

Case Selection in Three Supreme Courts: A Comparative Perspective

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Justice Ruth Bader Ginsburg of the U.S. Supreme Court believes that courts in the United States and other countries have much to learn from one another: “The U.S. judicial system will be the poorer ... if we do not both share our experience with, and learn from, legal systems with values and a commitment to democracy similar to our own.”¹

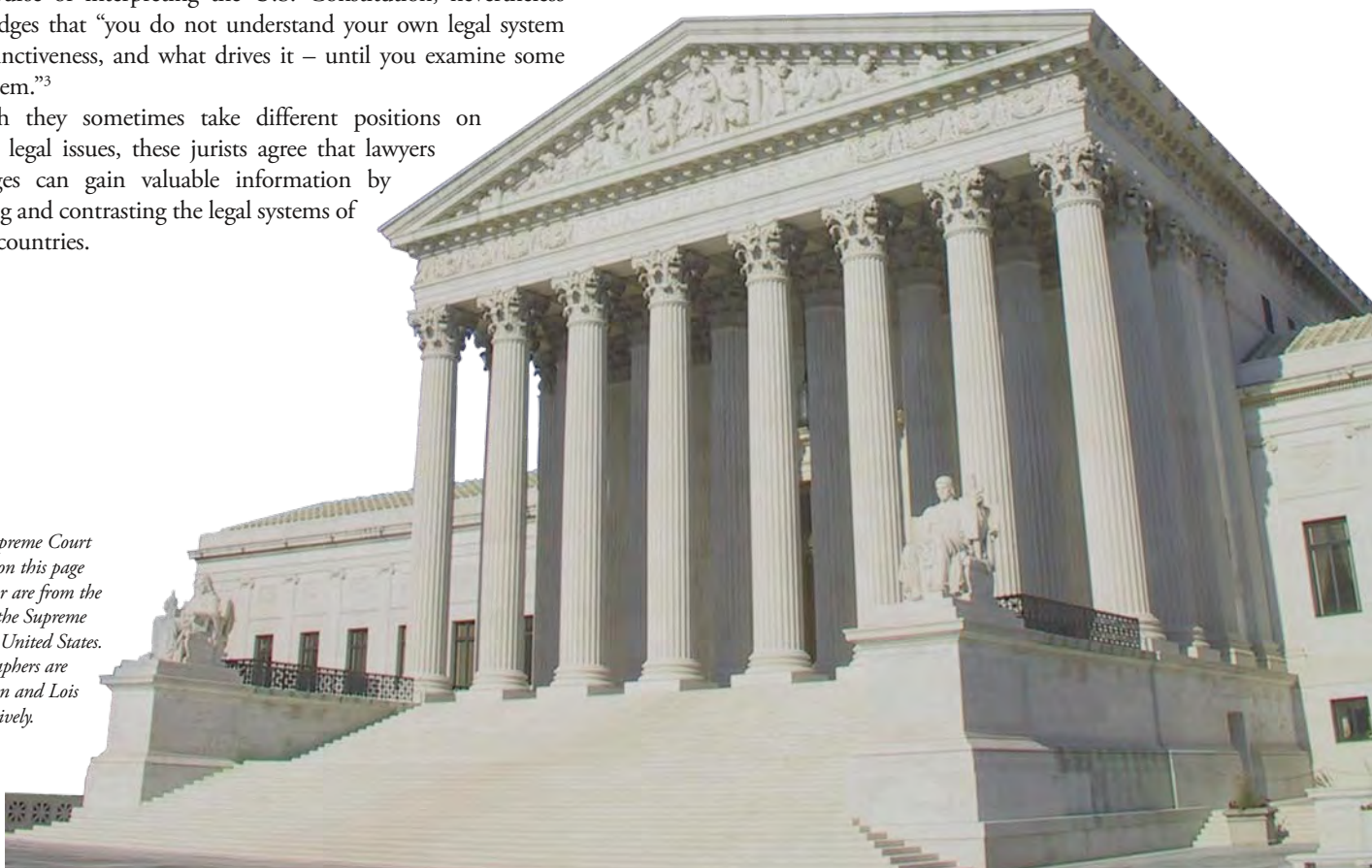
Justice Stephen Breyer frequently emphasizes the benefit of studying the decisions and practices of other legal systems.² Even their colleague Antonin Scalia, who rejects the citation of foreign precedent in the course of interpreting the U.S. Constitution, nevertheless acknowledges that “you do not understand your own legal system – its distinctiveness, and what drives it – until you examine some other system.”³

Though they sometimes take different positions on contested legal issues, these jurists agree that lawyers and judges can gain valuable information by comparing and contrasting the legal systems of different countries.

