difference was found in review policy as compared to formal disposition policy suggests, likewise, that the Court may be in transition on its policy concerning individuals' rights.

Since no real agenda was discovered, the variation in gatekeeping

in relation to the different types of cases suggests that the process is affected by factors other than a decision on the part of the Court to accept certain types of litigation for decision. These may include political factors within the Court, as in the discussion of civil liberties above, administrative considerations aimed at decreasing caseload, response patterns between the Court and other governmental actors, and the records of the individual cases. While these factors may prove difficult to quantify and objectively study, they may be important variables to consider in further studies of this type.

The brief time span studied here may have caused the lack of variation from year to year (with the exception of 1972 when criminal and civil liberties questions were heard to a disproportionate degree) but a longer study might reveal changes over time, or a progressive nature of the gatekeeping policy process as the Court's priorities shift. A fuller picture of the Burger Court's gatekeeping policy may emerge if the Court develops certain patterns over time and as the membership changes. There are many other possible factors that may influence gatekeeping and these could contribute greatly to our knowledge of the Court's methods of choosing cases for review, especially if the factors could be studied and rank ordered by strength of relationship to grant of review and grant of formal hearing. Such factors as parties to the case (whether private, corporate, or governmental) should also be considered as possible factors influencing gatekeeping. Also, topic of linkages between the different factors influencing the gatekeeping process is another possibility for worthwhile research.

Beyond pointing out other directions for further study of Supreme Court certiorari policy, this research has been, in part, directed toward a placement of Supreme Court procedure within its political and social environment. In relation to the administration of the Court's workload, further careful study in the direction of this research would enable observers of the Court to provide constructive criticism of inadequacies in the Court's handling of its increasingly crowded docket. If periodic statistical studies of gatekeeping policy were published with other court statistics, lawyers petitioning the Court could better assess the probability their clients' cases might have of receiving hearing. This might reduce the number of submitted petitions, thereby allowing the Court more time to review the substance of accepted litigation. The problems encountered in data gathering for this type of study clearly indicate the pressing need for the development and implementation of a computerized docketing and data retrieval systems, for social scientists, lawyers, and judicial administrators. Current legal research has, of necessity, focused on readily accessible, though often incomplete, materials. The study has pointed out the advantages of an integration of law and social science, which will be more fully realized when information is more accessible.

BIBLIOGRAPHY

Books

- Abraham, Henry J. The Judiciary. Boston: Allyn & Bacon, Inc., 1965.
- Baade, Hans W., ed. Law and Contemporary Problems. Durham, N.C.: Duke University School of Law.
- Beaney, William M. "The Supreme Court: The Perspective of Political Science." In Perspectives on the Court, Evanston, Ill.: Northwestern University Press, 1965.
- Becker, Theodore L. Political Behavioralism and Modern Jurisprudence. Chicago: Rand McNally & Co., 1964.
- _____. Comparative Judicial Politics. Chicago: Rand McNally & Co., 1970.
- Becker, Theodore L. and Feeley, Malcolm M., eds. The Impact of Supreme Court Decisions, 2nd ed. New York: Oxford University Press, 1973.
- Beth, Loren P. Politics, the Constitution and the Supreme Court. Evanston, Ill.: Row, Peterson & Co., 1962.
- Campbell, Donald T. and Stanley, Julian C. Experimental and Quasi-Experimental Designs for Research. Chicago: Rand, McNally & Co., 1963.
- Dahl, Robert. "The Supreme Court and Judicial Review." In Impact of Supreme Court Decisions, 2nd ed. Edited by Theodore L. Becker and Malcolm M. Feeley. New York: Oxford University Press, 1973.
- Davis, Abraham L. The United States Supreme Court and the Uses of Social Science Data. New York: MSS Information Corp., 1973.
- Easton, David. A Framework for Political Analysis. Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1965.
- Everson, David H. and Paine, Joann Paparad. An Introduction to Systematic Political Science. Homewood, Ill.: Dorsey Press, 1973.

