CUE THE LIGHTS: A CALL TO THE SUPREME COURT AND CONGRESS TO SHED LIGHT ON THE CONFUSING LAW IN THE DBA/LONGSHORE ACT CIRCUIT SPLIT.

I. INTRODUCTION

Jackie Stillwell and his wife, Barbara, thought they stumbled upon the chance of a lifetime. Jackie's employer contracted with the United States government to install an electrical-power system at the naval base in Guantanamo Bay, Cuba. Knowing the job overseas would yield higher earnings,[1] Jackie agreed to go abroad and work. Their hope for a brighter future was dashed, however, when Jackie received a high voltage shock and died.

The silver lining to this horrific event was that before Jackie traveled abroad, a federal statute, the Defense Base Act (DBA),[2] mandated that his employer provide workers' compensation coverage for him. Now a widow, Barbara applied for death benefits pursuant to the DBA.[3] Barbara's claim passed onto an Administrative Law Judge (ALJ) for a hearing pursuant to another statute, the Longshore and Harbor Workers' Compensation Act[4] (Longshore Act). The employer's insurance company claimed it did not owe death benefits to Jackie's wife; however, the ALJ found the company liable and awarded benefits. The insurance company appealed the award to the Benefits Review Board (Board), an administrative board designed to review the ALJ's findings. The Board affirmed the ALJ's judgment. Still unsatisfied, the insurance company appealed to the circuit court of appeals pursuant to the Longshore Act's

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[1] *See* Profit v. Serv. Emp'rs Int'l, Inc., 40 B.R.B.S. 41 (2006) (explaining how an overseas contractor can earn up to three times what he could earn in the United States).
[2] 42 U.S.C. §§ 1651-54 (2003).
[3] *See id.*
[4] *See* 33 U.S.C. § 901 (2000).

language.[5] The Sixth Circuit found that it did not possess jurisdiction because of the interplay between the DBA and Longshore Act and refused to rule on the merits.[6]

Currently, the language of the DBA, is directly in contradiction with older, yet still controlling, legislation, the Longshore Act. The contradiction has led to a circuit split concerning the proper forum for appeals of administrative judgments of workers' compensation claims for civilians injured while working overseas.[7] Two petitions for certiorari were filed, but the Supreme Court denied both petitions. Additionally, Congress declines to amend either statute. This paper analyzes both branches' refusal to clarify the law and proposes resolutions for future claimants and practitioners.

II. LEGISLATIVE HISTORIES OF THE DBA AND THE LONGSHORE ACT

Created in 1941, Congress modeled the DBA after the Longshore Act.[8] Initially, both statutes called for review of administrative judgments to arise in the district courts.[9] In 1972, however, Congress amended the procedural structure of the Longshore Act to allow for direct review by the courts of appeals.[10] Congress failed to amend the DBA concurrently.[11] The current circuit split arose because Congress remained silent on whether the 1972 Amendments extended to the DBA, which currently mandates initial review of administrative judgments to pass through the federal district courts.[12] As Home Indemnity Company v. Stillwell (Stillwell I)[13] highlights:

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[5] *See* 33 U.S.C. § 901.
[6] *See* Home Indem. Co. v. Stillwell (Stillwell I), 597 F.2d 87, 88 (6th Cir. 1979) *cert. denied*, 444 U.S. 869 (1979).
[7] *Current Circuit Splits: Civil Matters: Labor Law*, 6 SETON HALL CIR. REV. 347, 347-48.
[8] *See* 42 U.S.C. § 1651(a); *see also* 33 U.S.C. § 901.
[9] *See* 42 U.S.C. § 1653(b) ("Judicial proceedings . . . shall be instituted in the United States District Court of the judicial district wherein is located the office of the deputy commissioner whose compensation order is involved . . . ."); 33 U.S.C. § 921(b) (1970) (amended 1972) ("If not in accordance with the law, a compensation order may be suspended or set aside . . . through injunction proceedings . . . instituted in the Federal district court for the judicial district in which the injury occurred.").
[10] *See* 33 U.S.C. § 921(b).
[11] *See* 42 U.S.C. § 1653(b).
[12] *See* Claire Been, *Bypassing Redundancy: Resolving the Jurisdictional Dilemma Under the Defense Base Act*. 83 WASH. L. REV. 219, 227 (May 2008).

"whether through legislative oversight or intent, [Congress did not] amend the judicial review provisions of the Defense Base Act."[14]

III: Analysis of the Current Circuit Split

The circuit split hinges upon whether the language in the DBA, commonly referred to as § 3(b)—which designates the United States District Courts as the proper venue—is ambiguous or not.[15] The Fourth, Fifth, Sixth, and Eleventh circuits have found that the DBA is unambiguous.[16] The First, Second, Seventh, and Ninth circuits find that § 3(b) is ambiguous and that the Longshore Act repealed the district court provision of the DBA.[17] For the purposes of this paper, some of the cases within the split offer insight as to why Congress and the Court refuse to address the jurisdictional dilemma. The Sixth and Fifth Circuit cases offer clues as to why the Court denied petitions for certiorari to the two cases within the split.[18] The language of the Fourth, Fifth, and Eleventh Circuit cases send signals to Congress, calling on it to fix the disparity between the DBA and Longshore Act.[19]

In *Stillwell I*, the Sixth Circuit, which was the first circuit to take up this issue, held that it lacked jurisdiction to hear the appeal.[20] The respondents in the case included attorneys from the Board and the Department of Labor. The Sixth Circuit decided *Stillwell I* in the beginning of

