

REPORT*Introduction*

Our federal courts are generally designed to assign district judges randomly to cases as they are filed, barring, e.g., a relationship to pending matters within the same district or relationship to a prior, concluded case. Chief Justice Roberts noted in the 2021 Year-End Report on the Federal Judiciary that “the Judicial Conference has long supported the random assignment of cases”¹ Random assignment serves important functions in preserving and promoting public confidence in the judiciary. It avoids the appearance that some litigants can literally “pick their judge” by, in some instances, filing within a particular division within a federal district; in some circumstances, the courthouse in which a case is filed leads to the sole judge who sits there routinely receiving assignments from filings made “at” that courthouse.²

This tactical version of “judge-shopping” by place-of-filing was highlighted by the practice of patent owners filing cases with nationwide impact in a single division (Waco) in the Western District of Texas, resulting in nearly 25% of patent cases nationally being assigned to the single judge in that division.³ In 2021, Chief Justice Roberts addressed criticism of this practice, noting that “Senators from both sides of the aisle have expressed concern that case assignment procedures allowing the party filing a case to select a division of district court might, in effect, enable the plaintiff to select a particular judge to hear a case.”⁴ Chief Justice Roberts was sufficiently concerned that he “asked the Director of the Administrative Office, who serves as Secretary of the Judicial Conference, to put the issue before the Conference,” noting further that the “Committee on Court Administration and Case Management is reviewing this matter and will report back to the full Conference.”⁵ The Chief Judge for the Western District of Texas then issued case-assignment orders expressly directed at patent filings to prevent filings in Waco from leading to assignment to a particular judge.⁶ In effect,

¹ John G. Roberts, Jr., C.J., U.S. Sup. Ct., 2021 Year-End Report on the Federal Judiciary at 5, <https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf> (“2021 Year-End Report”) (specifically addressing assignment of patent cases as one of the three agenda topics the Chief Justice chose to highlight that year).

² The word “at” is singled out because in this day and age e-filing is available throughout the federal system, although it is not the only method for filing.

³ Michael Shapiro, *West Texas Patent Case Assignment Order Stays in Place, for Now*, Bloomberg Law (December 22, 2022), <https://news.bloomberglaw.com/ip-law/west-texas-patent-case-assignment-order-stays-in-place-for-now>. The number of patent case filed in federal court in Waco, Texas, soared from a total of five in 2016-2017 to nearly 1,000 in 2019-2020. J. Jonas Anderson & Paul R. Gugliuzza, *Federal Judge Seeks Patent Cases*, 71 Duke L.J. 419, 421 (2021).

⁴ 2021 Year-End Report, *supra* note 1, at 5.

⁵ *Id.* As of the first quarter of 2023, no “report back to the full Conference” has been released, perhaps due to the issuance of case assignment Orders in the Western District of Texas addressing the practice.

⁶ Order Assigning the Business of the Court as It Relates to Patent Cases (W.D. Tex. July 25, 2022) (“[A]ll civil cases involving patents (Nature of Suit Codes 830 and 835), filed in the Waco Division on or after July 25, 2022, shall be randomly assigned to the following [twelve named] district judges of this Court until further order of the Court.”), as continued in Amended Order Assigning the Business of the Court, Item IX(c) (W.D. Tex. May 1, 2023), (“Patent cases will be assigned as ordered on July 25, 2022, in the

these orders confirmed Chief Justice Roberts's stated belief "that self-governing bodies of judges from the front lines are in the best position to study and solve—and to work in partnership with Congress in the event change in the law is necessary."⁷

Yet patent cases are not the only kind of case in which strategic, geographic filings have apparently been made to select a particular judge. As the Congressional Research Service noted in late 2022, "[i]n recent years, some observers have expressed concerns that litigants challenging government actions were filing suit in those divisions [where only one or two active federal judges are assigned] in an attempt to judge shop."⁸ For example, an amicus brief in the recent application in *United States*

v. Texas and Louisiana examined nineteen instances in which the State of Texas had filed challenges to federal law in federal courts from in 2021 and 2022, and noted that eighteen of the nineteen cases had been assigned to a district judge appointed by a President of the opposite political party from the Administration promoting the federal law or policy being challenged. Of the eighteen cases, seven were filed in single-judge divisions, while another eight were filed in two-judge divisions.⁹

Of course, concern with "judge shopping" is nothing new and is not restricted to any particular political viewpoint or party or kind of case. This Report shows that concerns about "judge shopping" arise in many contexts or kinds of cases,¹⁰ with the recent decision on the medication-abortion drug mifepristone in the single-judge Amarillo Division of the Northern District of Texas as a case in point.¹¹ While that case brought this issue once again to the forefront, the perception that a party can choose a

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Court's Order Assigning the Business of the Court as it Relates to Patent Cases") (collectively referred to as "Orders").

