

September 1, 2023

H. Thomas Byron III, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Submission of a Proposal to Adopt a Rule to
Increase the Randomness of Civil Case Assignments

Dear Secretary Byron:

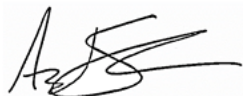
Please find enclosed a Proposal requesting that the Committee on Rules of Practice and Procedure adopt a rule that would establish a minimum floor for the randomization of judicial assignment within districts in certain civil cases. The Proposal details one potential approach for the Committee's consideration: if a plaintiff seeks injunctive relief that would extend beyond a judicial district, the case would be randomly assigned to any judge within the district, regardless of the division in which the case was filed. The Committee might also consider additional potential criteria for requiring randomization, as discussed in the Proposal.

Random case assignment protects the impartiality and public legitimacy of the judiciary. This is especially important where parties seek broad injunctive relief that will affect numerous others not before the court. Currently, there are a number of divisions in the country where, pursuant to local rules, all cases filed in the counties of a division are assigned to a small handful of judges, and often a single judge. Litigants in a range of high-profile cases have filed in such divisions with the aim of securing a judge they believe will favor their claims.

This judge-shopping has damaged public confidence in the fairness of the judicial system, at a time when the judiciary is already under intense scrutiny. A new Federal Rule of Civil Procedure is needed to ensure uniform minimum standards for random case assignment. Adopting such a change through rulemaking would permit thoughtful consideration of the different values and institutional needs implicated by judicial case assignment procedures. An effective response from the judiciary itself to the problem of judge-shopping would promote public confidence in judicial impartiality.

Professor Amanda Shanor and the Brennan Center for Justice are the Proponents and respectfully request that they be notified when the Committee considers this matter in open session. For the convenience of the Committee, all communications can be directed to the undersigned at shanor@wharton.upenn.edu.

Respectfully Submitted,



Amanda Shanor
Assistant Professor

The Wharton School of the University of Pennsylvania
3730 Walnut Street, Suite 600
Philadelphia, PA 19104
(203) 247-2195

Alice Clapman
Jennifer Ahearn
Brennan Center for Justice
1140 Connecticut Ave NW #1150
Washington, DC 20036
(202) 230-4043

**BEFORE THE COMMITTEE ON
RULES OF PRACTICE AND PROCEDURE
PROPOSAL TO REQUIRE RANDOM JUDICIAL ASSIGNMENT FOR CERTAIN CASES**

Professor Amanda Shanor and the Brennan Center for Justice (the Proponents) respectfully request that the Committee on Rules of Practice and Procedure consider and then adopt a Rule under which certain cases would be randomly assigned to any judge of the district in which the case was filed.

Introduction & Rationale for the Proposal

Currently, the judges in each federal judicial district have discretion to devise a system for case assignment within their district. Pursuant to 28 U.S.C. § 137, titled *Division of business among district judges*, “[t]he 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.” Rule 83 on Local Rules then sets the procedures under which case assignment systems can be adopted. For instance, it provides that “[a]fter giving public notice and an opportunity for comment, a district court, acting by a majority of its district judges, may adopt and amend rules governing its practice” and that “[c]opies of rules and amendments must, on their adoption, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public.” Fed. R. Civ. P. 83.

Districts have adopted a wide variety of methods to allocate cases among judges.¹ In some places, districts assign all cases filed within a division with a relatively low volume of cases to only one or two judges. Geographically-tied assignment rules are a valuable tool for preserving access to justice in less populous areas and for ensuring that “litigants are served by federal judges tied to their communities.”² However, they were not meant to enable plaintiffs to hand-pick their judges, let alone in cases with significant nationwide implications.

