

# NOTES

## THE VIABILITY OF CERTIFICATION IN FEDERAL APPELLATE PROCEDURE

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## INTRODUCTION

In the summer of 2009, a federal circuit court of appeals used an appellate mechanism that has been described as “a dead letter.”<sup>1</sup> Given its dead-letter status, it should come as little surprise that “there are few lawyers (and perhaps few circuit judges) who even know it remains an option.”<sup>2</sup> Despite this reality, the Fifth Circuit Court of Appeals, sitting en banc, utilized Supreme Court Rule 19, which provides: “A United States court of appeals may certify to [the Supreme Court] a question or proposition of law on which it seeks instruction for the proper decision of a case.”<sup>3</sup> The Fifth Circuit was divided evenly over the proper resolution of a legal issue, so it certified a question of law to the Supreme Court.<sup>4</sup> One can only speculate as to whether the Fifth Circuit appreciated at the time it issued the certified question<sup>5</sup> that it was employing an appellate mechanism that the Supreme Court has discouraged, and that circuit courts have rarely implemented in the last fifty years.<sup>6</sup> Despite these hostilities, certification has existed in federal statutory law for more than two centuries.<sup>7</sup> Notwithstanding

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1. Edward A. Hartnett, *Questioning Certiorari: Some Reflections Seventy-Five Years After the Judges' Bill*, 100 COLUM. L. REV. 1643, 1712 (2000).

2. *Id.*

3. SUP. CT. R. 19.

4. *United States v. Seale*, 577 F.3d 566, 571 (5th Cir. 2009) (“What statute of limitations applies to a prosecution under 18 U.S.C. § 1201 for a kidnapping offense that occurred in 1964 but was not indicted until 2007?”).

5. *But see id.* at 572 (Jones, J., dissenting) (“The likelihood of the Court’s accepting certification, based on past usage, is virtually nil.”).

6. See ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 10.3, at 679 (5th ed. 2007) (“The Supreme Court is generally reluctant to accept matters via certification.”); EUGENE GRESSMAN ET AL., SUPREME COURT PRACTICE 597 (9th ed. 2007) (stating that the Supreme Court disfavors certification); Tracey E. George & Chris Guthrie, *Remaking the United States Supreme Court in the Courts' of Appeals Image*, 58 DUKE L.J. 1439, 1450 (2009) (concluding that the Justices discourage certified questions just as much as they discourage petitions for writs of certiorari).

In the last fifty years, the Court has granted only three certificates. See *Iran Nat'l Airlines Corp. v. Marschalk Co.*, 453 U.S. 919 (1981); *Moody v. Albermarle Paper Co.*, 417 U.S. 622 (1974) (per curiam); *United States v. Barnett*, 376 U.S. 681 (1964).

7. Congress first authorized certification in 1802. See Act of Apr. 29, 1802, ch. 31, § 6, 2 Stat. 156, 159. More surprising is the fact that certification has existed longer—approximately ninety years longer—than the writ of certiorari, the most widely used appellate mechanism today. See generally Judiciary Act of 1891, ch. 517, § 6, 26 Stat. 826, 828.

certification's deep historical roots, few lawyers, legal scholars, and judges know that it exists.<sup>8</sup> Moreover, despite a dearth of academic literature and recent case law on the topic, certification remains a relevant aspect of federal appellate practice.<sup>9</sup>

By entering the somewhat dormant academic debate on certification, this Note seeks to assess the history, constitutionality, and viability of certification. Part I provides a historical overview of the arguments that Congress, the Supreme Court, and legal scholars have advanced to justify certification's inception and continued existence. Part II addresses whether certification is wholly constitutional or whether, even if it is constitutional, it has been unconstitutionally applied. Part III evaluates the present and future viability of certification. Ultimately, this Note concludes that certification remains a viable, albeit broken, appellate mechanism. In order to maximize the benefits that it has to offer, the Supreme Court must reevaluate and revise certification's place in federal appellate procedure.

## I. A BRIEF HISTORY OF CERTIFICATION

In order to assess the future viability of certification, one must first understand and appreciate the role that certification has played in federal appellate procedure.<sup>10</sup> Through an examination of statutory law and judicial interpretation, Part I tracks the expansion, limitation, and transformation of certification from its initial conception through its multiple revisions. This Part also examines

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8. See *supra* text accompanying note 2. Much of what has been written on certification can be found in only a handful of academic pieces. See, e.g., Kent S. Bernard, *Certified Questions in the Supreme Court: In Defense of an Option*, 83 DICK. L. REV. 31 (1979); James W. Moore & Allan D. Vestal, *Present and Potential Role of Certification in Federal Appellate Procedure*, 35 VA. L. REV. 1 (1949); Aaron Nielson, *The Death of the Supreme Court's Certified Question Jurisdiction*, 59 CATH. U. L. REV. 483 (2010); Amanda L. Tyler, *Setting the Supreme Court's Agenda: Is There a Place for Certification?*, 78 GEO. WASH. L. REV. 1310 (2010). Even one of the leading case books on federal court procedure consigns its discussion of certification to only one page. See CHARLES ALAN WRIGHT ET AL., *FEDERAL COURTS* 1054 (12th ed. 2008).

9. *But see* Nielson, *supra* note 8, at 487 (declaring the death of certification after the Supreme Court's refusal to answer the Fifth Circuit's certified question in *Seale*).

10. For a more extensive historical treatment of certification, see generally Hartnett, *supra* note 1, *passim*, and Moore & Vestal, *supra* note 8, at 10-19.

the nexus between the Supreme Court and certification, and analyzes the Justices' reasons for certification's continued use.

*A. Certification's Inception: Resolving Intra-Circuit Splits*

Certification has deep historical roots that extend as far back as 1802.<sup>11</sup> At the time, there were only six circuit courts, and each individual court "consist[ed] of the justice of the supreme court residing within the said circuit, and the district judge of the district where such court [was] holden."<sup>12</sup> Because these courts were composed of only two judges, a district judge and a Supreme Court Justice, the sitting judges frequently did not agree on the appropriate holding.<sup>13</sup> In response to this problem, Congress enacted the following law:

[W]henever any question shall occur before a circuit court, upon which the opinions of the judges shall be opposed, the point upon which the disagreement shall happen, shall, during the same term, upon the request of either party, or their counsel, be stated under the direction of the judges, and certified under the seal of the court, to the supreme court, at their next session to be held thereafter; and shall, by the said court, be finally decided.<sup>14</sup>

Congress intended that circuit courts would use certification to resolve intra-circuit splits.<sup>15</sup> Congress, however, in rectifying one problem, created another: due to the frequency with which the circuit courts split,<sup>16</sup> certification had the potential to burden the Supreme Court with certified questions. To guard against this, the Court began to place restrictions on certification despite the fact

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11. See CHEMERINSKY, *supra* note 6, at 678.

12. Act of Apr. 29, 1802, ch. 31, § 4, 2 Stat. 156, 157.

13. See CHARLES ALAN WRIGHT & MARY KAY KANE, LAW OF FEDERAL COURTS § 106, at 780 (6th ed. 2002) (finding that judges would frequently "disagree deliberately in order to bring a question to the Supreme Court").