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[13] 597 F.2d 87, 88 (6th Cir. 1979).
[14] *Id.* at 90.
[15] *See* Been, *supra* note 12, at 228.
[16] *See, e.g.*, *Stillwell I*, 597 F.2d at 88; AFIA/CIGNA Worldwide v. Felkner (Felkner I), 930 F.2d 1111, 1116 (5th Cir. 1991); Lee v. The Boeing Co. (Lee), 123 F.3d 801, 808 (4th Cir. 1997); ITT Base Serv. v. Hickson (Hickson), 155 F.3d 1272, 1274-75 (11th Cir. 1998).
[17] *See, e.g.*, Air Am., Inc. v. Dir. Office of Workers' Comp. Programs (Air America), 597 F.2d 773, 776 (1st Cir. 1979); Pearce v. Dir., Office of Workers' Comp. Programs (Pearce I), 603 F.2d 763, 766 (9th Cir. 1979); Pearce v. Dir., Office of Workers' Comp. Programs (Pearce II), 647 F.2d 716, 721 (7th Cir. 1981); Serv. Emps. Int'l, Inc. v. Dir., Office of Workers' Comp. Program, 595 F.3d 447, 452-53 (2d Cir. 2010).
[18] *See, e.g.*, *Stillwell I*, 597 F.2d at 88; *Felkner I*, 930 F.2d at 1111.
[19] *See Felkner I*, 930 F2.d at 1116-17; *Lee*, 123 F.3d at 806; *Hickson*, 155 F.3d at 1275.
[20] *See Stillwell I*, 597 F.2d at 88, 90.

May 1979,[21] and by the end of that summer, two circuits released contradictory opinions.[22] Later that summer, in Pearce v. Director, Office of Workers' Compensation Programs (Pearce I),[23] the Ninth Circuit held that that the courts of appeals possessed jurisdiction to hear appeals from the Board.[24] The Ninth Circuit established that the Seventh Circuit was the proper circuit to hear the case and transferred it.[25] The Seventh Circuit accepted the transfer from the Ninth Circuit and proceeded to hear the case on its merits.[26]

It was not until the 1990s that the courts addressed the jurisdictional issue again. For the three courts that did, their biggest priority was to signal to Congress the need for clarification in the law. The Fifth, Fourth, and Eleventh circuits held that appeals arising from the Board lie within the jurisdiction of the district court.[27] Interestingly, however, all three circuits acknowledged the pure absurdity of their holdings by highlighting that requiring appeals to continue on through the district court is duplicative, repetitive, and "out of synch" with the original meaning and intention of the statutes.[28] Most importantly, all three circuit courts left

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[21] *Id.* at 87

[22] Literally the day after the *Stillwell I* decision came down, the First Circuit stated unequivocally in *Air America*, that the Board's order was appealable to the court of appeals. The court was so confident in its jurisdictional finding that it did not devote more than a single sentence to justifying it. *See Air America*, 597 F.2d at 776.

[23] 603 F.2d 763, 764 (9th Cir. 1979).

[24] *See id.* at 765.

[25] *See id.* at 771. If the court had not transferred the case, the petitioner would have been required to start the litigation process anew and could have possibly encountered time bars, a denial of application, administrative *res judicata*, or encountered the doctrine of administrative action.

[26] *See* Pearce v. Dir., Office of Workers' Comp. Programs, 647 F.2d 716, 721 (7th Cir. 1981). The court accepted the case without a single question as to jurisdiction.

[27] AFIA/CIGNA Worldwide v. Felkner, 930 F.2d 1111, 1115 (5th Cir. 1991) ("Under the current statutory scheme, compensation orders for claims arising under either the DBA or the LHWCA are first reviewed by the BRB. After that, further judicial reviews follow divergent paths depending on whether the claim originated under the DBA, or the LHWCA."); Lee v. The Boeing Co., 123 F.3d 801, 805 (4th Cir. 1997) ("We therefore conclude that judicial review of DBA claims differs from judicial review of the LHWCA claims."); ITT Base Serv. v. Hickson, 155 F.3d 1272, 1274 (11th Cir. 1998) ("[W]hile judicial review in all cases originating under the LHWCA now beings in the federal courts of appeal, the DBA continues to provide for judicial review in the "district court" of the appropriate judicial district.") (citing 42 U.S.C. § 1653(b)). The DC Circuit has commonly followed the Fourth Circuit and in Hice v. Dir., Office of Workers' Comp. Programs, it denied the petitioner benefits for injuries sustained overseas because the proper forum for review resided in the district court. *See* 156 F.3d 214, 218 (App DC 1998).

[28] *See Felkner*, 930 F.2d at 1116-17 ("While we recognize that taking this rather attenuated avenue to review the DBA compensation orders may be cumbersome and duplicative . . . ."); *Lee*, 123 F.3d at 806 ("We realize that our

glaring signals in their opinions regarding the complication in the law and the need for Congress to address the jurisdictional issue.[29] For instance, in *Felkner I*, the court stated that "it is not our function to correct Congressional oversight . . . [u]ntil Congress so acts, we are bound to interpret the DBA according to its plain, unambiguous language."[30] In *Lee*, the court stated "it is for Congress to eliminate any redundant steps insinuated by the 1972 Amendments to the [Longshore Act]."[31] Finally, in *Hickson*, the court stressed that "the problem must be addressed by Congress, not by this Court through judicial legislation."[32]

Of the cases just mentioned, only one, AFIA/CIGNA Worldwide v. Felkner (Felkner II),[33] petitioned for certiorari. Originally, the employer, American Express Company, and its insurer, AFIA/CIGNA Worldwide, appealed to the Fifth Circuit from the district court's dismissal of its suit against Deputy Commissioner, Marilyn C. Felkner, for awarding benefits to the workers' compensation claimant.[34] As this was early on in the history of the jurisdictional issue, the plaintiff in the suit filed multiple appeals in an effort to satisfy the confusing statutory language.[35] The petitioner stressed the need for the Supreme Court to grant certiorari and illuminate the proper jurisdictional path for Board appeals in its certiorari petition.

