

## CONSTITUTIONAL CASE ASSIGNMENT\*

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*Reproductive rights have been repeatedly challenged before the same judge in the Northern District of Texas’ Amarillo Division. In the Western District of Texas, patent litigation boomed in one judge’s Waco courtroom. And several cases involving former President Trump were assigned to the same judge in the Southern District of Florida. When a party steers a case toward a particular judge, the outcome in that case may seem predetermined and therefore unfair. Assigning cases at random is one way to ensure at least the appearance of fairness. Yet there is no right to random case assignment in federal court.*

*This Article offers three unique contributions to understanding federal case assignment. First, it contends that whether a party is entitled to a certain form of case assignment is a question of power, not fairness. The statutes, rules, and orders that determine how federal cases are assigned are creatures of federal procedure. The Constitution assigns the power to create that procedure to Congress, which Congress can delegate to the courts. Second, the Article identifies the procedure that controls case assignment in the federal district courts. A first-of-its-kind review of hundreds of local rules and general orders highlights how often cases are not assigned at random. Third, the Article evaluates the validity of case assignment practices that have impacted reproductive rights and patent litigation in Texas, and cases involving the former President in Florida. If the local rules and general orders that govern case assignment are invalid exercises of the rulemaking power Congress delegated to the courts, then the case assignments they create may be unconstitutional.*

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## INTRODUCTION

Random case assignment is considered a hallmark of the federal courts.<sup>1</sup> The practice guarantees that a judge cannot draw a specific case onto their docket, and that a party cannot choose which judge will preside over their case.<sup>2</sup> Random case assignment furthers at least the appearance of impartiality and fairness because a case's outcome is not predetermined based on an intentional assignment to a particular judge.<sup>3</sup>

1. See Adam S. Chilton & Marin K. Levy, *Challenging the Randomness of Panel Assignment in the Federal Courts of Appeals*, 101 CORNELL L. REV. 1, 17–18 (2015) (stating that “[a]lthough a few researchers have questioned the randomness of how judges are ultimately assigned to cases . . . random assignment of judges to panels remains the dominant view in the literature”).

2. *Tripp v. Exec. Off. of the President*, 196 F.R.D. 201, 202 (D.D.C. 2000) (“[Random case assignment] guarantees fair and equal distribution of cases to all judges, avoids public perception or appearance of favoritism in assignments, and reduces opportunities for judge-shopping.”).

3. Marin K. Levy, *Panel Assignment in the Federal Courts of Appeals*, 103 CORNELL L. REV. 65, 98 (2017) [hereinafter Levy, *Panel Assignment*] (“The intentional assignment of cases to judges is understood as deeply problematic for its potential to predetermine case outcomes and certainly for its appearance of predetermining case outcomes.”); J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037, 1040 (2000) (stating that when case assignment “is not adequately based upon principles of neutrality,” there is a possibility that assignments were made “in an effort to influence the outcome of a case”).

Recent cases involving former President Donald Trump have raised concerns about case assignment fairness.<sup>4</sup> The criminal case brought against him for his alleged illegal retention of classified documents was assigned to Southern District of Florida Judge Aileen Cannon.<sup>5</sup> Judge Cannon previously presided over the civil action in which Trump sought to halt the review of documents the F.B.I. seized from his Mar-A-Lago home.<sup>6</sup> In the first case, Judge Cannon sided with the former President, ordering the appointment of a special master and barring the government from using the seized documents before a special master could review them.<sup>7</sup>

Judge Cannon was widely criticized for her special master ruling,<sup>8</sup> and was swiftly reversed by the Eleventh Circuit, which held that Judge Cannon lacked jurisdiction and ordered the case dismissed.<sup>9</sup> Judge Cannon's critics questioned her subsequent assignment to the criminal case because she might continue to rule for Trump—in other words, that based on whom the case was assigned to, the outcome appeared preordained.<sup>10</sup>

A third Southern District of Florida case involving former President Trump and assigned to Judge Cannon went unnoticed by Judge Cannon's critics. On January 6, 2023, after the special master case was resolved but before the criminal case involving retained documents was filed, John Anthony Castro brought an action against Trump in the Southern District of Florida.<sup>11</sup> Appearing pro se, Castro sought a declaration that Trump is “ineligible to hold

4. See, e.g., Charlie Savage, *A Trump-Appointed Judge Who Showed Him Favor Gets the Documents Case*, N.Y. TIMES, <https://www.nytimes.com/2023/06/09/us/politics/trump-documents-judge-aileen-cannon.html> [<https://perma.cc/6RBS-JJ27> (staff-uploaded, dark archive)] (last updated June 13, 2023) (“It was not immediately clear whether Mr. Trump lucked out, or if an exception was made.”).

5. See Indictment at 1, *United States v. Trump*, No. 23-cr-80101 (S.D. Fla. June 8, 2023), Doc. No. 3.

6. Motion for Judicial Oversight and Additional Relief, *Trump v. United States*, No. 22-cv-81294 (S.D. Fla. Aug. 22, 2022), Doc. No. 1.

7. *Trump v. United States*, 625 F. Supp. 3d 1257, 1261 (S.D. Fla.), *vacated and remanded*, 54 F.4th 689 (11th Cir. 2022).

8. See, e.g., Charlie Savage, ‘Deeply Problematic’: Experts Question Judge’s Intervention in Trump Inquiry, N.Y. TIMES (Sept. 5, 2022), <https://www.nytimes.com/2022/09/05/us/trump-special-master-aileen-cannon.html> [<https://perma.cc/CEX3-LYEE> (staff-uploaded, dark archive)]; Steve Benen, *What the Judge Got Wrong in the Latest Mar-a-Lago Ruling*, MSNBC (Sept. 16, 2022, 8:00 AM), <https://www.msnbc.com/rachel-maddow-show/maddowblog/judge-got-wrong-latest-mar-lago-ruling-rca48040> [<https://perma.cc/2MYM-U2HU>]; Ryan Lizza & Eugene Daniels, *Legal World Fires at Judge Cannon*, POLITICO (Sept. 7, 2022, 6:06 AM), <https://www.politico.com/newsletters/playbook/2022/09/07/legal-world-fires-at-judge-cannon-00055134> [<https://perma.cc/D953-FPGC>].

9. *Trump*, 54 F.4th at 701–02 (stating that anything but a reversal would constitute “a radical reordering of our caselaw limiting the federal courts’ involvement in criminal investigations” and would “violate bedrock separation-of-powers limitations”).

10. See, e.g., Mark Joseph Stern, *Judge Aileen Cannon Can Absolutely Sink the Federal Prosecution of Trump*, SLATE (June 9, 2023, 1:44 PM), <https://slate.com/news-and-politics/2023/06/aileen-cannon-federal-prosecution-donald-trump.html> [<https://perma.cc/389D-JE7L>].

11. See Complaint at 1, *Castro v. Trump*, No. 23-cv-80015 (S.D. Fla. Jan. 6, 2023), Doc. No. 1.

public office for having given aid or comfort to the insurrectionists that attacked our United States Capitol” and an injunction prohibiting Trump from “fundraising or campaigning.”<sup>12</sup> Castro moved to disqualify Judge Cannon, questioning her partiality in matters involving the former President. He argued that “[t]he Eleventh Circuit could not have been [clearer]: [Judge Cannon] disregarded nearly 80 years of established case law . . . in an attempt to thwart the criminal investigation of the man that awarded her with a lifetime appointment.”<sup>13</sup> The motion was denied in a minute order the day after it was filed.<sup>14</sup>

The Southern District of Florida’s Clerk of Court has explained that because the Trump criminal case was filed on June 8, 2023, it was more likely to be assigned to Judge Cannon.<sup>15</sup> Senior judges who would have otherwise been eligible to receive the case were likely removed from the case assignment wheel, having hit their yearly case quotas.<sup>16</sup> This explanation does not hold for Castro, who filed in January 2023.<sup>17</sup> Counting *Castro*, the criminal case against former President Trump is the third Trump case assigned to Judge Cannon in less than a year.

Though the Southern District of Florida’s case assignment practices are difficult to pin down, the district does not assign cases at random. As J. Jonas Anderson has explained, even though “[n]on-random case assignment is subject to universal condemnation by the courts themselves,” “in practice[,] there likely is something less than a random assignment of cases at virtually all the U.S. Circuit Courts and the U.S. District Courts.”<sup>18</sup> For example, senior judges and visiting judges are invited to choose the category of cases they hear.<sup>19</sup> The Patent Pilot Program permitted certain district judges to volunteer for patent

12. *Id.* at 2.

13. Motion to Disqualify Judge Aileen Cannon at 3, *Castro*, No. 23-cv-80015 (S.D. Fla. Feb. 15, 2023), Doc. No. 17.

14. Paperless Order Denying Plaintiff’s Motion to Disqualify Judge, *Castro*, No. 23-cv-80015 (Feb. 16, 2023), Doc. No. 19.