- Fins, Harry G. Federal Jurisdiction and Procedure. Chicago: The Bobbs-Merrill Co., Inc., 1960.
- Forrester, Ray; Currier, Thomas S.; and Moyer, John E. Federal Jurisdiction and Procedure. St. Paul, Minn.: West Publishing Co., 1970.
- Forte, David F. The Supreme Court in American Politics. Lexington, Mass.: D. C. Heath & Co., 1972.
- Frankfurter, Felix and Landis, James M. The Business of the Supreme Court. New York: MacMillan Co., 1927.
- Freund, Paul Abraham. The Supreme Court of the United States. Cleveland: World Publishing Co., 1961.
- Friedman, Max. "Justice Frankfurter & Judicial Review." In Perspectives on the Court. Evanston, Ill.: Northwestern University Press, 1965.
- Goldman, Sheldon and Janige, Thomas P. The Federal Courts as a Political System. New York: Harper and Row, Publishers, 1971.
- Grossman, Joel B. "A Model for Judicial Policy Analysis." In Frontiers of Judicial Research, pp. 405-460.
- Grossman, Joel B. and Tanenhaus, Joseph, eds. Frontiers of Judicial Research. New York: John Wiley & Sons, Inc., 1969.
- Grossman, Joel B. and Wells, Richard S. Constitutional Law and Judicial Policy-Making. New York: John Wiley & Sons, Inc., 1972.
- Gurr, Ted Robert. Polimetrics: An Introduction to Quantitative Macropolitics. Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1972.
- Hakman, Nathan. "The Supreme Court's Political Environment: The Processing of Non-commercial Litigation." In Frontiers of Judicial Research, edited by Joel B. Grossman and Joseph Tanenhaus. New York: John Wiley & Sons, Inc. (1969): 199-254.
- Herndon, James. "The Role of the Judiciary in State Political Systems." In Judicial Behavior--A Reader in Theory and Research, edited by Glendon A. Schubert. Chicago: Rand McNally & Co., 1964, pp. 153-162.

- Isaak, Alan C. Scope and Methods of Political Science. Homewood, Ill.: The Dorsey Press, 1969.
- Levy, Leonard W., ed. Judicial Review and the Supreme Court. New York: Harper and Row, Publishers.
- McCloskey, Robert G. The American Supreme Court. Chicago: University of Chicago Press, 1960.
- Murphy, Walter F. and Pritchett, C. Herman. Courts, Judges and Politics. New York: Random House, 1961.
- Murphy, Walter F. Elements of Judicial Strategy. Chicago: University of Chicago Press, 1964.
- North, Arthur A. The Supreme Court: Judicial Process and Judicial Politics. New York: Appleton-Century-Crofts, 1968.
- Pfeffer, Leo. The Liberties of an American. 2nd ed. The Beacon Press, 1963.
- Roche, John Pearson. Courts and Rights. 2nd ed. New York: Random House, 1966.
- Rosen, Paul L. The Supreme Court and Social Science. Urbana, Ill.: University of Illinois Press, 1972.
- Rostow, Eugene V. "The Supreme Court as a Legal Institution." In Perspectives on the Court. Evanston, Ill.: Northwestern University Press, 1965.
- Rudner, Richard S. Philosophy of Social Science. Englewood Cliffs, N.J.: Prentice-Hall, Inc., 1966.
- Schubert, Glendon A., Quantitative Analysis of Judicial Behavior. Glencoe, Ill.: The Free Press, 1959.
- _____. Constitutional Politics. New York: Holt, Rinehart & Winston, Inc., 1960.
- _____. ed. Judicial Decision-Making. London: Collier-McMillan Ltd., 1963.
- _____. Judicial Behavior--A Reader in Theory and Research. Chicago: Rand McNally & Co., 1964.
- _____. The Judicial Mind. Evanston, Ill.: Northwestern University Press, 1965.