In early 2010, the Second Circuit, in Service Employees International, Inc. v. Director, Office of Workers' Compensation Programs,[36] came out with the latest case to analyze the

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conclusion results in a somewhat cumbersome and duplicative review procedure in DBA cases and that Congress may not have made a conscious decision to create such a procedure."); *Hickson*, 155 F.3d at 1275 ("If the LHWCA and the DBA are 'out of synch,' . . . .").

[29] *See Felkner I*, 930 F.2d at 1116-17; *Lee*, 123 F.3d at 806; *Hickson*, 155 F.3d at 1275.

[30] *Felkner I*, 930 F.2d at 1116-17.

[31] *Lee*, 123 F.3d at 806.

[32] *Hickson*, 155 F.3d at 1275.

[33] 502 U.S. 906 (1991).

[34] *See Felkner I*, 930 F.2d at 1112.

[35] *See* E-mail from Kenneth G. Engerrand, Esq., former Plaintiff's attorney for AFIA/CIGNA, to author (Feb. 26, 2011, 19:50 EST) (on file with author); *See also, id.*

[36] 595 F.3d 447, 452-53 (2d Cir. 2010).

jurisdictional debate and found the circuit courts possessed jurisdiction.[37] Despite deciding differently on the jurisdictional issue than the Fifth, Fourth, and Eleventh Circuits, the Second Circuit sent the same signals to Congress regarding the need to clarify the confusing statutory law as its sister courts had.[38] The court stressed that Congress has not modified the DBA since its inception and hinted towards the need for revision of the statute.[39]

IV. How a Constructive Pattern Approach Solved Other Longshore Act Extension Jurisdictional Issues

There is an easy solution to the current conflict. If Congress took notice of the circuit courts' signals regarding the confusing law, and used a "constructive pattern" approach to scrutinize the problem, federal courts and Congress could work together to quickly resolve this jurisdictional dilemma.[40] In fact, Congress and the courts have employed this tactic previously when interpreting whether the 1972 Amendments applied to other Longshore Act extensions and could use the same ingenuity exercised there to illuminate the darkened jurisdictional path for claimants under the DBA/Longshore Act split.

A prime example of the constructive pattern approach includes the Black Lung Benefits Act (BLBA).[41] The BLBA, another extension of the Longshore Act, amended the Federal Coal Mine Health and Safety Act of 1969.[42] Like the DBA, the BLBA incorporated several provisions of the Longshore Act.[43] Similar to the problem found in the DBA/Longshore Act

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[37] *See id.* at 447.
[38] *See id.* at 454.
[39] *See id.* ("No modification of the DBA has been made since its inception . . . .").
[40] *See generally*, Gordon Silverstein, Law's Allure: How Law Shapes, Constrains, Saves, and Kills Politics (2009).
[41] Black Lung Benefits Act of 1972, Pub. L. No. 92-303, 86 Stat. 153 (1972) (codified as amended at 30 U.S.C. § 901 (2000)).
[42] Federal Coal Mine Health and Safety Act, Pub. L. No. 91-173, 83 Stat. 742 (1969) (codified as amended at 30 U.S.C. § 901) (2000)).
[43] *See* Been, *supra* note 12, at 218-19.

split, the Seventh Circuit was presented with a case, questioning whether the BLBA adopted the 1972 Amendments and whether it had jurisdiction to hear a case that was on appeal from the Board.[44] Congress did not specify in the original BLBA whether the 1972 Longshore Amendments were automatically incorporated.[45] The Seventh, Sixth, and the Fourth Circuits found "express intent" to automatically incorporate the 1972 Amendments.[46] As evidence of this intent, in 1977, Congress passed the Black Lung Benefits Reform Act, which explicitly stated that the 1972 Amendments applied to the BLBA.[47]

V. THE MEANING OF CERTIORARI DENIALS

To begin to understand why the Supreme Court has not actively addressed the current circuit split in the past thirty years, it is important to analyze how scholars interpret a denial of certiorari. Considerable amounts of scholarship attempt to discern the true reasoning behind why judges rule the way they do. Of the highest intrigue is the Supreme Court and its denials of writs of certiorari. Scholars theorize every possible explanation for a denial, varying from those embedded in the judicial code to those of a lack of judicial independence. While, some scholarship finds that a denial of certiorari imparts no meaning, other scholars argue that certain cues within petitions influence the Court's decision regarding certiorari. This paper addresses two cues that are present in the certiorari petitions in the DBA/Longshore Act split: (1) the influence the Solicitor General over the Court, and (2) the impact amicus curiae briefs have over the Court.

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[44] *See* Dir., Office of Workers' Comp. Programs v. Peabody Coal Co., 554 F.2d 310, 317 (7th Cir. 1977) ("Obviously, Congress made a technical mistake with respect to the October 1972 (Longshore Act) [A]mendments.").
[45] *See id.*
[46] *See id.* at 323; Dir., Office of Workers' Comp. Programs v. E. Coal Corp., 561 F.2d 632, 638-39 (6th Cir. 1977); Dir., Office of Workers' Comp. Programs v. Nat'l Mines Corp., 554 F.2d 1267, 1274 (4th Cir. 1977).
[47] 30 U.S.C. § 901.