14. Act of Apr. 29, 1802 § 6, 2 Stat. at 159.

15. This argument depends on one defining an intra-circuit split as a conflict between the two judges sitting on a circuit court. This definition, however, is dated given the current makeup of the circuit court system. For a modern definition of an intra-circuit split, see *infra* note 124.

16. See *supra* note 13 and accompanying text.

that these restrictions were absent from the statute.<sup>17</sup> For example, the Court dismissed those questions that were “too imperfectly stated to enable [the Supreme Court] to pronounce any opinion upon them.”<sup>18</sup> The Court also accepted only questions of law, dismissing those questions in which the facts were still at issue.<sup>19</sup> Similarly, the Court restricted certified questions to a “single and material point” of law, reasoning that when a certificate brings up the whole case, “it would, in effect, be the exercise of original, rather than appellate jurisdiction.”<sup>20</sup> Acting under congressional silence, the Court has repeatedly either upheld or expanded these restrictions.<sup>21</sup>

### *B. Certification and the Judiciary Act of 1891: Resolving Inter-Circuit Splits*

Despite the Supreme Court’s restrictions on certification, it was still overburdened with an ever-increasing caseload.<sup>22</sup> In response to this growing problem, Congress sought to revise the structure and procedures of the federal judiciary, which it did in 1891.<sup>23</sup> As part of these revisions, Congress established the permanent circuit

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17. The statute, moreover, gives the Court no authority to create such restrictions.

18. *Perkins v. Hart*, 24 U.S. (11 Wheat.) 237, 237 (1826).

19. *E.g.*, *Adams, Cunningham & Co. v. Jones*, 37 U.S. (12 Pet.) 207, 213 (1838) (“[T]o express an opinion upon the whole facts of the case, instead of particular points of law growing out of the same ... [is] a practice which is not deemed by the majority of the Court to be correct, under the act of congress on this subject.”).

20. *White v. Turk*, 37 U.S. (12 Pet.) 238, 239 (1838). Part II discusses whether the Court, in deciding a certified question that is dispositive of the case, exercises original jurisdiction. For now, it is simply important to note that the Court understood the jurisdictional and constitutional issues that may arise with respect to certification’s use.

21. *E.g.*, *Cleveland-Cliffs Iron Co. v. Arctic Iron Co.*, 248 U.S. 178, 179 (1918) (dismissing the certificate because “the statements amount but to a narrative of facts mixed with questions of law so interblended ... as to cause it to be impossible to conclude as to either the law or the facts without a separation of the two”); *Columbus Watch Co. v. Robbins*, 148 U.S. 266, 269 (1893) (dismissing the certificate because “[i]t does not specifically set forth the question or questions to be answered, and ... it does not state that instruction is desired for proper decision of such question or questions”).

22. *See Hartnett*, *supra* note 1, at 1650 (“By 1888, the Court was more than three years behind in its work, and when the 1890 Term opened, the Court had reached the absurd total of 1800 cases on its appellate docket—and was obligated to decide them all.”) (internal quotations and citations omitted).

23. *See* Judiciary Act of 1891, ch. 517, 26 Stat. 826 (“An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes.”).

courts of appeals to act as intermediate appellate courts between the Supreme Court and the district courts.<sup>24</sup> Congress also retained certification, and authorized the Court to “require that the whole record and cause ... be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.”<sup>25</sup> This revision, surprisingly, was met with little debate.

When the Judiciary Act was first introduced in Congress in 1888, the legislation “provided for circuit court certification of sufficiently important legal questions.”<sup>26</sup> After its passage in the House in 1889, the bill authorized the circuit courts in diversity cases “to certify novel, difficult, or important questions, and required circuit courts to certify any question that had been decided differently in another circuit court.”<sup>27</sup> The purpose of certification, however, remained an issue for debate. Originally, certification was established for the purpose of resolving *intra*-circuit splits between the two judges sitting on a circuit court.<sup>28</sup> But proponents of the 1888 legislation asserted that the revised purpose of certification was to resolve *inter*-circuit splits.<sup>29</sup> The legislation’s sponsor, Senator William Evarts, supported this latter view in the congressional debates, contending that certification would “guard against diversity of judgment in these different courts.”<sup>30</sup>

At the time the Senate considered the legislation, the Senate Judiciary Committee requested the Justices’ views on the “various proposals for relieving the Court’s workload,” one of which included a proposal to establish permanent intermediate appellate courts of

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24. *Id.* § 2, 26 Stat. at 826.

25. *Id.* § 6, 26 Stat. at 828. The Court had previously held that the certification statute did not authorize it to order up a case to decide the entire matter in controversy. Rather, the Court reasoned that it was restricted to deciding only certified questions of law. *See, e.g., Wheeler Lumber Bridge & Supply Co. v. United States*, 281 U.S. 572, 577 (1930) (“[T]his Court uniformly ruled that it could not entertain the certifications unless they were of distinct questions of law and not of the whole case.”).

26. Hartnett, *supra* note 1, at 1651.

27. *Id.*

28. *See supra* Part I.A.

29. *See* Comment, *Federal Appellate Practice—Certified Questions on a Division of Opinion Between Two Panels of a Court of Appeals Dismissed*, 43 IOWA L. REV. 432, 436 (1958) (“The sponsor of the ... Bill ... indicated that diversity of judgment between different circuit courts of appeals would be a proper situation for certification.”).

30. 21 CONG. REC. 10,222 (1890) (statement of Sen. Evarts).

appeals.<sup>31</sup> Voicing their support, the Justices, in a letter to the Committee, noted “their approval of eleven particular features of the various proposals.”<sup>32</sup> The Justices were particularly interested in “the provision that certain cases were ‘not to be brought to the Supreme Court ... unless the Court of Appeal, or two judges thereof, certify that the question involved is of such novelty, difficulty or importance as to require a final decision by the Supreme Court.’”<sup>33</sup> Although the Justices thought that certification would be especially useful in resolving inter-circuit splits,<sup>34</sup> they would ultimately restrict its use in cases implicating such divisions.

### *C. Certification and the Judiciary Act of 1925: Reducing the Court’s Docket*

Certification achieved its ultimate design in the Judiciary Act of 1925, which “amend[ed] the Judicial Code” and “further define[d] the jurisdiction of the circuit courts of appeals and of the Supreme Court.”<sup>35</sup> The legislation’s sponsor, Senator Albert Cummins, acknowledged that revisions to the Judicial Code were necessary to “restrict or reduce the appellate jurisdiction of the Supreme Court ... in order to enable it fairly to meet the demands that are made upon it.”<sup>36</sup> For example, when Congress enacted the legislation, the

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31. The Supreme Court became involved with the legislation during a dinner party hosted by Chief Justice Melville Fuller and attended by the Justices and seven members of the Senate Judiciary Committee. See Hartnett, *supra* note 1, at 1651.