However, they have led to just that result. In recent years, plaintiffs have exploited case assignment procedures to seek nationwide relief from one or two judges in divisions that bear little connection to the facts of their case, in what has widely been perceived to be an effort to choose a judge who favors their

¹ For a policy that mostly relies on random selection, but within limits so that certain districts are not overburdened, see General Order No. 21-01 at 9-15 (C.D. Cal. 2021), <https://www.cacd.uscourts.gov/sites/default/files/general-orders/GO%2021-01.pdf>. For an example of a policy of random assignment in the context of one courthouse, see D.D.C. LCvR. 40.3, https://www.dcd.uscourts.gov/sites/dcd/files/local_rules/Local%20Rules%20April_2023.pdf. For a geographically large district split into many divisions that assigns all of its judges to all of its divisions and randomly divides all cases between all of them, regardless of where filed, see General Order No. 12 (N.D.N.Y. 2020), <https://www.nynd.uscourts.gov/sites/nynd/files/general-ordes/GO12.pdf> (“Civil cases shall be assigned blindly and at random by the Clerk”). The Western District of Missouri uses a similar approach W.D. Mo. L.R. 83.9, https://www.mow.uscourts.gov/sites/mow/files/Local_Rules.pdf (“Unless otherwise provided in a statute, federal rule, or order of the Court en banc, the Clerk must assign newly filed matters among the qualified judges by blind draw.”).

² John G. Roberts, Jr., C.J., *2021 Year-End Report on the Federal Judiciary*, Supreme Court of the United States, 5 (Dec. 31, 2021), <https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf>.

viewpoint.³ This includes cases where the issues being litigated, and even the parties, have no particular connection to that division.⁴ In recent years, parties have filed a remarkable volume of cases seeking, and obtaining, nationwide relief in single-judge divisions. Indeed, a small number of judges in single-judge divisions have issued nationwide injunctions against a range of federal policies related to immigration,⁵ abortion,⁶ contraception,⁷ gun regulation,⁸ employment law,⁹ and educational policy.¹⁰

This situation has damaged public confidence in the fairness of the judicial system and prompted widespread demands for change. The American Bar Association, for example, recently adopted a resolution urging the federal courts to “eliminate case assignment mechanisms that predictably assign cases to a single United States District Judge” in cases seeking injunctions against federal or state law where any party objects to the initial assignment within a reasonable time period.¹¹ Those cases, the ABA

³ See e.g., Motion for Leave to File Amicus Curiae Brief and Brief of Stephen I. Vladeck as Amicus Curiae in Support of Applicants, *United States v. Texas*, No. 22-40367 (July 13, 2022), https://www.supremecourt.gov/DocketPDF/22/22-58/230032/20220713161446965_22A17%20tsac%20Stephen%20I.%20Vladeck.pdf (describing Texas’s practice of filing dozens of challenges in divisions outside the state capital and far from the relevant facts, staffed by one or two judges appointed by administrations of the same party, and of consolidating cases away from multi-judge divisions); Perry Stein, *The Justice Department’s Fight against Judge Shopping in Texas*, Wash. Post (May 9, 2023), <https://www.washingtonpost.com/national-security/2023/03/19/judge-shopping-justice-protests-texas/>.

⁴ Abbie Vansickle, *Schumer Asks Judicial Policymakers to End Single-Judge Divisions in Texas*, N.Y. Times (July 11, 2023), <https://www.nytimes.com/2023/07/11/us/politics/schumer-judge-selection-texas.html> (describing how an advocacy group incorporated in Amarillo, Texas shortly after *Roe v. Wade* was overturned, and then filed suit in that district, where all cases go to a judge who had publicly criticized *Roe* and who then granted the group’s motion to reverse 20 years of unchallenged Food and Drug Administration approval for medication abortion).

⁵ Sabrina Rodriguez, *Federal Judge Deals Biden Another Blow on 100-Day Deportation Ban*, Politico (Feb. 24, 2021), <https://www.politico.com/news/2021/02/24/texas-judge-biden-deportation-ban-471315>.