15. Charlie Savage, *Trump Appointee Will Remain Judge in Documents Case, Clerk Says*, N.Y. TIMES (June 10, 2023), <https://www.nytimes.com/2023/06/10/us/politics/judge-aileen-cannon-trump-documents.html> [<https://perma.cc/U2WG-UQ65> (staff-uploaded, dark archive)] [hereinafter Savage, *Trump Appointee Will Remain*].

16. *Id.* (stating that, in June 2023, “[a]t least one of the senior judges [was] done” and other two others were “very likely at their target”).

17. See Complaint, *supra* note 11, at 1.

18. J. Jonas Anderson, *Court Capture*, 59 B.C. L. REV. 1543, 1591 (2018).

19. See, e.g., S.D.N.Y. Rules for the Division of Business Among District Judges, Rule 11 (“[A senior judge] shall advise the assignment committee of the number and categories of new cases which that judge is willing and able to undertake.”); S.D.N.Y. Rules for the Division of Business Among District Judges, Rule 12 (“[A visiting judge] shall advise the assignment committee of the number and categories of pending cases which that judge is required or willing to accept.”).

cases their colleagues rejected.<sup>20</sup> Pro se habeas petitions and pro se civil rights actions challenging prison conditions are frequently assigned to designated judges<sup>21</sup> and staff attorneys.<sup>22</sup>

Attempts to reform case assignment in the federal district courts have been ad hoc. After Senators Patrick Leahy and Thom Tillis expressed concern about patent plaintiffs' apparent forum and judge shopping in the Western District of Texas' Waco Division,<sup>23</sup> the Western District amended its case assignment rules.<sup>24</sup> Representative Mikie Sherrill has introduced legislation that would generally limit the power of single-judge divisions,<sup>25</sup> and has honed in on the Northern District of Texas' Amarillo Division, characterizing it as a destination for parties seeking a favorable ruling from Judge Matthew Kacsmaryk.<sup>26</sup> Judge Kacsmaryk is the division's sole judge and recently and controversially rescinded mifepristone's FDA approval.<sup>27</sup> "[C]onservative groups have zeroed in on the Amarillo division of the Northern District of Texas as a go-to place to challenge a wide range of Biden administration policies," where plaintiffs know that their cases will be assigned to Judge Kacsmaryk.<sup>28</sup> Kacsmaryk, "who ascended to the federal bench from the conservative legal group First Liberty

20. See Amy Semet, *Specialized Trial Courts in Patent Litigation: A Review of the Patent Pilot Program's Impact on Appellate Reversal Rates at the Five-Year Mark*, 60 B.C. L. REV. 519, 539–40 (2019).

21. See Lois Bloom & Helen Hershkoff, *Federal Courts, Magistrate Judges, and the Pro Se Plaintiff*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 475, 488–93, 495–97 (2002).

22. See Katherine A. Macfarlane, *Shadow Judges: Staff Attorney Adjudication of Prisoner Claims*, 95 OR. L. REV. 97, 107–12 (2016) [hereinafter Macfarlane, *Shadow Judges*].

23. Letter from Thom Tillis & Patrick Leahy, U.S. Sens., to the Honorable Chief Justice John Roberts, Presiding Officer, Jud. Conf. of the U.S. (Nov. 2, 2021), <https://patentlyo.com/media/2021/11/Letter-to-the-Chief-Justice-about-Judge-Albright.pdf> [<https://perma.cc/KA5R-K2AC>]. The catalyst for that reform was Professors J. Jonas Anderson's and Paul R. Gugliuzza's careful research. *Id.* (citing J. Jonas Anderson & Paul R. Gugliuzza, *Federal Judge Seeks Patent Cases*, 71 DUKE L.J. 419 (2021)).

24. Order Assigning the Business of the Court as It Relates to Patent Cases (W.D. Tex. July 25, 2022) [hereinafter Patent Litigation Order], <https://www.txwd.uscourts.gov/wp-content/uploads/2022/12/Order-Assigning-the-Business-of-the-Court-as-it-Relates-to-Patent-Cases-072522.pdf> [<https://perma.cc/X5BB-KS67>].

25. End Judge Shopping Act of 2023, H.R. 3163, 118th Cong. § 2(a) (2023) ("A civil action which seeks an order enforceable in each district and division of the United States shall be brought only in a division of a judicial district which has two or more active judges assigned.").

26. Press Release, Mikie Sherrill, U.S. Rep., Sherrill Aims To End Anti-Abortion Tactic of Handpicking Favorable Judges (May 9, 2023), <https://sherrill.house.gov/media/press-releases/sherrill-aims-to-end-anti-abortion-tactic-of-handpicking-favorable-judges> [<https://perma.cc/3FBS-YBHR>].

27. *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 668 F. Supp. 3d 507, 560 (N.D. Tex.), *aff'd in part and vacated in part*, 78 F.4th 210 (5th Cir.), *cert. granted*, 144 S. Ct. 537 (2023). The district court's holding regarding the FDA's 2000 approval was stayed. *All. for Hippocratic Med. v. Food & Drug Admin.*, No. 23-10362, 2023 WL 2913725, at \*1 (5th Cir. Apr. 12, 2023).

28. Caroline Kitchener & Ann E. Marimow, *The Texas Judge Who Could Take Down the Abortion Pill*, WASH. POST (Feb. 25, 2023, 6:00 AM), <https://www.washingtonpost.com/politics/2023/02/25/texas-judge-abortion-pill-decision/> [<https://perma.cc/HA7H-P8KU> (dark archive)].

Institute,” has issued several wide-reaching decisions characterized as “wins for the right.”<sup>29</sup>

Efforts at case assignment reform lean into the notion that nonrandom case assignment is fundamentally unfair.<sup>30</sup> But fairness is not the standard that case assignment must meet.<sup>31</sup> Case assignment statutes, rules, and orders derive from Congress’s original and delegated authority over the lower federal courts.<sup>32</sup> If the exercise of that power is valid, so is the resulting procedure.

Following this introduction, Part I explores the constitutional origins of the power to determine how federal cases are assigned, and how that power has been exercised by Congress and delegated to the courts. Part II describes the results of a three-district study that reviewed hundreds of local rules and general orders that control case assignment in those courts. Part III considers whether the courts’ nonrandom case assignment policies, including the use of single-judge divisions, exceed the rulemaking authority delegated to the courts by Congress. The Article then concludes, highlighting the importance of case assignment transparency and neutrality at the district court level, especially given the inability to challenge judicial conflicts of interest at the Supreme Court.

## I. CASE ASSIGNMENT AND THE CONSTITUTION

Case assignment in the federal courts involves an exercise of Congress’s authority over federal procedure. This part describes the constitutional origin of the power to regulate the lower federal courts, and the legislation passed pursuant to that power, which shapes the category of cases district and circuit judges preside over. Next, it identifies the procedure created pursuant to Congress’s delegation of its procedural power to the Supreme Court and the lower federal courts, and how courts have exercised that power to create case assignment rules. It then explores whether district courts’ local rules and general orders, both of which are used to regulate case assignment in the district courts, are subject to Federal Rule of Civil Procedure 83’s and Federal Rule of Criminal Procedure 57’s notice, comment, and majority vote provisions.<sup>33</sup>

This part demonstrates that nonrandom case assignment takes many forms. It permits district judges to sit by designation on a circuit panel at an

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29. *Id.* (describing a Kacmaryk decision that “struck down new Biden administration protections for transgender people” and another that “forced thousands of asylum seekers to return to Mexico while they awaited processing”).

30. See Press Release, *supra* note 26 (describing judge shopping as an “unfair practice”).

31. *In re Marshall*, 721 F.3d 1032, 1040 (9th Cir. 2013) (“[A] party has no due process right to random case assignment.”).

32. See *infra* Part I.

33. FED. R. CRIM. P. 57 advisory committee’s note to 1985 amendment (“[T]he procedures for adoption of local rules by a district court are the same under both the civil and the criminal rules.”).

appointed place and time to hear a particular case, with co-panelists purposefully selected to make the experience educational. It may also direct a certain category of case, such as a social security appeal, away from the district judge to whom it was randomly assigned to a magistrate judge who hears only social security appeals. In single-judge divisions, it assigns all cases to one district judge.

#### A. *Original Authority To Control Procedure*

The Constitution contains several provisions that shape the federal courts. Article III requires one Supreme Court, and gives Congress the discretion to establish “inferior Courts.”<sup>34</sup> As a result, the ninety-four district courts and thirteen courts of appeals exist because Congress has exercised its constitutional authority to create them.<sup>35</sup> With respect to judges, the Constitution mandates that Supreme Court Justices be nominated by the President and appointed with the advice and consent of the Senate.<sup>36</sup> It also requires that all Article III judges enjoy life tenure and receive a fixed salary.<sup>37</sup> Every new Article III judgeship must be authorized and funded by Congress, which also decides how many judges sit on each court.<sup>38</sup>

The Constitution does not specify how the lower courts are to be organized, nor does it contemplate multiple levels of lower court review.<sup>39</sup> The federal judicial system’s structure is left to Congress.<sup>40</sup> Congress determines the “relationships between the various levels of the federal judiciary” and “establishes the initial bounds of their jurisdiction.”<sup>41</sup> Congress’s power over the

34. U.S. CONST. art. III, § 1.

35. *Wellness Int’l Network, Ltd. v. Sharif*, 575 U.S. 665, 668 (2015). Though Congress has created non-Article III bankruptcy judges to assist district courts, it “could choose to rest the full share of the Judiciary’s labor on the shoulders of Article III judges.” *Id.* at 680.