In this paper, we bring a comparative perspective to an important procedural issue faced in many judicial systems. We examine the exercise of the power of case selection in three supreme courts that have each been given some degree of control over whether to accept particular cases for review. Our focus will be two American courts, the Supreme Court of the United States (USSC) and the Supreme Court of Georgia (GASC), as well as one Russian court, the Supreme Arbitrazh (Commercial) Court of the Russian Federation (SACRF).

When a Supreme Court exercises the power to grant review in particular cases, its decisions raise profound questions about the court's role in the larger legal system. Case selection forces judges to reflect on a court's mission, its reason for existence.

The U.S. Supreme Court photographs on this page and page four are from the collection of the Supreme Court of the United States. The photographers are Franz Jantzen and Lois Long, respectively.





RUSSIAN FEDERATION



The Supreme Arbitrazh (Commercial) Court of the Russian Federation.

Standards and procedures for review of lower court decisions

Supreme Arbitrazh (Commercial) Court of the Russian Federation (SACRF)

The Russian arbitrazh courts⁴ were established in 1991 as a separate branch of state courts dedicated to resolving commercial disputes. The SACRF occupies the highest level of the arbitrazh court system.

Potentially every arbitrazh case submitted to the SACRF might be reviewed by the Presidium.⁵ But the application must go through a preliminary filtering stage before being accepted for consideration. The application is distributed to the appropriate panel according to specialization and a judge is assigned. This judge takes primary

responsibility for the case and will participate in proceedings before the Presidium if review is granted.

Within a month, the assigned judge and two other judges examine the application and related documents to determine whether the case presents grounds for review under article 304 of the Arbitrazh Procedural Code (APC). The three-judge panel will issue an opinion giving reasons for the decision to grant or deny review. An opinion granting review will be sent to the opposing party, together with the application and accompanying documents and a deadline for a response. The Presidium will review a case within three months after the panel decision granting review.



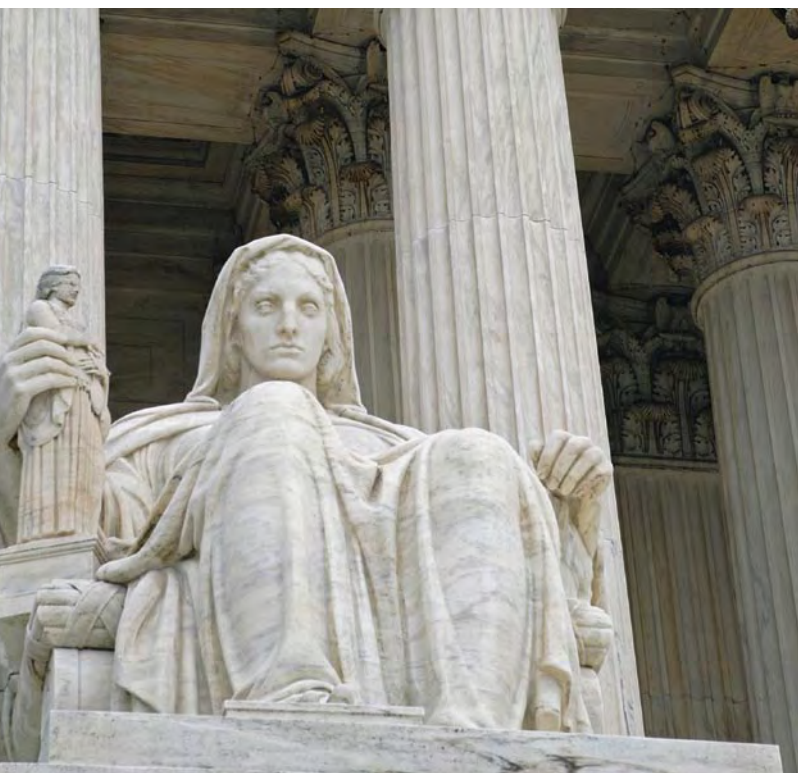
U.S. Supreme Court (USSC)

The current process for reviewing petitions for certiorari in the U.S. Supreme Court has been in place for many years. Much of the work of reviewing cert petitions occurs in the “cert pool,” in which all but one of the justices participate.⁶ Cert petitions are divided among the law clerks for the eight participating justices. The assigned clerk must review the petition, along with any response, conduct appropriate research and prepare a short memorandum.

