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## THE “BERMUDA TRIANGLE?” THE CERT POOL AND ITS INFLUENCE OVER THE SUPREME COURT’S AGENDA

*Barbara Palmer\**

It has been called a “monopoly,” a “swamp,” a “Leviathan,” and even “the Bermuda Triangle.”<sup>1</sup> The culprit: the Supreme Court’s cert pool, the system of randomly assigning petitions for review to a single clerk for a recommendation regarding acceptance or denial of a case. Former Supreme Court clerk and solicitor general, Kenneth Starr, recently lamented that Supreme Court justices have abdicated their responsibility in screening cases for review and have ceded too much power to their clerks; cases worthy of the justices’ attention go into the cert pool, but they never come out. According to Starr, the cert pool “is at war with Justice Louis Brandeis’ proud proclamation that the justices, unlike high government officials from the other branches, do their own work.” Moreover, the cert pool “squander[s] a precious national resource—the time and energy of the justices themselves.” Others agree that the cert pool is a “very dangerous proposition.”<sup>2</sup> In 1998, *USA Today* conducted a five month study on the “effect and growing influence of law clerks,” with several stories devoted to the influence of the cert pool.<sup>3</sup> In ad-

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\* Assistant Professor, Washington Semester Program, American University. The author wishes to thank John Jacob, Archivist, at the Justice Lewis F. Powell Archives, Washington & Lee University School of Law, and Joe Kobyłka, Southern Methodist University. All sources from the Powell Archives used in this article are on file with the author.

1. All quotes are taken from Kenneth W. Starr, *Trivial Pursuits at the Supreme Court*, Wall Street Journal A17 (Oct. 6, 1993), and Kenneth W. Starr, *Supreme Court Needs a Management Revolt*, Wall Street Journal A23 (Oct. 13, 1993).

2. Roger K. Lowe, *Most Supreme Court Justices Let Clerks Screen New Cases*, Columbus Dispatch 9A (Oct. 1, 1993), available in LEXIS, News Library, Columbia Dispatch File.

3. Tony Mauro, *The Hidden Power Behind the Supreme Court Justices Give Pivotal Role to Novice Lawyers*, USA Today 1A (Mar. 13, 1998); Tony Mauro, *Justices, Court-Watchers Concerned with Clerks’ Clout*, USA Today 13A (Mar. 13, 1998); Tony Mauro, *Tactics, Law Clerks Influence High Court’s Agenda*, USA Today 10A (Dec. 23, 1998); Tony Mauro, *Steering Clear of Controversy Court’s Inaction Allows Confusion*,

dition, at least one Justice has been publicly critical of this practice, Justice Stevens.<sup>4</sup> All of this has created a perception of the justices shirking their duties and clerks determining access to the nation's highest bench.

We actually know, however, very little about the role of the cert pool and the potential influence of clerks.<sup>5</sup> Until now, there have been no systematic assessments of the role of the cert pool in determining the Court's agenda. With data from the 1971-1974 and 1984-1985 Terms, this analysis focuses on two criticisms of the cert pool: (1) the cert pool largely determines case selection; and (2) the cert pool fosters the creation of a "cert-pool voting bloc" among the Justices in the pool. Surprisingly, the Court only took the action suggested by a cert-pool memo in approximately half the cases that were granted review. Moreover, little evidence exists that the cert pool fostered the creation of a voting bloc that controlled the Court's docket. In fact, vote-cohesion between the justices in the cert pool actually declined over time. In very few cases, the cert-pool justices voted as a

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USA Today 1A (Dec. 23, 1998).

4. Mauro, *The Hidden Power Behind the Supreme Court Justices Give Pivotal Role to Novice Lawyers* (cited in note 3). Interestingly, Stevens is currently the only Justice who is not a member of the cert pool.