32. *Id.*

33. *Id.* (quoting WALTER F. MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* 228-29 n.36 (1964)).

34. *Id.* (“But any question shall be so certified upon which there has been a different decision in another circuit.” (quoting MURPHY, *supra* note 33, at 228-29 n.36)).

35. Judiciary Act of 1925, ch. 229, § 239, 43 Stat. 936, 936. Specifically, this Act provided:

In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, the court at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which instructions are desired for the proper decision of the cause; and thereupon the Supreme Court may either give binding instructions on the questions and propositions certified or may require that the entire record in the cause be sent up for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there by writ of error or appeal.

*Id.* ch. 229, 43 Stat. at 938.

36. 66 CONG. REC. 2752 (1925) (statement of Sen. Cummins).

Court was “15 or 18 months behind in its work.”<sup>37</sup> In relieving the Court of its ever-increasing caseload, the legislation “restricted the right of appeal to the Supreme Court to a very limited area involving constitutionality of statutes.”<sup>38</sup> Certification, however, remained intact, largely because Congress sought to limit “the number of cases in which there is an appeal or writ of error as of right, and increase those in which only a certiorari or a certificate can bring the case before the Supreme Court.”<sup>39</sup> Ultimately, Congress determined that certification’s “obligatory review”<sup>40</sup> would “furnish ample opportunity for all cases to go from the circuit court of appeals to the Supreme Court.”<sup>41</sup>

Although Congress was primarily responsible for drafting this legislation, the Court was given the opportunity to weigh in on the proposed revisions. During congressional hearings on certification, Justice Willis Van Devanter stated that “[t]he present statute has proved to be a useful one” because it authorized the circuit courts of appeals “to avail themselves of decisions on distinct questions of law unassociated with all the other complexities of the case, and then to apply them instead of going ahead and making a decision and having the whole case come up to us.”<sup>42</sup> The validity of this observation, however, depends on the logical assumption that answering a certified question is likely to expend less of the Court’s limited judicial resources than would a decision of the entire case on appeal. That observation is true if, for example, a circuit court of appeals, confronted with a pressing legal question that it is unable to answer, issues a certified question to the Supreme Court. The Court answers the question, which just so happens to be dispositive of the case pending before the circuit court. The circuit court, in turn, applies the answer in its judgment. This judgment may have implications in other circuit or district courts faced with the same or similar legal question. In this scenario, the Supreme Court’s

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37. *Id.*

38. Comment, *supra* note 29, at 433.

39. H.R. REP. NO. 68-1075, at 3 (1925).

40. Comment, *supra* note 29, at 433.

41. S. REP. NO. 68-362, at 3 (1924).

42. *Jurisdiction of Circuit Courts of Appeals and of the Supreme Court of the United States: Hearing Before the H. Comm. on the Judiciary on H.R. 8206, 68th Cong. 15, 29 (1924)* (statement of J. Van Devanter).



answer to the certified question effectively limits the number of appeals to both the circuit courts and the Supreme Court.

Despite Justice Van Devanter's assurances that certification would "always [be] granted when there is a conflict between courts of appeals and would always be granted when there was an arguable constitutional claim, [the Justices] never explained what the supposedly recognized principles were" that would guide them in granting or dismissing a certificate.<sup>43</sup> Without such "governing principles," the Court, by dismissing valid certificates, effectively "achieved absolute and arbitrary discretion over the bulk of its docket."<sup>44</sup> In fact, the Court sought to increase this discretion "by practically eliminating the certification power of courts of appeals."<sup>45</sup> The Judiciary Act of 1925, which Congress enacted to reduce the caseload of the Supreme Court and to furnish the circuit courts of appeals with greater control, conferred to the Court near complete discretion over its docket, thereby "depriv[ing] the lower courts of their promised role"<sup>46</sup> and contravening the legislation's purpose. As the decreasing number of certificates issued by the circuit courts demonstrates, the Court has exercised such complete control and discretion over its docket that it has all but eliminated certification's use.<sup>47</sup>

## II. THE CONSTITUTIONALITY OF CERTIFICATION

In order to assess the future viability of certification, one must determine whether certification, as authorized by Congress or as applied by the federal courts, is constitutional. For example, does Congress, through certification, usurp the judicial power of the Supreme Court by vesting control over the Court's docket in the

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43. Hartnett, *supra* note 1, at 1705.

44. *Id.*

45. *Id.*

46. *Id.* at 1710. Then-Professor Frankfurter and Professor Landis asserted that, in spite of the Court's hostility to certification, "questions certified must be answered." *Id.* (quoting Felix Frankfurter & James M. Landis, *The Business of the Supreme Court at October Term, 1929*, 44 HARV. L. REV. 1, 35 (1930)).

47. From 1927 to 1936, the circuit courts issued seventy-two certificates. *Id.* at 1710-12. This number dropped to twenty a decade later, and the decline continued; from 1946 to 2009, the Supreme Court granted certificates in only four cases. *Id.*; see also Nielson, *supra* note 8, at 486-87.

circuit courts of appeals?<sup>48</sup> The more important question, however, is whether the Supreme Court acts within its constitutionally delegated authority when it grants a certificate if the answer to the certified question is dispositive of the entire case pending before the lower court exercising original jurisdiction.<sup>49</sup> In such cases, does the Court implicitly exercise original jurisdiction in contravention of the Constitution? Is the federal statute authorizing certification constitutionally valid because it permits the Court to choose between a constitutionally permissible assertion of appellate jurisdiction and a constitutionally impermissible assertion of original jurisdiction?

### *A. The Supreme Court's Original and Appellate Jurisdictions*

In addressing the constitutional issues that are implicated when the Supreme Court answers a certified question, one must first understand when the Court is permitted or required to exercise jurisdiction over a case. Section 2 of Article III of the U.S. Constitution authorizes the Court to exercise original jurisdiction over cases affecting “Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party.”<sup>50</sup> In those few enumerated instances, the Court exercises exclusive jurisdiction and acts as the court of first instance;<sup>51</sup> that is, the Supreme Court is the only court that has the authority to render a decision in the matter.<sup>52</sup> When the Supreme Court is constitutionally forbidden from exercising original jurisdiction, the Court is authorized to exercise appellate jurisdiction “both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.”<sup>53</sup>

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48. For an answer to this question, see Bernard, *supra* note 8, at 44.

49. Moore and Vestal raise a similar question, which they answer in the negative. Moore & Vestal, *supra* note 8, at 34-35 (“But where the certificate meets the established standards as to operative facts and distinct and definite questions of law the Supreme Court’s appellate jurisdiction is invoked, and no valid objection can, therefore, be based upon the decisive character of the certified questions.”).

50. U.S. CONST. art. III, § 2, cl. 2.

51. Laurence Claus, *The One Court that Congress Cannot Take Away: Singularity, Supremacy, and Article III*, 96 GEO. L.J. 59, 77 (2007) (“Article III, § 1 and Article III, § 2, cl. 1 together define the one supreme Court’s jurisdiction. Article III, § 2, cl. 2 divides that pre-defined jurisdiction between matters to be decided by the Court at first instance and matters to be decided by the Court on appeal.”).

