

Signaling the Supreme Court: Lower Court Dissent and Certiorari Grants

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ABSTRACT

The United States Supreme Court has almost complete discretion over the cases it hears, so how does it decide which cases are worthy of its attention? The Court receives many signals from various actors indicating which cases are worthy of its attention. Many signals, including those sent by the federal government and various interest groups have been widely researched and have been demonstrated to increase the likelihood the Court will grant certiorari to cases when these signals are present. The signal sent by lower court judges through their dissents is the concern of this study. This study contributes to the literature by investigating whether the ideological proximity of the dissenting judge and Court median affects the likelihood the Court will review a case. This study uses the last three years of the Rehnquist Court and the first three years of the Roberts Court. During these six years, a sample of constitutional law cases petitioning for a writ of certiorari is randomly selected and coded for dissent and other factors. Some of the other factors coded for: federal government involvement, amicus briefs and saliency, among others, when present, have previously been shown to increase the probability that cert will be granted. This study analyzes whether the presence of a lower court dissent affects the probability that the Supreme Court will grant certiorari to constitutional law cases. In order to hold the type of signal that could be sent as constant as possible only cases decided by three-judge panels in federal circuit courts are considered in this study. The hypothesis of this study is that the presence of a lower court dissent increases the likelihood that the Supreme Court will grant a writ of certiorari. This study also hypothesizes that the smaller the ideological distance between the dissenting judge and the Court median, the greater the likelihood the Court will grant certiorari. This study finds that dissent enhances the likelihood the Court will grant certiorari but the ideological proximity and partisanship of the dissenter does not influence the Court's decision to grant review.

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THE CERTIORARI PROCESS

The Supreme Court has both original and appellate jurisdiction. The original jurisdiction of the Court is set by the Constitution and cannot be altered. Most of the cases reviewed by the Court fall under its appellate jurisdiction. There are three ways to get a case to the Court under appellate jurisdiction. A case can be appealed as a matter of right, and Congress decides which issues are so important that they fall under this category. Certification provides another mechanism for invoking the Court's appellate jurisdiction, but only federal court judges can use this method. It is used to ask the Court to clarify an obscure area of federal law. The last way to request the Court to review a case under its appellate jurisdiction is through certiorari. Most cases are reviewed after being granted a writ of certiorari (Murphy et al 2006, 77-102).

The Supreme Court's agenda, since the Judiciary Act of 1925, is almost purely discretionary. The vote of four justices is sufficient for certiorari to be granted; this practice is called the Rule of Four. The Rule of Four existed before 1925, but according to Supreme Court Justice Stevens, 1925 is the first year it was publicly discussed in congressional hearings. "Since 1925," says Justice Stevens, "most of the cases brought to the Supreme Court have been by way of a petition for a writ of certiorari - a petition which requests the Court to exercise its discretion to hear the case on the merits - rather than by a writ of error or an appeal requiring the Court to decide the merits" (Stevens 1983, 96).

Supreme Court Justice Stevens described how cases are discussed for a grant of certiorari; he said, "the Chief Justice circulates a list of cases that he deems worthy of discussion and each of the other members of the Court may add cases to that list." This

differs from the method used in the past in which all cases were on the list and they could be removed when they did not merit discussion (Stevens 1983, 97). The Justices, at the Friday Conference of an oral argument week, now decide on cert. for cases that made the list. Chief Justice Rehnquist said: “at the...Conference we pass on what may be anywhere from 80 to 100 petitions for certiorari or appeals, usually not to decide them on their merits but simply to decide whether we will grant plenary review and hear them argued at some later time” (Rehnquist 93). The Chief Justice has a strong influence on the manner in which cert petitions are handled. Chief Justice Hughes allotted specific time for discussion of voting on cert petitions, while Chief Justice Stone allowed extensions on time to discuss cert petitions (Menez 1984, 3-4).

Different justices hold different views on the importance of certiorari petitions, and they treat them differently. For example, Chief Justice Stone read all or most petitions himself, while others delegated this task to their law clerks. Law clerks increasingly aid justices in sorting through cases so they know which ones to put on the list. Justice Stevens says: “Today law clerks prepare so-called pool memos that are used by several justices in evaluating certiorari petitions” (Stevens 1983, 97). Law clerks’ pool memos are circulated to all of the justices participating in the pool so they can use this information to evaluate the cert-worthiness of a case.

The Supreme Court’s docket is largely discretionary, so the question becomes, how does the Court decide which cases are cert-worthy? When cases are evaluated, some are dismissed for failing to satisfy certain criteria. In order to file a case, a plaintiff must have standing to sue, meaning the person must have a stake in the legal issue at hand. For the Court to hear a case, it must have jurisdiction, the authority to rule on that case. Another

requirement for the Court to hear a case is that a case or controversy must exist, which means a concrete disagreement must be presented. The Court will only hear cases that are ripe and justiciable, those that have exhausted all other remedies, and for which a legal remedy is the optimal solution (Murphy et al. 2006, 253 - 264). Some cases are dismissed for failing to meet the criteria mentioned above, but most pass these hurdles. Therefore, the Court must rely on other criteria to decide which cases to hear.

FACTORS AFFECTING GRANTS OF CERTIORARI

As discussed below, many factors have been investigated and demonstrated to affect the certiorari process. Two of the strongest are whether there is conflict in national law (Ulmer 1984), and whether the federal government is a litigant in a case (Tanenhaus 1963; Teger and Kosinski 1986). When these factors are present, the likelihood of a case being granted cert increases. Having amicus curiae briefs also enhances the likelihood a case will be granted cert (Caldeira and Wright 1980).

Divergence in Federal/National Law: Circuit Splits and Precedent Conflict

Supreme Court Rule Ten reveals conflict, defined as a divergence in national or federal law, is one of the reasons for which the Court may grant a writ of certiorari. One of the “compelling reasons” to grant cert. highlighted by the Supreme Court is when a case reveals that “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter” (Supreme Court Rule 10). The Supreme Court states that an important motivation for it to grant certiorari, though it does not guarantee cert will be granted, is when a case reveals a non-uniform national law. There are three different types of conflict the Court pays attention to: the first is conflict created by a circuit split, the second is conflict with active

Court precedent, and the third is conflict between state courts of last resort on a federal question (Supreme Court Rule 10).

The presence of conflict is the best predictor of whether or not a case will be granted cert. Lawyers know this, so when they file petitions, they often allege a conflict exists even if one does not exist in reality. Because of this, Sidney Ulmer distinguishes between alleged conflict and actual conflict for cases petitioning for cert. Ulmer examines the correlation between the existence of conflict and the grant of cert for three Courts: the Vinson Court, the Warren Court, and the Burger Court. Ulmer finds “there is a significant association between Court decision and conflict for all three courts...the three Courts denied from 88 to 93% of the applications when conflict was absent” (Ulmer 1984, 906). Ulmer asserts “the presence of a conflict with a Supreme Court precedent significantly enhances the probability the Court will grant certiorari” (Ulmer 1984, 907). When “genuine conflict” is isolated from alleged conflict, it becomes clear it has a very strong association with cert grants. Ulmer says, “when other factors are controlled or incorporated into the analysis, conflict is far and away the most significant predictor of certiorari decisions for two of our three Courts” (Ulmer 1984, 910). The Supreme Court is aware of divergence of law and attempts to correct it. Ulmer claims “that in making up its plenary case agenda, the Court is significantly responsive to the legal-systemic variable - conflict - and less governed by case issue variables than one would have thought” (Ulmer 1984, 910).

Supreme Court Justices and their law clerks have also pointed to the significance of conflict in granting cert. H.W. Perry asked a Supreme Court Justice “what would make a case an obvious grant,” to which the Justice replied, “Conflict among the circuits might”

(Perry 1991, 246). Law clerks also noticed conflict when drafting cert. memos. Perry asked clerks “what they looked for in a cert. petition,” and they emphasized the role of conflict. One law clerk said: “First, is there a conflict. Those really dominated and were clearly the most important reason for taking cert” (Perry 1991, 246).