⁶ Brendan Pierson, *Explainer: Kacsmayk Suspends Approval of Abortion Pill. What’s Next?*, Reuters (April 10, 2023), <https://www.reuters.com/world/us/texas-judge-suspends-approval-abortion-pill-what-happens-next-2023-04-08/>.

⁷ *DeOtte v. Azar*, 393 F. Supp. 3d 490 (N.D. Tex. 2019), <https://affordablecareactlitigation.files.wordpress.com/2019/06/deotte-summary-judgment-order.pdf>.

⁸ Melissa Quinn, *Alito Extends Order Reinstating ATF Rules Restricting ‘Ghost Guns’ for Now*, CBS News (Aug. 4, 2023), <https://www.cbsnews.com/news/justice-samuel-alito-atf-rules-ghost-guns-supreme-court/>; Perry Stein, *Veterans Sue Biden Justice Dept. over Pistol Brace Restrictions*, Wash. Post (Feb. 2, 2023), <https://www.washingtonpost.com/national-security/2023/02/01/wisconsin-pistol-brace-lawsuit/> (describing Wisconsin firm filing in Amarillo Division of Northern District of Texas to block federal policy).

⁹ *Texas v. United States*, 95 F. Supp. 3d 965 (N.D. Tex. 2015) (ruling by Judge Reed O’Connor blocking the federal Department of Labor from including same-sex spouses in a statutory definition of the word “spouse”).

¹⁰ Camila Domonoske, *U.S. Judge Grants Nationwide Injunction Blocking White House Transgender Policy*, NPR, (Aug. 22, 2016), <https://www.npr.org/sections/thetwo-way/2016/08/22/490915833/u-s-judge-grants-nationwide-injunction-blocking-white-house-transgender-policy>. Additionally, a motion is pending to block a federal policy permitting retirement funds to consider ethical guidelines in making investment decisions. Jon McGowan, *Biden Administration and Republicans Trade Motions in ESG Rule Lawsuit*, Forbes (June 6, 2023), <https://www.forbes.com/sites/jonmcgowan/2023/06/06/biden-administration-and-republicans-trade-motions-in-esg-rule-lawsuit/?sh=33afe1dc141f>.

¹¹ American Bar Association (ABA), Resolution No. 521 (Aug. 2023), <https://www.americanbar.org/content/dam/aba/administrative/news/2023/am-res/521.pdf>.

proposes, would then be randomly assigned among all of the district judges.¹² Nineteen Senators recently called on the Judicial Conference to recommend rules to all district courts that would ameliorate judges shopping.¹³ And Senate Majority Leader, Chuck Schumer, has called on the U.S. District Court for the Northern District of Texas, which has assignment rules¹⁴ that have been frequently exploited, to adopt random case assignment.¹⁵ In short, as the Congressional Research Service has noted, “[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.”¹⁶ These concerns have correctly identified a fundamental problem; a new Rule is needed to establish uniform minimum standards for random case assignment.

The process for adopting new Federal Rules provided in the Rules Enabling Act, 28 U.S.C. § 2072, and elaborated through the Judicial Conference, is a preferable method for dealing with this issue for several reasons. This process would allow both a systematic approach to and public comment on the administrative practicalities and multiple values implicated by case assignment procedures. As the Supreme Court has recognized, rulemaking “draws on the collective experience of bench and bar, and it facilitates the adoption of measured, practical solutions.”¹⁷ It is also flexible: the rules committees are “left wholly free to approach the question of amendment of . . . the rules in the light of whatever considerations seem relevant to them,”¹⁸ and are not constrained by the “time pressures and piecemeal character of case-by-case adjudication”¹⁹ or other similar limitations. For this reason, this Committee can more comprehensively study and weigh the issues raised by judge shopping and case assignment processes.

A Rule would also establish not only a uniform but also, critically, a clear policy. All litigants then could both be assured that their case had been assigned in accordance with a minimum floor of randomness and have a clear Rule to cite if there was any question as to the processes of their case assignment. Adopting a Rule that ensures minimum standards for the random assignment of cases would thus promote both the legitimacy and impartiality of the judiciary—fostering public confidence.