This “cert memo” will typically summarize the issues presented and make a recommendation regarding whether the petition for certiorari should be granted. The cert memo will be circulated for review by the eight justices in the cert pool, any of whom might ask his or her own clerks to do additional research.

The only justice who does not participate in the cert pool is Justice John Paul Stevens, who prefers to review all petitions for certiorari in chambers. Stevens’ four clerks divide the cert petitions among themselves and prepare brief memoranda concerning petitions they wish to bring to Stevens’ attention. Review by Stevens and his clerks constitutes the principal institutional check on the cert pool review process.

Cert petitions that have been reviewed are scheduled for consideration at a conference of the justices. Most petitions will not be individually discussed by the court. To receive individual consideration, a justice must place the case on the court’s “discuss list.”



Cases in which the cert pool memorandum recommends a grant of certiorari are typically placed on the discuss list, and any justice may add cases to the list. Certiorari will be automatically denied in cases not placed on the discuss list by the day before the conference. Grant of certiorari, which results in full briefing and oral argument, requires the votes of at least four of the nine justices.

Rule 10 of the USSC sets forth the standards for review of peti-

tions for certiorari. The rule provides that review by writ of certiorari “is not a matter of right, but of judicial discretion.” The court will only grant a petition for certiorari “for compelling reasons,” such as a conflict of authority on an important federal question. The rule indicates that the court will “rarely” grant certiorari “when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.”

Georgia Supreme Court (GASC)

A centralized administrative staff assists the GASC in reviewing petitions for certiorari. Incoming petitions are assigned randomly to staff attorneys, who do not specialize with respect to subject matter. The staff attorney will first review the cert petition to ensure that formal requirements have been satisfied and will then prepare a memorandum summarizing the facts, the questions of law presented and other relevant information.

The memo will typically include a recommendation as to whether the petition for certiorari should be granted. The memo will be distributed to all seven of the GASC’s justices.

In addition to the staff attorney, each cert petition will be assigned to one of the justices by wheel, meaning a particular justice receives every seventh petition. The assigned justice reviews the petition and presents the case at a conference of the court, making a recommendation that may depart from that of the staff attorney. The members of the court then discuss the case and take a vote.

If the court unanimously agrees with the recommendation of the assigned justice, the petition is granted or denied without further discussion. If any justice does not agree with the recommendation, he or she can ask that the petition be deferred for a “second reading” by another member of the court.

At that point, justices may circulate memoranda concerning the pending cert petition, which will be discussed and voted upon for the second time at a later conference. Grant of a petition for certiorari requires a majority vote of the court.⁷

The Georgia Constitution limits review of Georgia Court of



Justices of the Supreme Court of Georgia are: (back, l. to r.) Harris Hines, George Carley (LL.B.'62), Hugh Thompson, Harold Melton (J.D.'91), (front, l. to r.) Carol Hunstein (presiding justice), Leah Ward Sears (chief justice) and Robert Benham (J.D.'70).

Appeals decisions to cases “of gravity or great public importance.”⁸ The GASC rules provide little elaboration: “A review on certiorari is not a right. A petition for the writ will be granted only in cases of great concern, gravity, or importance to the public.”⁹

The rule does clarify, however, that “certiorari generally will not be granted to review the sufficiency of evidence.”¹⁰

A comparison of case selection practices

Common features

A high level of selectivity

While procedures for case selection differ markedly in the three courts we studied, they all produced comparable outcomes in one respect: only a small percentage of proffered cases were accepted for review.

The USSC reports that it received 7,496 case filings during its October 2004 term. It accepted 87 cases (disposing of 85 in signed opinions), indicating an acceptance rate of approximately 1.16 percent.¹¹