⁷ 2021 Year-End Report, *supra* note 1, at 5.

⁸ Joanna R. Lampe, Cong. Rsch. Serv., LSB1085, Where a Suit Can Proceed: Court Selection and Forum Shopping 3 (2022).

⁹ Amicus Curiae Brief of Stephen I. Vladeck in Support of Applicants at 3-4 & n.5, *United States v. State of Texas & State of Louisiana*, No. 22A17 (U.S. July 13, 2022) ("Vladeck Amicus Brief"). To the brief Vladeck attached and discussed a chart of nineteen instances in which the State of Texas has challenged federal policy in Texas federal courts, with eighteen of the nineteen cases being filed resulting in assignment to judges appointed by the President of one national political party. *Id.*, app. A.

¹⁰ In addition to concerns about this practice in patent cases raised by the Chief Justice and cases like the mifepristone case brought in the Northern District of Texas, these concerns have arisen in bankruptcy cases, ERISA cases, among others. See, e.g., Adam J. Levitin, *Judge Shopping in Chapter 11 Bankruptcy*, 2023 U. Ill. L. Rev. 351, 354 (2023) ("In recent years, judge shopping has become standard practice in large chapter 11 bankruptcy cases."); U.S. Government Defendants' Motion to Transfer Venue, *State of Utah v. Walsh*, No. 2:23-cv-00016-Z (N.D. Tex. Feb. 7, 2023) (seeking to transfer under 28 U.S.C.

§ 1404, arguing that there was not proper venue because "there is no connection between the Complaint and this District or Division," in a case challenging regulations promulgated under the Employee Retirement Income Security Act of 1974 ("ERISA").

¹¹ *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, No. 2:22-CV-223-Z, 2023 WL 2825871 (N.D. Tex. Apr. 7, 2023), *granting motions to stay in part sub. nom. All. for Hippocratic Med. v. Food & Drug Admin.*, No. 23-10362, 2023 WL 2913725 (5th Cir. Apr. 12, 2023) (per curiam) (Unpublished Order), *stay granted sub nom. Danco Lab'y's., LLC v. All. for Hippocratic Medicine*, No. 22A901, 2023 WL 3033177 (U.S. Apr. 21, 2023).

preferred judge is problematic whether the practice is used to advance a conservative ideology or a liberal one, or whether it is used to gain advantage in patent cases or any other type of litigation. The organization of the courts and case-assignment should be fair, and should be seen as fair by all, and should not be used as a vehicle for advancing any kind of political agenda or financial or other result.

Blind, random selection of judges has long been thought to be critical to “prevent[] judge shopping by any party, thereby enhancing public confidence in the assignment process.”¹² If a party “attempted somehow to choose the judge whom she believed would be most favorable to her case, our judicial system would condemn this action because it impairs the integrity of the judicial system and judicial process.”¹³

Against this background, it is important that district courts protect what Chief Justice Roberts described as the “important” value of “the random assignment of cases.”¹⁴ by assigning certain cases via district-wide, normal random case-assignment provisions (which may very well include the judge in the division in which the case was filed, but will not automatically result in assignment to that judge). The proposal is limited to cases seeking to enjoin national or state law or agency action (or mandate its enforcement in a particular way) such that the ruling would apply outside the division in which a case is filed—if not nationwide. When such a case is filed in a division in which it would be predictably assigned to a single district judge, including single-judge divisions that use the division in which a case is filed to make the case assignment, such predictable assignment would be circumvented if a party or intervenor promptly objects. Because this proposal is limited to cases challenging federal or state law or agency action beyond the division’s geographic limits, the interest in having “litigants . . . served by federal judges tied to their communities”¹⁵ is not at issue. Because the process requires an objection, cases that fit the description but are otherwise viewed by all parties as appropriate for resolution before the one judge in that division (whether due to their familiarity with the local community or otherwise) would not be affected by this proposal. The proposal does not seek, as some commentators have suggested, to dismantle current single-judge divisions. It is important to note, also, that not all districts

¹² *United States v. Mavroules*, 798 F. Supp. 61, 61 (D. Mass. 1992).