5. The general influence of clerks over the Supreme Court's inner-workings has long been a controversial topic in the popular press and news media. See David J. Garrow, *The Lowest Form of Animal Life?: Supreme Court Clerks and Supreme Court History*, 84 Cornell L. Rev 855 (1999). Two of the more "notorious" accounts of clerk control over the Court are Bob Woodward and Scott Armstrong's *The Brethren* (Simon and Schuster, 1979), and Edward Lazarus' *Closed Chambers* (Times Books, 1998). Most of what we know about clerks comes from Justices' biographies or personal accounts of the clerks themselves. See Dean Acheson, *Recollections of Service With the Federal Supreme Court*, 18 Alabama Lawyer 355 (1957); Paul R. Baier, *The Law Clerks: Profile of an Institution*, 26 Vand. L. Rev. 1125 (1973); Alexander M. Bickel, *The Unpublished Opinions of Mr. Justice Brandeis: The Supreme Court at Work* (Belknap Press, 1957); Sidney Fine, *Frank Murphy: The Washington Years* (U. of Michigan Press, 1996); John C. Jeffries, Jr., *Justice Lewis F. Powell, Jr.* (Charles Scribner's Sons, 1994); Alpheus Thomas Mason, *Harlan Fiske Stone: Pillar of the Law* (Viking Press, 1956); Chester A. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 Or. L. Rev. 299 (1961); Richard A. Posner, *The Federal Courts: Crisis and Reform* (Harvard U. Press, 1985); J. Harvie Wilkinson, III, *Serving Justice: A Supreme Court Clerk's View* (Charterhouse, 1974); Samuel Williston, *Life and Law: An Autobiography* (Little, Brown and Co., 1940). What little academic research that exists on clerks provides a very different picture than the media, suggesting that the influence of clerks is often overstated. See Saul Brenner and Jan Palmer, *The Law Clerks' Recommendations and Chief Justice Vinson's Vote on Certiorari*, 18 Am. Pol. Q. 68 (1990); Kevin T. McGuire, *Advocacy in the U.S. Supreme Court: Expertise Within the Appellate Bar*, 11 Const. Comm. 267 (1994); Karen O'Connor and John R. Hermann, *The Clerk Connection: Appearances Before the Supreme Court By Former Law Clerks*, 78 Judicature 247 (1995); H.W. Perry, Jr., *Deciding to Decide: Agenda Setting in the United States Supreme Court* (Harvard U. Press, 1991); Saul Brenner, *Error-Correction on the U.S. Supreme Court: A View from the Clerks' Memos*, 34 Soc. Sci. J. 1 (1997).

bloc against the non-cert pool justices. At best, evidence for the influence of the cert pool over the Court's agenda is quite limited. Cert-pool memos primarily serve as summaries for the justices, not as a screen.

## I. THE CREATION OF THE CERT POOL

The cert pool was implemented in October of 1972, but there is very little historical record of its creation. Justice Powell is usually credited with the idea of streamlining the process of case selection,<sup>6</sup> but Chief Justice Warren Burger also claimed that the cert pool was his idea.<sup>7</sup> Unfortunately, archival documentation sheds little light on the development of the cert pool. In fact, if Powell was the primary force behind the cert pool, his personal papers are decidedly lacking in any kind of written records or memoranda regarding its creation.<sup>8</sup>

Although the genesis of the cert pool is unclear, the logic behind its creation is clear: to save time and increase efficiency. During the 1960's, the Court's docket had grown rapidly, reaching over 4000 cases by the early 1970s, and the process of disposing of cases was unique to each Justice's chamber. With the cert pool, rather than each chamber reviewing every petition that came to the Court, petitions would be randomly assigned in equal numbers to each chamber that participated in the pool. A clerk would then evaluate the petition and write a "cert-pool memo," ranging from two to twenty pages long. The memo had a standard format, beginning with a statement of the issues raised, followed by summaries of the facts of the case, the lower court opinion, and the contentions and arguments presented by the parties. At the end of the memo, the clerk would discuss

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6. See, e.g., Jeffries, *Justice Lewis F. Powell, Jr.* at 270-72 (cited in note 5); Clifford M. Kuhn and George E. Butler, III, "An Opportunity to be Heard": *An Oral Interview with Lewis F. Powell, Jr.*, 1 Ga. J. of Southern Legal Hist. 413 (1991); William H. Rehnquist, *The Supreme Court: How it Was, How it Is* (William Morrow, 1987); Bernard Schwartz, *A History of the Supreme Court* (Oxford U. Press, 1993).