Emily Grant and colleagues, contend however, that there is some ideological bases for distinguishing which conflicting cases will be granted cert, and which will be left to stand. This is expected because the likelihood that a case will be reversed is high when the Court decides to hear a case, otherwise it could have denied the petition and let the lower court decision stand. It is also expected because there are more cases involving conflict than the Court can hear so the Court must choose among these cases. Grant and colleagues claim “the ideological content of lower court conflict provides informational clues to justices that influence their decision to grant certiorari...when the justices on the two sides of a circuit split have distinct ideological differences, cases are more likely to be heard by the Court” (Grant et al. 2012, 582). Grant and her colleagues focus on ideological conflict present in federal courts of appeals. Grant and her colleagues took the judges issuing the conflicting court opinions and aligned them on a liberal-conservative spectrum, which they compared to the Supreme Court’s ideological spectrum with the aid of the Martin-Quinn scores. They find that as the ideological distance between the conflicting courts increases, so does the probability that the Court will grant cert. to at least one of the conflicting cases. They also find that as ideological distance between the Court and one of the conflicting courts increases, so does the likelihood that the case in question will be granted cert. (Grant et al. 2012).

Law Clerks

Because of the increasing applications for certiorari, most justices are no longer able to review the cases individually to decide whether to grant cert. Justices increasingly rely on help from clerks to distinguish between cases worthy and unworthy of cert. Each justice is entitled to three law clerks, and the chief justice can have up to four law clerks assisting him (Spaeth 1979, 21). Some scholars have begun to question the influence of law clerks at the agenda setting stage for the Supreme Court (Dunham and Kurland 1956; Black and Boyd 2012).

Ryan Black and Christina Boyd analyze the influence of law clerks on Supreme Court justices' willingness to grant certiorari. To understand the relationship a clerk has with the justice who hires him, Black and Boyd use the principal-agent model. It is expected that the clerk will follow the justice's policy preferences because the hiring process helps the justice hire someone who will be faithful to his policy preferences. There is also a potential for repercussions on the legal career of the law clerk and a possibility the justice conducts a random inspection, which act as deterrents (Black and Boyd 2012, 150-152).

To understand the interactions between a law clerk and the other justices on the Court, Black and Boyd use a signaling game. A law clerk submits a recommendation of either deny or grant, and the justice will either vote to deny or grant cert. A justice interprets the signal based on a combination of the law clerk's attributed ideology and the "certworthiness" of a case. A case is considered to be cert-worthy if there is a circuit split on this issue, if the federal government is a party, or there are other factors that increase the likelihood cert will be granted. The justice also takes into account whether the

recommendation is grant or deny, as well as the perceived ideological distance between the clerk and himself. The justice uses the hiring justice's ideology as a proxy for the clerk's ideology (Black and Boyd 2012, 152-156). Black and Boyd find that "given a low level of certworthiness, a recommendation of deny has roughly a 0.90 probability of being followed." They also find "the deny recommendation is unaffected by the role of ideological distance" (Black and Boyd 2012, 159). However, when a recommendation to grant is issued, the justice receiving the memo becomes more skeptical. Black and Boyd say that, "regardless of the certworthiness of a petition, the likelihood of agreement for a *grant* recommendation decreases as ideological distance increases" (Black and Boyd 2012, 162).

A law clerk has greater power in denying cert, since his influence on a recommendation of granting cert varies with ideology. Even when the clerk's ideological preferences match those of the justice, the clerk can be seen as merely reinforcing the ideology of a justice since those who have different ideologies are more skeptical of the clerk's recommendation. Interestingly, Black and Boyd find that "for petitions that are of moderate quality, the recommendation from the law clerk is regarded by *any* pool justice, regardless of...ideological distance from the clerk, as being uninformative" (Black and Boyd 2012, 161). Black and Boyd conclude that law clerks potentially have a significant impact because of the Rule of Four, where one vote often makes the difference between granting cert or not (Black and Boyd 2012, 164-165).

The influence of a law clerk also varies with the tenure of the justice. Justices who have been in the position for a smaller amount of time are more likely to rely on law clerks and follow their recommendations than are justices who have held their position

for a longer time. A new justice is more likely to follow the recommendations of law clerks while he is transitioning and becoming accustomed to his new post than when he is confident in his job. New justices, as well as new members of Congress, have been shown in previous studies to rely more on their assistants than those justices and members who have held their position for a longer period of time (Hagle 1993; Hurwitz and Stefko 2004).

Cue Theory: Federal Government Involvement and Issue Saliency

Other strong predictors of whether or not cert. will be granted are whether the federal government is a litigant in the case, and whether the case addresses a salient issue. This was derived from Joseph Tanenhaus and colleagues' work on Supreme Court grants of certiorari. Tanenhaus predicted the Court resorted to cues for deciding which cases it would grant cert to and identified four cues he thought were relevant to the Court's certiorari decision: federal government involvement, conflict coupled with lower court dissent, civil liberties, and economic factors.

Stuart Teger and Douglas Kosinski retested the significance of these cues with a different data set and found the data once again supports Tanenhaus' federal government cue. When the federal government is a litigant the chances of a case being granted cert are greatly enhanced. Teger and Kosinski state it "is fairly strong; it's predictive accuracy is impressive. This fact suggests that the best single predictor of which cases will be granted review is not the subject matter, but the petitioner" (Teger and Kosinski 1980, 840). After testing Tanenhaus' theory with a different data set, Teger and Kosinski decide to reject Tanenhaus' theory even though their data supports it because they think issue saliency is what is driving the justices to grant cert. Teger and Kosinski say, "The

implication is clear: the subject cues are effective only to the extent that they will select out the issues that the Justices consider salient” (Teger and Kosinski 1980, 844-845). They conclude that saliency is the reason that civil liberties and economic issues were granted cert more often than other types of cases during the time period in which Tanenhaus originally tested his theory.

Teger and Kosinski have shown in their reevaluation of Tanenhaus’ Cue Theory, that issue saliency changes and this change impacts whether a case will be granted cert. A highly salient issue is more likely to be granted cert over one that is not, so the issues that will be reviewed by the Court will change as the saliency of the issues change. Overall Teger and Kosinski find that the issues Tanenhaus had previously found as affecting certiorari decisions did so because they were salient issues at that time. Because the saliency of these issues had changed they no longer had the same effect (Teger and Kosinski 1980). Joseph Menez comments on the relationship between saliency and Court composition, saying: “Libertarians consider the Burger Court hostile to civil liberties. In fact their strategy currently is to avoid petitioning the Court and to wait for a change in the Court’s personnel” (Menez 1984, 6). This reveals that the composition of the Court itself may determine which issues are salient.

Interest Groups

Interest groups are also involved in attempting to sway the Court to hear a case by sending signals to the Court, and it turns out their signals are heeded. Because filing an amicus curiae brief carries costs, it serves as a signal to the Court as to the “political, social, and economic significance of cases,” (Caldeira and Wright 1988, 1112); and this holds true regardless of the direction of a brief. Whether a brief recommends the Court

grant or deny cert is deemed irrelevant because the main purpose a brief serves is informing the Court who has a stake in the issue area addressed by the case, which also reveals who the potential litigants for future cases are. After controlling for other factors also deemed to be important in granting cert, Gregory Caldeira and John Wright still found amicus curiae briefs filed at this stage to be important in determining cert. They assert,

Organized interests are generally influential during the Court's agenda phase because they solve an informational problem for the justices. Through participation as amici organized interests effectively communicate to the justices information about the array of forces at play in the litigation, who is at risk, and the number and variety of parties regarding the litigation as significant (Caldeira and Wright 1988, 1122-1123).

Law clerks also notice who is filing an amicus brief and they write it in their memos to the justices (Perry 1991).