According to the Supreme Court's own rules, "[a] review on writ of certiorari is not a matter of right, but of sound judicial discretion, and that will be granted only where there are special and important reasons therefore."[48] So what constitutes a legal issue significant enough to draw the attention of the Supreme Court? "Neutral factors," such as circuit splits, are one of the sources in which the Supreme Court itself deems necessary to grant certiorari, as it is important to clarify confusing law.[49] Other issues, such as political factors, can contribute to a petition for certiorari being granted or denied also.[50] However, because the Court denied the petitions for certiorari from the cases in the DBA/Longshore Act split – ignoring the neutral factor present – questions arise as to the meaning of a denial and why the Court denied certiorari.

A. The Orthodox View: A Denial is Nothing More than a Denial

According to the "orthodox view," a denial of certiorari is not an indication of the case upon its merits.[51] As Justice Holmes explained, a denial from the Court "imports no expression of opinion upon the merits of the case . . . ."[52] In Maryland v. Baltimore Radio Show,[53] Justice Frankfurter noted that a denial simply means that fewer than four members of the bench found the lower court's decision to be a matter "of sound judicial discretion."[54] On the other hand, a case may raise an important legal question, but the record may be too "cloudy," or the Court may prefer that lower courts grapple with the legal question further.[55] Additionally, the Supreme

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[48] Sup. Ct. R. 19.
[49] *See* Sup. Ct. R. 19(b).
[50] *See* Harold J. Spaeth, *The Attitudinal Model*, *in* CONTEMPLATING COURTS, 305 (Lee Epstein ed.) (1995) (arguing that "justices decide their cases on the basis of the interaction of their ideological attitudes and values with the facts of a case.").
[51] *See* Peter Linzer, *The Meaning of Certiorari Denials*, 79 COLUM. L. REV. 1227, 1228 (1979).
[52] United States v. Carver, 260 U.S. 482, 490 (1923).
[53] 388 U.S. 912 (1950).
[54] *Id.* at 917-18.
[55] Linzer, *supra* note 51, at 1251 (citing *Baltimore Radio Show*, 388 U.S. at 917-18).

Court generally will not grant certiorari where factual correctness is the sole issue because such a decision would lack general impact.[56]

B. The Cue Theory: How Cues in Certiorari Petitions Can Influence the Court

The cue theory is one of the best predictors as to why a petition for certiorari was granted or denied. The cue theory hypothesizes that, because of the numerous amounts of petitions the Court receives in each term, it is impossible for every petition to be thoroughly investigated.[57] Therefore, clerks and justices look for certain cues to weed out petitions they deem to be frivolous.[58] Several studies have analyzed the cue theory in action.[59] While there has been some scholarship criticizing the cue theory,[60] it is hard to believe that considering the massive amount of petitions that flood the Supreme Court every year,[61] and the limited personnel resources of the Court, there is not some sort of screening mechanism to spot worthy petitions.

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[56] *See id.* at 1251 n.184 (citing Wilkerson v. McCarthy, 336 U.S. 53, 66-68 (1949) (Frankfurter, J., concurring)).
[57] *See* Joseph Tanenhaus, Marvin Schick, Matthew Muraskin, & Daniel Rosen, *The Supreme Court's Certiorari Jurisdiction: Cue Theory*, 118 *in* JUDICIAL DECISION-MAKING, (Glendon A. Schubert, ed.) (1963) [hereinafter Tanenhaus].
[58] *See id.*
[59] *See generally* Saul Brenner, *Granting Ceriorari in the United States Supreme Court: An Overview of the Social Science Studies*, 92 L. LIBR. J. 193 (2000) (outlining the various social science studies researching granting certiorari); *See also*, Ulmer, Hintze & Kirklosky, *The Decision to Grant or Deny Certiorari: Further Consideration of Cue Theory*, 6 Law & Soc. Rev. 637 (1972) (finding the only substantial cue is whether the government is a party); Virginia Armstrong & Charles A. Johnson, *Certiorari Decision Making by the Warren and Burger Courts: Is Cue Theory Time Bound?* 15 POLITY 141 (1982) (finding that the government being a party to the suit is only one of many cues); Donald R. Songer, *Concern for Policy Outputs as a Cue for Supreme Court Decisions*, 41 J. POL. 1185 (1979) (finding a cue in whether the case below was decided in a direction that differed from the ideology of a majority of the justices on the Court); S. Sidney Ulmer, *Conflict with Supreme Court Precedents and the Granting of Plenary Review*, 45 J. POL. 474 (1983) (finding a cue in whether there was a conflict between the decision of the lower court and Supreme Court precedent); S. Sidney Ulmer, *The Supreme Court's Certiorari Decisions: Conflict as a Predictive Variable*, 78 AM. POL. SCI. REV. 901 (1984) (finding a cue in whether there was a genuine intercircuit conflict).
[60] *See, e.g.*, DORIS MARIE PROVINE, CASE SELECTION IN THE UNITED STATES SUPREME COURT (1980); H. W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT (1991); Stuart H. Teger & Douglas Kosinski, *The Cue Theory of Supreme Court Jurisdiction: A Reconsideration*, 42 J. POL. 834 (1980).
[61] Reports indicate that over 7,000 petitions are filed with the Court every year. *See Supreme Court FAQs*, ASIAN AMERICAN JUSTICE CENTER *available at* www.napalc.org/attachments/wysiwyg/1/SCOTUS_FAQ.pdf (last visited Mar. 7, 2011).