7. Kuhn and Butler, 1 Ga. J. of Southern Legal Hist. at 430 (cited in note 6).

8. The first written memo regarding the cert pool is dated June 7, 1973. It was an assessment of the performance of the cert pool during its first year of operation and a discussion of whether it should be continued over the summer. See Supreme Court B Memoranda - General, Powell Archives, Wash. and Lee U. Sch. of L. Beginning in the fall of 1973, Powell included a section on the cert pool in the manuals he created for his clerks. See Supreme Court - Memoranda - Clerks B Procedures Book #1, 1973-75, and Procedures Book #2, 1975-82, Powell Archives, Wash. and Lee U. Sch. of L. Other than this, Powell's papers contain no documents regarding the actual creation of the cert pool, debate over how it was to be run, or any discussion of the format and content of cert-pool memos.

reasons why the cert petition should or should not be granted. This memo would be circulated to all the chambers in the pool. Upon receiving the pool memo, another clerk would "mark up" the memo for his or her specific justice, providing further analysis or disagreeing with the pool memo's assessment.

Unlike decisions on the merits and the circulation of opinion drafts, the Justices rarely debate the decision to grant review to a case.<sup>9</sup> The time pressures created by the docket simply prohibit meaningful discussion of all but a few noteworthy cases. Given this, clerks in the cert pool could conceivably have a great deal of influence over the Court's agenda. With Justices spending so little time reviewing each petition, those in the pool would almost have to rely on cert-pool recommendations. The Justices in the pool share an important source of information that the non-cert pool justices lack, the cert-pool memo. As a result, the Justices in the pool would probably tend to vote together, creating a "cert pool voting bloc." Thus, it does seem logical to expect that the clerks in the cert-pool would largely determine which cases were selected.

## II. LOOKING AT CERT POOL MEMOS

Empirically assessing the influence of the cert pool poses some significant challenges. Agreement between Justices' votes and clerk recommendations "does not prove that the justice[s] [are] being influenced; the law clerks might be merely following the guidelines established" by the Court; in other words, they might be using the same criteria that the Justices are using.<sup>10</sup> The Justices have specified particular criteria for screening cases, conflict among the circuits being one of the most important,<sup>11</sup> and clerks in the cert pool obviously look for cases with these characteristics. On the other hand, some correlation between Justices' votes and pool-memo recommendations must be shown as a precondition of any inferences regarding influence. If there is little to no association between pool-memo recommendations, the Justices' choices, and the Court's docket, the cert pool is not influencing case selection.

The most substantial problem posed by any kind of study of the cert pool is the availability of data. Currently, Justice Lewis

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9. See Perry, *Deciding to Decide* (cited in note 5); Robert L. Stern, et al., *7 Supreme Court Practice* (Bureau of National Affairs, 1993).

10. Brenner and Palmer, 18 *Am. Pol. Q.* at 68 (cited in note 5).

11. Stern, et al., *Supreme Court Practice* (cited in note 9).

Powell's papers are the only public source of cert-pool memos. While Justice Powell did keep pool memos from cases the Court decided during his tenure, unfortunately he destroyed all his records on cases that were denied review. Consequently, it is impossible to assess how many times the Court voted to deny review when the cert-pool memo recommended that a case should be granted. It is also impossible to assess how many times the Court agreed when the cert-pool memo recommended that a case should be denied review. On the other hand, the vast majority of cases that come to the Court are "frivolous," particularly those filed *in forma pauperis* by prisoners. It stands to reason that, in i.f.p. cases in particular, the clerks and the justices would be in agreement regarding the denial of review, not because the clerks are exerting "influence" over the Justices in the cert pool, but because these are indeed cases that are not worthy of the Court's time.<sup>12</sup> At any rate, while the lack of data from cases denied review results in an incomplete picture of the influence of the cert pool, until we have better data, it is the best we can do.

With these caveats, this analysis uses data from the cert-pool memos in the papers of Justice Lewis Powell from cases decided during the 1972-1974 Terms and the 1984-1985 Terms.<sup>13</sup> This allows us to assess possible changes that may have developed over time. It is conceivable that the influence of the cert pool was relatively limited during the first years of its operation given its novelty, but grew over time as the practice became institutionalized. During the 1972-1974 terms, the members of the cert pool were Justices White, Blackmun, Powell, Rehnquist and Chief Justice Burger. Justices Douglas, Brennan, Stewart and Marshall were not members. During the 1984-1985 terms, the members of the cert pool were Justices White, Blackmun, Powell, Rehnquist, Chief Justice Burger, joined by Justice O'Connor. Justices Stevens, Marshall and Brennan were not members.

