

THE DECISION TO DECIDE

The need for publication on
discretionary decisions of the
SCOTUS



Ryan McCaskill-Schock
Ayla Gonzalez
Terrence Pittman



ELON
UNIVERSITY

Phoenix
Policy Institute

TABLE OF CONTENTS



- 1. Abstract**
- 2. Problem Definition**
- 3. Policy Context**
- 4. Policy Alternatives**
- 5. Grant Writs of Certiorari**
- 6. Potential Drawbacks**
- 7. Conclusion**

ABSTRACT

This issue examines the Supreme Court's power to choose which cases it hears and argues that the process should be more transparent. Each year, **thousands of petitions are denied without explanation**, even though those decisions can shape laws and rights nationwide. The memo proposes requiring the Court to give brief public reasons for granting or denying certiorari. While this could invite criticism, it argues that greater transparency would ultimately strengthen public trust in the Court.



PROBLEM DEFINITION

There are no published guidelines or definitions for which cases the SCOTUS chooses to grant writs of certiorari for.

This has led to a lack of transparency in the decisions made behind closed doors in the Supreme Court. This is the highest, most untouchable institution in the United States Government, which has been rarely challenged, even with the disagreements in the courts. In recent years, the Supreme Court has grown to a conservative super majority in which leaders on the left and right have questioned the decisions in terms of bias.



Why is this important?

The general public is at the mercy of the Supreme Court's discretion when it comes to salient issues of massive importance, and yet, it is extremely rare that reasoning for a decision on cert is publicized. Many journalists and politicians demand that documents known as the "shadow docket" be released as justices issue orders and summary rulings on urgent matters without full briefing or oral arguments.

GRANT WRITS OF CERTIORARI

Certiorari is the process by which the SCOTUS reviews cases. Many cases are submitted before the court for review, and many are not accepted. The court holds steady around 1%.

Example of popular case that was not granted certiorari:

- Carter v. United States
 - This case presented an opportunity to amend the federal government's immunization of liability for service-related injuries for military personnel.
 - Carter v. United States was denied cert in February of 2025, with Justice Clarence Thomas critiquing the case as “incoherent”, “unjust”, and a “judicial failure”.



CURRENT POLICY CONTEXT

The U.S. Congress has shaped judicial discretion through legislative efforts. **The Judiciary Act of 1925** expanded certiorari to give the court more discretion when choosing to grant cert. This serves as the foundation of this policy issue. Congress's passing of this legislation continues its relevance today through the SCOTUS's below 5% acceptance rate of petitions.



Over time, the SCOTUS has **experienced a decrease** in the number of cases that it chooses to hear. This decrease emphasizes the importance of certiorari decisions today and how it affects the court's limited review process.

POLICY ALTERNATIVES

The most practical solution to this issue is simple: **Require the Supreme Court to publicly explain why a petition for certiorari is granted or denied, without allowing that explanation to become grounds for retrial or appeal.** The goal is not to create more litigation, but to provide transparency in the Court's decision-making. A short-written statement from the Chief Justice, similar to a standard opinion, could explain whether the case involved a circuit split, constitutional importance, or national significance. Dissenting statements could also be published if justices disagree. This would not remove the Court's discretion, but it would **create accountability** in how that discretion is used.



POTENTIAL DRAWBACKS

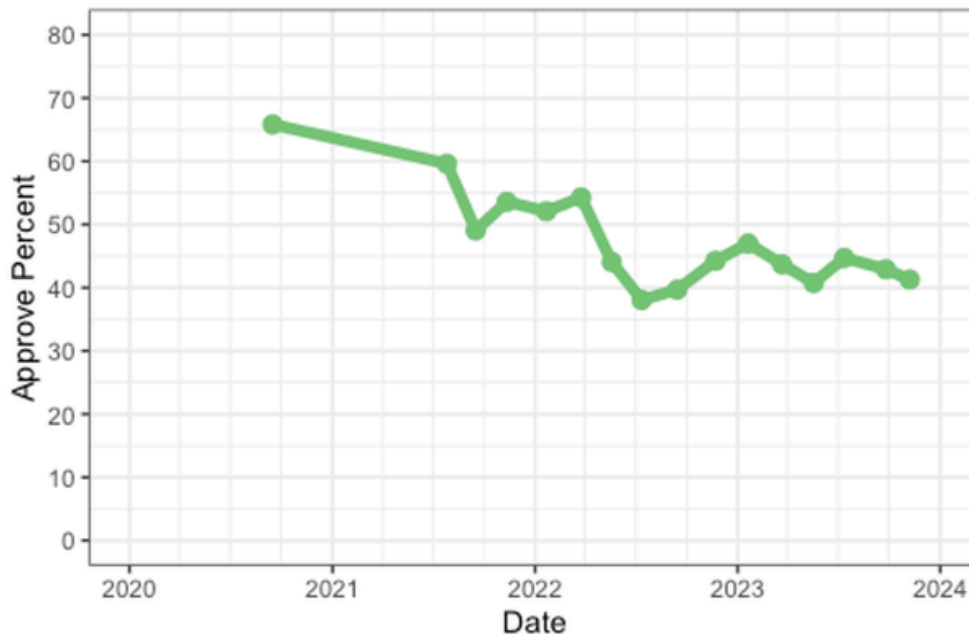
Public outrage **could** increase when controversial petitions are denied, and some may argue that trust in the Court would decrease if the reasoning appears political or inconsistent. It could also increase pressure for broader reforms like term limits, restructuring confirmations, or changing the size of the Court. However, that may not be a bad thing.