52. *Id.* at 77-78.

53. U.S. CONST. art. III, § 2, cl. 2.

Although the Constitution confers upon Congress the authority to regulate any matter pertaining to the Court's *appellate* jurisdiction, it does not grant the same authority with respect to the Court's *original* jurisdiction.<sup>54</sup> In *Marbury v. Madison*, the Court emphatically rejected the use of congressional power to modify the Supreme Court's original jurisdiction.<sup>55</sup> Writing for the Court, Chief Justice John Marshall expounded, "If congress remains at liberty to give this court appellate jurisdiction, where the constitution has declared their jurisdiction shall be original; and original jurisdiction where the constitution has declared it shall be appellate; the distribution of jurisdiction, made in the constitution, is form without substance."<sup>56</sup> The Court ultimately concluded that the "obvious meaning" of Article III prohibits Congress from either adding to or detracting from the Constitution's grant of original jurisdiction.<sup>57</sup> To hold otherwise, the clause would become "inoperative" and would have little effect in limiting the power of Congress to manipulate the jurisdiction of the Court, either by granting original jurisdiction when none exists or by removing original jurisdiction in contravention of the Constitution.<sup>58</sup>

Although certification is primarily used as an appellate mechanism, there are rare instances when the Court answers a certified question that is dispositive of the entire case pending before the lower court exercising original jurisdiction.<sup>59</sup> As Parts II.B and II.C demonstrate, whether the Court in such cases implicitly and unconstitutionally exercises original jurisdiction depends, to some extent, on how one defines original jurisdiction.

### *B. Answering a Certified Question that Is Dispositive of the Entire Case*

The Supreme Court in *Wheeler Lumber Bridge & Supply Co. v. United States* answered a certified question dispositive of an entire

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54. *Id.*

55. 5 U.S. (1 Cranch) 137, 138 (1803) ("Congress have not power to give original jurisdiction to the supreme court in other cases than those described in the constitution.").

56. *Id.* at 174.

57. *Id.* at 175.

58. *Id.*

59. See *United States v. Rice*, 327 U.S. 742 (1946); *Wheeler Lumber Bridge & Supply Co. v. United States*, 281 U.S. 572 (1930).

case.<sup>60</sup> In 1930, the Court of Claims, exercising original jurisdiction, certified a question concerning an interpretation of the Revenue Acts of 1917 and 1918.<sup>61</sup> The Supreme Court originally dismissed the certificate because it “embrace[d] the whole case, and so could not be answered consistently with the applicable statute or with the constitutional limitations on our jurisdiction.”<sup>62</sup> Constitutionally, the Court would have been unable to entertain the certificate because, in so doing, it would have exercised “original jurisdiction ... contrary to the constitutional provision.”<sup>63</sup> Statutorily, the Court would have been unable to grant the certificate because “the statute permit[ted] a certification only of definite and distinct questions of law.”<sup>64</sup> As the Court correctly concluded, “it could not entertain the certifications unless they were of distinct questions of law and not of the whole case, for otherwise it would be assuming original jurisdiction withheld from it by the Constitution.”<sup>65</sup> Despite these findings, the Supreme Court vacated its original order, granted the certificate, and answered the certified question.<sup>66</sup> This change of heart rested, in large part, on the Court’s determination that “the certification of a definite question of law is not rendered objectionable merely because the answer may be decisive of the case.”<sup>67</sup> Although the Court answered the certified question that was dispositive of the entire case pending before the Court of Claims, it did not consider that such an approach could amount to a constitutionally impermissible extension of the Supreme Court’s original jurisdiction.

The same issue arose in *United States v. Rice*.<sup>68</sup> In *Rice*, the circuit court certified a question as to “whether [the circuit court] may, by mandamus, review the judgment of the District Court for

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60. *Wheeler*, 281 U.S. 572.

61. *See id.* at 575-76 (“[I]s the transportation of the lumber to the place of delivery a service rendered to the county (State) within the meaning of the exempting provisions of § 502 of the Revenue Act of 1917 and § 500(h) of the Revenue Act of 1918, and within the principle recognized and applied in *Panhandle Oil Co. v. Mississippi*, 277 U.S. 218?”).

62. *Id.* at 573.

63. *Id.* at 576.

64. *Id.* (quotations omitted).

65. *Id.* at 577.

66. *Id.* at 573. The Court ultimately granted the certificate because it contained “a distinct and definite question of law” that did not “in form nor in effect ... embrace the whole case.” *Id.* at 578.

67. *Id.* at 577.

68. 327 U.S. 742 (1946).

Eastern Oklahoma ordering the remand of a proceeding to the County Court of Okfuskee County, Oklahoma.”<sup>69</sup> Although statutory law at the time authorized the Supreme Court to order up the case for decision,<sup>70</sup> the Court correctly concluded that doing so would contravene the Constitution.<sup>71</sup> But suppose that the Court had ordered the entire record sent up so as to decide whether to grant or dismiss the writ of mandamus. Because the writ was originally instituted in the circuit court, the circuit court exercised original jurisdiction. So by ordering up and deciding the case, the Court would have impermissibly exercised original jurisdiction over the writ.<sup>72</sup> Following similar logic, the *Rice* Court refused to order up the case; nonetheless, the Court answered the certified question, which was “dispositive of the whole case before the circuit court of appeals,”<sup>73</sup> and effectively resolved the case as if it had original jurisdiction.

The preceding examples are important in two respects. First, the Court in *Wheeler* and *Rice* correctly concluded that when a lower court exercising original jurisdiction in a case issues a certificate, the Court is constitutionally prohibited from ordering up the record and deciding the *entire* matter in controversy because doing so would be an impermissible exercise of original jurisdiction.<sup>74</sup> Second, the Court in both instances found it constitutionally permissible to answer a certified question that was dispositive of the case pending before the lower court exercising original jurisdiction.<sup>75</sup> If the Court

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69. *Id.* at 744. The proceeding was instituted by the United States “in the circuit court of appeals by a petition for writ of mandamus, to direct the district court to vacate its judgment dismissing the Government’s petition for intervention and remanding the proceeding.” *Id.* at 746.

70. See 28 U.S.C. § 346 (1940) (current version at 28 U.S.C. § 1254 (2006)) (“[T]he Supreme Court may ... require that the entire record in the case be sent up for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there by appeal.”).

71. See *Rice*, 327 U.S. at 747 (“The practice established by statute ... of answering questions certified to this Court, or in some such cases, of deciding the entire controversy on the whole record, is plainly not within our original jurisdiction.”).

72. The Court has expressly held that it could not constitutionally exercise original jurisdiction over a writ of mandamus. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 173-75 (1803).

73. *Rice*, 327 U.S. at 747.