Data on justices' cert votes were collected from the papers of Justice William Brennan from the 1971-1974 terms and the 1984-1985 terms.<sup>14</sup> With cert votes from before and after the

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12. See Kuhn and Butler, 1 Ga. J. of Southern Legal Hist. at 430 (cited in note 6); Perry, *Deciding to Decide* (cited in note 6).

13. Papers of Justice Lewis F. Powell, case folders from 1972-1974 and 1984-1985, Powell Archives, Wash. and Lee U. Sch. of L.

14. Papers of Justice William J. Brennan, Part I, Boxes 417-26, 666-69, 695-98, Library of Congress, Washington, D.C. Brennan's Papers are used for cert votes because they are much more complete than Powell's.

implementation of the cert pool in 1972, not only can we assess the impact of the cert pool on the Court's agenda, but we can also explore whether there were any changes in the voting behavior of individual Justices.

When cases arrive at the Court, justices and their clerks have several options at their disposal in deciding what to do with a particular case. The most obvious are granting or denying review to petitions for certiorari, or noting probable jurisdiction or dismissing appeals. The Justices may also withhold a decision on review until more information has been gathered. They may "call for a response" (CFR), which allows the respondent (the winning party below) to file a brief in opposition to certiorari, or "call for the views of the solicitor general" (CVSG), in which the Court invites the solicitor general to file an amicus brief, typically in cases that will potentially effect the federal government. Cases can also be "held," pending a decision in another case, or treated summarily and vacated and remanded without full plenary review.<sup>15</sup>

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15. Specifically, docket numbers were used as the unit of analysis to account for consolidated cases. The data include cases that came to the Court through both certiorari and appellate jurisdiction; appeals cases were largely treated as discretionary and were placed in the cert pool along with petitions for certiorari.

Cert-pool memos were coded as follows:

*Grant the petition or note probable jurisdiction:* The pool memo specifically states that the case should be granted or noted. This includes pool memos with language such as, "The Court should probably grant," or "This case is probably cert worthy." This also includes pool-memo recommendations that review be limited to specific questions within the petition or appeal.

*ImPLY grant or note:* The pool memo provides reasons why the case should be granted or noted, but does not make a clear recommendation.

*Deny the petition or dismiss the appeal:* The pool memo specifically states that the case should be denied or the appeal should be dismissed. This includes pool memos with language such as, "The Court should probably deny", or "This case is probably not cert worthy."

*ImPLY deny or dismiss:* The pool memo provides reasons for why the case should be denied or dismissed, but does not make a clear recommendation.

*No recommendation:* The pool memo gives reasons why the case should be granted/noted and reasons why the case should be denied/dismissed, or the discussion section of the memo focuses on substantive issues raised by the case. In other words, there is no clear indication of any particular recommendation by the cert-pool memo. This includes memos with language such as, "This is a tough case", or "This is a close case."

*Take some other action:* The pool memo suggests holding for another case, vacating and remanding, affirming or postponing the appeal, calling for the views of the solicitor general (CVSG), or calling for a response from the respondents or appellees (CFR).

Justices' votes were coded as follows: *Grant the petition or note probable jurisdiction* (including instances when the Justices granted review limited to specific questions), *Deny the petition or dismiss the appeal*, *Take some other action* (including holding for another case, vacating and remanding, affirming or postponing the appeal, calling for the views of the solicitor general - CVSG). Another option used by Justices is a "join 3" vote. There

### III. THE CERT POOL'S INFLUENCE OVER THE COURT'S AGENDA

How often did the Court actually do what the pool memo recommended? Table 1 shows the cert-pool recommendations from all cases granted review during the 1972-1974 and 1984-1985 Terms. In the early years of the cert pool, the decision to grant review was largely left open by the clerks. During the 1972-1974 period, the clerks specifically recommended that the Court grant review to the cert petition or appeal in only 24% of the cases that were granted review.

Table 1  
Action Recommended by Cert Pool Memos in Cases  
that were Granted Review

	1972-1974	1984-1985
Grant the petition or note probable jurisdiction	24% (73)	51% (151)
Imply grant or note	9% (29)	0
Deny the petition or dismiss the appeal	5% (15)	24% (71)
Imply deny or dismiss	3% (9)	0
No recommendation	47% (144)	.5% (1)
Take some other action*	13% (40)	25% (73)
	N = 310	N = 296

\* includes recommendations to hold for another case, call for the views of the solicitor general (CVSG) or call for a response from the respondent (CFR), or treat the case summarily.