- Schubert, Glendon A. and Danelski, David J., eds. Comparative Judicial Behavior. New York: Oxford University Press, 1969.
- Schubert, Glendon A. Judicial Policy-Making, Rev. ed. Glenville, Ill.: Scott, Foresman & Co., 1974.
- _____. The Judicial Mind Revisited. New York: Oxford University Press, 1974.
- Scigliana, Robert, ed. The Courts: A Reader in Judicial Process. Boston: Little, Brown & Co., 1962.
- Shapiro, Martin. Law and Politics in the Supreme Court. Glencoe: The Free Press of Glencoe, 1964.
- _____. The Supreme Court and Public Policy. Glenview, Ill.: Scott, Foresman & Co., 1969.
- Sigler, Jay A. An Introduction to the Legal System. Homewood, Ill.: The Dorsey Press, 1968.
- Simon, James F. In His Own Image: The Supreme Court in Richard Nixon's America. New York: David McKay Co., Inc., 1973.
- Spaeth, Harold J. An Introduction to Supreme Court Decision Making. San Francisco: Chandler Publishing Co., 1965.
- Sprague, John D. Voting Patterns of the United States Supreme Court. Indianapolis: Bobbs-Merrill Co., Inc., 1968.
- Stern, Robert L. and Grossman, Eugene. Supreme Court Practice. 4th ed. Washington, D.C.: Bureau of National Affairs, Inc., 1969.
- Sweet, Ester C. Civil Liberties in America. Princeton, N.J.: D. Van Nostrand Co., Inc., 1966.
- Tanenhaus, Joseph; Schick, Marvin; Muraskin, Matthew; and Rosen, Daniel. "The Supreme Court's Certiorari Jurisdiction: Cue Theory." In The Supreme Court and Public Policy, edited by Martin M. Shapiro. Glenview, Ill.: Scott, Foresman & Co., 1969.
- Tanenhaus, Joseph. "The Application of Social Science Methods." In Judicial Behavior--A Reader in Theory and Research, edited BY Glendon A. Schubert. Chicago: Rand McNally & Co., 1964, pp. 530-548.

Ulmer, S. Sidney. "Homeostasis in the Supreme Court." In Judicial Behavior, edited by Glendon A. Schubert. New York: Oxford University Press, 1973.

Van Dyke, Vernon. Political Science: A Philosophical Analysis. Stanford, Calif.: Stanford University Press, 1960.

Webb, Eugene J.; Campbell, Donald T.; Schwartz, Richard D.; and Sechrest, Lee. Unobtrusive Measures: Nonreactive Research in the Social Sciences. Chicago: Rand, McNally & Co., 1973.

Wright, Charles Alan. Law of Federal Courts. 2nd ed. St. Paul, Minn.: West Publishing Co., 1970.

Journals and Magazines

Allen, Layman E. "Automation: Substitute and Supplement in Legal Practice." American Behavioral Scientist 7 (December 1963), 4:39-45.

Allen, Layman E. and Caldwell, Mary Ellen. "Modern Logic and Judicial Decision Making: A Sketch of One View." Law and Contemporary Problems 28 (1963), 1:185-213.

American Behavioral Scientist 7 (December 1963) #4. Special Issue: "Frontiers of Legal Research."

Aubert, Vilhelm. "Researches in the Sociology of Law." American Behavioral Scientist 7 (December 1963), 4:16-20.

Becker, Theodore L. "On Science, Political Science, and Law." American Behavioral Scientist (December 1963):11-15.

Berns, Walter. "Law and Behavioral Science." Law and Contemporary Problems 28 (1963), 1:185-212.

Boskey, Bennett. "Mechanics of the Supreme Court's Certiorari Jurisdiction." Columbia Law Review 46 (1964):255-280.

Casper, Gerhard and Posner, Richard A. "A Study of the Supreme Court's Caseload." Journal of Legal Studies III (June 1974), 2:339-375.

"The Court, The Bar, and Certiorari at October Term, 1958." University of Pennsylvania Law Review 108 (1960):1160-1217.

Cowan, Thomas S. "Decision Theory in Law, Science and Technology." Rutgers Law Review 17 (1962-63):425-470.