74. See *id.*; *Wheeler Lumber Bridge & Supply Co. v. United States*, 281 U.S. 572, 577 (1930).

75. See *Rice*, 327 U.S. at 747; *Wheeler*, 281 U.S. at 577.

is considered the final arbiter of the Constitution,<sup>76</sup> one could claim sensibly that, because the Court has decided that certification “is appellate,”<sup>77</sup> certification never implicates the Court’s original jurisdiction. As Part II.C demonstrates, however, this response is neither entirely accurate nor adequate.

### *C. The Dual Definitions of Original Jurisdiction*

Whether the Court acted constitutionally in answering the certified questions in *Wheeler* and *Rice* depends, in large part, on how one defines original jurisdiction. This Note argues that there are two possible definitions, and the application of each definition leads to a different result. First, the Court exercises original jurisdiction only by deciding both questions of law and fact. Conversely, the second possible definition would find that the Court exercises original jurisdiction by acting “as both the first and the final arbiter of a case.”<sup>78</sup>

In applying the first definition, the Court is constitutionally permitted to answer a certified question of law that is dispositive of a case pending before a lower court exercising original jurisdiction as long as the certificate does not also raise a question of fact. Such cases do not implicate the Court’s original jurisdiction because the Court, in granting a certificate, is neither permitted nor required to respond to questions of fact.<sup>79</sup>

If, however, the second definition is applied, one must determine whether the Court acts as the first and final arbiter in answering a certified question that is dispositive of the case pending before the lower court exercising original jurisdiction. Although the lower courts are authorized to issue certificates, they are statutorily

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76. See *Marbury*, 5 U.S. (1 Cranch) at 177 (“It is emphatically the province and duty of the judicial department to say what the law is.”).

77. *Wheeler*, 281 U.S. at 576.

78. See Note, *The Original Jurisdiction of the United States Supreme Court*, 11 STAN. L. REV. 665, 694 (1959).

79. Both statutory law and Supreme Court Rules require that the certified question implicate law rather than fact. See 28 U.S.C. § 1254(2) (2006); SUP. CT. R. 19. The Court has also dismissed certified questions for which the facts were still at issue. *E.g.*, *Adams, Cunningham & Co. v. Jones*, 37 U.S. (12 Peters) 207, 213 (1838) (“[T]o express an opinion upon the whole facts of the case, instead of particular points of law growing out of the same; [is] a practice which is not deemed by the majority of the Court to be correct, under the act of congress on this subject.”).

required to adhere to the Court's disposition of the certified question and enter a judgment that comports with the Court's answer.<sup>80</sup> Because the Supreme Court's answer represents the first legal judgment of the issues presented in the case, the Court acts as the first arbiter. Moreover, because the Court's answer controls the legal outcome of the case, the Court acts as the final arbiter. Under this approach, the Court implicitly exercises original jurisdiction.

Alternatively, one could argue that the Court is *not* the first arbiter because the lower court, rather than the Supreme Court, enters the first formal judgment that will legally bind the parties. Under this approach, the Court does not exercise original jurisdiction. Depending on which approach is adopted, the Court's actions are at best constitutionally sound and at worst constitutionally suspect. This Note need not definitively subscribe to either approach; given the future unlikelihood that the Court will answer a certified question issued from a circuit court exercising original jurisdiction, this discussion is more academic than practical.

### III. THE FUTURE OF CERTIFICATION

Certification, as it is perceived today, is a severely flawed appellate mechanism without relevance or utility to the federal courts.<sup>81</sup> In order to ensure that certification once again becomes a viable appellate mechanism, the Supreme Court must be willing to change its attitude toward—and disposition of—certified questions. More specifically, the Court must consistently apply the process by which it grants or dismisses a certificate. This need for consistency does not mean that the Court should be required to grant every certified question that conforms to the relatively broad restrictions contained in the Court's rules.<sup>82</sup> To do so would effectively limit the Court's discretion over what cases it reviews,<sup>83</sup> a power that the

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80. See 28 U.S.C. § 1254(2) (“[T]he Supreme Court may give binding instructions.”).

81. See GRESSMAN ET AL., *supra* note 6, at 597 (declaring certification “virtually, but not quite, a dead letter”); Hartnett, *supra* note 1, at 1712 (proclaiming “certification is practically a dead letter”).

82. SUP. CT. R. 19(1) (requiring that the certificate “contain a statement of the nature of the case and the facts on which the question or proposition of law arises”).

83. See Bernard, *supra* note 8, at 44 (“Certification is viewed as a threat to the Court’s control of its own docket because it is nominally a nondiscretionary review procedure.”) (citation omitted).

Court greatly values. Rather, the Court should establish a more specific set of restrictions that will help to guide the lower courts in deciding whether and how to issue certified questions.

The success of this Note's proposal hinges on the Court's consistent adherence to its own restrictions. This does not mean that the Court must cede all of its discretion over whether to answer a certified question; the Court will still have discretion to make flexible or strict restrictions on the certification process. But these restrictions must not be so broad or narrow or ambiguous as to nullify the usefulness of and need for certification. By consistently adhering to its own restrictions, the Court will help to maximize the benefits of certification as an appellate mechanism by guiding the lower courts in deciding whether and how to issue certified questions.

#### *A. Current Restrictions on the Use of Certification*

Soon after Congress created certification, the Supreme Court began restricting its use,<sup>84</sup> even though the statute authorizing certification and the corresponding Supreme Court Rules do not permit such restrictions.<sup>85</sup> For example, the Court has frequently dismissed certificates because they contained questions of law and fact.<sup>86</sup> It has also refused to answer questions that were hypothetical or abstract,<sup>87</sup> questions that contained more than one question of law,<sup>88</sup> questions with answers dependent upon answers to other questions,<sup>89</sup> questions that the Court must reframe,<sup>90</sup> questions that

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84. *See supra* Part I.A.

85. No evidence supports the argument that the Court itself could restrict certification. For example, Congress requires that the certified question be one "of law" rather than fact. 28 U.S.C. § 1254(2). The Court, however, requires that the certificate contain both "a statement of the nature of the case and the facts on which the question or proposition of law arises" as well as a "question[] or proposition[] of law" that is "stated separately and with precision." SUP. CT. R. 19(1). These restrictions are not precise enough to guide lower courts effectively.

86. Bernard, *supra* note 8, at 33 (citing *Pflueger v. Sherman*, 293 U.S. 55, 57-58 (1934) (per curiam)).

87. *Id.* at 34 (citing *NLRB v. White Swan Co.*, 313 U.S. 23, 27 (1941)).

88. *Id.* at 33 (citing *Quinlan v. Green County*, 205 U.S. 410 (1907)).

89. *E.g.*, *Lowden v. Nw. Nat'l Bank & Trust Co.*, 298 U.S. 160, 163 (1936) ("Question No. 2 is dependent by its terms upon an affirmative answer to question No. 1.").