One of the cues that most scholars agree is crucial is whether the government is a party to the suit.[62] Gerald Rosenberg theorizes that the federal judiciary is overly deferential to the Executive Branch and describes the Solicitor General's close relationship with the Court.[63] The Solicitor General not only has special access to the court, but the Court may request the Solicitor General to intervene in cases and present the government's position, even when the government is not a party to the suit.[64] Historically, the Solicitor General wins approximately 70 percent of the cases it is either appearing on behalf of or supporting through amicus briefs.[65] Furthermore, during the early 1990s, Rosenberg reported that out of the only seven or eight percent of petitions the Supreme Court heard, three-quarters of those petitions were on behalf of the Solicitor General.[66] During the period in which the *Stillwell II* petition was pending, 1969-1983, the Supreme Court only accepted a mere four percent of the cases when the Solicitor General opposed the appeal.[67] The close-knit relationship between the Court and the Solicitor General prompts one of Rosenberg's theories that the judiciary "lacks the necessary independence from the other branches of government to produce significant social reform."[68]

C. Influencing the Grant of Certiorari through Amicus Briefs

According to Caldeira and Wright, amicus briefs are vital to the decision-making process because they "provide the justices with an indication of the array of social forces at play in litigation."[69] As such, they argue that the Supreme Court justices are motivated by ideological preferences just like officials in other branches of government and that they "pursue their policy

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[62] *See* Tanenhaus, *supra* note 57, at 118.
[63] *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 14 (1991).
[64] *See id.*
[65] *See id.*
[66] *See id.* at 14 n.11.
[67] *See id.*
[68] *Id.* at 25.
[69] Gregory A. Caldeira & John R. Wright, *Organized Interests and Agenda Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1118 (1988) [hereinafter Caldiera].

goals by deciding cases with maximum potential impact on political, social, or economic policy."[70] According to this theory, justices are so motivated by ideological preferences that they devote their resources to cases that will have the most impact on policies relative to their ideologies.[71] Caldeira and Wright further argue that justices, just like other public officials, feel pressure to accomplish a lot in a little amount of time.[72] Therefore, the justices have developed shortcuts to handle the large docket and allow certain cues, such as the presence or absence of amicus briefs, to influence their decisions regarding certiorari.[73]

Amicus briefs not only play an instrumental role for the justices, they are vital tools for interest groups and practitioners as well. Caldiera and Wright's study included amicus briefs from a wide variety of groups: corporations, labor unions, professional and trade associations, ideological and single-issue membership groups, religious organizations, racial and ethnic groups, individuals, and units of local, state, and federal government.[74] The amicus brief gives interest groups, who have a vested interest in seeing a particular policy issue addressed by the Supreme Court, an opportunity to highlight the pending policy ramifications of the case. For practitioners, amicus briefs also help to highlight the need for the Court to explain a confusing part of the law.[75]

VI. ANALYSIS

For more than thirty years, the intercircuit conflict surrounding the DBA/Longshore Act jurisdictional issue has percolated within the circuit courts. During that time, two petitions for

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[70] *Id.*
[71] *See id.* at 1111.
[72] *See id.* at 1114.
[73] *See id.*
[74] *See id.* at 1118-19. Participation in filing amici curiae is, of course, not the only way to influence litigation. For example, the NAACP Legal Defense Fund used a variety of tactics in its campaign to end restrictive covenant in housing. *See id.* at 1110 (citing Clement E. Vose, *Interest Groups and Litigation*. Presented at the annual meeting of the American Political Science Association).
[75] *See id.*

certiorari came before the Supreme Court, but the Court denied certiorari in both cases. To add insult to injury, Congress has failed to clarify the law. With both branches of government refusing to take up the split, questions remain as to why the branches do not act. The orthodox view and the cue theory explain why the Court refuses to grant certiorari in the two cases. However, congressional silence is harder to explain away considering Congress has at its disposal the BLBA model, which would help it resolve the DBA/Longshore Act split.

A. The Orthodox View and Cue Theory Account for the Supreme Court's Denial of Certiorari in Stillwell II *and* Felkner II

Despite the presence of a neutral factor—the existence of an intercircuit conflict—the Supreme Court has not addressed the legal issue.[76] The Supreme Court denied certiorari in two cases, Home Indemnity Company v. Stillwell[77] (Stillwell II) and AFIA/CIGNA Worldwide v. Felkner[78] (Felkner II), within the split, and in both these cases, the Supreme Court denied certiorari without an opinion.[79] Considering the context of the denials, it is possible that certain cues may have persuaded the Court to deny certiorari.

1. The Orthodox View Explains the Denial of Certiorari for the Stillwell II *Case*

The *Stillwell II* denial fits well within the orthodox view paradigm, considering that the circuit split, a neutral factor, was not present when the petition came before the Court.[80] *Stillwell II* was the first case to address the issue, and it was probably nearly impossible for the Supreme Court to predict that this legal issue would produce a circuit split. While the Ninth Circuit's *Pearce I* decision came down approximately one month before the Supreme Court decided to

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[76] *See* Sup. Ct. R. 19.
[77] Home Indem. Co. v. Stillwell (Stillwell II), 444 U.S. 869 (1979).
[78] AFIA/CIGNA Worldwide v. Felkner (Felkner II), 502 U.S. 906 (1991).
[79] *See Stillwell II*, 444 U.S. at 869; *Felkner II* 502 U.S. at 906.
[80] *See* Linzer, *supra* note 51, at 1228; *see also id.*

deny certiorari in *Stillwell II*,[81] it is hard to conceive that the Supreme Court would find that essentially two circuits in conflict with one another rose to the level of an intercircuit conflict calling for resolution.[82] It is also possible that the Supreme Court denied certiorari because it felt that the intercircuit split was premature and wanted the lower courts to grapple with the legal issue at hand further.[83] Perhaps, because the denial of certiorari in *Stillwell II* was so early on in the issue's history, the Supreme Court found that it lacked "general impact," rendering it inappropriate for the Court to hear the case at that time.[84] While the orthodox view accounts for the Court's denial in *Stillwell II*, it does not sufficiently explain the denial in *Felkner II*.