Court Responsiveness to Society

The factors influencing the Court's decision to grant cert reveal that the Court is responsive to society even though it is often considered a countermajoritarian institution. The Court is concerned with performing its expected job: smoothing out differences in national law and assuring that those differences do not exist for an extended period of time. Conflict was the best predictor of whether a case would be granted cert. The Court is also responsive to the saliency of issues and interest group pleas. But a bigger predictor of cert being granted is government involvement in a case. This reveals that the Court's concern for legitimacy may affect the process of granting cert. The Court's concern with legitimacy may lead it to address salient issues because the public and the other branches of government demand they be addresses. The fact that the Court is responsive to federal government litigation also reveals the Court's concern with reinforcing its legitimacy. If

the Court is responsive to pleas from the federal government, the likelihood that its decisions will be enforced is probably higher than if the Court were unresponsive because the Court lacks enforcement mechanisms of its own and relies on its legitimacy and the other branches of government to enforce its decisions.

Lower Court Dissent

In addition to investigating whether the presence of a lower court dissent affects the probability that a case will be granted certiorari, this study also investigates whether the ideological distance between the Court median and the dissenting judge affects the probability that cert will be granted. This study hypothesizes that the presence of a lower court dissent increases the likelihood that a case will be granted a petition for certiorari, and that the smaller the ideological distance between the dissenter and the Court median, the higher the likelihood that review will be granted. Lower court dissent could be a more reliable signal than that provided by amici as to the importance of an issue because it is coming from a more credible and more neutral source, one who does not have a direct stake in the issue. This study hypothesizes that dissent has an effect of its own, separate from the aforementioned factors, on the Court's decision to grant cert.

A judge can dissent for many reasons, and conflict is one of them. A judge may dissent because he believes the law set by the majority conflicts with what the law is. However, conflict is not the only reason a judge dissents. Supreme Court Justices have dissented because they do not believe they have jurisdiction to answer the case, they believe the case is not properly before the Court, they believe a case has been decided wrongly, or they wish to push the Court into new areas of law by forcing the majority to address the issues they bring up in their dissent (Menez 1984). Supreme Court Justice

William Brennan Jr. said: “In its most straightforward incarnation, the dissent demonstrates flaws the author perceives in the majority’s legal analysis. It is offered as a corrective” (Brennan 1985, 430). “But,” Justice Brennan went on to say, “the dissent is often more than just a plea; it safeguards the integrity of the judicial decision-making process by keeping the majority accountable for the rationale and consequences of its decision” (Brennan 1985, 430). Justice Brennan also said that dissents can serve as a mechanism to signal the litigants what the best way to resolve the conflict would be. But dissents are also signals of the scope of the majority decision. Justice Brennan said, “The dissent is also commonly used to emphasize the limits of a majority decision that sweeps, so far as the dissenters are concerned, unnecessarily broadly – a sort of ‘damage control’ mechanism” (Brennan 1985, 430).

If Supreme Court Justices dissent for these reasons, it is logical that they look at the dissents from lower court judges when deciding whether or not to grant cert because these issues may arise later if they choose to hear and decide the case. Even though dissents can arise for different reasons, the effect of different types of dissents will not be separated in this study because dissents are often influenced by many factors simultaneously. “While it is relatively easy to describe the principal functions of dissents,” says Justice Brennan, “it is often difficult to classify individual dissents, particularly the great ones, as belonging to one category or another; rather, they operate on several levels simultaneously” (Brennan 1985, 431).

There have also been studies done examining the usefulness of dissent as a whistleblowing mechanism within the federal judicial hierarchy for lower court compliance. Frank Cross and Emerson Tiller predict and confirm that split panels, those

in which there is an ideological difference among the judges in the panel, have higher levels of compliance with judicial doctrine (Cross and Tiller 1998). Deborah Beim and colleagues also studied dissents as a whistleblowing mechanism that enables lower court compliance. Interestingly they found that dissents are the most informative and credible when they are rare, and that a judge who is too close, ideologically, to the Supreme Court, dissents too often (Beim et al. 2014)

This project treats lower court dissents as informational signals sent by lower court judges to Supreme Court Justices about the case. Dissents can be intentional signals sent by lower court judges to the Supreme Court justices to overturn a specific decision or indicate problems with the majority decision, but they do not have to be intentional to be informational in the cert. process.

EXPLORING THE RELATIONSHIP BETWEEN LOWER COURT DISSENTS AND CERTIORARI GRANTS

This study seeks to examine the effect that a lower court dissent has on the likelihood that a case will be granted a writ of certiorari by the Supreme Court, as well as whether the identity of the dissenting judge matters for the cert. process. Mixed methods, both quantitative and qualitative data, are used to answer these questions concerning the certiorari process. A hypothesis of this study is that there is a positive relationship between the presence of a lower court dissent and the decision of the Supreme Court to grant a writ of certiorari to that case.

The second hypothesis of this study is that a smaller ideological distance between the dissenting judge and the Court median makes it more likely that the Court will grant cert to a case. In this study these hypotheses are tested empirically. Who the dissenting

judge is noted, since it is the case that when the Supreme Court hears a case it will most likely reverse the previous decision of the lower court made in that case. This is not always the case, but it holds true for the majority of cases the Supreme Court hears. “On balance,” says Joseph Menez, “it is probably correct to hold that the Justices deny certiorari to lower court cases because they are satisfied with the decision rendered. Denial could also mean that the Justices do not want to become involved in a political ‘hot potato’ or that the Court is so divided on the issue that it is not prepared to take a stand” (Menez 1984, 23). The ideological connection between the dominant Court ideology and that of the dissenting judge may serve as an additional cue for Supreme Court justices to hear a certain case. From this emerges the hypothesis that the Supreme Court will be more likely to grant certiorari to a case in which there is a dissent and there is an ideological connection between the Court and the dissenting judge than if there was a disconnect. This is simply another expression of the fact that when the Court grants certiorari it is more likely to reverse a case than to affirm the case. It is logical, since if the Court wanted to affirm the case in most instances it could simply let the previous decision stand by choosing not to hear that case, unless the issue is controversial or conflict is involved (Menez 1984, 23).

In order to test the aforementioned hypotheses a random sample of cases in the area of constitutional law petitioning for a writ of certiorari in the last three terms, the 2002, 2003 and 2004 October terms, of the Rehnquist Court and the first three terms, the 2005, 2006 and 2007 terms, of the Roberts Court has been taken. The period examined in this study provides a natural control for change in Court membership, dramatic shifts in issue saliency, and dramatic ideological shifts in the Court. However, Justice Alito’s

replacement of Justice O'Connor did shift the swing vote; Justice Kennedy became the swing vote on the Court. But this does not happen until 2006. In order to keep the type of signal examined a constant, only constitutional law cases being appealed from three-judge circuit court panels are examined in this study.

Dissent and Certiorari Relationship

The relationships of interest to this study are those between the presence of a lower court dissent and the likelihood that a case is granted certiorari, and the ideological distance of the dissenting judge from the Court median and the likelihood that cert is granted. The dependent variable in both instances is whether a case is granted certiorari. If a case is granted cert it is coded as a one, otherwise it is coded as a zero. The independent variable of interest for the first relationship is the presence of dissent. Dissent, like the dependent variable, is treated as a discrete variable. A case is coded as a one if lower court dissent is present, and a zero otherwise. Whether the opinion is published or unpublished is also noted in order to examine whether it matters in the process of evaluating certiorari petitions. Currently, only around twenty percent of circuit court opinions are published, and most courts hold that only published opinions are binding precedent and look unfavorably at citations of unpublished opinions. The high workload of the circuit courts limits them to publishing so few opinions (Murphy et al. 2006, 89). It could be hypothesized that binding opinions, published opinions, make it more likely that cert. will be granted.