90. *E.g.*, *Atlas Life Ins. Co. v. W. I. S., Inc.*, 306 U.S. 563, 571-72 (1939) ("In this aspect of the case the certified questions are incapable of categorical answer and the questions which



require a conclusion as to the weight of the evidence submitted at trial,<sup>91</sup> and questions that require an answer in one set of circumstances but a different answer in another set of circumstances.<sup>92</sup> Although the preceding examples do not completely delve into the restrictions that the Supreme Court has imposed on certification, they do offer a glimpse into the many ways that the Court has effectively exercised discretion over the types of certificates that it grants. They also highlight the reality that a lower court must strictly adhere to the Court's restrictions lest its certificate be dismissed. This Note does not object to the use of such restrictions, for without them, the lower courts could use certification to usurp the Supreme Court's control over its own docket.<sup>93</sup> The Court, however, should not use restrictions that are so generally worded or vaguely defined as to provide little guidance to the lower courts.

One such ambiguous restriction is the phrase "objectionable generality," which has caused the dismissal of many otherwise valid certificates.<sup>94</sup> The phrase's ambiguity also gives it the potential to be used as a "catch-all" for the Court to dismiss any or all certificates. For example, in *NLRB v. White Swan Co.*, the Court dismissed a certificate because "the questions certified [did] not reflect the precise conclusions of the Board and the precise findings on which those conclusions were based," and the Court qualified its dismissal by describing the questions as "hav[ing] an 'objectionable generality.'"<sup>95</sup> The Court used the same qualification in other cases in which it dismissed a certificate.<sup>96</sup> Despite this widespread usage, the Court

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they suggest can be properly answered only by reframing the questions certified.").

91. *E.g.*, *Pflueger*, 293 U.S. at 57-58 ("The certificate fails to conform to the requirement that questions submitted must ... not ... involve or imply conclusions or judgment by the Court upon the effect of facts adduced in the cause.").

92. *E.g.*, *White v. Johnson*, 282 U.S. 367, 371 (1931) ("And a question is improper which is so broad and indefinite as to admit of one answer under one set of circumstances and a different answer under another.").

93. *See* GRESSMAN ET AL., *supra* note 6, at 597 (finding that the Supreme Court disfavors unrestricted use of certification because it "would frustrate the Court's discretionary power to limit its review to cases it deems worthy" and would give the lower courts the power to decide via certification what cases the Court will hear).

94. Bernard, *supra* note 8, at 33.

95. 313 U.S. 23, 27 (1941).

96. *See, e.g.*, *Atlas Life Ins. Co. v. W. I. S., Inc.*, 306 U.S. 563, 573 (1939); *Triplett v. Lowell*, 297 U.S. 638, 648 (1936), *overruled by* *Blonder-Tongue Lab v. Univ. of Ill. Found.*, 402 U.S. 313 (1971); *Pflueger*, 293 U.S. at 57-58; *White*, 282 U.S. at 371; *United States v. Mayer*, 235 U.S. 55, 66 (1914).

has failed to define the phrase in such a way as to effectively guide lower courts in issuing a certificate. A restriction such as “objectionable generality,” which provides no instruction for the lower courts and instills near limitless discretion in the Supreme Court, should be eliminated in favor of one that provides more precise direction and guidance.

*B. “Recent” Uses of Certification*

In the past fifty years, the Supreme Court has granted only three certificates.<sup>97</sup> In all three cases, the Court answered the certified question because it presented urgent issues of national public importance or involved “exceptional circumstances.”<sup>98</sup> Of particular note is *United States v. Barnett*, in which the Fifth Circuit certified the following question: whether the Constitution provided a right to a jury trial to the Governor and Lieutenant Governor of Mississippi after they were held in contempt of court for failing to obey the district court’s injunctions.<sup>99</sup> The circuit court held that the Governor had “deliberately prevented” a black student from entering the all-white University of Mississippi and ordered that the student be admitted.<sup>100</sup> President Kennedy, in order to ensure compliance with the circuit court’s mandate, dispatched United States Marshals to accompany the student.<sup>101</sup> Although the Supreme Court did not expressly state its reason for granting the certificate, one can reasonably conclude that it did so for the very purpose of resolving an urgent issue of national importance, namely the desegregation of American public schools.

After its decision in *Barnett*, the Court granted a certificate in one case that presented issues of great importance<sup>102</sup> and another certificate in a case with extraordinary circumstances.<sup>103</sup> The Court

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97. See *supra* note 6.

98. GRESSMAN ET AL., *supra* note 6, at 596 n.3.

99. 376 U.S. 681, 682 (1964).

100. *Id.* at 684-85.

101. *Id.* at 686.

102. In *Moody v. Albermarle Paper Co.*, 417 U.S. 622 (1974) (per curiam), the Court granted the certificate because “of the importance of the question to the administration of judicial business in the circuits.” *Id.* at 624.

103. The Court granted the certificate in *Iran National Airlines Corp. v. Marschalk Co.*, 453 U.S. 919 (1981), because the certificate concerned issues that the Court resolved in another case it reviewed during the same Term.

thus seems to have implicitly restricted certificates to those cases presenting such issues, which illustrates that the Court is exercising discretion over the types of certificates that it grants. But if the Court is going to place restrictions on the use of certification, it should do so openly. The Court should clearly define these restrictions and grant those certificates that fully comply with its guidelines.<sup>104</sup> As the most recent use of certification demonstrates, however, the Court dismisses even those certificates that are seemingly flawless in structure and substance.<sup>105</sup>

### C. *United States v. Seale: Certification in the 21st Century*

In 2007, a federal jury convicted James Ford Seale of kidnapping and conspiring to kidnap two black teenagers.<sup>106</sup> Although the kidnappings occurred in 1964, over forty years earlier, Seale was not indicted for those crimes until 2007.<sup>107</sup> On appeal of his conviction to the circuit court, Seale argued that the statute of limitations barred his indictment.<sup>108</sup> The court agreed with Seale and held that

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104. In the words of Bernard, “the Court should not reject a validly formed question simply because the Court feels that other circumstances make it more appropriate for the lower court to decide the question for itself.” Bernard, *supra* note 8, at 36.

105. See Tyler, *supra* note 8, at 1322 (“[T]he *Seale* case presented a strong candidate for certification.”).

106. *United States v. Seale*, 542 F.3d 1033, 1034 (5th Cir. 2008).