36. U.S. CONST. art. II, § 2. Congress has codified the same appointment process for circuit and district court judges. Pauline T. Kim, *Beyond Principal-Agent Theories: Law and the Judicial Hierarchy*, 105 NW. U. L. REV. 535, 555 n.97 (2011) (citing 28 U.S.C. §§ 44, 133); cf. Tuan Samahon, *The Judicial Vesting Option: Opting Out of Nomination and Advice and Consent*, 67 OHIO ST. L.J. 783, 833 (2006) (explaining that the statutes “reflect simply a congressional policy judgment to retain advice and consent”).

37. U.S. CONST. art. III, § 1.

38. Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1118 (2006) (“Each new constitutional judge needs Congress to authorize judgeships, which are line-by-line items in bills and which thereby give patronage opportunities to a sitting President.”).

39. The Constitution establishes the limits of federal jurisdiction and the scope of the Supreme Court’s original jurisdiction, and also provides that the Supreme Court’s appellate jurisdiction is subject to congressional exceptions. U.S. CONST. art. III, § 2.

40. *Washington v. Jarvis*, 137 F. App’x 543, 547 (4th Cir. 2005); Kim, *supra* note 36, at 554; Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741, 844 (1984).

41. Kim, *supra* note 36, at 554.

lower federal courts and their judges is immense and, as described below, reaches case assignment in several significant ways.<sup>42</sup>

### 1. Judicial Duties

The President nominates and the Senate confirms Article III judges to a specific lower federal court, with the obvious goal of shaping outcomes in that court.<sup>43</sup> However, Congress has always had discretion “to modify the powers and duties” of lower court judges.<sup>44</sup> Congress has done so, passing laws that permit altering the duties Article III judges were originally appointed to fulfill.

Marin Levy’s detailed history of the use of visiting judges describes how the practice of visiting “expanded significantly in 1850,” when Congress first passed a law authorizing a district judge “to sit by designation on a court that was not his own, provided that he was assisting a disabled judge and that he was not straying far.”<sup>45</sup> By 1922, district judges “from anywhere in the country” could sit by designation for additional reasons, such as “for the health of a court and the public interest.”<sup>46</sup> In 1942, Congress passed a law authorizing circuit judges to do the same.<sup>47</sup> The system established in 1922 and 1942 continues to govern how judges sit by designation today.<sup>48</sup>

Several federal statutes authorize judges nominated and confirmed to certain courts to sit by designation elsewhere. For example, a judge confirmed to the District of Alaska, the district with the smallest number of pending cases

42. For a description of how Congress has shaped the structure of the federal courts, beginning with the Judiciary Act of 1789, see Justin C. Van Orsdol, *Cooking the Books: The Art of Judicial Gamesmanship*, 74 RUTGERS U. L. REV. 1099, 1103–07 (2022).

43. See, e.g., Susannah Luthi, *How Trump Is Filling the Liberal 9th Circuit with Conservatives*, POLITICO, <https://www.politico.com/news/2019/12/22/trump-judges-9th-circuit-appeals-court-088833> [<https://perma.cc/HTD2-SMQQ>] (last updated Dec. 27, 2019, 4:26 AM) (describing former President Trump’s efforts to nominate conservative judges to the influential Ninth Circuit to weaken the influence of the court’s progressive bloc).

44. *Washington*, 137 F. App’x at 548 (stating that 28 U.S.C. § 292, authorizing district judges to sit by designation as circuit judges, does not violate the Appointments Clause, U.S. CONST. art. II, § 2, cl. 2).

45. Marin K. Levy, *Visiting Judges*, 107 CALIF. L. REV. 67, 80, 82 (2019) [hereinafter Levy, *Visiting Judges*] (citing An Act of July 29, 1850, ch. 30, 9 Stat. 442). Doron Dorfman has studied the use of the words “disability” and “disabled” outside of the civil rights context. When the term “disabled” is used to refer to judges or lawyers, it means “the inability of a legal actor to continue taking on the role assigned to them” and “diverges from the term of art adopted in disability rights law.” Doron Dorfman, *Disability as Metaphor in American Law*, 170 U. PA. L. REV. 1757, 1775 (2022).

46. Levy, *Visiting Judges*, *supra* note 45, at 90 (citing An Act of Sept. 14, 1922, ch. 306, § 1, 42 Stat. 837). The same act created the Judicial Conference. *Id.*

47. *Id.* at 91 (citing An Act to Amend the Judicial Code To Authorize the Chief Justice of the United States To Assign Circuit Judges to Temporary Duty in Circuits Other Than Their Own of Dec. 29, 1942, ch. 835, § 1, 56 Stat. 1094).

48. *Id.* at 98.



of all districts within the Ninth Circuit,<sup>49</sup> can, pursuant to federal legislation, sit by designation on the Ninth Circuit itself.<sup>50</sup> The Ninth Circuit is an influential appellate court that both President Trump and President Biden have shaped ideologically through their judicial appointments.<sup>51</sup> When a judge appointed to a district court may sit by designation as a Ninth Circuit judge, that judge takes on a role quite different and arguably more consequential than that originally contemplated by the President.<sup>52</sup>

Permitting judges to sit by designation outside of their own court can give a district court judge the power to reverse or undermine precedent that would otherwise bind them. In 2015, Southern District of New York Judge Jed Rakoff, sitting by designation, authored a Ninth Circuit opinion in an insider trading case that rejected the Second Circuit's approach to the same issue.<sup>53</sup> Judge Rakoff was originally appointed to a court bound by Second Circuit precedent. Yet not only did Judge Rakoff "creat[e] a conflict with his own reviewing court," that conflict was resolved by the Supreme Court, and his position eventually prevailed.<sup>54</sup>

Congress authorized Judge Rakoff's transcontinental swing. Pursuant to federal legislation, the Chief Justice may designate a district judge to sit in another circuit, either as a district court or court of appeals judge, so long as the chief judge of the destination circuit presents a certificate of necessity.<sup>55</sup> The

49. U.S. CTS., U.S. DISTRICT COURTS—CIVIL FEDERAL JUDICIAL CASELOAD STATISTICS, TABLE C 4 (March 31, 2022), <https://www.uscourts.gov/statistics/table/c/federal-judicial-caseload-statistics/2022/03/31> [<https://perma.cc/MH6K-BNKH> (staff-uploaded archive)]. In the twelve-month period ending March 31, 2022, 397 cases were pending in the District of Alaska, and 11,268 in the Northern District of California. *Id.*

50. 28 U.S.C. § 292(a).

51. Kevin Rector, *Biden Has Bolstered 9th Circuit's Liberal Flank, but Has Yet To Match Trump's Impact*, L.A. TIMES (Jan. 30, 2023, 4:00 AM), <https://www.latimes.com/california/story/2023-01-30/can-biden-reshape-the-9th-circuit-court-of-appeals-like-trump-did> [<https://perma.cc/AM9C-HKRQ> (staff-uploaded, dark archive)] (describing the importance of "[t]he political makeup of the judges who serve on the 9th Circuit," a court "that includes nine Western states and two U.S. territories," and "helps set legal precedent around some of the nation's most pressing cultural and political issues").

52. A rejected version of the bill that became the 1850 law would have given the President the power, in certain circumstances, to assign a district judge to visit a particular court. Levy, *Visiting Judges*, *supra* note 45, at 81.

53. *Id.* at 68–69.

54. *Id.* at 69.