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were no join 3 votes during the 1971-74 period, but by the 1984-85 period, they were relatively common. Join 3 votes were coded as votes to grant review.



In other words, the cert-pool memo suggested that the Court grant review in only one-fourth of the cases that made it onto the Court's agenda.

In another 9% of cases, the cert-pool memo did not specifically state that the case should be granted review; but the recommendation was implied.<sup>16</sup> These were cases in which the pool memo indicated that the criteria for granting review were present in a particular case, but did not specifically state that a case should be granted review.

In 15 cases, or 5%, the pool memo recommended that the case be denied, but the Court granted review; and in another 3%, the pool memo implied that there were no reasons to grant the case, but the Court did anyway. Thus, 8% of the time, the Court did the opposite of what the cert pool recommended.

During the first three years of the pool, by far the most common recommendation made by a cert-pool memo was no recommendation at all. In 47% of the cases that were granted review during the 1972-1974 terms, the clerk writing the memo did not take a specific position regarding whether the Court should grant review. In fact, it was quite common for the clerk to give reasons why the case should be granted, but also reasons why it should not be granted.<sup>17</sup> In almost half of all cases, the clerk discussed pros and cons regarding whether the case should be granted, specifically leaving the judgment up to the Justices. This suggests that cert-pool memos served primarily as summaries for the Justices, rather than an initial screening method. Cert-pool memos provided a more efficient means of getting

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16. *Kokoszka v. Belford* provides a good example of this: the discussion section of the pool memo states that "there appears to be a direct and clear conflict . . . . The issue would seem to have importance for the many wage earner bankrupts in this country." Preliminary Memo, pp. 3-4, *Kokoszka v. Belford*, File Number 73-5265, Powell Archives, Wash. and Lee U. Sch. of L.

17. A typical example is *Johnson v. Railway Express Agency, Inc., et al.*: the final discussion section of the pool memo explains that "[i]n general, only the tolling issue appears to be worthy of review, and since that issue cannot be readily separated from the remaining issues in the case, perhaps this is not a good case to grant. The seeming importance of the issue and the incipient conflict are strong countervailing factors, however." Preliminary Memo, p. 16, *Johnson v. Railway Express Agency, Inc., et al.*, File Number 73-1543, Powell Archives, Wash. and Lee U. Sch. of L. Another example is *Williams and Williams Co. v. United States*: the pool memo explains that "[t]his is obviously an important case in terms of the impact upon the medical and scientific publishing industry and the effective operation of research libraries . . . [but] this is a close case, and because it is the first case from the Court of Claims under this statute, the Court may want to forego consideration for further developments in the field." Preliminary Memo, p. 13, *Williams and Williams Co. v. United States*, File Number 73-1279, Powell Archives, Wash. and Lee U. Sch. of L.

through the docket for the Justices in the pool by condensing case records. At least in the early years of the cert pool, the Justices were clearly making the ultimate decision to grant or deny review in the vast majority of cases and were still very much in control of their agenda.<sup>18</sup>

In fact, it was not until the 1981 Term, almost ten years after the pool's creation, that clerks began consistently recommending a specific course of action in the "discussion" section at the end of the memo.<sup>19</sup> In the beginning of the 1983 term, a change occurred in the format of pool memos, with the addition of a final section entitled "Recommendation."<sup>20</sup> This section was typically only one to three sentences and provided a specific statement regarding what the Justices should do with the case. As Table 1 shows, during the 1984 and 1985 terms, only one cert-pool memo out of almost 300 did not make a specific recommendation regarding a particular case.<sup>21</sup>

With cert-pool memos now making specific recommendations in every case, we would expect that the cert pool would have substantially more influence over the Court's agenda. It seems logical to expect that if the Justices now required the clerk writing the cert-pool memo to make a specific recommendation, they would follow it, at least most of the time. The addition of a short "Recommendation" section to the end of the pool memo suggests that, along with summary information, the Justices wanted to know what the cert-pool clerk thought should be done with the case.