Controlling for Other Factors

To test the hypothesis that dissent has a positive relationship with certiorari being granted, other factors, which some authors have claimed and demonstrated have an effect

on whether a case is granted certiorari, are controlled for. The presence of amicus briefs, which Caldeira has shown increases the probability that a case will be granted certiorari (Caldeira and Wright 1988), is also coded. The presence of amicus briefs is considered a discrete variable, and it is be coded as a one if there is at least one amicus brief filed at the lower court level for a case that has petitioned for a writ of certiorari from the U.S. Supreme Court. In addition, whether the Federal Government is a party to the case is also coded, as this has been shown to increase the likelihood that a case will be granted certiorari (Tanenhaus 1963; Teger and Kosinski,1980). When the attorney general, or the Department of Justice is involved in a case, either as a litigant or as amici, the case is coded as a one, and zero otherwise.

The saliency of a case is also coded, and though it could be treated as a continuous variable, it is treated as a discrete variable in order to diminish the subjectivity in coding for saliency. A case that is considered salient will be coded as one, and zero otherwise. Saliency is case dependent, and a case will be considered salient if it appears in the New York Times at some point before the decision on its cert petition is rendered. Case saliency is less subjective as a measure than is issue saliency. Other studies have also used newspaper coverage as a proxy for saliency (Collins and Cooper 2012). The New York Times was chosen because it maintains good coverage of Supreme Court cases and it has a national audience. The circuit court from which the case emerges will also be coded.

After collecting these data a multivariate logistic regression has been run in order to separate out the effect dissent has on whether certiorari is granted once the aforementioned factors have been controlled for. This shows whether the presence of a

lower court dissent has any effect separate from that of the other factors mentioned. A binary regression has also been run to discern the effect of ideological proximity of the dissenting judge on the Court's decision to grant a writ of certiorari.

Limitations

A limitation of this study is that the presence of conflict has not been coded for. Ulmer has shown that conflict, a discrepancy in national law created either by a circuit split interpretation of a law, a case's divergence from a Supreme Court precedent, or a state court of last resort disagreement on a federal question, has an immense impact on the likelihood that a case will be granted a writ of certiorari. The presence of conflict is considered the biggest predictor of whether a case will be granted certiorari; the probability that a case will be granted certiorari if it has the element of conflict increases immensely (Ulmer 1984). Coding for conflict is a subjective measure because it involves a personal decision as to whether a case qualifies as conflict or not, and professional lawyers disagree over this issue frequently. Because conflict will not be coded for in this study, it is a limitation of this study since it has been recognized as the main reason and justification for which the United States Supreme Court grants a writ of certiorari.

Supreme Court justices and their former law clerks have also highlighted the presence of conflict as the main factor that may make them grant a writ of certiorari (Perry 1991).

However, this study will still be relevant even if the effect that dissent potentially has on the Court's decision to grant certiorari cannot be separated from the effect that conflict has on this decision. Dissent may itself be a judge's own indicator of conflict, as a judge may dissent because he or she believes that the outcome of the case conflicts with a higher court precedent, but dissent may represent something other than conflict as well.

The effect of new justices on the Court, Justice Roberts and Justice Alito and how much they rely on their law clerks during this time will not be contrasted to the reliance of the other members of the Court on their law clerks during the cert process. This is a limitation because law clerks may have a bigger effect on these new Justices, one of which is the Chief Justice.

Another limitation of this study is that only seventeen observations were used to test the second hypothesis, making results inconclusive for that hypothesis, with some prima facie evidence that there is no correlation between ideological proximity and the decision to grant certiorari.

Enriching Research through Interviews

The effect of law clerks and conflict, though not explicitly coded, are represented in interviews with former Supreme Court law clerks. This provides an insight into what they search for when they go through cases and decide which ones to recommend. It has been demonstrated that law clerks have an effect on whether a case is granted a petition for certiorari. Their recommendation to deny cert. does not seem to be questioned, so their recommendation on this aspect is influential. The influence of a law clerk's recommendation to grant a writ of certiorari is received with greater skepticism dependent on the ideological proximity between the justice who the clerk making the recommendation works for and that of the receiving justice (Black and Boyd 2012).

Two former Supreme Court clerks were interviewed for this study: Professor John Yoo, who served as a law clerk for Justice Clarence Thomas, and Professor Amanda Tyler, who served as a law clerk for Justice Ruth Bader Ginsburg. The interview process began with the question of what they, as law clerks, searched for in a case, and what

factors made them more likely to recommend that a case be granted certiorari. Interview questions were intentionally open-ended so that greater insight into the process of creating cert. pool memos could be gained. The interviews ended with a more specific question about whether, having served as law clerks, they took into account a dissent from a lower court when drafting their memos and what effect it had on their likelihood of recommending that the case be granted a writ of certiorari.

Another source of data that supplements these interviews is Perry's book which includes interviews of former Supreme Court justices and former Supreme Court justice's law clerks. This also provides an insight into what law clerks look for in recommending that a case be granted certiorari. It also helps fill in the gap in what Supreme Court justices then look for after having received the memos from the law clerks when they are deciding whether or not to grant certiorari (Perry 1991).

Advantages of Using Mixed Methods

Using mixed methods enriches the paper because the quantitative and qualitative data supplement each other and fill in some of the gaps left by the other. Interviews provide an opportunity to gain an insight into the certiorari process above that which numbers could provide. Even though conflict has an affect on the certiorari process and will not be coded for, its importance is not forgotten in the study since it comes up as a factor in the interviews. It is also a factor that came up widely in the interviews conducted by Perry; therefore, a measure of conflict is also represented through those interviews.

FINDINGS

An anticipated finding of this study was that when a case carrying a lower court dissent has petitioned for a writ of certiorari, the Supreme Court would be more likely to grant certiorari to that case. The second hypothesis was that the effect of a lower court dissent would also be dependent on the ideological connection between the dominant Court ideology and that of the dissenting judge. The prediction is that if they both have the same ideology, the lower court dissent makes it more likely that the Court will grant certiorari. The evidence presented in this section supports the first hypothesis, but not the second.

How Factors Impact Certiorari Grants

The biggest factor impacting the Court's decision to grant certiorari, as expected, is the presence of conflict. The interviews with Professor John Yoo, who served as a former clerk for Supreme Court Justice Clarence Thomas, and Professor Amanda Tyler, who served as a law clerk for Supreme Court Justice Ruth Bader Ginsburg, both stressed the importance of splits. They stated it was the primary, single most important factor, determining whether cert would be granted, and whether they themselves would recommend in their memos that cert. be granted. Splits, or conflict, refer to the divergence in federal law that the Supreme Court rules state dominate the certiorari process. When asked what factors made it more likely that she would recommend cert. be granted, Professor Tyler said:

The primary factor is whether there is a split in the lower courts: circuit courts or state supreme courts. If there is a split in the lower courts, then the Supreme Court needs to step in and resolve it. As clerks we would highlight a split by flagging it in the memos. A split is the single most important factor influencing the cert. process

Professor Yoo also highlighted the importance of splits and coupled it with issues of

national significance as the main factors guiding the cert. process.

The Supreme Court rules also mention that issues of national significance are important for the certiorari process, and the law clerks confirmed it in the interviews. When asked what factors made it more likely that he would recommend cert. be granted, Professor Yoo responded: “Two things in the Supreme Court Rules: if a case involves a Circuit split, or it is a matter of national significance.” When asked to elaborate on the definition of a matter of national significance, he said, “It is hard to define, but for example. I think today’s case (*Schuette v. Coalition*) was granted cert because affirmative action is considered a matter of national significance.”

Professor Tyler also alluded to the importance of cases that are of national significance by saying that petitions for cases with high profile issues were also more likely to be granted cert. because the Court needed to weigh in on the matter. Professor Tyler said: “Split, or not, high profile issues are more likely to be granted cert. Some cases are so momentous that the Court has to have a voice” and the Obama Care case is an example of this.

But there are also other factors, not within the Supreme Court rules, that, although they are not as strong predictors of when cert. will be granted, they do enhance the likelihood that cert. will be granted. Many of these factors were coded for, and the following table shows the results of the coded data indicating their influence on the Supreme Court’s decision to grant certiorari. The results reinforce the current literature, indicating that amicus briefs, especially those submitted by the attorney general or the Department of Justice, increases the probability that cert. will be granted by the Supreme Court.