55. 28 U.S.C. § 292(d). At least one chief judge has refused to provide a certificate of necessity. See *In re Motor Fuel Temperature Sales Pracs. Litig.*, 711 F.3d 1050, 1055 (9th Cir. 2013). Three cases filed in the Southern, Central, and Northern Districts of California were referred to the District of Kansas by the Judicial Panel on Multidistrict Litigation for consolidated pretrial proceedings. *Id.* at 1051–52. Once the proceedings concluded, the presiding District of Kansas judge remanded the cases to their original courts for trial. *Id.* at 1052. However, the Kansas judge wanted to stay on. Then-Chief Judge of the Ninth Circuit Alex Kozinski stated he could only bring in an out-of-circuit judge if "the presiding judge is recused or unable to serve, and the local district is unable to reassign the case." *Id.* at 1054. No such condition was met. *Id.* Kozinski resigned from the court in 2017 after "at least 15 female

chief circuit judge may assign a district judge within their circuit to sit by designation as a circuit judge in that circuit “whenever the business of that court so requires.”<sup>56</sup> Similarly, the chief judge “may, in the public interest,” designate “any district judge of the circuit” to sit in any court within the circuit as a district judge.<sup>57</sup>

Congress has also enacted legislation that governs how circuit judges sit by designation. The Chief Justice may designate a circuit judge to sit by designation in another circuit following a request made by the chief judge or circuit justice of such circuit.<sup>58</sup> Similarly, the chief judge of a circuit or the circuit justice may designate a circuit judge to sit by designation as a district court judge within the judge’s circuit.<sup>59</sup>

Statutes also speak to the composition of circuit panels. Though legislation gives circuit courts a great deal of autonomy to determine which judges hear certain cases, the grant of autonomy nevertheless represents a congressional decision about how the lower courts operate. For example, Congress has provided that each circuit may authorize cases to be heard by separate three-judge panels, “unless such judges cannot sit . . . or unless the chief judge of that court certifies that there is an emergency.”<sup>60</sup> Congress has also provided that each circuit determines which panels its judges sit on,<sup>61</sup> and the time and place in which the panels sit.<sup>62</sup> J. Robert Brown, Jr. and Allison Herren Lee have

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law clerks and staffers accused him of sexual harassment.” Patricia Barnes, *He’s Back. After Resigning, Federal Judge Accused of Sexual Harassment Returns as a Practitioner*, FORBES (Dec. 6, 2019, 11:23 PM), <https://www.forbes.com/sites/patriciagbarnes/2019/12/06/hes-back-after-resigning-federal-judge-accused-of-sexual-harassment-returns-as-a-practitioner/> [https://perma.cc/N3HQ-G7XH (staff-uploaded, dark archive)]. “He left with a full pension and his law license” and, by 2019, was back at the Ninth Circuit as an advocate. *Id.*

56. § 292(a).

57. § 292(b).

58. § 291(a). The Chief Justice and Associate Justices are appointed as “circuit justices” “by order of the Supreme Court.” § 42. A circuit justice “is primarily responsible for emergency requests (for example, an application to block an execution or to allow it to go forward) from the geographic area covered by his or her circuit, as well as more mundane matters, such as requests to extend filing deadlines.” Amy Howe, *Court Issues New Circuit Assignments*, SCOTUSBLOG (Nov. 20, 2020, 12:06 PM), <https://www.scotusblog.com/2020/11/court-issues-new-circuit-assignments-2/> [https://perma.cc/GP5C-ARLT]; see also *Circuit Assignments*, SUP. CT. U.S., <https://www.supremecourt.gov/about/circuitassignments.aspx> [https://perma.cc/PC6D-MF67].

59. § 292(b). Intercircuit judge assignments are “aided by the Judicial Conference Committee on Intercircuit Assignments,” which operates “as a clearinghouse for judges willing to take out-of-circuit assignments and circuits needing judicial help from visiting judges.” *In re Motor Fuel Temperature*, 711 F.3d at 1052. “The Chief Justice has adopted Guidelines for the Intercircuit Assignment of Article III Judges.” *Id.* As recently as 2021, the Guidelines were “not readily accessible.” See Motion to Disclose All Designation and Assignment Orders for This Appeal at 1 n.1, *Roe v. United States*, No. 21-1346 (4th Cir. Oct. 29, 2021), Doc. No. 78.

60. 28 U.S.C. § 46(b).

61. § 46(a).

62. § 46(b). “[T]here are non-nefarious reasons for nonrandomized panel assignments.” Van Orsdol, *supra* note 42, at 1125.

described how this discretion has been manipulated. Fifth Circuit panels were “packed” with liberal majorities in the late 1950s and early 1960s, when “the Fifth Circuit found itself in the eye of the civil rights storm, charged with primary responsibility for enforcing the mandate of *Brown v. Board of Education*.”<sup>63</sup> In one case allegedly impacted by panel packing, two out of three judges rightfully voted to desegregate the public schools of Birmingham, Alabama.<sup>64</sup>

Congress has also regulated the role of retired Article III judges. Judges who retire from active service, but not from their office, are designated “senior judges” and may be assigned by their circuit’s chief judge to sit within the circuit.<sup>65</sup> The Chief Justice may assign retired judges to sit by designation in a circuit other than their own.<sup>66</sup> A retired Chief or Associate Justice may be assigned to sit by designation as a district or circuit judge.<sup>67</sup> Judges who retire and do not take senior status may also sit by designation.<sup>68</sup> In each instance, the judges only preside over cases they are “willing and able” to take. Congress has also established procedures for circuit en banc hearings and rehearings.<sup>69</sup> There, it has given each circuit the ability to decide by local rule whether senior judges can “(1) vote to rehear a case *en banc* or (2) participate in the rehearing if they were part of the original panel.”<sup>70</sup> A circuit court’s local rules must be approved by a majority of the court’s active judges.<sup>71</sup> As a result, local rules can be manipulated to exclude or include senior judges from the en banc process based on the preferences of a majority of a circuit’s active judges.<sup>72</sup>

The above-described statutes represent exercises of Congress’s constitutional authority to shape the lower federal courts. Congress has exercised that power by influencing what cases a judge will hear—district or circuit—and how judges will sit together on panels. Though not expressly about case assignment, these laws minimize the impact of the executive’s decision regarding what a judge’s judicial duties should be. Laws permitting certain

63. Brown & Lee, *supra* note 3, at 1046; *see also* Levy, *Visiting Judges*, *supra* note 45, at 107 (describing how the D.C. Circuit’s decision to cease hosting visiting judges was motivated in part by concerns that a former chief judge “had been deliberately inviting liberal judges to sit and decide cases”).

64. Brown & Lee, *supra* note 3, at 1048. The authors advocate for complete case assignment neutrality, which, if applied post-*Brown*, would have likely derailed desegregation efforts in the Fifth Circuit, which heard many disputes involving segregation in the South.

65. 28 U.S.C. § 294(b), (c).

66. § 294(d).

67. § 294(a). Upon his retirement, Justice Breyer noted his intent to continue to serve the federal courts. Letter from Stephen Breyer, Justice, U.S. Sup. Ct., to the President (Jan. 27, 2022) (citing § 371(b)) (on file with the North Carolina Law Review).

68. § 294(d).

69. § 46(c).

70. *See* Van Orsdol, *supra* note 42, at 1123.

71. FED. R. APP. P. 47(a)(1).

72. Van Orsdol, *supra* note 42, at 1123.

judges to limit their work to those judicial duties they are willing to undertake authorize a form of nonrandom case assignment. Such judges could elect to hear any case they choose.

## 2. Division of District Court Business

Congress's procedural power reaches far beyond authorizing judges to sit by designation. Its Article III power over the lower federal courts is "augmented by the Necessary and Proper Clause."<sup>73</sup> Congress has the constitutional authority to establish the district and appellate courts, and also to "establish procedural Rules governing litigation in these courts."<sup>74</sup>

The venue statutes are one example of how Congress exercises its augmented procedural power.<sup>75</sup> In *Stewart Organization, Inc. v. Ricoh Corp.*,<sup>76</sup> the Supreme Court held that 28 U.S.C. § 1404 applies in diversity actions even when it conflicts with state law.<sup>77</sup> In assessing the validity of the venue statute, the Court explained that Congress's authority to create rules regarding practice and pleading in the lower courts "in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either."<sup>78</sup> Section 1404(a) is "doubtless capable of classification as a procedural rule," and therefore, the Court explained, it "falls comfortably within Congress' powers under Article III as augmented by the Necessary and Proper Clause."<sup>79</sup> The venue statute was valid and applied despite conflicting state law.<sup>80</sup>

Congress has also exercised its augmented procedural authority to direct the district courts to manage the division of business among its district judges.<sup>81</sup>

73. *Burlington N. R.R. Co. v. Woods*, 480 U.S. 1, 5 n.3 (1987).

74. *Id.*

75. *See, e.g., Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31–32 (1988). Congress's procedural power has also been attributed to its Article I authority to "constitute Tribunals inferior to the supreme Court." U.S. CONST. art 1, § 8, cl. 9; *see Willy v. Coastal Corp.*, 503 U.S. 131, 136 (1992) (first citing *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 21–22 (1825); and then citing *Hanna v. Plumer*, 380 U.S. 460, 473 (1965)). No matter the source, Congress's textual authority is amplified by the Necessary and Proper Clause.

76. 487 U.S. 22 (1988).

77. *Id.* at 32.

78. *Id.* (quoting *Hanna*, 380 U.S. at 472).

79. *Id.* at 31–32. *Stewart's* holding can also be framed in Supremacy Clause terms. The federal law in question is a valid exercise of federal authority, in this case, congressional authority, and therefore it supersedes state law to the contrary. By contrast, *Erie* is a case in which the exercise of federal power was invalid and did not preempt state law to the contrary. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78–79 (1938) ("Supervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specifically authorized or delegated to the United States," and "[a]ny interference with either, except as thus permitted, is an invasion of the authority of the state.").