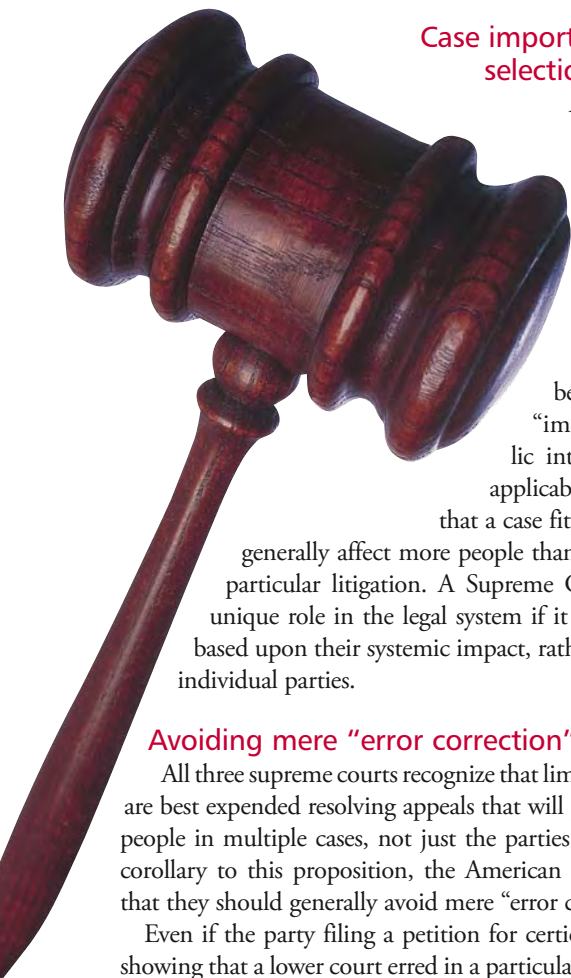
Statistics published by the SACRF indicate that 16,172 petitions for review were considered in 2005 and review was granted in 379 cases, generating an acceptance rate of 2.34 percent.¹²

Statistics from the GASC indicate that the court granted 43 out of 527 petitions for certiorari in 2005, for an acceptance rate of 8.16 percent.¹³

The relatively low case acceptance rate in these three supreme courts highlights the fact that case selection represents a sort of rationing process. Each court possesses only limited appellate resources that can be brought to bear on the review of lower courts’ decisions. Case selection therefore constitutes an exercise in seeking to ensure wise use of judicial resources.

Maintaining uniformity as a selection criterion

In both the USSC and the SACRF, the most commonly invoked reason for granting review is the necessity to restore uniformity in light of conflicting lower court decisions. It would probably be accurate to say that the goal of maintaining uniformity in the interpretation of applicable law constitutes the principal rationale for structuring a court system so that cases are funneled to a single court of last resort.



Case importance as a selection criterion

All three supreme courts give prominent attention in the case selection process to the importance of cases presented for review. While a variety of meanings could be attached to terms like “importance” or “public interest,” a core concept applicable in all three courts is that a case fitting these criteria must generally affect more people than just the parties in the particular litigation. A Supreme Court better fulfills its unique role in the legal system if it carefully chooses cases based upon their systemic impact, rather than the interests of individual parties.

Avoiding mere “error correction”

All three supreme courts recognize that limited appellate resources are best expended resolving appeals that will potentially affect many people in multiple cases, not just the parties before the court. As a corollary to this proposition, the American courts have concluded that they should generally avoid mere “error correction.”

Even if the party filing a petition for certiorari makes a plausible showing that a lower court erred in a particular case, that will not justify intervention by the USSC or GASC unless correcting the error could affect the resolution of similar cases involving other parties.

The avoidance of mere error correction emphasizes the character of case selection as a rationing process. Of course, this principle tends to contradict a common popular understanding of the role of a Supreme Court.

Lay people often see a Supreme Court as the final guarantor of justice, the backstop to ensure that all cases will be properly resolved according to law. We believe, however, that error correction should generally be viewed as the responsibility of the intermediate appellate courts, not a Supreme Court.

Variations in case selection processes

While the three courts were comparable in terms of the low percentage of cases accepted and the criteria applied in the selection process, they differed significantly with respect to the procedures employed.

Degree of judicial involvement

The process of case selection in the SACRF ensures a significant level of judicial involvement in every case. By contrast, under the screening process currently employed by the USSC, many requests for review will be resolved without any justice having read the petition for certiorari.

Comparison of the case selection procedures in these three courts raises the question whether the USSC should move in the direction of the other courts (and its own earlier practice) so that the justices

would devote more personal attention to the review of cert petitions.

In considering this issue, we return to the theme of wisely rationing limited judicial resources. In the 1920s, when the justices individually reviewed cert petitions, the court received fewer than 400 petitions annually.¹⁴ That amounts to approximately 5 percent of the 7,500-8,000 petitions filed in recent years.