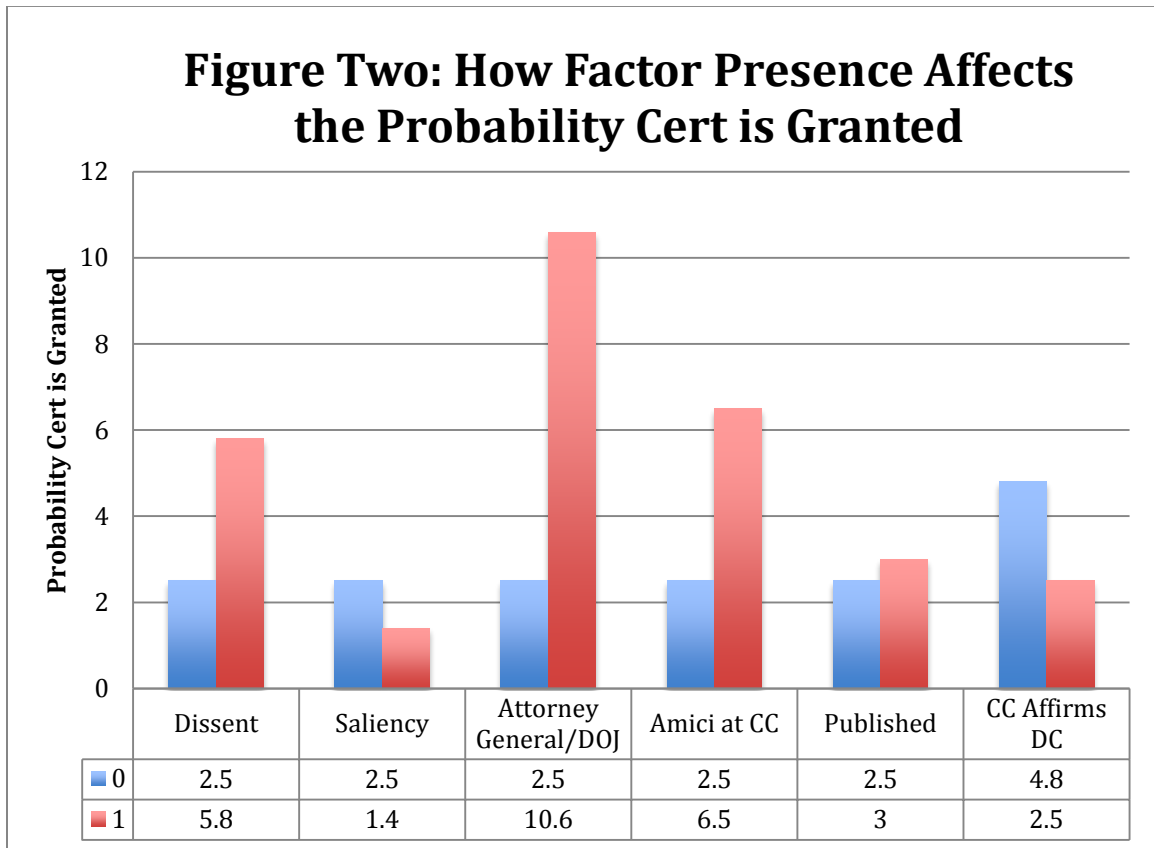
Table One: Effect of Dissent on Certiorari Grants

Estimation Type	(1) Binary Logistic Regression	(2) Multivariate Logistic Regression	(3) Multivariate Corrected Logistic Regression
Number of Observations	141	129	129
Log Likelihood	-75.432	-67.313	-67.313
Likelihood Ratio Chi-square (p-value)	7.16*** (0.007)	16.19** (0.013)	16.19** (0.013)
Pseudo R2	0.045	0.107	0.107
Intercept (Standard Error)	-1.327*** (0.221)	-1.016 (0.673)	-2.978*** (0.704)
Dissent (Standard Error)	1.444*** (0.533)	1.048* (0.634)	0.840 (0.649)
Published (Standard Error)		0.468 (0.592)	0.214 (0.859)
Amici At Lower Court Level (Standard Error)		1.15* (0.662)	0.996 (0.728)
Attorney General/DOJ (Standard Error)		1.422 (1.314)	1.547 (1.281)
Saliency (NYT) (Standard Error)		-0.681 (1.824)	-0.759 (1.961)
Circuit Court Affirms District Court Decision (Standard Error)		-0.535 (0.68)	-0.670 (0.759)
***p ≤ 0.01; ** p ≤ 0.05; * p ≤ 0.1			

Column one of Table One shows that as a single variable predictor in a binary logistic regression, the presence of dissent is a good predictor of whether cert. will be granted; it is statistically significant at the one percent level. When other factors have

been controlled for in the second multivariate regression, dissent remains a helpful predictive variable, but its significance decreases, maintaining statistical significance at the ten percent level. Only the presence of amici at the lower court level is a better predictive value for cert being granted than is dissent. The third multivariate regression corrects for the case-control sampling that was used in which all cases granted cert. in the area of constitutional law emerging from three judge circuit court panels were coded for, while a random sample of those denied cert. under the same conditions, was taken. Under this regression, none of the factors attains statistical significance.

To put this in more concrete terms, the probabilities associated with the presence of enhancing factors has been calculated and are shown in Figure Two.



These probabilities were calculated using the third multivariate regression model. The probability of a case being granted certiorari when there are no enhancing factors: when a case is non-salient, there is no dissent, the attorney general and Department of Justice have not been involved, no amici briefs have been filed, the lower court opinion is unpublished, and the circuit court has affirmed the district court decision, the probability of a constitutional law case emerging from a three judge circuit court panel being granted a writ of certiorari is around three percent plus or minus seven percent. The probability of certiorari being granted increases to approximately six percent, plus or minus six percent, when dissent is present and all of the other enhancing factors are absent. According to the data, a salient case actually decreases the likelihood that cert is granted to approximately one percent, contradicting previous literature. However, it must be noted that the saliency measure used is case saliency as opposed to the conventional issue saliency. Also, there was a particularly highly salient case that had all enhancing factors, *Tribune Co. v. FCC*, that was denied cert. When that case is taken out, the data indicates that saliency slightly enhances the likelihood that cert is granted, conforming to predictions derived from previous literature.

The biggest enhancing factor for the certiorari process, of those that were coded for, is the participation of the attorney general or Department of Justice in a case. When the federal government takes interest in a constitutional law case emerging from a three-judge circuit court panel, the likelihood that cert is granted increases to approximately eleven percent. When amicus briefs are the only enhancing factor present, the probability of cert being granted increases to approximately six percent plus or minus eight percent. When the circuit court affirms the district court ruling, the probability of a case being

granted cert. is approximately five percent plus or minus seven percent. When all enhancing factors are present, and the circuit court has overturned the district court ruling, the probability of certiorari being granted is forty-three percent. It is clear that most of these factors increase the probability that cert will be granted, and dissent, to a lesser extent does too.¹ But how do they increase the likelihood cert. is granted?

The presence of these factors leads clerks to take longer in evaluating the cert-worthiness of a petition. A difference in the allocation of time can make the difference between a petition that is granted cert, and one that is not. When asked how much time is normally allocated to evaluating the cert-worthiness of a petition, Professor Tyler said: “It depends. There is a high percentage that are obviously not cert-worthy. For example, most habeas corpus cases are obvious denials. Some are close cases on which you could spend many hours if not a day or two on them.” The cases that are close, are the cases that have enhancing factors of amicus briefs, or are accompanied by briefs from the solicitor general recommending a case be taken, or have dissents from lower court judges. Professor Tyler indicated that cert. is more likely to be granted when “a case involves a federal issue and the Solicitor General submitted a brief where he recommends the Court should take the case. Cert is not always granted to those cases, but,” she said, “it does increase the odds.” When enhancing factors are present, more time is allocated to evaluating the cert-worthiness of the petition. This matches well with the evidence provided in the interviews conducted by Perry, too. A clerk told Perry, “I think any cert. petition that has an amicus is going to get more scrutiny” (quoted in Perry 1991).