80. *Stewart*, 487 U.S. at 32.

81. 28 U.S.C. § 137(a).

The division of business statute, 28 U.S.C. § 137, is relied upon by some district courts to create case assignment procedures.<sup>82</sup> Section 137 requires random case assignment in only one limited category of music royalty cases.<sup>83</sup> Except for the Music Modernization Act, which added the music royalty provision in 2018, § 137 has remained substantively unchanged since it was enacted in 1948.<sup>84</sup>

Section 137 requires that districts courts composed of more than one judge divide their business among its judges “as provided by the rules and orders of the court.”<sup>85</sup> Each district’s chief judge is responsible for “the observance of such rules and orders,”<sup>86</sup> and when the rules and orders are silent, the chief judge must “divide the business and assign the cases.”<sup>87</sup> If a district’s judges cannot agree on “the adoption of rules or orders,” then the circuit judicial council steps in to divide the court’s business.<sup>88</sup>

Federal Rule of Civil Procedure 83(a) is clear that a court’s local rules must be approved by a majority of the district’s judges. However, § 137(a) suggests that the business of the court can also be managed through orders, which are typically issued by a district court’s chief judge. Section 137(a) could be read to authorize a district’s chief judge to unilaterally issue case assignment orders.<sup>89</sup>

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82. *See, e.g.*, Amended Order Assigning the Business of the Court (W.D. Tex. Nov. 15, 2022) (stating that the district’s cases are to be assigned “[p]ursuant to Section 137 of Title 28, United States Code”).

83. § 137(b); Orrin G. Hatch-Bob Goodlatte Music Modernization Act, Pub. L. No. 115-264, § 104, 132 Stat. 3676, 3726 (2018) (codified at 17 U.S.C. § 137); *United States v. Broad. Music, Inc.*, No. 22-cv-5023, 2023 WL 3788859, at \*1 (S.D.N.Y. May 26, 2023) (stating that the Music Modernization Act reorganized the management of rate disputes “involving music performing rights licensing organizations and the Rate Court”).

84. Section 137’s predecessor statute, enacted as part of the Judicial Code of 1911, provided that in districts with more than one district judge, “the judges may agree upon the division of business and assignment of cases for trial in said district,” but if they do not agree, “the senior circuit judge of the circuit in which the district lies, shall make all necessary orders for the division of business and the assignment of cases for trial.” Judicial Code of 1911, ch. 231, § 23, 36 Stat. 1087, 1090 (repealed).

85. § 137(a).

86. *Id.*

87. *Id.*

88. *Id.*

89. *But see* *United States v. Stone*, 411 F.2d 597, 598 (5th Cir. 1969) (citing § 137 and FED. R. CRIM. P. 57(b)) (“District judges may by rule, order or consent transfer cases between themselves.”). Though § 137 may grant chief judges district-wide authority, it does not contemplate giving other district judges any district-wide power. Federal Rule of Criminal Procedure 57(b) codified the notion that a court has inherent authority. *See, e.g.*, *United States v. Catalan Roman*, 376 F. Supp. 2d 108, 115 (D.P.R. 2005). But inherent authority is a grant of case-specific power—it does not apply to the court as a whole. *See, e.g.*, Samuel P. Jordan, *Situating Inherent Power Within a Rules Regime*, 87 DENV. U. L. REV. 311, 313 (2010) [hereinafter Jordan, *Situating Inherent Power*]; H. Brent McKnight, Jr., Note, *Keeping Secrets: The Unsettled Law of Judge-Made Exceptions to Grand Jury Secrecy*, 70 DUKE L.J. 451, 480 (2020). A district judge that transfers a case to another judge is not managing the judge’s own docket but is dividing up the court’s business.

At least one circuit has held that it does not. In 1958, the sole district judges in the District of Utah, Chief Judge Ritter and Judge Christensen, were unable to agree on the district's case assignment rules.<sup>90</sup> Pursuant to § 137, the Tenth Circuit explained, "if the district judges in any district are unable to agree on the adoption of rules or assignments of cases and division of business, the Judicial Council [makes] the necessary orders."<sup>91</sup> The Tenth Circuit's Judicial Council imposed rules that divided the district's caseload evenly between the two judges, and required that the cases be assigned to each judge at random.<sup>92</sup>

In 1971, Judge Christensen took senior status, and a third judge, Judge Anderson, took over as his successor.<sup>93</sup> The case assignment rules implemented by the Judicial Council did not expressly deal with the reassignment of a senior judge's cases.<sup>94</sup> Two months after Judge Anderson's arrival, Chief Judge Ritter issued an order that purported to rescind the Judicial Council's directive, create new assignment rules substantially similar to those imposed by the Judicial Council, and reassign Judge Christensen's cases.<sup>95</sup> He assigned some of those cases to himself.<sup>96</sup>

Thereafter, the Judicial Council asked Chief Judge Ritter and Judge Anderson, the new active judge, if the two had reached an agreement with respect to case assignment.<sup>97</sup> They had not.<sup>98</sup> As a result, the Judicial Council reaffirmed its 1958 rules that Chief Judge Ritter had purported to rescind and ordered that Judge Christensen's cases be assigned to Judge Anderson.<sup>99</sup>

Utah-Idaho Sugar Company, the defendant in one of Judge Christensen's cases that Chief Judge Ritter assigned to himself, sought a writ of mandamus to have its case transferred from Ritter to Judge Anderson.<sup>100</sup> The Tenth Circuit granted the relief, holding that pursuant to § 137, "it is unquestioned that the division of the court's business in a multi-judge district is the responsibility of the judges and not the responsibility of the chief judge acting unilaterally."<sup>101</sup> A chief judge must enforce "the agreed upon rules" and ensure that they are administered "so as to carry out their purposes."<sup>102</sup> However, it is not the chief judge's duty to make rules "without the approval of his fellow judges," and the

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90. *Utah-Idaho Sugar Co. v. Ritter*, 461 F.2d 1100, 1101–02 (10th Cir. 1972).

91. *Id.* at 1102.

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 1103.

98. *Id.*

99. *Id.* at 1102.

100. *Id.* at 1104.

101. *Id.* at 1103.

102. *Id.*

Judicial Council must step in when a chief judge does so over the objection of the judge's colleagues.<sup>103</sup>

The Tenth Circuit was not swayed by the fact that Chief Judge Ritter was entering an order regarding a subject not expressly covered by the Judicial Council's earlier case assignment rules. It held that if there are rules in place, whether prescribed by the district judges or the Judicial Council, the rules apply "until modified or rescinded," even after a personnel change.<sup>104</sup> Such a process ensures continuity.<sup>105</sup> The court conceded that chief judges have some discretion to take action "for the good of the court in exceptional circumstances," but none were present.<sup>106</sup> Ultimately, the Judicial Council's decision to keep its case assignment rules in place was valid on two grounds: first, because Chief Judge Ritter "acted unilaterally and not in conjunction with Judge Anderson," and second, "because there was continued disagreement between the judges of the district."<sup>107</sup>

*Utah-Idaho Sugar Co.* could be read to mean that chief judges may only act unilaterally with respect to case assignment in exceptional circumstances.<sup>108</sup> A decision from the District of Utah offers a more limited reading. In *United States v. Phillips*,<sup>109</sup> the Assistant United States Attorney ("AUSA") moved to have a criminal case reassigned from the presiding judge, who was randomly assigned, to a judge who had recently presided over an earlier criminal case against the same three defendants.<sup>110</sup> That earlier case was dismissed without prejudice.<sup>111</sup>

A local criminal rule provided for random assignment of the district's criminal cases.<sup>112</sup> Still, the AUSA argued that a district judge has inherent authority to reassign a case to another judge within the same district.<sup>113</sup> The court disagreed.<sup>114</sup> Even the chief judge could not reassign the case. Citing *Utah-Idaho Sugar Co.*, the court noted that a chief judge's case reassignment power is limited: "[T]he chief judge has no power to withdraw an assignment and reassign a case if the rules and orders of the court provide otherwise."<sup>115</sup> When a local rule provides for random assignment, "[t]here is simply no extant

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103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* at 1103–04.

107. *Id.* at 1104.

108. *See id.*

109. 59 F. Supp. 2d 1178 (D. Utah 1999).

110. *Id.* at 1180–81.

111. *Id.* at 1181.

112. *Id.* at 1180.

113. *Id.* at 1182.