¹² *Id.*

¹³ Letter from Sen. Charles Schumer et al. to Hon. Robin L. Rosenberg (July 10, 2023), <https://www.democracymarket.com/wp-content/uploads/2023/07/Letter-on-judge-shopping.pdf>.

¹⁴ Special Order 3: Order Regarding Judgeships and Case Assignments (N.D. Tex.), <https://www.txnd.uscourts.gov/special-order-3/>.

¹⁵ Letter from Sen. Charles Schumer to Hon. David C. Godbey (April 27, 2023), https://www.democrats.senate.gov/imo/media/doc/following_devastating_decisions_on_abortion_lgbt_protections_and_immigration_majority_leader_schumer_pushes_to_end_contemptible_practice_of_texas_forum_shopping.pdf. Bills have also been proposed in both the House and Senate to address the situation by providing the District of Columbia, which uses full random assignment, jurisdiction over all cases involving declaratory or injunctive relief against the federal laws. *See* Stop Judge Shopping Act, S. 1265, 118th Congress (2023), <https://www.congress.gov/bill/118th-congress/senate-bill/1265/text>; Stop Judge Shopping Act, H.R. 3163, 118th Congress (2023), <https://www.congress.gov/bill/118th-congress/house-bill/3163/text>.

¹⁶ Joanna R. Lampe, *Where a Suit Can Proceed: Court Selection and Forum Shopping*, Cong. Research Serv. No. LSB10856, 3 (Nov. 8, 2022), <https://crsreports.congress.gov/product/pdf/LSB/LSB10856>.

¹⁷ *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 114 (2009).

¹⁸ *Miner v. Atlass*, 363 U.S. 641, 651 (1960).

¹⁹ *Harris v. Nelson*, 394 U.S. 286, 306 (1969) (Harlan, J., dissenting).

Proposal

The Judicial Conference is empowered under 28 U.S.C. § 2072 “to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.” Pursuant to this authority, similar to Rule 83, the Conference should adopt a rule that creates a minimum procedural floor for the impartiality of case assignment. Districts would continue to have the flexibility, beyond that minimum, to adopt local rules to best divide business among district judges based on local conditions.

There are multiple ways to ensure cases are randomly assigned in circumstances when the risks of judge-shopping exceed the importance of having a case resolved locally by a judge with local community ties. Proponents offer one, relatively simple approach for the Committee’s consideration. Specifically, Proponents ask that this Committee promulgate the following rule or its equivalent:

- In cases where a plaintiff seeks injunctive or declaratory relief that may extend beyond the district in which the case is filed, districts shall use a random or blind assignment procedure to assign the case among the judges in that district.

If the Committee determines that requiring random assignment for a narrower category of cases would strike a better balance between preventing judge-shopping and preserving the benefits of single-judge divisions, it could require random assignment only for cases where 1) the plaintiff is seeking injunctive relief that would extend outside the district; AND 2) at least one of the plaintiffs is a governmental entity or official, resides outside the division, or is a member organization that includes members residing outside the division. Alternatively, it could require random assignment when a plaintiff seeks to enjoin a federal or state law or agency action, as the ABA recently recommended.²⁰

This Proposal, like other similar proposals for randomization, accords with the Conference’s longstanding support for random case assignment, recently reaffirmed by Chief Justice Roberts, who observed 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.”²¹ The proposal also responds to widespread and bipartisan concerns about judge-shopping.²² It does so in a balanced way that preserves single-judge judicial assignments in cases where they better serve the interests of access to justice or where a judge’s community ties might be germane to the issues at stake.

Similar limits on single-judge assignment have already proved workable in other contexts. Most recently, in response to judge-shopping concerns in patent cases filed in Waco, Texas, and after Chief Justice Roberts had referred the issue to the Conference for study,²³ the Western District of Texas revised its

²⁰ ABA, *supra* note 11.