The large number of cert petitions *per judge* in the USSC necessarily requires substantial reliance on staff assistance. Moreover, the justices must allocate time between reviewing petitions for certiorari and writing opinions in argued cases. Since the former responsibility is arguably less important than the latter, the USSC has made a defensible decision to manage the certiorari process in a manner that leaves more judicial time for the opinion writing task.

Discretion in the case selection process

The rules of the USSC explicitly affirm that the decision whether to grant a petition for certiorari constitutes a matter of judicial discretion. There is a clear distinction between an appeal as a matter of right and discretionary review by writ of certiorari.

In the SACRF, by contrast, the decision to review a lower court judgment has been viewed as a legal decision. If the statutory standards for review are met, it has been thought that the court has a duty to take the case.

We believe discretion in case selection allows a Supreme Court to steward its resources and more efficiently fulfill its role in the overall legal system. When the USSC receives a petition for certiorari showing an apparent conflict of authority among the lower courts, the court sometimes concludes that it would be wiser to deny certiorari and await further developments.

In some cases, the court wants to learn the views of additional lower court judges on a difficult question before reaching its own conclusion. In other situations, the particular case may constitute a poor vehicle for resolving a conflict of authority, either because the facts are atypical or because there are arguable jurisdictional defects that could prevent the court from reaching the merits.

Finally, denying certiorari can give lower courts time to resolve a conflict on their own without Supreme Court intervention. Such discretion could prove useful to the SACRF in efficiently supervising the system of arbitrazh courts.

Explanation of decisions denying review

The SACRF issues written opinions when it declines to review cases from the lower courts. Opinions denying review contain varying degrees of explanation, depending on the particular judges writing the order. By contrast, the USSC and GASC generally do not explain decisions rejecting petitions for certiorari.

Any serious effort to provide individualized orders explaining denials of certiorari would require the USSC or GASC to make a much greater expenditure of judicial resources than that necessitated by current screening processes. We do not think the potential advantages of explained denials merit such a large imposition on the justices' time.

First, in the USSC and GASC, petitions for certiorari concern access to a possible second layer of appellate consideration, one designed to be used only selectively.

Second, if a Supreme Court exists primarily to maintain uniformity in the interpretation of law, failure to take any particular case can

create only a temporary systemic problem, easily corrected in time.

Third, the advantages of additional information from published orders denying certiorari would likely be marginal, since the justices have often explained in written opinions why they granted certiorari in particular cases.

Expectations of the parties

The USSC clearly places the burden on the party seeking review to do the work of persuading the court to take the case. The less detailed SACRF requirements make it easier to file an application for review, but also leave more of the burden of determining whether there are grounds for review on the judges and their staff.

Of course, a party seeking review obviously has an incentive to make a persuasive case, but additional guidance on the court's expectations could help both the parties and the judges.

The SACRF makes the decision whether to accept a case based upon the application of the party seeking review. The opposing party may not even know an application has been submitted until the case is handed over to the Presidium by the three-judge screening panel.

The practice in the USSC, by contrast, has been to call for a response from the opposing party before deciding whether to grant certiorari. Hearing from both parties would make the procedure more adversarial and help in the decision making process. We therefore recommend that the SACRF adopt the practice of calling for a response from the opposing party before deciding whether to refer a case to the Presidium for review on the merits.