107. *Id.*

108. *Id.* At issue in *Seale* was whether current statutory law established a five-year statute of limitations period for “non-capital” crimes. *Id.*; see also 18 U.S.C. § 3282 (2006). Although Seale was convicted of violating a federal kidnapping statute, 18 U.S.C. § 1201, the statute does not contain its own statute of limitations. *Seale*, 542 F.3d at 1034-35. In order to determine the applicable limitations period, the circuit court looked to 18 U.S.C. § 3281, which establishes an “unlimited” period for capital offenses, and 18 U.S.C. § 3282, which establishes a five-year period for noncapital offenses. *Id.* at 1035. At the time Seale committed the crimes, the federal kidnapping statute permitted the imposition of the death penalty. See 18 U.S.C. § 1201 (1964). Because kidnapping was considered a capital crime, the statute contained an “unlimited” limitations period. See *id.* § 3281. Four years later, however, the Supreme Court declared unconstitutional the imposition of the death penalty for kidnapping offenses. See *United States v. Jackson*, 390 U.S. 570, 581-82 (1968). Congress, then, in its revisions to the federal kidnapping statute, eliminated the death penalty as a punishment. See Act for the Protection of Foreign Officials and Official Guests of the United States, Pub. L. No. 92-539, 86 Stat. 1072 (1972). Given such changes, the issue before the circuit court was whether Congress’s revisions applied retroactively to kidnapping offenses committed prior to 1972. See *Seale*, 542 F.3d at 1036. If the revisions were retroactive, then a kidnapping offense would qualify as a noncapital crime and thus be subject to a five-year limitations period. If, however, the revisions were not retroactive, then a kidnapping offense occurring prior to 1972 would

“the five-year limitations period made applicable to the federal kidnapping statute by the 1972 amendment applies to this case, where the alleged offense occurred in 1964 and the indictment was issued in 2007.”<sup>109</sup> Because “[t]he more than forty-year delay clearly exceeded the limitations period,” the circuit court vacated Seale’s conviction and acquitted him of the offenses.<sup>110</sup>

Following the court’s decision, prosecutors requested that the Fifth Circuit reconsider the ruling, which it did en banc.<sup>111</sup> Because the Fifth Circuit was evenly divided over the issue, the court reinstated Seale’s conviction and sentence.<sup>112</sup> On Seale’s motion, the Fifth Circuit “voted to certify the following question of law to the Supreme Court: What statute of limitations applies to a prosecution under 18 U.S.C. § 1201 for a kidnapping offense that occurred in 1964 but was not indicted until 2007?”<sup>113</sup> In certifying the question, the Fifth Circuit acknowledged that the case presented “an issue of first impression and national importance.”<sup>114</sup> The court also reasoned that a resolution of the legal issue would “give guidance in future cases” and “establish precedent for filing other criminal indictments relating to unresolved civil rights era crimes.”<sup>115</sup> Despite the historically significant issue and extraordinary circumstances that the case presented, the Supreme Court dismissed the certified question without opinion.<sup>116</sup> Justices Stevens and Scalia, however, dissented from the Court’s disposition.<sup>117</sup>

In his statement, which Justice Scalia joined, Justice Stevens asserted that the certificate presented “a pure question of law” that was “narrow, debatable, and important.”<sup>118</sup> In other words, the certificate was structurally and substantively flawless: the question was sufficiently narrow, its answer sufficiently disputed, and the

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be a capital crime subject to an “unlimited” limitations period.

109. *Seale*, 542 F.3d at 1045.

110. *Id.*

111. *United States v. Seale*, 550 F.3d 377, 377 (5th Cir. 2008).

112. *United States v. Seale*, 570 F.3d 650, 650-51 (5th Cir. 2009) (per curiam).

113. *United States v. Seale*, 577 F.3d 566, 567 (5th Cir. 2009) (per curiam).

114. *Id.* at 571.

115. *Id.* at 571. The dissenters argued that certification would (1) waste the circuit court’s and Supreme Court’s time, (2) likely fail given the Supreme Court’s opposition to its use, and (3) be imprudent because a panel of the circuit court could “ultimately reverse the conviction.” *Id.* at 572 (Jones, J., dissenting).

116. *Seale v. United States*, 130 S. Ct. 12 (2009).

117. *Id.* (Stevens, J., dissenting from dismissal of certified question).

118. *Id.* at 12-13.

subject sufficiently extraordinary and important to require the Court's timely and quick resolution. Concurring with the circuit court's reason for issuing the certificate, Justice Stevens argued that "[t]his certificate ... may well determine the outcome of a number of cases of ugly racial violence remaining from the 1960s."<sup>119</sup> Of particular importance is Justice Stevens's conclusion that the "unusual circumstances" of the certificate warranted its grant.<sup>120</sup> This reasoning follows the Court's implicit rule of deciding only those certificates that involve extraordinary circumstances.<sup>121</sup>

However, despite the certificate's apparent flawlessness, Justice Stevens raised the question of whether certification was appropriate given the Court's restrictions on certificates that implicate intra-circuit splits.<sup>122</sup> In responding to this issue, Justice Stevens argued that there would be "no benefit and significant cost to postponing the [certified] question's resolution."<sup>123</sup> Although such a response is a fitting reason for why certification is generally useful, it does not adequately address the preceding issue: whether the Court properly dismissed the certified question because it implicated an intra-circuit split. If the Supreme Court should adhere to its own restrictions on certification, then Justice Stevens should have responded with the following: "Despite the restrictions that the Court has placed on certificates that implicate intra-circuit splits, this restriction is inapplicable in the present case." Because *Seale* concerned a split among *all* the judges on the Fifth Circuit, rather than a split among the three-judge panels within the circuit, this Note argues that the certificate at issue in *Seale* does not implicate an intra-circuit split.<sup>124</sup> Therefore, the Court could have granted the

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119. *Id.* at 12. Circuit judges have disputed this claim given the uncertainty that the "issue may bear on two dozen or so cold cases of ugly racial violence remaining from the early 1960s." *Seale*, 577 F.3d at 572 (Jones, J., dissenting).

120. *Seale*, 130 S. Ct. at 13 (Stevens, J., dissenting from dismissal of certified question).

121. *See supra* text accompanying note 98.

122. *Seale*, 130 S. Ct. at 13 (Stevens, J., dissenting from dismissal of certified question).

123. *Id.*

124. If one defines an intra-circuit split as one in which a circuit court panel renders a decision that is different from an earlier decision rendered by a different circuit court panel concerning the same or similar question of law, then *Seale* would not rise to the level of an intra-circuit split because only one circuit court panel had divided over the question of law at issue in *Seale* before the case was reheard en banc. *See Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (dismissing a certificate because it involved an intra-circuit split in which a "question certified by the Court of Appeals was decided by another panel of that court less than a year and a half before the present certification").

certificate without contradicting the restrictions it has imposed on certification.

*D. Maximizing the Benefits of Certification*

The Court's disposition in *Seale* is noteworthy for three additional reasons: (1) it demonstrates that, two hundred years after its enactment, certification is still used as an appellate mechanism; (2) it shows that certification still has supporters in the Court's membership; and (3) it reveals that certification offers significant benefits, including the timely and efficient resolution<sup>125</sup> of issues of national importance<sup>126</sup> and the conservation of scarce judicial resources. Such benefits, however, cannot be realized unless and until the Court is willing to change its approach to certification.

As an example of the benefits that can be realized, consider the procedural facts of *Seale*. The defendant in *Seale* lost in the district court, won on appeal in a three-judge circuit court panel, and then lost after the circuit court, sitting en banc, split on the question of law. The circuit court then certified the question to the Supreme Court,<sup>127</sup> which dismissed the certificate without opinion.<sup>128</sup> Because the circuit court split on the question of law, the defendant's conviction and sentence were reinstated and subsequently upheld by a divided panel of the Fifth Circuit.<sup>129</sup> Defendant appealed to the Supreme Court, which denied the petition for certiorari.<sup>130</sup> Accordingly, no precedent exists to guide lower courts in deciding the same question of law. This void will generate additional appeals, expense, and uncertainty in other circuits. Justice Stevens's observation has been validated: if the certificate was granted in the first place, then the Court would have not only resolved a legal issue of national public importance, it would have saved for itself and the

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125. See Tyler, *supra* note 8, at 1325 (“[C]ertification often results in more efficient resolution of cases.”).

