

ACTION PLAN NEEDED TO REDUCE “CIRCUIT SPLITS” IN FEDERAL COURT

by

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Although the press, the public, and commentators regularly pay a great deal of attention to the Supreme Court’s decisions, another and equally important part of the Justices’ business often passes basically unnoticed: the parallel process by which they choose which cases to decide. With the exception of a few high profile matters, and occasional news reports mistakenly claiming that the denial of *certiorari* “affirmed” a lower court decision, the Justices’ agenda-setting role is regarded as too complicated or too trivial to merit much discussion, even in the academic literature.

The time has come, however, for a serious reexamination of the criteria used to pick cases at the nation’s highest court, for (as this LEGAL BACKGROUNDER is intended to demonstrate) the Justices’ current approach is flawed. In particular, the Court’s long-standing, overriding focus on resolving circuit conflicts no longer stands a real chance of bringing coherence to federal law, but instead crowds off its docket many important cases. The Court, Congress, and the bar can and should take steps to improve the system, particularly in commercial cases, by creating a mechanism to promptly resolve most conflicts legislatively, thereby leaving the Justices’ free to select cases with an eye to their broader importance.

For as long as the Court has had some control over its own docket, and well before Congress in 1988 basically eliminated the remaining vestiges of the “right” to Supreme Court review by appeal, the Justices have needed criteria to separate wheat from chaff. The Court agrees to hear approximately 80 of the 2000 “paid” petitions filed each Term (4%) and 10 of the 5000 petitions on the *in forma pauperis* docket dominated by *pro se* prisoner filings (.2%). The raw odds that *certiorari* will be granted in any particular case are thus daunting, but misleadingly so. Supreme Court review is not a random lottery. Only a small proportion of the petitions — around 20% of the paid docket and far less for *pauper* cases — have any chance of being considered seriously by the Justices because they present a clear, recurring, and even moderately important question of federal law. The remainder, which are effectively screened out by law clerks, should never be filed in the first place and, at least in the commercial context, amount to nothing more than a waste of the client’s money and the attorney’s time.

Although Supreme Court Rule 10 sets out several non-exclusive factors the Justices consider in selecting cases, one overwhelmingly dominates those in which *cert.* is granted: 80% present a circuit

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conflict.¹ Although any number of obstacles can derail a petition — and the law clerks search doggedly for grounds to recommend a “deny” — *certiorari* is quite likely to be granted in those cases that squarely present a recurring and outcome-determinative circuit split. Indeed, circuit conflicts so dominate the *cert.* docket that the Justices appear to regard them as a violation of a norm of federal law — *viz.* that a single rule, statute, or constitutional provision should mean the same thing throughout the country. The Supreme Court thus regularly grants *certiorari* to resolve even those conflicts that lack much (if any) practical consequence, as when litigants easily can adapt to the particular rule applied by their circuit and when the question rarely recurs.

Although widely accepted as appropriate, this exceedingly broad conception of the Supreme Court’s role in eliminating circuit splits actually suffers from two flaws. *First*, as a practical matter, the Court cannot hope to bring any greater uniformity to American federal law — the most complicated and most rapidly changing legal system in human history — which inevitably tends to entropy. Congress constantly enacts new statutes, many sweeping, that are rife with ambiguities giving rise to conflicts. Even the Supreme Court’s own decisions regularly give rise to new conflicts over how to interpret and to apply those rulings. There are now several *thousand* extant circuit splits and, as the author has learned over the past several years in cataloging conflicts for *United States Law Week*, many more constantly emerge than the Justices are able to resolve each Term. Further, the Justices are reviewing essentially a random sample of circuit conflicts, many of which would not be regarded as among the most “important” by most objective measures. Cases presenting particularly important conflicts regularly evade Supreme Court review either because the losing party declines to seek *cert.* given the high costs and low odds, or because *cert.* is sought but the Justices decline to hear the case because of some perceived flaw in its posture.

Second, the existence of a circuit conflict does not, without more, actually violate an important norm of our system of laws, or at least it does not do so in any unique respect. Even in those cases that involve interstate conduct, a single party (other than businesses operating interstate) rarely faces the impossible prospect of abiding by inconsistent interpretations of a single provision of law. And inconsistencies exist throughout federal law even when there is no circuit split, for only an infinitesimally small proportion of all the debatable questions of federal law have been definitively resolved in every circuit. In those jurisdictions in which no controlling ruling exists, uncertainty can arise in many ways, including from the simple absence of a settled rule, conflicting district court decisions, a strong dissent in one court of appeals, or even a plain reading of the text that runs contrary to existing precedent. Yet the Supreme Court limits its docket principally to reviewing that particular and limited subset of uncertain questions that have been decided inconsistently by the courts of appeals.

The Supreme Court nonetheless can accomplish a great deal in granting *certiorari* to resolve circuit splits, albeit in a more limited fashion than its current approach dictates. The Justices do well to consider conflicts insofar as they signal that a question of law merits further consideration because it is particularly close and knotty. Justice Stevens recently articulated this view when he explained that conflicts between the law of the Federal Circuit (on which Congress has conferred exclusive appellate jurisdiction over, for example, patent cases) and the prior precedent of the regional circuits are “useful in identifying questions that merit this Court’s attention.” *Holmes Grp., Inc. v. Vornado Air Circ. Syst.*,

¹The remaining cases generally involve a lower court decision that declares a statute unconstitutional or that conflicts with Supreme Court precedent, a question within the exclusive appellate jurisdiction of the U.S. Court of Appeals for the Federal Circuit, an issue of overriding importance to the federal government, or a question arising under the rare statutory scheme that provides a special right of appeal.