At Table 1 shows, the Court took the pool memo's suggestion to grant cases about twice as often as it did in the early years

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18. The influence of cert-pool memos when they fell into the "take some other action" category is probably minimal. When a cert-pool memo recommended CFR or CVSG, and the Court agreed, it appears that it was up to clerks in the Justices' individual chambers to take further action. According to Powell's manuals for his clerks, if the Court did, in fact, CFR or CVSG after it was recommended in a cert-pool memo, it was standard procedure for his clerks to write a brief update for Powell. Powell Memoranda to Clerks - Orientation, 1974-75, Powell Archives, Wash. and Lee U. Sch. of L. Thus, if a recommendation regarding review was made, it did not come from the cert pool. In addition, the number of instances in which a cert-pool memo recommended that the case be disposed summarily were extremely low, only 1.5% of cases granted review during the 1972-74 period and 2% during the 1984-85 period.

19. This was determined by searching case files in Powell's papers until consistent recommendations were found. There was a relatively clear break in the frequency of recommendations between the 1980 and 1981 terms.

20. There are no memos in Powell's papers describing what brought about this formal change.

21. Preliminary Memo, *Schreiber v. Burlington Northern, Inc., et al.*, File Number 83-2129, Powell Archives, Wash. and Lee U. Sch. of L.

of its operation, but this is at least partly due to the increased number of recommendations in the cert-pool memos. On the other hand, it is quite remarkable that during the 1984-1985 Terms, the pool memo recommended that a case be granted review in only half of the cases that were actually granted review. Even more strikingly, the cert pool had recommended that the Court deny review in 24% of the cases granted. Thus, in almost one-fourth of the cases that were granted review, the Court ignored the recommendation of the cert-pool memo. This is also a substantial increase over the earlier period.

With the Court accepting half of the cases that the cert-pool memo recommended, the cert pool may have played a much larger role in the development of the Court's agenda by the 1984-85 terms. On the other hand, the high number of cases in which the Court rejected the cert-pool recommendation indicates that even when clerks suggested a specific course of action, the Justices still made their own independent judgments regarding case selection. Even in this later period, it appears that cert-pool memos were still serving primarily as summaries and not a screening-method.

#### IV. THE CERT POOL'S INFLUENCE OVER THE CERT-POOL JUSTICES

If the Court did what the cert-pool memo recommended about half the time, was it, in fact, the Justices in the cert pool who voted to accept these cases, or was it some combination of Justices in and out of the pool? If the Justices in the pool were voting together in these cases, this would suggest that the pool fostered a voting bloc that was able to determine half of the Court's docket. The influence of the cert pool on the Court's agenda would be more indirect, but still important.

Table 2 shows how many times Justices in the cert pool voted together in various-sized voting blocs before the implementation of the cert pool and for the two periods after the implementation of the cert pool.

Table 2  
Voting Blocs on the Court

	pre-pool 1971-1972	post-pool 1972-1974	post-pool 1984-1985
Number of Justices in the cert pool who voted as a bloc:			
6			15% (36)
At least 5	32% (43)	41% (103)	35% (86)
At least 4	74% (99)	71% (178)	64% (157)
At least 3	100%(135)	99% (251)	95% (235)
	(N = 135)	(N = 254)	(N = 248)
Number of Justices not in the cert pool who voted as a bloc:			
4	48% (123)	40% (104)	
At least 3	86% (220)	83% (215)	48% (132)
At least 2	100%(258)	100%(259)	94% (258)
	(N = 258)	(N = 259)	(N = 274)

Prior to the creation of the cert pool, during the 1971-1972 terms, Justices White, Blackmun, Powell, Rehnquist and Chief Justice Burger, the five Justices who eventually made up the cert pool, voted together as a bloc of five 32% of the time. Once the cert pool was implemented, they voted as a bloc of five 41% of the time, an increase of 9%. This does suggest that the cert pool contributed to the development of a cert-pool voting bloc. Further analysis, however, suggests a much murkier picture. Only four Justices' votes are needed to grant review, so a more accurate picture of the influence of the cert pool on the Court's agenda is drawn by considering whether the cert pool fostered a bloc of four Justices among the five in the cert pool. In other words, how often did *at least* four of the five justices in the cert pool vote together and ensure that a case was granted? As Table 2 shows, there was virtually no difference between the 1971-

1972 and the 1972-1974 periods in the number of cases that at least four cert-pool justices voted together. If anything, there was a slight decline, from 74% to 71%.