²¹ Roberts, C.J., *supra* note 2 at 5.


²² *Id.* (in context of case assignment for patent cases, noting concerns from Senators “from both sides of the aisle); ABA, *supra* note 11; Lampe, *supra* note 16 at 3.

²³ Roberts, C.J., *supra* note 2 at 5 (naming addressing assignment of patent cases as one of the three agenda topics highlighted that year).

rules to require the random assignment of patent cases among the twelve judges in the district regardless of where the case is filed.²⁴ Other districts have put similar measures in place.²⁵ The Northern District of California uses random assignment for patent, trademark, and copyright cases, securities class actions, prisoner petitions, and capital habeas corpus cases.²⁶ The District of Nebraska does so when the United States is the plaintiff or the State of Nebraska, its agencies, or employees are the defendants, as well as for prisoner and pro se plaintiffs and social security cases.²⁷ The District of Montana largely does so for election-related cases.²⁸ The District of Maine does so where the state is a plaintiff or defendant.²⁹ And both the Northern District of New York and the Western District of Missouri—both large districts divided into many divisions—assign all of their judges to all of their divisions and randomly divide all cases between all of them, regardless of where filed.³⁰

While these individual district rules vary, they all reflect and seek to reinforce the widely-shared values of fairness and impartiality. These values merit uniform protection throughout the federal judiciary. This Proposal would take a critical step in that direction by preventing the exploitation of case assignment rules by plaintiffs seeking geographically broad injunctive relief.

Thank you for your consideration,



Amanda Shanor
Assistant Professor

²⁴ Order Assigning the Business of the Court as it Relates to Patent Cases (W.D. Tex. July 25, 2022), <https://www.txwd.uscourts.gov/wp-content/uploads/Standing%20Orders/District/Order%20Assigning%20the%20Business%20of%20the%20Court%20as%20it%20Relates%20to%20Patent%20Cases%20072522.pdf> (“[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.”).

²⁵ See generally Alex Botoman, *Divisional Judge-Shopping*, 49 Colum. Hum. Rts. L. Rev. 297 (2018), <https://hrlr.law.columbia.edu/files/2018/07/AlexBotomanDivisionalJudg.pdf>.

²⁶ General Order No. 44(D)(3) (N.D. Cal. Jan. 1, 2018), https://www.cand.uscourts.gov/filelibrary/132/GO-44_01.01.18.pdf.

²⁷ General Rule 1.4(a)(5)(A) (D. Neb. Dec. 1, 2016), <https://www.ned.uscourts.gov/internetDocs/localrules/NEGenR.2016.pdf>.

²⁸ Standing Order No. BMM-25 (D. Mont. July 19, 2023), https://www.mtd.uscourts.gov/sites/mtd/files/SO_BMM-25.pdf (changing standing order from one requiring random assignment for such cases to random assignment with the exclusion of one senior judge).

²⁹ D. Me. L.R. 3(b) (Dec. 1, 2017), <https://www.med.uscourts.gov/sites/med/files/LocalRules.pdf>.

³⁰ General Order No. 12 (N.D.N.Y. 2020), <https://www.nynd.uscourts.gov/sites/nynd/files/general-ordes/GO12.pdf> (“Civil cases shall be assigned blindly and at random by the Clerk”). The Western District of Missouri uses a similar approach W.D. Mo. L.R. 83.9, https://www.mow.uscourts.gov/sites/mow/files/Local_Rules.pdf (“Unless otherwise provided in a statute, federal rule, or order of the Court en banc, the Clerk must assign newly filed matters among the qualified judges by blind draw.”).

The Wharton School of the University of Pennsylvania
3730 Walnut Street, Suite 600
Philadelphia, PA 19104
(203) 247-2195

Alice Clapman
Jennifer Ahearn
Brennan Center for Justice
1140 Connecticut Ave NW #1150
Washington, DC 20036
(202) 230-4043