114. *Id.*

115. *Id.* at 1183 (citing *Utah-Idaho Sugar Co. v. Ritter*, 461 F.2d 1100, 1103–04 (10th Cir. 1972)).

authority . . . for any judge of this court to unilaterally make a decision concerning case assignments.”<sup>116</sup>

In light of *Phillips, Utah-Idaho Sugar Co.* likely stands for the more limited proposition that when local rules expressly provide for a certain form of case assignment, no judge can unilaterally create exceptions to that rule without formally amending the court’s local rules. But using general orders to create case assignment rules when the local rules are silent may also be problematic. Without presenting a proposed assignment order to the court’s judges for a vote, a chief judge may not learn whether the district’s other judges agree with the chief judge’s decision. Also, § 137 provides that the circuit judicial council steps in when the district’s judges cannot agree on the adoption of rules *and* orders, suggesting that all judges have a role to play in both, rather than with respect to rules alone.<sup>117</sup>

As described below, when district courts change case assignment rules through general orders, the orders may be invalid.

### 3. Patent Pilot Project

Finally, Congress has regulated case assignment by singling out district court patent cases for nonrandom assignment. In 2011, Congress established the Patent Pilot Program (“PPP”), which gave fourteen district courts the option of reassigning patent cases that were initially randomly assigned to its judges.<sup>118</sup> The cases would be reassigned to judges in the district who volunteered to hear patent cases.<sup>119</sup> The program was intended to give judges who volunteered for patent cases the chance to “develop greater expertise,” thereby “decreasing the time to decision and lowering litigation costs.”<sup>120</sup> The PPP ended in 2021, and received mixed reviews.<sup>121</sup>

116. *Id.*

117. *But see* *Hvass v. Graven*, 257 F.2d 1, 5 (8th Cir. 1958) (holding that a chief judge may reassign a case to a judge within the district if the case was originally assigned to a visiting judge whose visit has concluded); Note, *Rule 83 and the Local Federal Rules*, 67 COLUM. L. REV. 1251, 1253 n.7 (1967) (describing the regulation of “calendar matters” authorized by 28 U.S.C. § 137 as an authorization independent from Rule 83 and “open-ended”).

118. Mark A. Lemley, Su Li & Jennifer M. Urban, *Does Familiarity Breed Contempt Among Judges Deciding Patent Cases?*, 66 STAN. L. REV. 1121, 1128 (2014).

119. *Id.*

120. *Id.* at 1128–29.

121. Matthew Bultman, *Pilot Program’s End Likely To Affect Where Patent Owners Sue*, BLOOMBERG L. (Mar. 9, 2021, 5:52 AM), <https://news.bloomberglaw.com/ip-law/pilot-programs-end-likely-to-affect-where-patent-owners-sue> [<https://perma.cc/XA4V-FWGX> (staff-uploaded, dark archive)]. For example, five years into the program, “[a] Federal Judicial Center report . . . found pilot judges terminated patent cases faster than other judges,” due to the pilot judges’ greater experience with patent cases, but University of Buffalo law professor Amy Semet found that during the same timeframe, “pilot judges were reversed on appeal at about the same rate as other district court judges.” *Id.*; *see also* Katie Chang, Comment, *When Patent Litigators Become Neurosurgeons*, 98 WASH. L. REV. ONLINE 1, 23



B. *Delegated Authority To Control Procedure*

When the courts shape their own procedure, they generally act pursuant to delegated authority. That delegated authority is conditional. This section describes how the Federal Rules are curtailed by the Rules Enabling Act, and how local rules are subject to the requirements of Federal Rule of Civil Procedure 83 and its counterpart, Federal Rule of Criminal Procedure 57. This section then examines the standards governing district-wide general orders and judge-specific standing orders. General orders are often used to assign a district court's cases. This section concludes by considering whether a district court's general orders represent a lawful exercise of inherent authority, or an invalid exercise of delegated authority.

1. Federal Rules

Congress has delegated some of its procedural rulemaking authority to the Supreme Court. That delegation has resulted in the enactment of the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and the Federal Rules of Evidence, amongst others.<sup>122</sup> Federal rules are adopted through a process intended to mimic how bills are considered by the House and Senate.<sup>123</sup>

Since 1958, the Federal Rules amendment process has been relatively public.<sup>124</sup> The Supreme Court has delegated the majority of its rulemaking authority to the Judicial Conference, the federal courts' policymaking body.<sup>125</sup> New civil rules and amendments to existing civil rules are considered by the Judicial Conference's Standing Committee on Rules of Practice and Procedure and the Standing Committee's Advisory Committee on Civil Rules, as well as

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(2023) (describing some pilot judges' observation that the project did not result in the assignment of more patent cases to designated judges, and therefore did not help those judges develop patent expertise).

122. *United States v. Roy*, 694 F. Supp. 635, 638 (D. Minn. 1988).

123. Katherine A. Macfarlane, *A New Approach to Local Rules*, 11 STAN. J.C.R. & C.L. 121, 134 (2015) [hereinafter Macfarlane, *A New Approach*].

124. See Katherine A. Macfarlane, *The Danger of Nonrandom Case Assignment: How the Southern District of New York's "Related Cases" Rule Shaped Stop-and-Frisk Rulings*, 19 MICH. J. RACE & L. 199, 206 n.16 (2014) [hereinafter Macfarlane, *The Danger of Nonrandom Case Assignment*] (describing how the Judicial Conference was created by Congress in 1922 "to serve as the principal policy making body concerned with the administration of the U.S. Courts"); see also Andrew Hammond, *The Federal Rules of Pro Se Procedure*, 90 FORDHAM L. REV. 2689, 2725–26 (2022) (describing the Judicial Conference's role). Commentators have criticized the outsized role that former civil defense counsel play in the national rulemaking process. See Adam N. Steinman, *The End of an Era? Federal Civil Procedure After the 2015 Amendments*, 66 EMORY L.J. 1, 22–27 (2016); Patricia W. Hatamyar Moore, *The Anti-Plaintiff Pending Amendments to the Federal Rules of Civil Procedure and the Pro-Defendant Composition of the Federal Rulemaking Committees*, 83 U. CIN. L. REV. 1083, 1153 (2015).

125. Macfarlane, *A New Approach*, *supra* note 123, at 133–34 (citing Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 467 (1993)).

the Supreme Court and Congress.<sup>126</sup> As a result of the Judicial Improvements and Access to Justice Act of 1988, Advisory Committee meetings are open to the public and must be scheduled with sufficient notice “to permit ‘all interested persons to attend.’”<sup>127</sup>

The standard that measures the validity of Federal Rules is taught in most first-year Civil Procedure courses. The Rules Enabling Act provides that the Supreme Court “shall have the power to prescribe general rules of practice and procedure,” and that such rules “shall not abridge, enlarge or modify any substantive right.”<sup>128</sup> A federal rule will apply regardless of conflicting state law so long as it does not exceed “the congressional mandate embodied in the Rules Enabling Act.”<sup>129</sup> No Federal Rule has ever been deemed invalid.

## 2. Local Rules

The standard governing local rules is less familiar. The Federal Rules delegate local rulemaking authority to the district courts. The conditions of that delegation are found in Federal Rule of Civil Procedure 83(a) and its criminal counterpart.<sup>130</sup> Similar to the Rules Enabling Act, Rule 83(a) provides that a local rule must govern a court’s practice.<sup>131</sup> Local rules must also “be consistent with—but not duplicate—federal statutes and rules adopted under [the Rules Enabling Act].”<sup>132</sup> A local rule requires a notice and comment period, and a majority of the court’s district judges must vote to adopt each new local rule and each amendment to an existing local rule.<sup>133</sup>

The Supreme Court has emphasized that district courts must strictly comply with Federal Rule of Civil Procedure 83(a), especially when judicial integrity is at stake. In *Hollingsworth v. Perry*,<sup>134</sup> a case challenging the constitutionality of California’s Proposition 8, the Northern District of California issued an order permitting the case’s trial to be broadcast live to

126. *Id.* at 133–35.

127. Laurens Walker, *A Comprehensive Reform for Federal Civil Rulemaking*, 61 GEO. WASH. L. REV. 455, 468–69 (1994) (quoting 28 U.S.C. § 2073(c)(2)).

128. 28 U.S.C. § 2072(a), (b).

129. *Hanna v. Plumer*, 380 U.S. 460, 463–64 (1965); Lisa Litwiller, *Re-Examining Gasperini: Damages Assessments and Standards of Review*, 28 OHIO N.U. L. REV. 381, 390–91 (2002).

130. Macfarlane, *Shadow Judges*, *supra* note 22, at 121–23.

131. FED. R. CIV. P. 83(a)(1).

132. *Id.* Rule 83 also provides that “[a] local rule imposing a requirement of form must not be enforced in a way that causes a party to lose any right because of a nonwillful failure to comply.” FED. R. CIV. P. 83(a)(2).

133. FED. R. CIV. P. 83(a)(1). District courts’ local rulemaking may violate separation of powers principles. See Linda J. Rusch, *Separation of Powers Analysis as a Method for Determining the Validity of Federal District Courts’ Exercise of Local Rulemaking Power: Application to Local Rules Mandating Alternative Dispute Resolution*, 23 CONN. L. REV. 483, 502 (1991) (contending that a local rule may “interfere[] in congressional judgments about proper procedure” and “undermin[e] the main function of the district courts, which is to decide disputes in a fair, just, and impartial manner”).