If transparency reveals serious flaws, then political pressure for **reform may be necessary**.

Protecting legitimacy through secrecy is not the same as earning legitimacy through accountability.

The American public's perception of the SCOTUS plays an important role in its legitimacy. If the public perceives its decisions as unfair, **the court's legitimacy erodes** as support among Americans dwindles. When the court releases its justification for the denial of cert, it can appear arbitrary or politically motivated, resulting in public backlash.

Figure 1: Approval of U.S. Supreme Court
Among adults



Data: Marquette Law School Poll, national surveys

CONCLUSION

The U.S. government must maintain its transparency. There is no better time to promote transparency and regain public trust in the government than now, when many Americans face uncertainty about our country's political future. Many cases have been petitioned to the court that would have had long-lasting effects, but **no one knows why those cases were not heard.** The court's discretion makes one wonder what would happen if landmark cases like *Brown v. Board of Education* or *Roe v. Wade* were never heard and decided upon. By limiting SCOTUS's discretionary authority and mandating that its reasoning and justification be made public, we can **hold the court accountable** for upholding the constitutionality of its decisions.

There is an understanding of the credibility of the Supreme Court and a level of privacy due to the power the Court holds. However, to remain in the best interest of American citizens, **transparency is necessary.** The United States has entered a time of growing dissatisfaction with government institutions, and the judiciary is no exception. People are skeptical of major decisions made behind closed doors, especially when those decisions shape rights and policy for generations. One way to rebuild trust is through factual transparency in the reasoning behind those decisions. Requiring explanation would not weaken the Court; it would strengthen its legitimacy.



REFERENCES

ACLU. (2025, September 29). Scorecard for State Supreme Court transparency. American Civil Liberties Union. <https://www.aclu.org/publications/scorecard-for-state-supreme-court-transparency>

Bell, P. (2025, December 4). Public Trust in Government: 1958–2025. Pew Research Center. <https://www.pewresearch.org/politics/2025/12/04/public-trust-in-government-1958-2025/>

Collins, N. (2026, April 13). How the justices decide ... which cases to decide: An explainer. SCOTUSblog. <https://www.scotusblog.com/2026/04/how-the-justices-decide-which-cases-to-decide-an-explainer/>

S.359 - 118th Congress (2023–2024): Supreme Court Ethics, Recusal, and transparency act of 2023 | congress.gov | library of Congress. Library of Congress. (n.d.). <https://www.congress.gov/bill/118th-congress/senate-bill/359>

Supreme Court procedures. United States Courts. (n.d.). <https://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-court-procedures>

Gibson, J. L., Caldeira, G. A., & Spence, L. K. (2003). The Supreme Court and the US presidential election of 2000: Wounds, self-inflicted or otherwise?. *British Journal of Political Science*, 33(4), 535–556.

Baird, V. A., & Gangl, A. (2006). Shattering the myth of legality: The impact of the media's framing of Supreme Court procedures on perceptions of fairness. *Political Psychology*, 27(4), 597–614.

Cranfill Sumner LLP. "Supreme Court Cert Denials: Beyond the Headlines - Cranfill Sumner LLP." Cranfill Sumner LLP, 13 May 2025, www.cshlaw.com/resources/supreme-court-cert-denials-beyond-the-headlines/. Accessed 7 May 2026.