- Douglas, William O. "The Supreme Court and Its Case Load." Cornell Law Quarterly 45 (1960), 3:401-419.
- de Grazia, Alfred and Ruttenberg, Charles L. "Innovators in the Study of Legal Process." American Behavioral Scientist 7 (December 1963), 4:48-52.
- Eldridge, William B. and Dennis, Sally F. "The Computer as a Tool for Legal Research." Law and Contemporary Problems 28 (1963), 1:78-100.
- Fisher, Franklin M. "The Mathematical Analysis of Supreme Court Decisions: The Use and Abuse of Quantitative Methods." American Political Science Review 52 (June 1958), 2:321-338.
- Freed, Roy N. "Prepare Now for Machine-Assisted Legal Research." American Bar Association Journal 47 (August 1961):764-767.
- Gibbs, Robert W. "Certiorari: Its Diagnosis and Cure." Hastings Law Journal 6 (February 1955):131-170.
- Grossman, Eugene. "The National Court of Appeals: A Dissent." American Bar Association Journal 59 (March 1973):253-260.
- Grossman, Joel B.; Murphy, Walter F.; Kristov, Samuel; Tanenhaus, Joseph; Kort, Fred; and Fuller, Lon L. "Symposium on Social Science Approaches to the Judicial Process." Harvard Law Review 79 (1966), 8:1551-1629.
- Handy, Rollo and Kurtz, Paul. "A Current Appraisal of the Behavioral Sciences: Political Science and Jurisprudence." [Supplement to] American Behavioral Scientist 7 (December 1963), 4:57-76.
- Hanus, Jerome J. "Denial of Certiorari and Supreme Court Policy-Making." American Univ. Law Review 17 (1967):41-56.
- Harper, Fowler V. and Etherington, Edwin D. "What the Supreme Court Did Not Do During the 1950 Term." University of Pennsylvania Law Review 100 (1951-52):354-409.
- Harper, Fowler V. and Leibowitz, Arnold. "What the Supreme Court Didn't Do In 1952." University of Pennsylvania Law Review 112 (1953-54):427-463.
- Harper, Fowler V. and Pratt, George C. "What the Supreme Court Did Not Do During the 1951 Term." University of Pennsylvania Law Review 101 (January 1953):439-479.

- Harper, Fowler V. and Rosenthal, Alan S. "What The Supreme Court Did Not Do in the 1949 Term--An Appraisal of Certiorari." University of Pennsylvania Law Review 99 (1950-51): 293-325.
- Hart, Henry M., Jr. "The Time Chart of the Justices." Harvard Law Review 73 (November 1959): 84-125.
- Harvard Law Review 69 (1955-56). "Supreme Court Per Curium Practice: A Critique." pp. 707-725.
- Horn, Robert A. "A Quantitative Study of Judicial Review." American Behavioral Scientist [formerly Political Research: Organization and Design] 1 (September 1957); 27-30.
- Irish, Marian D., ed. Journal of Politics. Gainesville, Fla.: The Southern Psci. Assoc., The University of Florida.
- Kort, Fred. "The Quantitative Content Analysis of Judicial Opinions." American Behavioral Scientist III (March 1960): 11-15.
- Kurland, Philip B. "Jurisdiction of the United States Supreme Court: Time for a Change." Cornell Law Quarterly 59 (1974): 628-656.
- Lawlor, Reed C. "What Computers Can Do: Analysis and Prediction of Judicial Decisions." American Bar Association Journal 49 (April 1963): 337-344.
- Loevinger, Lee. "Jurimetrics: The Methodology of Legal Inquiry." Law and Contemporary Problems 28 (Winter 1963), 1: 5-36.
- Madden, J. Warren. "One Supreme Court and the Writ of Certiorari." Hastings Law Journal 15 (1963-64): 153-160.
- Mendelson, Wallace. "The Neo-Behavioral Approach to the Judicial Process: A Critique." American Political Science Review 57 (September 1963), 3: 593-603.
- Richardson, Richard J. and Vines, Kenneth N. "Review, Dissent and the Appellate Process: A Political Interpretation." Journal of Politics 29 (1967), 3: 597-616.
- Schubert, Glendon A. "Policy Without Law: An Extension of the Certiorari Game." Stanford Law Review 14 (1962): 284-327.
- _____. "The Study of Judicial Decision-Making as an Aspect of Political Behavior." American Political Science Review 52 (June 1958), 4: 1007-1026.
- Stern, Robert L. "Denial of Certiorari Despite a Conflict." Harvard Law Review 66 (1952-53): 465-472.