134. 558 U.S. 183 (2010).

courthouses around the country.<sup>135</sup> The trial was the subject of significant public attention.<sup>136</sup> The Northern District’s local rules banned broadcasting trials outside of the courthouse in which trials took place.<sup>137</sup> To permit the broadcasting, the court amended its local rules via postings on the court’s website in the days before trial was scheduled to begin.<sup>138</sup>

The Court held that “a comment period spanning five business days” did not provide appropriate notice and an opportunity for comment.<sup>139</sup> It compared Federal Rule of Civil Procedure 83(a)’s notice and comment process to those provided by administrative agencies, which typically last “thirty days or more.”<sup>140</sup> The Court’s interest in ensuring compliance with Rule 83(a) was “particularly acute” with respect to rules that impact “the integrity of judicial processes.”<sup>141</sup>

“If courts are to require that others follow regular procedures, courts must do so as well.”<sup>142</sup>

### 3. General Orders

A local rule governing case assignment must adhere to Federal Rule of Civil Procedure 83(a). But case assignment in the district courts is the subject of both local rules and district-wide orders, sometimes referred to as internal operating procedures, issued by a district’s chief judge. For example, in the District of Kansas, a local rule provides that “[i]n the interest of justice or to further the efficient disposition of the business of the court, a judge may return a case to the clerk for reassignment or, with the approval of the chief judge, may transfer the case to another judge who consents.”<sup>143</sup> But in the Western District of Texas, an order issued by the chief district judge requires that patent cases filed in the Waco Division be assigned at random to twelve Western District judges.<sup>144</sup> In the Southern District of Florida, an internal operation procedures manual gives the clerk authority to “assign a case to a particular Judge.”<sup>145</sup>

135. *Id.* at 184. The Court subsequently held that Proposition 8’s proponents lacked standing to defend its constitutionality in federal court. *Hollingsworth v. Perry*, 570 U.S. 693, 715 (2013).

136. *Hollingsworth*, 558 U.S. at 185.

137. *Id.* at 184.

138. *Id.*

139. *Id.* at 192.

140. *Id.* (quoting *Riverbed Farms, Inc., v. Madigan*, 958 F.2d 1479, 1484 (9th Cir. 1992)).

141. *Id.* at 196.

142. *Id.* at 199. The Supreme Court has at least once used its supervisory authority to invalidate a district court’s local rule. *Frazier v. Heebe*, 482 U.S. 641, 645 (1987) (invalidating district court’s bar admission rule).

143. D. KAN. R. 40.1.

144. Patent Litigation Order, *supra* note 24.

145. INTERNAL OPERATING PROCS. OF THE U.S. DIST. CT. FOR THE S. DIST. OF FLA. § 2.01.01(e) (2017), <https://www.flsd.uscourts.gov/sites/flsd/files/17-10-17-Internal-Operating->

District-wide orders could be subject to Federal Rule of Civil Procedure 83(b), which also authorizes the creation of local procedure.<sup>146</sup> Rule 83(b), titled “Procedure when There Is No Controlling Law,” provides that “[a] judge may regulate practice in any manner consistent with federal law, rules adopted under [the Rules Enabling Act], and the district’s local rules.”<sup>147</sup>

Rule 83(b) governs standing orders, also known as “individual practices.”<sup>148</sup> Standing orders are enforced by a judge in the judge’s own cases.<sup>149</sup> As the first sentence of Rule 83(b) provides, standing orders must be consistent with federal statutes and the Federal Rules, as well as a district court’s own local rules.<sup>150</sup> However, unlike local rules, standing orders “can simply be issued by an individual district judge.”<sup>151</sup> Rule 83(b) requires that litigants receive “actual notice” of standing orders enacted pursuant to Rule 83(b) before the orders are relied upon “to impose a ‘sanction or other disadvantage.’”<sup>152</sup>

Are district-wide orders and internal operating procedures (collectively, “general orders”) issued by a district’s chief judge subject to the notice, comment, and majority vote standards in Rule 83(a), or are they regulated by Rule 83(b)? In the previous subsection, this Article contends that the division of business statute does not authorize general orders issued by a district’s chief judge when those orders conflict with existing local rules. Some cases support a broader position—that a chief judge can only enforce procedure adopted by the district’s judges but cannot unilaterally create it. If general orders are not authorized by statute, they may nevertheless be authorized as Rule 83(b) procedure.

The text of Rule 83(b) suggests that its application is limited to individual judges’ practices; after all, it governs how “[a] judge” regulates practice.<sup>153</sup> However, a district court’s chief judge signs general orders that are intended to

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Procedures.pdf [https://perma.cc/2QC9-JYAQ] (stating that “[p]ursuant to Administrative Orders of the Court, or other authority, the Clerk may be required to directly assign a case to a particular Judge,” including “[n]on-capital motions to vacate a sentence under 28 U.S.C. § 2255”).

146. FED. R. CIV. P. 83(b).

147. *Id.*

148. *See, e.g.*, Standing Order for Cases Assigned to Judge Dale S. Fischer (C.D. Cal. 2020), <https://www.cacd.uscourts.gov/sites/default/files/documents/DSF/AD/JUDGE'S%20STANDING%20ORDER%2006-20.pdf> [https://perma.cc/2S4G-W64W]; Individual Rules of Practice — Hon. Jed S. Rakoff (S.D.N.Y. 2023), [https://www.nysd.uscourts.gov/sites/default/files/practice\\_documents/JSR%20Rakoff%20Rules%20Update%202023-11-27.pdf](https://www.nysd.uscourts.gov/sites/default/files/practice_documents/JSR%20Rakoff%20Rules%20Update%202023-11-27.pdf) [https://perma.cc/2BEA-JHZ7]. These orders are also known colloquially as “local local rules.”

149. Samuel P. Jordan, *Local Rules and the Limits of Trans-Territorial Procedure*, 52 WM. & MARY L. REV. 415, 441 (2010) [hereinafter Jordan, *Local Rules*].

150. *Id.*

151. *Id.* at 442.

152. *Id.* at 443 (citing FED. R. CIV. P. 83(b)).

153. FED. R. CIV. P. 83(b).

bind the entire district.<sup>154</sup> Rule 83(b)'s reference to "a judge" might authorize practices adopted both by individual judges and chief judges.

The Advisory Committee's notes support cabining Rule 83(b) to individual judges' practices. What is now Rule 83(b) was originally added as part of the 1985 amendments to Rule 83, becoming its last sentence.<sup>155</sup> That version provided that "[i]n all cases not provided for by rule, the district judge and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act."<sup>156</sup> The Advisory Committee explained that the amendment was intended to rein in "[t]he practice pursued by some judges of issuing standing orders," which "has been controversial, particularly among members of the practicing bar."<sup>157</sup> The Advisory Committee also noted that "it is hoped that each district will adopt procedures, perhaps by local rule, for promulgating and reviewing single-judge standing orders."<sup>158</sup>

In 1995, the last sentence of Rule 83 was revised and moved into the newly-created Rule 83(b).<sup>159</sup> The 1995 amendments also prohibited sanctioning a party for failure to comply with the procedure authorized by Rule 83(b) unless "the alleged violator has been furnished in the particular case with actual notice of the requirement."<sup>160</sup> The Advisory Committee notes to the 1995 amendments introduced ambiguity by describing Rule 83(b) as "provid[ing] flexibility to *the court* in regulating practice when there is no controlling law."<sup>161</sup> It confused things further by noting that "[s]ome courts regulate practice through the published Federal Rules and the local rules of the court" and others "have used internal operating procedures, standing orders, and other internal directives."<sup>162</sup>

Does the Advisory Committee's mention of *courts'* use of "internal operating procedures" mean that a court's district-wide orders are a form of Rule 83(b) procedure? Probably not. Internal operating procedures are mentioned in the Advisory Committee's Rule 83(b) note to emphasize just how much procedure a party must follow. It is helpful to consider the references to district-wide procedure in context. According to the Advisory Committee, Rule 83(b)

154. See, e.g., Standing Order 2021-08, *In re* Procs. for the Direct Assignment to Magistrate Judges of Certain Civ. Proc. (M.D. Pa. May 10, 2021), [https://www.pamd.uscourts.gov/sites/pamd/files/general-ordes/2021-08\\_0.pdf](https://www.pamd.uscourts.gov/sites/pamd/files/general-ordes/2021-08_0.pdf) [<https://perma.cc/M6GD-JGYK>].

155. Jordan, *Local Rules*, *supra* note 149, at 441 n.114.

156. Allan Erbsen, *A Unified Approach to Erie Analysis for Federal Statutes, Rules, and Common Law*, 10 U.C. IRVINE L. REV. 1101, 1150 tbl.1 (2020).

157. FED. R. CIV. P. 83 advisory committee's note to 1985 amendment.

158. *Id.*

159. FED. R. CIV. P. 83 advisory committee's note to 1995 amendment.

160. *Id.*

161. *Id.* (emphasis added).