What is quite clear, however, is that by the 1984-1985 period, ten years later, vote cohesion among pool justices had substantially declined. Admittedly, the addition of one more Justice, O'Connor, increasing the pool to six, simply makes it harder for them to vote as a bloc. On the other hand, the other five Justices who were in the pool from 1972-1974 were still there in 1984-1985. They voted as a bloc of six in only 15% of the cases granted review. They voted as a bloc of four or more only 64% of the time, a measurable decrease from the earlier periods, particularly the pre-cert pool years. It should also be noted that by the 1984-85 period, in 5% of the cases granted review, no more than two Justices could agree on a chosen course of action; there were at least three different voting blocs among the Justices in the cert pool.

Although vote cohesion among the Justices in the cert pool declined over time, were these Justices still more cohesive than the Justices who were not in the pool? Given that the number of non-cert-pool Justices has always been smaller than the number of cert-pool Justices, comparisons between the two groups are not precise, but the data are noteworthy. Table 2 indicates that the vote cohesion among the four Justices who were not in the pool, Justices Douglas, Brennan, Stewart and Marshall, declined from 48% to 40% during the 1971-1972 to 1972-1974 periods. They did vote as a bloc of three, however, well over 80% of the time during both periods. Without a cert pool, these Justices' votes were still relatively cohesive. During the 1984-1985 period, the three remaining non-cert pool Justices voted together as a bloc only half the time, in 48% of the cases granted review, suggesting that the decline in vote cohesion over this ten year period was a Court-wide phenomenon.

In the years immediately after the implementation of the cert pool, there was virtually no change in the vote cohesion of the Justices who joined the pool. Moreover, by the mid 1980s, when cert-pool memos were making explicit recommendations regarding which cases should be granted review, vote cohesion among the Justices in the pool declined. The Justices who were not in the cert pool also showed a relatively high level of vote cohesion that declined over time. All of this suggests that factors other than the cert pool were influencing the Justices' votes regarding certiorari.

The data in Table 2 are important in that they provide a comparison of the cert-pool Justices' cohesiveness before and after the implementation of the cert pool and a comparison to the non-cert pool justices. But these data reflect the number of times Justices voted in blocs, and thus potentially overstates the influence of the cert pool. These data do not specify how often the cert-pool justices voted in blocs *as the cert pool recommended* these justices should vote, a rather key assumption in assessing the actual influence of the cert pool over the Court's agenda. Justices could be voting together as a bloc, but against the cert-pool recommendation.

Table 3 shows the number of Justices in the cert pool who voted as the cert-pool memo recommended.<sup>22</sup>

Table 3  
Voting Blocs Matching Cert-Pool Memo Recommendations

	1972-1974*	1984-1985**
Number of Justices in the cert pool who voted as a bloc as the cert pool recommended:		
6	-	18% (38)
5	41% (32)	19% (40)
4	17% (13)	18% (37)
3	11% (9)	14% (30)
2	9% (7)	14% (30)
1	1% (1)	6% (13)
0	22% (17)	10% (20)
	(N = 79)	(N = 208)

\*This column includes only those cases in which the cert pool memo recommended grant or note, deny or dismiss, and at least 4 pool justices participated.

\*\*This column includes only those cases in which the cert pool memo recommended grant or note, deny or dismiss, and at least 5 pool justices participated.

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22. This data includes only the cases in which the clerk writing the memo made a clear recommendation to grant or note, deny or dismiss, which explains the small number for the 1972-1974 period. Cases in which the cert-pool memo recommended some other action are also excluded.

During the 1972-1974 period, in 41% of the cases in which the pool memo made a recommendation, all five Justices in the pool voted accordingly. In an additional 17%, four of the cert-pool Justices voted as the cert pool recommended. If these two categories are added, at least four of the Justices in the cert pool agreed with the cert pool recommendation 58% of the time. But it is important to keep in mind that during this early period, the data include only half of the cases granted review, given the high number of cases in which the cert-pool memo made no recommendation. Thus, during the early years of the cert pool, the cert-pool Justices voted cohesively as the cert-pool memo recommended in only one-fourth of the cases that made it onto the Court's docket. What is even more surprising is that 22% of the time, or about just as often, the Justices in the cert pool unanimously rejected the cert-pool recommendation.

During the 1984-1985 period, the Justices in the pool voted as a bloc of four or more in support of the cert-pool recommendation 55% of the time, essentially the same rate as the earlier period. Thus, even when the pool memo was more likely to make a recommendation, the Justices were not any more likely to follow it. The Justices were much less likely, however, to unanimously reject the cert-pool recommendation; they voted as a bloc of six against the cert-pool memo only 10% of the time.