- Strong, Frank R. "Three Little Words and What They Didn't Seem to Mean." American Bar Association Journal 59 (January 1973): 29-33.
- Tanenhaus, Joseph. "Supreme Court Attitudes Toward Federal Administrative Agencies." Journal of Politics 22 (1960), 3:502-524.
- Ulmer, S. Sidney. "The Decision to Grant Certiorari as an Indicator to Decision 'On the Merits'." Polity, Northeastern Political Science Assoc. IV (1972), 4:429-448.
- _____. "Mathematical Models for Predicting Judicial Behavior." Mathematical Applications in Psci III (1967):67-95.
- _____. "Quantitative Analysis of Judicial Processes: Some Practical and Theoretical Applications." Law and Contemporary Problems 28 (1963), 1:164-184.
- _____. "Scientific Method and the Judicial Process." American Behavioral Scientist 7 (December 1963), 4:21-38.
- Ulmer, S. Sidney; Hintze, William; and Kirklosky, Louise. "The Decision to Grant or Deny Certiorari: Further Consideration of Cue Theory." Law and Soc. Review 6 (May 1972):637-644.
- United States Law Week. Washington, D.C. Bureau of National Affairs.
- Warren and Burger. "Retired Chief Justice Warren Attacks, Chief Justice Burger Defends, Freund Study Group's Composition and Proposal." American Bar Association Journal 59 (July 1973):721-730.
- Young, Rowland L. "Supreme Court Report." American Bar Association Journal 59 (January 1973):71-73.

Miscellaneous

- The Attorney General's Annual Report. Washington, D.C.: U.S. Government Printing Office.
- Bickel, Alexander M. "The Caseload of the Supreme Court: And What, If Anything, To Do About It." Washington, D.C.: American Enterprise Institute for Public Policy Research, Domestic Affairs Study #21, 1973.

Brandeis, Louis D. "Decision Rules of the Court." Cases Argued and Decided in the Supreme Court of the United States, October term, 1935 [U.S. Supreme Court Reports]. New York: Lawyers Cooperative Publishing Co., 1963.

Freund, Paul A.; Bickel, Alexander M.; Ehrenhaft, Peter D.; Niles, Russell D.; Segal, Bernard G.; Stern, Robert L.; and Wright, Charles A. "Caseload of the Supreme Court." Federal Rules Decisions 57 (December 1972):569-627.

Schubert, Glendon A. "The Future of the Nixon Court." Honolulu: University of Hawaii, 1972.

**The vita has been removed from
the scanned document**

ALL THE COURT'S CASES: A STUDY OF
BURGER COURT CERTIORARI POLICY

by

Victoria Stone Howarth

(ABSTRACT)

While many scholars have ignored the cases that constitute the total litigational input to the U.S. Supreme Court, some have examined the possibility of a set policy or agenda for gatekeeping, or determination of which cases will be heard.

This study is concerned with the methodological implications of gatekeeping analysis in relation to other studies and Court procedure generally, and the Burger Court from 1971 through 1973 specifically. The data consists of cases listed in the Appellate Docket Index to U.S. Law Week. The study seeks to clarify: 1) the relative strengths of origin and type of case as factors in the decision of the Court to hear a case, 2) the differences in summary and formal hearing policies, and 3) the amount of change or evolution in Court gatekeeping policy during the period.

The findings indicate the presence of an active policy relative to the origin of cases in state or federal courts, while civil litigation was found to have greater access to the Court than criminal cases, linked apparently in part to the findings for civil liberties questions. Tax cases received no consistent treatment in the selection process.

The conclusion indicates that the Burger Court, as of 1973, had developed no set agenda in relation to the factors studied, but does not dismiss the possibility that if additional factors are studied over a longer period a pattern may emerge.