¹ Probability of cert being granted obtained through ReLogit. See Gary King and Langche Zeng. 1999a. “Logistic Regression in Rare Events.” Department of Government, Harvard University. Available from <http://gking.harvard.edu>. And Gary King and Langche Zeng. 1999b. “Estimating Absolute, Relative, and Attributable Risks in Case-Control Studies.” Department of Government, Harvard University. Available from <http://gking.harvard.edu>.

Professor Yoo said: “You take more time to look at it than you would otherwise” when these enhancing factors are present.

Dissent and Certiorari Grants

In the interviews, dissents were also noted as factors that grant more time to the consideration of a case in the certiorari process. Professor Yoo said, “If there is no dissent, you’re not as likely to give it strict scrutiny. Sometimes dissents call for Supreme Court review. You will definitely look at it if there is a dissent.” Though it does not guarantee that a case will be granted certiorari, dissent does increase the likelihood that cert. will be granted by increasing the time that clerks take to evaluate the cert-worthiness of that case.

Aside from the allocation of more time, a good dissent can further enhance the likelihood that cert. is granted, if it is written by an influential judge. Professor Tyler said: “If the dissent is good and really points out flaws in the majority opinion or it is written by a particularly influential judge, then it might be a thumb on the scale.” Dissenting opinions at least ensure that more time is allocated by clerks in evaluating the cert-worthiness of a case, the impact of the dissent depends on other factors, such as who is writing it and how good it is. A clerk told Perry that dissents do grasp the attention of law clerks, so they give a case more scrutiny when a dissent is present. The clerk said:

But you know judges in the courts of appeals often try to get us to take a case, because in their opinion they would say very explicitly we are in conflict with the Seventh Circuit... You can be assured that grabbed our attention... but a lot of that was just artful on the part of the judges (quoted in Perry 1991).

It is clear that signals sent by lower court judges in the form of dissents to the Supreme Court, are at least looked at, and guarantee that a case receives higher scrutiny when it is being evaluated by law clerks in the cert. process. But the presence of a dissent does not

guarantee that a case will be granted cert. because the signal itself is then evaluated by the law clerks and the justices.

Other Factors that Affect the Cert Process

There are also other factors, beyond those that were coded for, that in the interviews with former Supreme Court law clerks were noted as being important for the certiorari process. Three main factors were noted as receiving special attention in the certiorari process: whether the case was a death penalty case, whether it was in an area that the Court was trying to build a new body of law, and what the quality of lawyering was. The importance of these factors was highlighted by Professor Tyler. Referring to death cases, she said: "Some justices, not all, gave special attention to death cases. So those cases get greater scrutiny." This matches well with the interviews conducted by Perry. Perry was told by a law clerk "that all capital cases are discussed in conference. They were specially marked when we sent things into the justice. Even if the justices thought they were frivolous, they were at least discussed in conference" (Perry 1991). But, as Professor Tyler indicated, the extra attention may or may not make a difference.

Other cases are granted cert. because the justices on the Court are attempting to construct a new body of law. Professor Tyler said: "Some cases are accepted because the justices are building a new body of law, as they are doing now in Campaign Finance." When cases fall into this new category, they are more likely to receive further scrutiny in the certiorari process and are more likely to be granted cert.

The quality of lawyering was also mentioned as having an influence on the certiorari process. Other things being equal, the Court would prefer to take a case when the case is being litigated by good lawyers who will provide good arguments and reliable

briefs. Professor Tyler said, “If there is a prominent Supreme Court advocate on an issue that will be addressed, [the Court] might as well take it when so and so is arguing it because you know the briefing will be good, because that person will present a good argument.”

Then, of course, law clerks themselves greatly influence the certiorari process.

When asked what her general impression of the certiorari process was, Professor Tyler said:

Law clerks have a lot of influence, and that may not necessarily be a good thing. But the sheer volume of petitions makes me question whether it can be done any other way. There are more than eight thousand petitions filed in any given year. If you just take the memo at face value you can miss a lot, particularly in death penalty cases. That wasn't always the case, but I remember instances in which one clerk only wrote three paragraph memos for death penalty cases. I would rewrite full page memos for my justice in those cases.

The year Professor Yoo served as a cert pool clerk, he said everyone except for Justice Stevens participated in the cert. pool. The cert. pool can function properly only when clerks are skeptical of each other's memos. It confirms Perry's finding that clerks' skepticism of each other is one of the reasons the cert. pool works. A Supreme Court justice gave Perry his opinion on the cert pool, saying:

I haven't seen a disaster with the pool, and that is for a couple of reasons. First, all nine members are not a member of the pool. I would not want all nine...The second reason that there have been no disasters is that the pool memo doesn't come directly to me. My clerks review the pool memo and make their own recommendations, and they make an evaluation of what has been said...Many times clerks can be very critical of other clerk's work...I like that for two reasons. One, there is a braking effect. Secondly, it gives the clerk more of a chance to participate in the decision-making process (quoted in Perry 1991).

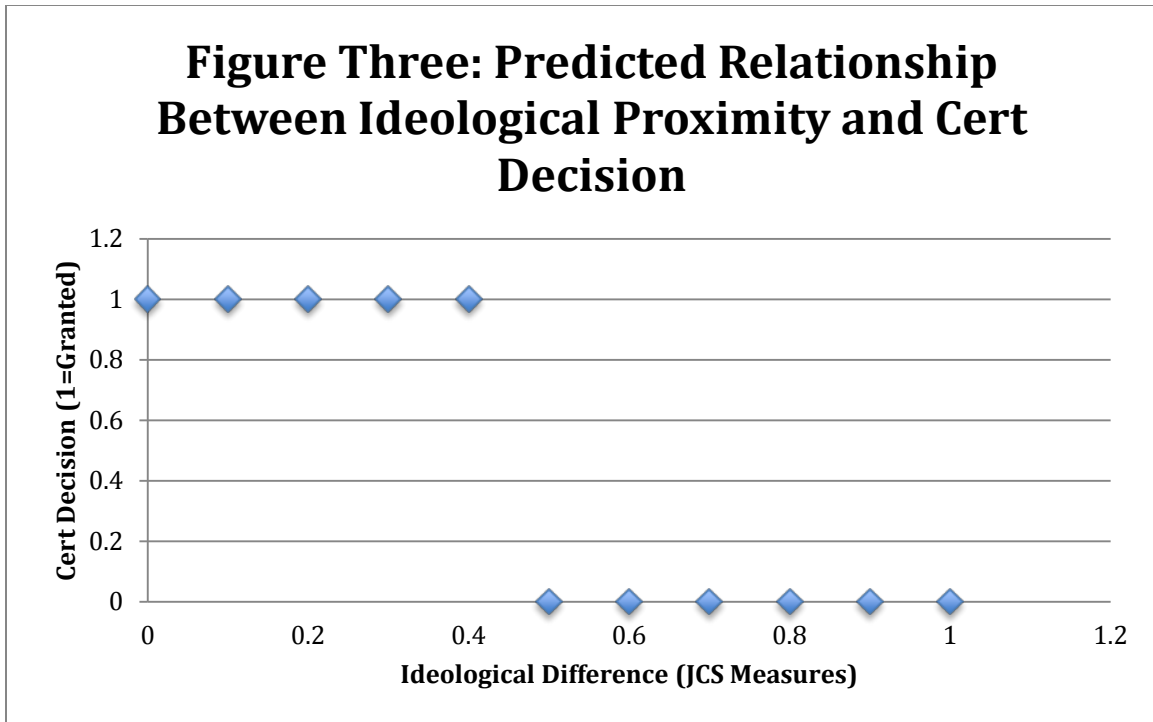
The justices rely on their law clerks in evaluating cert. petitions. One justice described his process for evaluating cert. petitions, he told Perry,

First I decide if I can make a decision on the basis of the memo. In fact, on most of them I can, because most of these I vote to deny. If the case is a good candidate for a grant, then I will mark the memo 'read.' Or I will sometimes mark a memo read even though I would vote to deny but think that others will vote to grant so I read them offensively and defensively (quoted in Perry 1991).