¹³ Kimberly Jade Norwood, *Shopping for a Venue: The Needs for More Limits on Choice*, 50 U. Miami L. Rev. 267, 268-69 (1996); see also A. Kohn, *Southern District Panel Studies Ways to End Judge-Shopping*, N.Y.L.J., Mar. 23, 1987 (referring to practice whereby criminal defendant could pick which judge would sentence him based on reputation of judge for severe or light sentences); A. Kohn, *U.S. Court Revises Format to Curtail Judge-Shopping*, N.Y.L.J., May 1, 1987 (reporting on vote by S.D.N.Y. judges to make choice of sentencing judge subject to random assignment); D. Wise, *Panel Seeks Reform of Case Assignment Rule: City Bar Committee Urges Change in Related-Case Process to Curb Vestiges of Judge-Shopping*, N.Y.L.J., Mar. 15, 1989; T. McGarity, *Multi-Party Forum Shopping for Appellate Review of Administrative Action*, 129 U. Pa. L. Rev. 302 (1980); S. Brill, *When the Government Goes Judge Shopping*, Am. Lawyer, Nov. 1988 (decrying “judge shopping” by government in civil RICO case against Teamsters using the “related case” process to have case assigned to judge perceived as pro-government).

¹⁴ 2021 Year-End Report, *supra* note 1, at 5 (addressing patent cases specifically).

¹⁵ *Id.* This was the sole “competing value[]” identified by Chief Justice Roberts as potentially weighing against random assignment. *Id.*

with divisions served by a single judge make case assignments based upon the division in which the case is filed.¹⁶

Background Regarding Districts and Divisions

Of the ninety-four judicial districts within the federal system as of the first quarter of 2023, only two districts have only a single authorized judge—the District of Guam and the District of the Northern Mariana Islands.¹⁷ Thus, in theory and barring recusals, no case filed in any other district court should automatically go to a particular judge due to a division being served by a single district judge.¹⁸

As of 2018, fifty-five of the ninety-four federal district courts have been divided into divisions by geography.¹⁹ And as of 2018, at least thirty-five of those fifty-five divisions appear to have either a single district judge or two district judges assigned to each.²⁰

Federal statutes leave case-assignment mechanisms to each district, with the judicial council of the appropriate circuit authorized to set procedures should the district court fail to do so.²¹ Common factors applied within districts in setting their case-assignment mechanisms include: (i) preferences for maintaining a balance of case numbers before each active district judge, (ii) some distinction between civil and criminal matters, (iii) some distinctions based upon type of case as revealed by

¹⁶ Alex Botoman, *Divisional Judge-Shopping*, 49 Colum. Hum. Rts. L. Rev. 297, 317 (2018).

¹⁷ In addition, there is one district judge authorized for the Eastern District of Oklahoma plus (as of March 11, 1994) an additional authorized district judge who “roves” equally between the Northern and Eastern Districts of Oklahoma. A breakdown is available through the United States Courts website at <https://www.uscourts.gov/judges-judgeships/authorized-judgeships>,

¹⁸ Botoman, *supra* note 16, at 317.

¹⁹ *Id.* at 299 & app. A.

²⁰ The United States Courts website does not publish information regarding one- or two-judge divisions. Botoman reported and tabulated the results of research indicating that identified thirty-five judicial divisions within which a single district judge hears greater than 50% of the cases, providing a logical proxy for one to two judge divisions. *Id.*, app. A. While information was not available for all districts and divisions, the article’s Appendix A identified the following districts with one or more such divisions in U.S. District Courts for the following districts: District of Montana (with five such divisions), Western District of North Carolina (with four such divisions), Western District of Pennsylvania (with two such divisions), Eastern District of Texas (with five such divisions), Northern District of Texas (with two such divisions), Southern District of Texas (with two such divisions), Western District of Texas (with two such divisions), Western District of Virginia (with six such divisions), Northern District of West Virginia (with four such divisions), Southern District of West Virginia (with two such divisions), and Eastern District of Wisconsin (with one such division), for a total of thirty-five divisions spread across seven states within which one judge is assigned more than half the cases filed.