2. The Cue Theory Accounts for The Supreme Court's Denial of Certiorari in Both Cases

The cue theory offers a viable explanation as to why the Court denied certiorari in both *Stillwell II* and *Felkner II*. Two prominent cues were likely contributing factors to the certiorari denials because the government: (1) was a party in both cases[85] and (2) opposed the petition for certiorari in *Felkner II*.[86]

First, because the government was a party in both cases, its close-knit relationship with the Supreme Court was probably a contributing factor to both cases' subsequent certiorari denials. While the significance of certain cues are in contention among scholars,[87] most

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[81] *Pearce I* was decided on August 31, 1979, and the Supreme Court denied certiorari to the *Stillwell II* case on October 1, 1979. *See* Pearce v. Dir., Office of Workers' Compensation Programs, 603 F.2d 763 (1979); Home Indem. Co. v. Stillwell, 444 U.S. 869 (1979).
[82] Essentially, when the Supreme Court denied certiorari to *Stillwell II*, three circuits stood in opposition to the *Stillwell I* decision. Included was the First Circuit in *Air America* and the Seventh Circuit's acceptance of transfer in *Pearce II*. While establishing that jurisdiction for appeals from the Board resided in the court of appeals, neither *Air America* nor *Pearce II* addressed the jurisdictional questions within their respective opinions but rather reviewed the cases simply on their merits. *See supra* text accompanying notes 21-27. Therefore, while essentially three circuits stood in opposition to the *Stillwell I* decision, only one actually analyzed the jurisdictional issue in any depth.
[83] *See* Linzer, *supra* note 51, at 1278.
[84] *See id.* at 1252 n.184.
[85] *See Stillwell II*, 444 U.S. at 869; AFIA/CIGNA Worldwide v. Felkner, 502 U.S. 906 (1991).
[86] *See* Brief for the Federal Respondent in Opposition, AFIA/CIGNA Worldwide v. Felkner 502 U.S. 906 (1991) (No. 91-48) 1991 WL 11178489 at *1.
[87] *See supra* note 59.

scholarship finds that the presence of the Solicitor General, is an important factor in the decision to grant or deny certiorari.[88] In *Stillwell II* and *Felkner II*, attorneys for either the Department of Labor or the Office of the Solicitor represented the government in the suits.[89] The cue theory finds that the Supreme Court is extremely deferential to the Executive Branch.[90] So deferential in fact, that the Supreme Court is essentially paralyzed from instituting essential social reform and clarifying the confusing law in the DBA/Longshore Act split.[91]

The second cue, that the government opposed the petition for certiorari, was likely an exceptionally strong signal to the Supreme Court to deny certiorari in *Felkner II*.[92] This cue maintains a stronger persuasion over the Court because of the government's outright request that the court reject the pending petition.[93] While this second cue pertains to the *Felkner II* case quite clearly, it is unclear whether it directly pertains to the *Stillwell II* case.[94]

In *Felkner II*, the government seemingly brushed off the glaring jurisdictional issue as unimportant.[95] The government acknowledged outright in its response to the petition for certiorari that, even though there was a circuit split, it "did not merit the Court's review at this time."[96] The government's petition failed to address why there was no need to take up the circuit split, and the Supreme Court did not seem compelled to scrutinize the government's argument. The Court, by following the Executive Branch's request to ignore the obvious circuit split,

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[88] *See* Caldiera, *supra* note 69, at 1118.
[89] *See Stillwell II*, 444 U.S. at 869; *Felkner II*, 502 U.S. at 906.
[90] *See* Rosenberg, *supra* note 63, at 14.
[91] *See id.* at 15.
[92] *See* Brief for the Federal Respondent in Opposition, AFIA/CIGNA Worldwide v. Felkner 502 U.S. 906 (1991) (No. 91-48) 1991 WL 11178489 at *1.
[93] *See* Rosenberg, *supra* note 63, at 14.
[94] Online databases do not maintain briefs for litigants in cases dating back to the 1970s.
[95] *See* Brief for the Federal Respondent in Opposition, AFIA/CIGNA Worldwide v. Felkner 502 U.S. 906 (1991) (No. 91-48) 1991 WL 11178489 at *8-9.
[96] *See id.*

illustrates how close the relationship between the two branches is.[97] Whatever its source, the Supreme Court's refusal to address the circuit split creates confusion in the law and drives the jurisdictional wedge in the DBA/Longshore Act split deeper.

B. Congress Should Apply the BLBA Model to the DBA/Longshore Split

Congressional inaction curtails the DBA's needed reform and hinders the potential for a clear designation as to the proper avenue for appeals. Congress's silence on the issue is unwarranted considering it has a previous model at its disposal. Regarding the jurisdictional issue previously associated with the BLBA, Congress clearly picked up on the cues the judiciary sent it regarding the need for clarification in the law and, accordingly, passed the Black Lung Benefits Reform Act.[98] While there are not any congressional hearings[99] or statements issued by the Department of Labor[100] as to why Congress reformed the Act, the inference can easily be drawn that Congress reacted directly to the Seventh, Sixth and Fourth Circuits' signals that the proper jurisdictional path was not so obvious.[101] Courts have recognized Congress's intent for uniformity of workers' compensation law by retaining parallel review procedures when interpreting other Longshore Act extensions and should employ that mechanism in conjunction with the DBA/Longshore Act split.[102]