122 S. Ct. 1889, 1898 (2002). In addition, there are conflicts that merit immediate review because they undermine the effective operation of federal law by rendering its meaning truly uncertain or by inviting forum shopping. These are quite likely to involve commercial issues. Businesses are frequently subject to exceptionally complex legal regimes for which certainty is at a premium for purposes of planning. Many businesses thus take a sophisticated approach to the law, carefully accounting for the nuances of legal requirements in planning their operations, as when they structure transactions for tax purposes and make disclosures under the securities laws. Larger businesses also operate interstate, such that circuit splits may subject them to intolerably inconsistent requirements.

This somewhat narrower conception of the circuit conflicts that merit *certiorari* would free up space on the Court's docket for more important matters, for the Court's current conception that its principal role is to resolve essentially any and all circuit conflicts squarely presented to it necessarily precludes the Court from granting *certiorari* in other important cases. Over the past decade, as the number of cases reviewed each Term has plummeted from around 150 to barely 80, the Court has almost uniformly denied those *cert.* petitions (at least among those filed by private parties rather than the Solicitor General) that indisputably present a vitally important and recurring legal issue but that have not given rise to a clear split in the circuits.

These cases that have been allowed to pass by review have often carried enormous financial consequences, a valuable measure of importance. In the commercial context, for example, the Court recently denied *cert.* in both the *Visa/Mastercard* class action litigation (No. 01-1464) in which tens of billions of dollars were admittedly at stake; a series of petitions challenging a multi-billion-dollar retroactive assessment against the nuclear industry (01-1411); and, over the dissents of Justices Kennedy and O'Connor, the *Trans Union* petition (No. 01-1080) involving a First Amendment challenge to regulations governing tens of millions of credit records and billions of dollars in potential liability. And although the Court granted *cert.* in the *Ford/Citibank* case (No. 01-896) to resolve a circuit split involving diversity jurisdiction, it refused to consider an even more significant issue presented by the petitioners: whether a class action seeking punitive damages for the class in excess of \$75,000 satisfies the diversity jurisdiction requirement.

Both the bar and Congress have important roles to play as well in focusing the Supreme Court's attention on the most important cases. Substantial thought should be given to creating a Supreme Court Bar Association in which firms and organizations that appear regularly before the Court would participate actively. Similar groups exist for other specialized courts such as the Federal Circuit and they play an important educational role as a forum for judges and lawyers to address an array of issues. Among other things, the Justices could invite a Supreme Court Bar Association to file briefs in particular cases addressing whether the questions presented are important enough to merit *certiorari*, just as they now invite the Solicitor General to advise them in some cases affecting the federal government.

In the commercial context, businesses should increase their financial support for non-profit organizations, like Washington Legal Foundation, and industry trade groups, such as the U.S. Chamber of Commerce, which regularly file *amicus* briefs at the *certiorari* stage. Those briefs play a vital role in demonstrating to the Justices and their law clerks, who have little experience in commercial matters, that questions presented by *cert.* petitions have widespread importance. Without them, the petitioner's arguments tend to ring hollow because they are entirely self-interested.

A serious and concerted effort to resolve the great mass of circuit splits, and thus to free the Supreme Court to shift its focus to truly important cases, will not succeed without the engaged

involvement of the U.S. Congress. Certainly, that body is better suited to the task of resolving conflicts over the meaning of federal statutes, as the Supreme Court's efforts often require it to play a role for which it is not suited (lacking any ability to study legislative matters but inevitably required to make choices between competing constructions that rely on policy judgments) and which the framers did not intend it to serve.

The process of shifting this responsibility to Congress should begin with a multi-year study of extant conflicts that could be easily accomplished simply by enacting a statute calling on federal courts to expressly acknowledge those conflicts that they identify in reaching decisions.² The Supreme Court should also take the opportunity, in the course of denying *certiorari* in various cases, to acknowledge the existence of apparent conflicts that it elects not to resolve (whether for lack of importance or because of some flaw in the case). The resulting base of knowledge will give all the branches of government a better sense of the scope of the problem of outstanding conflicts.

A mechanism must also be created to *resolve* the conflicts. Congress thus must be more willing to step in to clarify its intent when the lower courts identify ambiguities and adopt divergent rules. The difficulty is that no institution now has that responsibility. The scope of federal law spans the jurisdiction of numerous committees of both the House and Senate, which address conflicts *ad hoc*, often as part of omnibus legislation that broadly revisits an area of the law. But each body could establish a special subcommittee of its Judiciary Committee tasked with proposing legislation to other committees that would address acknowledged statutory ambiguities. Although some proposals would no doubt die for political reasons, many others would be uncontroversial and would provide a great benefit.

Many other approaches to resolving resolve circuit conflicts can and should be put forward. Hopefully, discussion of the issue will lead to a system in which the Supreme Court decides the most important cases (including resolving the most important circuit splits), while Congress takes on its proper role of addressing ambiguities in, and conflicts arising from, the statutes it has enacted.

²The Seventh Circuit has a narrower, but roughly analogous rule requiring panels to note if their opinions will create a circuit conflict.