²¹ 28 U.S.C. § 137(a) (“The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court. If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.”).

information contained on the Civil Cover Sheet²² or similar documentation, and (iv) use of divisions in making assignments.²³

Over the past several years the public perception has grown that high-profile cases with national impact are filed by repeat litigants in particular districts and divisions in order to be assigned to particular judges. As Chief Justice Roberts noted in his 2021 Year-End Report on the Federal Judiciary when addressing specifically the assignment of patent cases filed in a single-judge division:

Senators from both sides of the aisle have expressed concern that case assignment procedures allowing the party filing a case to select a division of a district court might, in effect, enable the plaintiff to select a particular judge to hear a case. Two important and sometimes competing values are at issue. First, the Judicial Conference has long supported the random assignment of cases and fostered the role of district judges as generalists capable of handling the full range of legal issues. But the Conference is also mindful that Congress has intentionally shaped the lower courts into districts and divisions codified by law so that litigants are served by federal judges tied to their communities. Reconciling these values is important to public confidence in the courts ²⁴

While the patent-case assignment situation was addressed by the district in which 25% of patent cases nationwide had been filed in a single-judge division²⁵ moving to a system where patent cases were to be assigned randomly throughout the district,²⁶ the ability to appear to “choose” a particular judge is (i) not limited to patent law, and (ii) not addressed in the internal Western District of Texas Assignment Order that sought to end the rush to select a single judge by filing in the Waco Division.²⁷

Abolition of “Divisional Venue”

Prior to 1988, the presence of judicial divisions did not lead to the possibility of judge-shopping because, under the relevant federal statute, a party was generally

²² Form JS-44, last revised Apr. 2021, with Civil Nature of Suit Code Description, last revised Dec. 2022, both available from the United States Courts website at <https://www.uscourts.gov/forms/civil-forms/civil-cover-sheet>.

²³ One author notes that thirty-six of the ninety-four district courts do not use “divisions” when making assignments. Botoman, *supra* note 16, at 317.

²⁴ 2021 Year-End Report, *supra* note 1, at 5 (emphasis added). The perception that the system was being manipulated in patent cases was of sufficient importance that it was one of only “three topics” expressly “highlighted” in the Report. *Id.* at 3 (“I would like to highlight three topics that have been flagged by Congress and the press over the past year.”); see also *id.* at 5.

²⁵ “At one point, nearly 25% of all patent litigation nationwide was pending before [District Judge Alan] Albright, prompting criticism from Congress and US Supreme Court Chief Justice John Roberts.” Shapiro, *supra* note 3.

²⁶ See Orders, *supra* note 6..

²⁷ See *id.*

required to file within the division where the defendant resided.²⁸ In 1988, Congress repealed that statutory provision, abolishing divisional venue at the federal level.²⁹ Now, following that repeal, divisional case-assignment rules run the gamut. Some districts make venue available only in one division. Other districts have established divisional rules largely tracking the rules for district-level venue, i.e., focusing upon where a defendant resides or where a substantial part of the events occurred that allegedly give rise to the claim; to still other courts that have elected not to establish any division-level rules, allowing any plaintiff to choose any division within the district.³⁰ Even those courts that allow filing in any division do not necessarily tie the case assignment of judges to the division in which a case was filed.³¹ In short, a variety of approaches exist, with one approach—assignment to single-judge divisions—resulting in the perception that the value of “random assignment” is being overrun without any corresponding benefit resulting from a perceived tie to the specific judges’ assigned communities.³²

The Impact of Single-Judge Divisions Can and Should Be Lessened or Eliminated

A. Case-Assignment Methods in Some Single-Judge Divisions Create an Appearance That Some Repeat Litigants Can Effectively Choose a Specific Judge, Unlike the Vast Majority of Litigants in Federal Court.

The experience of district courts throughout the system evidences a preference for initial random assignment to one or more judges. Chief Justice Roberts recognized this interest in his 2021 Year-End Report, stating that “the Judicial Conference has long supported the random assignment of cases and fostered the role of district judges as generalists capable of handling the full range of legal issues.”³³ Yet, as the patent-case assignment experience demonstrated, and as the pattern of filing cases with nationwide impact in particular one- and two-judge divisions has also shown,³⁴ the “random assignment of cases” can be circumvented, or seen to be avoided particularly in certain kinds of cases. This apparent avoidance, as the Chief Justice noted in 2021, has led to questioning and criticism from Congress and the public and press.³⁵ However, as

²⁸ 28 U.S.C. § 1393 (repealed) (providing that in judicial districts with divisions actions must be brought where one or more defendants resided).

²⁹ Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1001, 102 Stat. 4642, 4664 (1988) (“REPEAL.—Section 1393, relating to divisional venue in civil cases, and the item relating to section 1393 in the table of sections at the beginning of chapter 87, are repealed.”).

³⁰ These approaches are summarized and exemplars provided in Botoman’s article. Botoman, *supra* note 16, at 316 & nn. 102-104.