Law clerks wield a lot of influence in the cert. process, regardless of whether they participate in the cert. pool. Professor Tyler said: "even in those chambers where judges don't participate in the cert. pool, clerks still have a lot of influence." A law clerk interviewed by Perry talked about the influence law clerks have on their justices, saying: "the law clerks have more influence, I would say, on the areas of law that are less socially important...we only had the opportunity to persuade [the justice] on an opinion here or there, because he had his own views on the major stuff" (quoted in Perry 1991). The law clerks themselves, depending in the case, could make a difference in whether some cases are granted or denied cert.

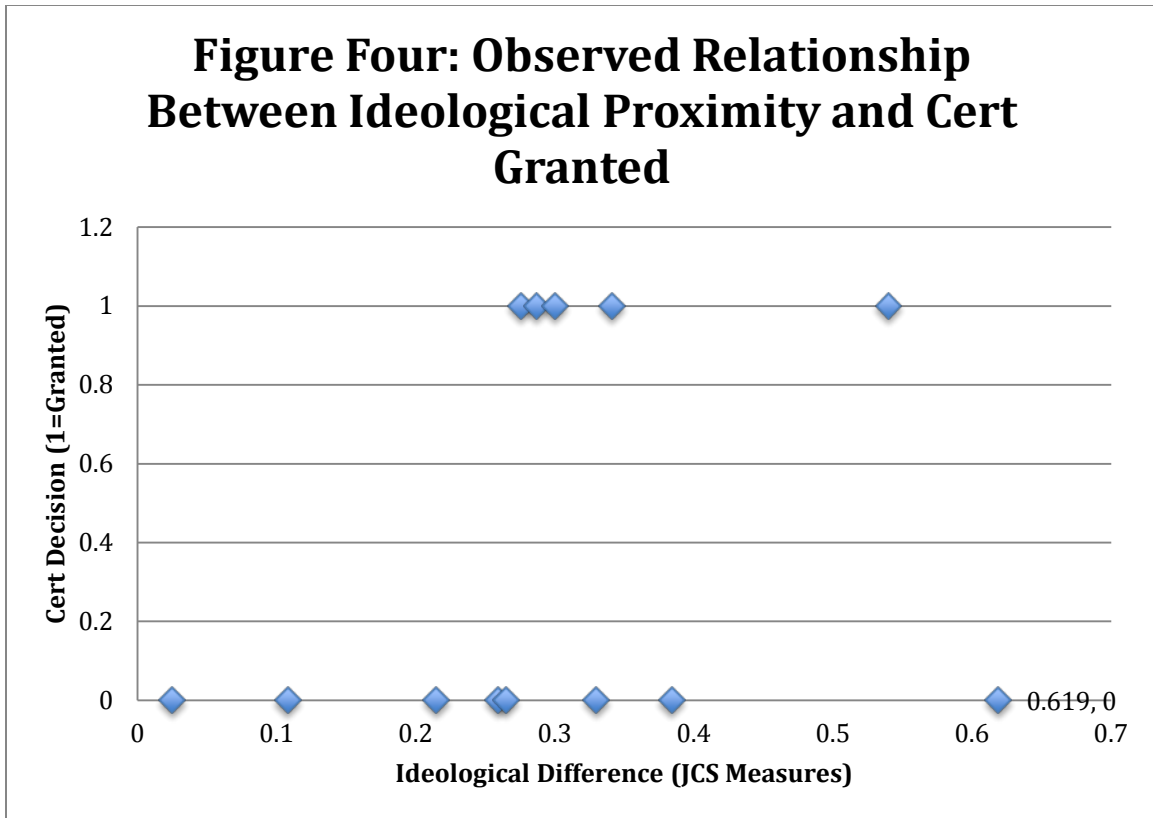
Ideological Difference and Certiorari Grants

It has been established that a lower court dissent does have a positive influence on the cert process, making it more likely that a case will be granted cert. But, does the ideological difference between the dissenting judge and the Court matter? The hypothesis of this study is that ideological proximity between the dissenting judge and the Court median would increase the likelihood. It is expected that the closer the dissenting judge is to the Court median, the greater the probability the Court would vote to grant cert to a given case. Supporting evidence for this hypothesis would look as follows. Figure three, below, denotes the expected relationship.



However, the evidence does not look like the graph above, instead it suggests that ideological proximity does not matter. There are only 17 observations for this model, since dissent was rare, but the evidence suggests there is no correlation between the ideological distance and the Court's decision to grant certiorari.² Figure Four, below, depicts the observed relationship between ideological proximity and the Supreme Court's decision to grant cert.

² Ideological Difference between dissenting judge and yearly Court median was calculated using Judicial Common Space scores. The See Epstein, Lee, Andrew D. Martin, Jeffrey A. Segal and Chad Westerland. 2007. "The Judicial Common Space." *Journal of Law, Economics, & Organization* 23: 303-325.



There seems to be a midpoint in which dissents are better correlated with cert grants. If that is the case it could be explained through the whistleblowing literature that was previously discussed. This literature finds that perfect ideological allies of the Court, those located very close to the Court, such that the ideological difference would be near zero, dissent too often. Because they dissent too often, their dissents lose informative value for the Court. There seems to be a point where the dissenters are still closer to the Court, with a slight difference score of 0.3, where dissents are perfect signals for the Court. However, there are too few observations for this hypothesis to be able to tell conclusively. The results for the second hypothesis are inconclusive regardless of whether ideological distance or partisanship match is coded for. The coefficient for the model for ideological difference is 0.080. Neither measure attains statistical significance as an explanatory variable for cert grants.

The interviews, similarly offered mixed evidence for the second hypothesis regarding the effect of ideological proximity or partisanship on the cert. process. Professor Yoo said he does not believe the ideological proximity of the dissenter, or the partisanship of the dissenter has an effect on the decision to grant cert. because the cert. pool is neutral. “A cert. pool memo” he said, “should be neutral, as if anyone had done it. You’re supposed to put aside the fact that you work for any particular justice.”

However, Professor Tyler suggested that partisanship or ideological proximity might have an effect on the decision to grant cert. When asked whether the partisanship or ideological proximity of the dissenting judge matters for the cert. process, Professor Tyler said: “I don’t know, because ideology tends to be correlated with particular jurisprudential approaches. So, it would be a muted yes.” She then defined jurisprudential approaches as “the methodology by which judges go about interpreting the Constitution and statutes.” Examples of jurisprudential approaches are Purposivism, Textualism, and Originalism. So she believes that if there is an effect, it would be because of the match in jurisprudential approaches used by the judges.