126. See *id.* at 1326 (“[C]ertification allows lower court judges themselves to inform the Court—directly and formally—that an issue is important, recurring, and in need of its resolution.”).

127. *United States v. Seale*, 577 F.3d 566 (5th Cir. 2009).

128. *Seale v. United States*, 130 S. Ct. 12 (2009).

129. *United States v. Seale*, 600 F.3d 472, 497 (5th Cir. 2010).

130. *Seale v. United States*, 131 S. Ct. 163 (2010).

lower courts a significant amount of resources that will be spent litigating and appealing the same question of law in other circuits.<sup>131</sup>

Despite these substantial benefits, scholars have criticized certification because it invokes the Court's obligatory jurisdiction and thereby increases the Court's docket.<sup>132</sup> Although certification was perceived to be a nondiscretionary appellate mechanism,<sup>133</sup> the Court has exercised tremendous discretion in granting or dismissing certified questions.<sup>134</sup> A way exists, however, to successfully limit the use of certification and ensure the Court's control over its own docket: the Court can impose reasonable and well-defined restrictions on the use of certification that will effectively guide the lower courts in deciding whether and how to issue a certificate. In exchange for having greater control over the types of certificates that it grants, the Court should also be willing to adhere to its own restrictions and to grant those certificates that are structurally and substantively flawless. Although the Court has the discretion to make these restrictions rigid, flexible, narrow, or broad, it should use this discretion carefully. The restrictions should not be so rigid or narrow as to nullify certification, nor should they be so flexible or broad as to be ineffective in guiding the lower courts. One way to strike this balance would be to promulgate the following rule, which is adapted from the current language of Supreme Court Rule 19:

A United States court of appeals may certify to this Court one pure question or proposition of law on which it seeks instruction for the proper decision of a case. The certificate shall contain a

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131. *See Seale*, 130 S. Ct. at 13 (Stevens, J., dissenting from dismissal of certified question) (“I see no benefit and significant cost to postponing the question’s resolution.... In these unusual circumstances, certification can serve the interests not only of legal clarity but also of prosecutorial economy and ‘the proper administration and expedition of judicial business.’” (quoting *Wisniewski v. United States*, 353 U.S. 901, 902 (1957))); *see also Bernard*, *supra* note 8, at 49 (“[T]he procedure permits many cases to be resolved finally at the court of appeals level while avoiding the time and expense of petitioning the Supreme Court, a burden both on the litigants and the high court itself.”); *George & Guthrie*, *supra* note 6, at 1451 (“[T]he Court may allow for more timely and cost-effective resolution of substantial cases by intervening to answer a limited question prior to the circuit court’s complete determination of all issues posed by an appeal.”).

132. *See Bernard*, *supra* note 8, at 44 (“Certification is viewed as a threat to the Court’s control of its own docket because it is nominally a nondiscretionary review procedure.”); *Moore & Vestal*, *supra* note 8, at 42.

133. *See supra* Part I.C.

134. *See supra* note 6.

statement of the nature of the case and the facts on which the question or proposition of law arises. The question or proposition of law shall (1) be disputed, (2) implicate extraordinary circumstances or important national or public interests, and (3) be stated with precision. No question or proposition of law shall arise from a conflict among the panels of a circuit court. A certified question may be issued by a panel of a circuit court where there is a division among two or more circuit courts or, absent a conflict, by a circuit court sitting en banc.<sup>135</sup>

Although these guidelines allow a degree of interpretive freedom, they will limit the Court in dismissing those certificates that follow these structural and substantive requirements and guide the lower courts in issuing certificates.

In applying these revisions to the facts in *Seale*, the Court would have been hard-pressed to dismiss the certified question at issue in the case.<sup>136</sup> These revisions, therefore, not only respond to those instances in which the Court has incorrectly dismissed a flawless certificate, they also help to merge into one authoritative source the restrictions that the Court has imposed on certification. If Congress no longer believes that certification has value as a federal appellate mechanism, it must repeal it so that the circuit courts no longer rely on it.<sup>137</sup> If, however, certification still offers some benefits,<sup>138</sup> the Court must revise and reevaluate its approach in reviewing

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135. Cf. SUP. CT. R. 19.

136. The certificate in *Seale* contained a statement of the case and facts as well as one pure and precise question of law: whether the five-year limitations period that was appended to the federal kidnapping statute in 1972 applies if the defendant's alleged offenses occurred in 1964, approximately forty-three years before the indictment. See *United States v. Seale*, 577 F.3d 566, 571 (5th Cir. 2009). The answer to this question is disputed, see *id.* (“[T]he evenly divided en banc court was simply unable to reach a decision.”), and the certificate implicated both extraordinary circumstances, see *id.* (“The nominal affirmance of Seale’s life sentence by an equally divided en banc court is the type of rare instance where certification is appropriate.”), and important national or public interests, see *id.* (“This discrete legal issue needs to be resolved by the Supreme Court in order to give guidance in future [civil rights era] cases.”). The certified question, moreover, did not arise from an intra-circuit split, see *supra* note 124 and accompanying text, and was issued by a circuit court sitting en banc.

137. Although Congress was given the opportunity to repeal certification in 1988 when it “eliminated a provision allowing for more direct appeals to the Supreme Court,” it refused to do so. Nielson, *supra* note 8, at 485 (citation omitted).

138. As Justice Holmes once commented, “[Certified] questions are to be encouraged as a mode of disposing of cases in the least cumbersome and most expeditious way.” *Chi., Burlington & Quincy Ry. v. Williams*, 214 U.S. 492, 495-96 (1909) (Holmes, J., dissenting).



certificates. Only then can these benefits be realized. Otherwise, certification will remain an appellate mechanism with little meaning and substance.

#### CONCLUSION

This Note examined a relatively unknown appellate mechanism that has been described as “a dead letter.”<sup>139</sup> But as the Supreme Court’s recent decision in *United States v. Seale* demonstrates, certification is not dead. Although the Court dismissed the certified question in *Seale*, the fact that the Fifth Circuit even issued a certificate and the fact that Justices Stevens and Scalia argued against the Court’s dismissal are testaments to the “down-but-not-out” position of certification in federal appellate procedure. Whether certification becomes the viable appellate mechanism that it once was depends on (1) clearly delineated rules that will guide the lower courts in deciding whether and how to issue their certificates, and (2) the Court’s strict adherence to these rules. In reassessing the Supreme Court’s role in the certification process, this Note’s proposed revisions will help to maximize the benefits of certification and reinforce its value as an appellate mechanism.

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139. See Hartnett, *supra* note 1, at 1712.

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