³¹ *Id.* at 315-20.

³² 2021 Year-End Report, *supra* note 1, at 5.

³³ *Id.*

³⁴ For example, the Vladeck Amicus Brief, *supra* note 9, discusses 19 instances in which the State of Texas has challenged federal policy in Texas federal courts, with 18 of the 19 cases resulting in assignment to judges appointed by the President of the same national political party. Seven of the cases were filed in single-judge divisions, while another eight were filed in two-judge divisions. *Id.*, app. A.

³⁵ See, e.g., 2021 Year-End Report, *supra* note 1, at 5 (referencing “Senators from both sides of the aisle hav[ing] expressed concern that case assignment procedures allowing the party filing a case to select a division of a district court might, in effect, enable the plaintiff to select a particular judge to hear the case”); Perry Stein, *The Justice Department’s Fight Against Judge Shopping In Texas*, The Washington Post,

discussed below, both the Courts themselves and the Congress each have toolkits that can be used to mitigate the perception of judge-shopping in these instances.

B. Multiple Alternative Approaches, if Taken by Courts, Can Avoid the Impact of Single-Judge Divisions.

The ABA Resolution does not call for the dismantling of any divisions or even of any divisions served by one judge. No new judges need to be added to any division, no court and chambers spaces need to be added in existing courthouses, and no new courthouses built. The Resolution seeks to avoid only the impact that non-random assignment brings.

District judges have the authority provided by 28 U.S.C. § 137(a) to craft and apply assignment systems within their districts, with judicial councils authorized to create assignment systems if the district judges do not agree. As with the patent-cases situation in the Waco Division of the Western District of Texas, “[t]his issue of judicial administration provides another good example of a matter that self-governing bodies of judges from the front lines are in the best position to study and solve—and to work in partnership with Congress in the event change in the law is necessary.”³⁶ In that instance, the chief judge of the district announced new case-assignment practices that returned cases to the wheel for random assignment across the district. Some other districts may take that same approach. Others may choose to eschew consideration of the division in which a qualifying case is filed for all assignment purposes. Other courts will find additional approaches to both allow the continuation of relatively small docket divisions that are geographically dispersed, so long as random assignment occurs for cases seeking to enjoin federal or state law or regulation.

Districts with single-judge divisions can address the issues through a variety of means, including assigning relevant cases in the first instance throughout the district to judges irrespective of the division in which the case is filed, or allowing a party or intervenor within a designated time after service to call for random assignment within the district.

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Mar. 19, 2023, <https://www.washingtonpost.com/national-security/2023/03/19/judge-shopping-justice-protests-texas/>; Steve Vladeck, *Texas Judge’s Covid Mandate Ruling Exposes Federal Judge-Shopping Problem*, MSNBC Jan. 11, 2022, <https://www.msnbc.com/opinion/texas-judge-s-covid-mandate-ruling-exposes-federal-judge-shopping-n1287324>.

³⁶ 2021 Year-End Report, *supra* note 1, at 5.

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C. Multiple Alternative Approaches by Congress Remain Available Should Courts Not Act to Restrict or Remove the Impact of Single-Judge Division Assignments.

This Resolution does not call for Congressional action. Yet commentators have noted several legislative approaches that could be taken, as the Chief Justice put it, "in the event change in the law is necessary."³⁷

For years, federal statutes required that such cases be resolved by three-judge courts. One legislative approach would address cases that have extra-divisional impact, or perhaps extra-district impact, and return to three-judge courts, when the validity of constitutionality of administrative rules or statutes are involved.³⁸

A second legislative approach has suggested that the U.S. District Court for the District of Columbia have exclusive jurisdiction over suits seeking an injunction against the enforcement of any federal law (including regulations and Executive orders).³⁹

A third alternative legislative approach would simply prohibit single-judge divisions from being used for assignment purposes if any party objected within a designated number of days after service. In the event of objection, the case would randomly be assigned to a judge at the district level without regard to the division in which the case was filed. In effect, this would legislate what the proposal proposes courts consider.

This Resolution and Report does not endorse any of these proposals. However, the availability of Congressional action may, as the Chief Justice suggested, encourage action by the Judiciary.

Conclusion

Confidence in our judicial system is the bedrock of the rule of law. The system's fairness, and perception of its fairness, is even more critical when addressing issues of legislative or executive power. This Resolution addresses efforts to pick not just a forum, but to pick a specific judge. Avoiding perceptions that parties can choose a judge to decide matters will help support the legitimacy of our federal courts and the public's confidence in them.