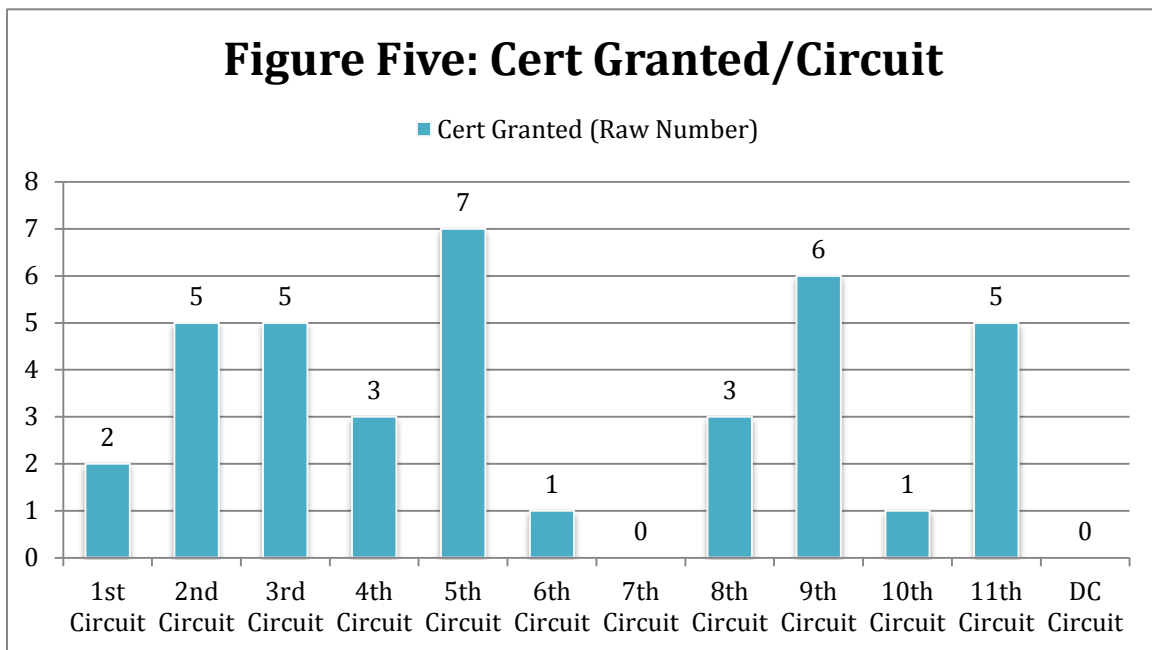
One of the reasons that the ideology or partisanship of dissenters may not have a strong effect on the cert. process is that each justice interprets the signal differently depending on who the dissenter is. Maybe the effect balances out if it is meaningful for one justice and meaningless for another. Perry said: “Interest in the makeup of the panel and the existence of a dissent is universal. When a *particular* judge is in dissent below, however, that may raise a flag for a particular justice and not for another” (Perry 1991). This provides for the possibility that the dissent itself may have an effect regardless of who the dissenter is. But, other personal attributes of the dissenting judge could matter

for the cert. process.

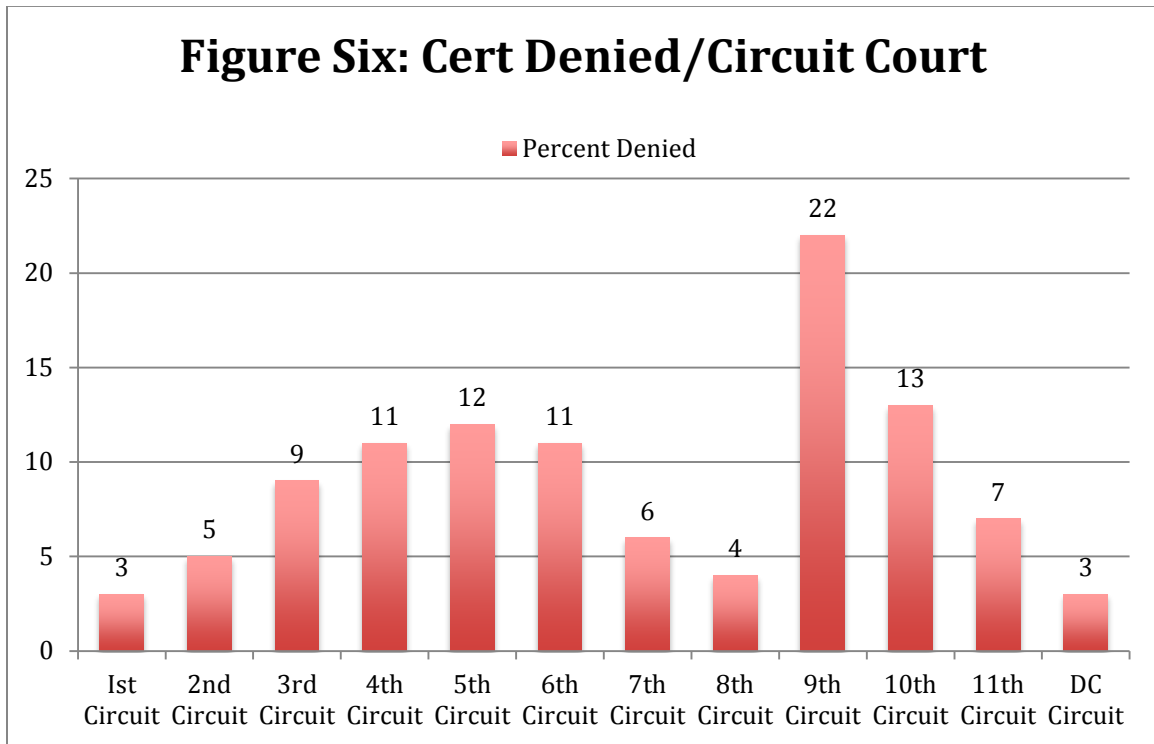
It appears that the main personal attribute of the dissenting judge that matters for the cert. process is the prestige and stature of the judge. When asked whether the area of expertise of the dissenting judge matters for the cert process. Professor Tyler said: “Maybe a little. But the stature the judge holds is more important. For example Judge Easterbrook and Judge Posner are widely respected. Their opinions receive close scrutiny, especially if they were dissenting.” Apparently some circuit courts were more likely to submit dissents and justices and clerks were aware of that too. Professor Tyler mentioned that the Ninth Circuit often had dissents that flagged the Court because Judge Reinhardt’s opinions often evoke flagrant dissents.

Circuit Court Differences

The cases accepted per circuit court turned out as expected. Figure Five shows the number of cases in constitutional law that emerged from each of the circuit courts in this six year term.



Notably, there were no cases that were granted a writ of certiorari from the Seventh Circuit and the DC Circuit courts. But otherwise, everything is as expected. Cases emerging from large circuits, the Ninth and Fifth Circuits, were granted cert. more often. Than those emerging from smaller circuits. That could be attributed to the number of cases under each circuit that petitioned for cert. More cases were granted review when they emerged from the Ninth and Fifth Circuits, but more cases were also denied from these circuits because more constitutional law cases were appealed under these circuits than others. Figure Six shows the percentage of cases that were denied a writ of certiorari from each of the circuit courts during the same six year period.



The Tenth Circuit has the biggest difference between a circuit court’s granted and denied cases. The Tenth Circuit composes twelve percent of the cert denials, but only three percent of the Court’s cert granted docket.

CONCLUSION

This study explored and tested the link between dissents at the circuit court level and Supreme Court certiorari grants, and found that even after controlling for other factors, dissent is a significant predictive variable of certiorari grants. When a case, for which a cert petition has been submitted to the Court, carries a dissent, it is more likely to be granted cert. Interviews with law clerks revealed that they paid more attention to a case, all else being equal, when the case had a dissent. More time was taken to evaluate the cert-worthiness of a petition when there was a dissent.

This study also tested whether the ideological proximity of the dissenting judge to the Court median further enhanced the likelihood that cert. would be granted. The results for the second hypothesis are inconclusive. There are only seventeen observations, but it does not seem that there is a correlation between the ideological proximity or partisan match between the dissenting judge and the Court median. There was no evidence supportive of this proposition. Cases in which dissenting judges were ideologically closer to the Court median than other dissenting judges who were farther from the Court median were equally likely to be granted review. The interviews also presented mixed results for this hypothesis, but they seem to indicate that the effect of ideology, if there is one at all, would be miniscule.

It seems that the dissent was more informative than the identity of the judge. This finding could potentially be explained by the finding that Beim and colleagues have made that those situated in a position closer to the Court often send too many signals that they stop being as informative as they could be. Signals work best when they are sent infrequently. A personal attribute of the dissenting judge that does seem to be important

for the cert. process is the stature of the judge.

In the future studies could attempt to discern whether the area of expertise of the dissenting judge matters. For example, it could be expected that if a judge is an expert in environmental law and has filed a dissent in that area of law, the Court views that as a more informative and reliable signal than if he filed a dissent in a constitutional law case. Another area that could be explored is whether the stature of the dissenting judge has a statistically significant effect on the Supreme Court's decision to grant review. Are more prestigious judges more successful in inducing Court review through their dissents than other judges?

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