The Fourth and Sixth Circuits, however, refuse to employ the same "express intent" analysis they used when they interpreted the BLBA for the DBA/Longshore Act split.[103] The

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[97] *See* Rosenberg *supra* note 63 at 14.
[98] *See* 30 U.S.C. § 901.
[99] Online databases do not keep records of congressional hearings dating back to the 1970s.
[100] *See Compliance Assistance – Materials Library – By Law: Black Lung Benefits Act*, UNITED STATES DEP'T OF LABOR, http://www.dol.gov/compliance/materials/results.asp?category=law&law=1&page=1&lawName=Black%20Lung%20Benefits%20Act (last visited Mar. 25, 2011).
[101] *See supra* text accompanying note 40-47.
[102] *See id.*
[103] *See* Dir., Office of Workers' Comp. Programs v. E. Coal Corp., 561 F.2d 632, 638-39 (6th Cir. 1977); Dir., Office of Workers' Comp. Programs v. Nat'l Mines Corp., 554 F.2d 1267, 1274 (4th Cir. 1977).

lack of congruency between the Fourth and Sixth Circuits' decisions regarding adoption of the 1972 Amendments to both Acts is impractical and creates inconsistency between Longshore Act extensions. The DBA should be interpreted the same as the BLBA because it is overly confusing for litigants to have certain statutory extensions incorporate the 1972 Amendments, while others do not. Without an eye towards judicial practicality and efficiency, the judicial dockets will likely overflow with unnecessary litigation requiring an independent analysis of all Longshore Act extensions and whether the 1972 Amendments apply.

C. The Court and Congress Inexplicably Refuse to Clarify the Law

Congress repeatedly fails to reform the DBA or Longshore Act in any way that would ease the burden of the confusing statutory language. There have been no amendments to the DBA passed since the 1990s. However, since the 1990s, Senator Jonny Isakson sponsored four bills in the Senate in 2006,[104] 2007,[105] 2009,[106] and 2011[107] that proposed amendments to the Longshore Act. All four bills contain the same language and claim "to amend the [Longshore Act] to improve the compensation system . . . ."[108] However, all four bills fail to address the jurisdictional dilemma.[109] All four bills were referred to the Committee on Health, Education, Labor, and Pensions, which remained their final resting place, as none were referred to other committees.[110] Currently, the latest bill was referred to committee on March 29th of this year.[111] However, considering the bill's history in committee, and the fact that it does not highlight or

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[104] *See* Longshore and Harbor Workers' Compensation Act Amendments of 2006, S. 3987, 109th Cong. (2006).
[105] *See* Longshore and Harbor Workers' Compensation Act Amendments of 2007, S. 846, 110th Cong. (2007).
[106] *See* Longshore and Harbor Workers' Compensation Act Amendments of 2009, S. 236, 111th Cong. (2009).
[107] *See* Longshore and Harbor Workers' Compensation Act Amendments of 2011, S. 669, 112th Cong. (in committee March 29, 2011).
[108] *See supra* notes 104-07.
[109] *See id.*
[110] *See id.*
[111] *See* Longshore and Harbor Workers' Compensation Act Amendments of 2011, S. 669, 112th Cong. (in committee March 29, 2011).

correct the jurisdictional issue, it is unlikely that it will pass—let alone make it out of committee. This paper argues that if the bill highlighted the jurisdictional issue and proposed amendments to fix the disparity between the statutes, it would pass. Interestingly, none of the bills had co-sponsors.[112] Perhaps, if Senator Isakson paired with other senators it would increase the chances of reforming the Longshore Act. While it is not unusual to have a sole sponsor, co-sponsors would highlight the bill's importance and garner more support for its passage. Interest groups or scholars need to draw attention to the problem because it seems from the text of Senator Isakson's bills that he is unaware of the jurisdictional dilemma.[113]

In addition, there is no clear reason as to why the Court denied certiorari in *Stillwell II* or *Felkner II*.[114] During the time the *Felkner II* petition was pending, there was no proposed legislation in Congress, or even any Congressional committee hearings, that addressed the need for clarification in the law. Further, neither legal nor non-legal literature of the time addresses the confusing jurisdictional path or the need for the Court to take up the case.

VII. Possible Resolution of the Jurisdictional Dilemma for Future Practitioners and Workers' Compensations Claimants.

For practitioners who have a client who is interested in appealing a compensation award, which has already undergone Board review, it is important to consider the circuit in which the appeal will take place. Depending on the circuit, some courts of appeals may accept an appeal directly from the Board,[115] while other circuits will dismiss any appeal filed directly from the

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[112] *See supra* notes 104-07.
[113] *See, e.g.*, S. 3987, 109th Cong. (2006); S. 846, 110th Cong. (2007); S. 236, 111th Cong. (2009); S. 669, 112th Cong. (in committee March 29, 2011).
[114] Because the Court denied certiorari in the *Stillwell II* case in the 1970s, online online-research databases do not contain information from that time. Further, despite online-research databases possessing information from the time period in which the Court denied certiorari to the *Felkner II* case, research yielded no dispositive results.
[115] *See* Air Am., Inc. v. Dir. Office of Workers' Comp. Programs, 597 F.2d 773, 776 (1st Cir. 1979); Pearce v. Dir., Office of Workers' Comp. Programs, 603 F.2d 763, 766 (9th Cir. 1979); Pearce v. Dir., Office of Workers' Comp.

Board, unless a United States District Court reviews the case first.[116] While the Department of Labor's website states that appeals belong in the court of appeals,[117] there is still a possibility that a claimant's petition will be thrown out for lack of jurisdiction.