None of this, however, accounts for the votes of the non-cert pool Justices. If the non-cert pool Justices are voting with the pool Justices in these cases, then something other than the pool-memo is catching the justices' attention. Unanimous cases are a prime example. During the 1972-1974 period, 22% of the time (17 cases) the Court unanimously agreed with the pool memo recommendation to grant review. During the 1984-1985 period, 8% of the time (16 cases) the Court unanimously agreed with the pool memo to grant review. These are cases that more than likely would have been granted review even without a cert-pool recommendation. Once these are accounted for, the potential influence of the cert pool declines even more.

In addition, the cert-pool Justices rarely voted as a bloc against the non-cert-pool Justices. During the 1972-1974 period, there was only one case in which the cert-pool memo recommended a grant, the cert-pool Justices agreed and voted as a bloc of four to grant, and the non-cert-pool justices voted as a unani-

mous bloc to deny.<sup>23</sup> There were no cases in which all five cert-pool Justices voted against all four non-cert-pool Justices. During the 1984-1985 period, there were 29 cases in which the cert-pool memo recommended a grant, the cert-pool justices agreed and voted as a bloc of four or more to grant, and the non-cert-pool justices voted as a unanimous bloc to deny. This is a substantial increase from the earlier period, but is still only 19% of the cases in which the cert-pool memo recommended a grant. As a proportion of all cases ultimately granted review by the Court, this is a mere 10%. Thus, only in a few cases did a cert-pool voting bloc thwart the wishes of the non-cert pool Justices. In the vast majority of cases, Justices in the cert pool and out of the cert pool were voting together to determine which cases were selected. Once again, this suggests that the influence of the cert pool over the Court's agenda is mitigated by the independent judgments of the Justices themselves. Whatever influence the cert pool may have over the Court's agenda is more than likely attributable to the fact that the Justices and the clerks are using the same criteria to evaluate cases.

## V. CONCLUSION

Much of the recent criticism of the cert pool surrounds the current status of the Court, with eight of the nine Justices participating in the pool. Conceivably, the cert pool's influence has become more pronounced since the mid-1980's with almost the entire Court in the pool. Unfortunately, cert-pool memos and reliable cert votes from the 1990's are not publicly available,<sup>24</sup> but the data from earlier periods are suggestive. Eliminating the cases in which the cert-pool memo did not make a recommendation, the rate at which the Court agreed with the cert pool slightly declined from 57% during the 1972-1974 Terms to 51% during the 1984-1985 Terms. If the cert pool now has more influence, it means that this trend has been reversed. Vote cohesion between the Justices also substantially declined from the early years of the cert pool to the 1984-1985 terms, and the cert pool probably has become even less cohesive in the 1990s. When the cert pool was created, those in the pool were largely

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23. Preliminary Memo, *Renegotiation Board v. Bannerkraft Co.*, File Number 72-822, Powell Archives, Wash. and Lee U. Sch. of L. Cert pool votes from Docket Sheet 72-822, Box 421. Papers of Justice Brennan, Library of Congress, Washington, D.C.

24. Currently, there are no pool memos publicly available from the period after Powell left the Court in 1986.



from the same ideological wing of the Court. All four of Nixon's appointees joined the pool, along with Justice White. Even during the 1984-1985 terms, with the addition of Justice O'Connor, there was still a relatively clear ideological break between those in the pool and those out of the pool. Today, there is less ideological cohesion between the Justices in the pool, with the addition of Justices Scalia, Thomas, Ginsburg and Breyer.

At any rate, the simple fact that the Court disagreed with the pool memo in almost half of the cases that were granted review is quite astonishing. Moreover, after the cert pool was implemented, vote cohesion between the Justices in the pool declined. Little evidence exists of a cohesive cert-pool voting bloc, or more specifically, of a cert-pool voting bloc controlling a significant amount of the Court's agenda. If any cert-pool voting bloc existed, Justices who were not in the cert pool usually voted with the Justices in the cert pool, which substantially weakens the possible influence of the cert pool. Moreover, the cert pool did not have a clear or consistent impact on the voting behavior of individual Justices. In general, their agreement rates declined over time as well. Thus, it appears that the cert pool serves primarily as a time-saver and not an initial case-screener; it merely provides the Justices with summarized versions of case records. To a surprisingly large extent, the cert pool does not determine which cases the Court ultimately decides. The decision to grant review is still based on the independent judgments of the Justices.