Specialization among reviewers

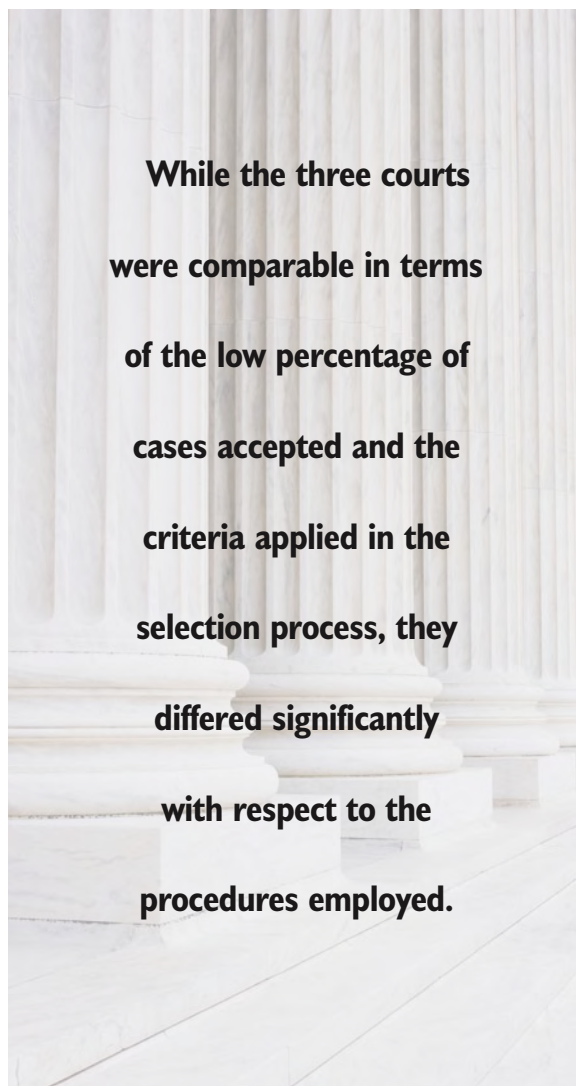
In the SACRF, applications for review are considered by judges with expertise in particular areas of law. By virtue of their training and experience, the judges are well positioned to evaluate the effect of a particular lower court decision on the relevant body of law, hence the value of referring the case to the Presidium.

One perennial criticism of the case selection process in the USSC has been that petitions for certiorari are reviewed by clerks with minimal legal experience. Without broad experience, they may be prone to underestimate the practical import of an issue raised in a petition for certiorari or the extent to which it departs from other decisions in the field.

Drawing on the experience of the SACRF, we think the USSC,

and perhaps the GASC as well, might profitably consider bringing greater specialization to bear on the review of petitions for certiorari. In the USSC, this could be done by increasing the role of permanent staff in the review of cert petitions. Memos from permanent staff with relevant expertise could sometimes supplement the work of clerks in the cert pool.

The GASC already uses permanent staff to screen petitions for certiorari. Introducing greater specialization might be a relatively simple matter, requiring minimal changes to the review process. Each staff attorney could take responsibility for reviewing cert petitions dealing with particular areas of the law and could be expected to develop greater expertise over time.



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End notes

¹ *Ruth Bader Ginsburg, A Decent Respect to the Opinions of [Human]kind: The Value of a Comparative Perspective in Constitutional Adjudication, Constitutional Court of South Africa (Feb. 7, 2006).*

² *Stephen Breyer, Dinner Speech for the Summit of World Bar Leaders (Nov. 10, 2001); Stephen Breyer, The Supreme Court and the New International Law, Speech to the American Society of International Law (Apr. 4, 2003); Patti Waldmeir, US Lawyers Urged to Study Foreign Law as Global Cases Grow, Financial Times Europe 3 (Aug. 11, 2005).*

³ *Antonin Scalia, Don't Impose Foreign Law on Americans, American Enterprise Institute, vol. 17, issue 4 (May 1, 2006).*

⁴ *The most common translation is "arbitration courts," but the term "arbitration" is misleading. The term "commercial" is more accurate, but sounds very different. Like other commentators, therefore, we prefer the term "arbitrazh."*

⁵ *There are two principal forums for the operation of the SACRF: the Plenum and the Presidium. The Plenum is a plenary session with all judges participating. The Presidium, which makes decisions on cases accepted for review, consists of the chairman of the court, the deputies, the chairmen of the panels and other judges appointed by the Plenum for a two-year term. There are presently 15 judges on the Presidium.*

⁶ *Tony Mauro, Justice Alito Joins Cert Pool Party, The Legal Intelligencer 4 (Apr. 10, 2006).*

⁷ *Interview with Justice George H. Carley and Amy Haney (June 5, 2006); R. Perry Sentell, Jr., Lightening the Load: In the Georgia Supreme Court, 37 Ga. L. Rev. 697 (2003).*

⁸ *Georgia Constitution, art. VI, § 6, ¶ 5.*

⁹ *GASC Rule 40.*

¹⁰ *Id.*

¹¹ *Chief Justice John Roberts, 2005 Year-End Report on the Federal Judiciary (Jan. 1, 2006).*

¹² *Information about the main characteristics of the work of the arbitrazh courts in 2004-2005, http://www.arbitr.ru/news/totals/2005/vas_05-2_osn.pdf.*

¹³ *Supreme Court of Georgia, Caseload Report for Calendar Year 2005, at 5.*

¹⁴ *Stern, Gressman, Shapiro & Geller, Supreme Court Practice 287-88 (8th ed. 2002).*