If a client seeks further redress of her award compensation after the court of appeals has reviewed her case, it is possible to appeal up to the Supreme Court; however, as *Stillwell II* and *Felkner II* illustrate there is a slim chance that a petition involving this issue will be granted certiorari.[118] Therefore, the practitioner interested in appealing up to the Supreme Court would need to set his case apart from previous cases by submitting amicus briefs. As discussed above, one of the cues the Supreme Court looks to when reviewing a petition for certiorari includes the presence of amicus briefs stressing the importance of granting certiorari.[119] By submitting amicus briefs from labor advocacy group or workers' compensation interest groups, such as Workers' Injury Law & Advocacy Group,[120] emphasizing the need to grant certiorari and clarify the law, the practitioner would set up the Supreme Court to grant certiorari.[121]

Considering that the Supreme Court has refused to take up the jurisdictional issue surrounding the DBA/Longshore Act split twice,[122] and no further petitions for certiorari have

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Programs, 647 F.2d 716, 721 (7th Cir. 1981); Serv. Emps. Int'l, Inc. v. Dir., Office of Workers' Comp. Program, 595 F.3d 447, 452-53 (2d Cir. 2010).

[116] Home Indem. Co. v. Stillwell, 597 F.2d 87, 88 (6th Cir. 1979); AFIA/CIGNA Worldwide v. Felkner, 930 F.2d 1111, 1116 (5th Cir. 1991); Lee v. The Boeing Co., Inc., 123 F.3d 801, 808 (4th Cir. 1997); ITT Base Serv. v. Hickson, 155 F.3d 1272, 1274-75 (11th Cir. 1998).

[117] *See U.S. Department of Labor Benefits Review Board Mission Statement*, UNITED STATES DEPARTMENT OF LABOR, http://www.dol.gov/brb/mission.htm, (last visited Mar. 6, 2011).

[118] *See* Home Indem. Co. v. Stillwell, 444 U.S. 869 (1979); AFIA/CIGNA Worldwide v. Felkner, 502 U.S. 906 (1991).

[119] *See* Caldeira, *supra* note 69, at 1111.

[120] The Workers' Injury Law & Advocacy Group is a national non-profit membership organization. *See Mission Statement*, WORKERS' INJURY LAW & ADVOCACY GROUP, http://www.wilg.org/index.cfm?pg=MissionStatement (last visited Apr. 4, 2011). ("[D]edicated to representing the interests of millions of workers and their families who, each year, suffer the consequences of workplace injuries and illnesses. The group acts principally to assist attorneys and non-profit groups in advocating the rights of injured workers through education, communication, research, and information gathering.").

[121] *See id.*; *see also* Linzer, *supra* note 51, at 1252 n.184.

[122] *See Stillwell II*, 444 U.S. 869; *Felkner II*, 502 U.S. 906.

been filed as of the date of this paper, it seems that a judicial avenue may not be the best option for clarification in the confusing statutes. Perhaps, the best avenue to achieve change would be through a legislative means. Workers' rights groups or even claimants themselves ought to lobby Congress—specifically, Senator Isakson—for revisions to the DBA or Longshore Act to clarify the proper jurisdictional path for Board appeals. Just as Congress passed the Black Lung Benefits Reform Act, which explicitly stated that the 1972 Amendments applied to the BLBA,[123] Congress needs to shed light on whether the 1972 Amendments apply to the DBA. Several circuits have sent cues in their opinions calling on Congress to fix this oversight in workers' compensation coverage.[124] Hence, a legislative action plan to draw attention to the current confusion in statutory language could achieve the necessary reform faster than through traditional judicial avenues.

VIII. CONCLUSION

The DBA/Longshore Act circuit split has existed for over thirty years, and the Supreme Court is unresponsive to the need to clarify the law. Once referred to as the "least dangerous" branch by founding father, Alexander Hamilton,[125] the Supreme Court, in the context of the DBA/Longshore Act split, is living up to its designation as the deadbeat branch within the family tree of government.

While the orthodox view attempts to justify the *Stillwell II* certiorari denial, it seems that the cue theory more accurately accounts for judicial dependence and deference. The cue theory pinpoints a reason why the Supreme Court refused to take up the legal issue in both cases. In

[123] 30 U.S.C. § 901 (2000).
[124] *See supra* text accompanying note 26.
[125] *See* Rosenberg, *supra* 63, at 3.

both *Stillwell II* and *Felkner II*, the government was a party to the suit.[126] Further, in the *Felkner II* case, the government and Office of the Solicitor prompted the Court to deny the petition because the government felt the split "did not merit the Court's review at this time."

Congress also has been unresponsive and refuses to pass reform legislation that would clarify the inconsistencies between the DBA and Longshore Act. Passing reform legislation, like Congress did with the BLBA, would easily fix the problem. Several of the courts within the circuit split, arising on both sides of the jurisdictional issue, have hinted to Congress that reform is necessary. The only step left for Congress is to institute the reform.

With both branches of government refusing to paint a clear picture as to claimants' appellate rights for workers' compensation claims, future practitioners and claimants will need to think outside of the box when planning for litigation. The next time that a practitioner considers appealing up to the Supreme Court, it will be necessary to include amicus briefs in order to persuade the Court of the importance of the jurisdictional issue. Because litigation can take an inordinate amount of time to effectuate public policy, claimants may seek retribution through legislative means and lobby Congress to clarify the law. Either way, the thirty-year circuit split is still looming over claimants' heads and causing unnecessary confusion, to which the Supreme Court and Congress can no longer ignore.

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[126] *See supra* note 86.