162. *Id.*

recognizes that courts rely on multiple directives to control practice. Some courts regulate practice through the published Federal Rules and the local rules of the court. Some courts also have used internal operating procedures, standing orders, and other internal directives. Although such directives continue to be authorized, they can lead to problems. Counsel or litigants may be unaware of various directives. In addition, the sheer volume of directives may impose an unreasonable barrier. For example, it may be difficult to obtain copies of the directives. Finally, counsel or litigants may be unfairly sanctioned for failing to comply with a directive. For these reasons, the amendment to this rule disapproves imposing any sanction or other disadvantage on a person for noncompliance with such an internal directive, unless the alleged violator has been furnished actual notice of the requirement in a particular case.<sup>163</sup>

The Advisory Committee used examples specific to individual judges' practices to describe the kind of notice that would authorize a Rule 83(b) sanction: "Furnishing litigants with . . . the judge's practices," "attaching instructions to a notice setting a case for conference or trial," or "an order in a case specifically adopting by reference a judge's standing order and indicating how copies can be obtained."<sup>164</sup>

In sum, Rule 83(b) controls an individual judge's rules for their own cases but likely not district-wide orders. Scholars support this reading.<sup>165</sup>

Still, the use of district-wide orders is prevalent. The Judicial Conference has recognized the fine line between such orders and local rules. In 2009, the Judicial Conference's Committee on Rules of Practice and Procedure, known as the Standing Committee, drafted guidelines regarding which matters district courts should regulate by local rule and which it should regulate by order. The Judicial Conference adopted the Standing Committee's guidelines and decided that they should be transmitted to the district courts along with an explanatory report.<sup>166</sup>

The report that accompanied the guidelines made some general observations. First, it defined "standing orders" as "orders—including 'administrative orders' or 'general orders'—adopted by district courts or bankruptcy courts as district-wide or division-wide orders, without an

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163. *Id.*

164. *Id.*

165. See Jordan, *Situating Inherent Power*, *supra* note 89, at 314 n.13 ("Rule 83(b) is most commonly relied on as the source for a judge's power to develop general standing orders."); Erbsen, *supra* note 156, at 1163 (stating that in adding current Rule 83(b)'s notice provision, "[t]he rulemakers' primary concern seemed to have focused on 'standing orders'").

166. JUD. CONF. OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 32–33 (2009), <https://www.uscourts.gov/sites/default/files/2009-09.pdf> [<https://perma.cc/TLZ3-XGTL>].

opportunity for notice or public comment.<sup>167</sup> The report also explained that “standing orders” may refer to a judge’s individual orders, but that those orders were not the guidelines’ focus.<sup>168</sup> The report then identified three concerns raised by district-wide orders:

First, standing orders are promulgated without the benefit of public comment. Second, standing orders are often harder to find and retrieve than local rules. Third, because standing orders may be entered by individual judges as well as by a division or district, there is significant variation even within the same district or division. Standing orders may raise these and other problems to such a degree as to risk invalidity and to invite congressional scrutiny.<sup>169</sup>

The report concluded that “[s]tanding orders are most appropriate to address matters that: 1) are of no direct concern to practicing attorneys or litigants; 2) require action for too short a time period to make the use of a local rule practical; or 3) require prompt action to address an emergency.”<sup>170</sup> Standing orders are most problematic when they “1) cover matters in which lawyers and litigants have a substantial interest but are issued without the notice and public comment that accompanies local rules; 2) modify or abrogate local rules; and, of course, 3) conflict with national or local rules.”<sup>171</sup> The report emphasized that “[e]fforts to modify or abrogate local rules should only be made through local rule, with notice and comment.”<sup>172</sup>

The report noted that the Standing Committee and the Administrative Office had surveyed district courts and chief judges to determine how district courts distinguish between orders and rules.<sup>173</sup> The surveys revealed that “it is not easy to find standing orders,” “[i]t is particularly difficult to search for a standing order on a specific topic,” and many “are not indexed and most are not searchable by subject or topic.”<sup>174</sup> The surveys also showed that certain matters were equally likely to be addressed by standing order as by local rule.<sup>175</sup>

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167. COMM. ON RULES OF PRAC. & PROC. OF THE JUD. CONF. OF THE U.S., REPORT AND RECOMMENDED GUIDELINES ON STANDING ORDERS IN DISTRICT AND BANKRUPTCY COURTS 1 (2009), [https://www.uscourts.gov/sites/default/files/standing\\_orders\\_dec\\_2009\\_0.pdf](https://www.uscourts.gov/sites/default/files/standing_orders_dec_2009_0.pdf) [<https://perma.cc/NPX7-3YVG>]. Generally, what the report and guidelines refer to as “standing orders” are district-wide orders. Hereinafter, “Report” refers to the portions of the document that contain only the report, and “Guidelines” refer to the document attached to the report, which is paginated separately.

168. Report, *supra* note 167, at 1.

169. *Id.*

170. *Id.* at 2.

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. *Id.* at 4.

However, some matters were more likely to be addressed by standing order than local rule, including “case allocations between judges and/or divisions.”<sup>176</sup>

The report also summarized relevant case law. It noted the Ninth Circuit’s position that “[s]tanding orders (both by the district and by an individual judge) can be an appropriate exercise of a court’s inherent authority over management of its cases and control of the courtroom.”<sup>177</sup> In *United States v. Ray*,<sup>178</sup> the case cited by the report, the Ninth Circuit considered a District of Montana standing order that “directed the United States Attorney, within 20 days after sentencing occurs in each criminal case, to assemble and file with the court clerk a report of sentence,” which the court clerk would then send on to the U.S. Sentencing Commission.<sup>179</sup> The court’s order was issued to comply with a statutory requirement through which Congress required the chief judge of each district court to “ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the [Sentencing] Commission a written report of the sentence.”<sup>180</sup> The law also codified “the specific list of documents to be submitted in each report.”<sup>181</sup> In *Ray*, the government moved to set aside the order rather than comply.<sup>182</sup>

The Ninth Circuit explained that to comply with its statutory duty, the district court could “employ all the powers it possesses, including both the powers impliedly granted by [the reporting statute] and the court’s accustomed, inherent powers of case management.”<sup>183</sup> The court explained that the District of Montana’s order was a proper exercise of its inherent authority, which authorized it to “requir[e] a lawyer to prepare a document for the court’s use in connection with a specific case in which the lawyer represents one of the litigating parties.”<sup>184</sup> The Judicial Conference’s report did not consider whether *Ray* was correctly decided.

*Ray*’s first holding reflects Congress’s power to regulate procedure in the federal courts and independently supports the outcome. *Ray*’s second holding does not. In explaining its reliance on inherent authority, *Ray* notes that “Rule 57(b) gives district courts power to ‘regulate practice in any manner consistent with federal law, these rules, and the local rules of the district.’”<sup>185</sup> However, the actual language of Rule 57(b) provides that “[a] judge may regulate practice in

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176. *Id.*

177. *Id.* at 8 (citing *United States v. Ray*, 375 F.3d 980, 993 (9th Cir. 2004)).

178. 375 F.3d 980 (9th Cir. 2004).

179. *Id.* at 982.

180. *Id.* at 983.

181. *Id.* at 984 (citing 28 U.S.C. § 994(w)(1)).

182. *Id.*

183. *Id.* at 988.

184. *Id.*

185. *Id.* at 993 (quoting FED. R. CRIM. P. 57(b)).



any manner consistent with federal law, these rules, and the local rules of the district.”<sup>186</sup>

*Ray* also states that “[t]he advisory committee’s [1995] notes to Rule 57(b) contemplate that courts may exercise this authority by issuing standing orders of general application.”<sup>187</sup> Yet the Advisory Committee’s notes do not reference “standing orders of general application.”<sup>188</sup> Rather, the notes specific to Rule 57(b) refer to “special requirements relating to practice before a particular judge” and “a judge’s standing order.”<sup>189</sup> Whether a district court can issue a district-wide order like the one in *Ray* is not resolved by resort to Federal Rule of Criminal Procedure Rule 57(b).<sup>190</sup>

Continuing its review of relevant authority, the report also noted that “[a]ppellate courts have expressed concern about the lack of notice and public participation in the implementation of standing orders and have on occasion suggested that matters addressed in standing orders would be better placed in local rules.”<sup>191</sup> It also cited Judge Easterbrook’s description of the difference between standing orders and local rules in *In re Dorner*,<sup>192</sup> in which the Seventh Circuit assessed the validity of a bankruptcy court’s court-wide order.<sup>193</sup> The order required parties submitting a bankruptcy appeal to the district court to request that relevant documents be added to the record.<sup>194</sup>

Though the district court’s dismissal of the bankruptcy appeal was upheld on other grounds, the Seventh Circuit noted that violation of the bankruptcy court’s court-wide order would not on its own have warranted dismissal. As Judge Easterbrook explained:

Adopting local rules through the device of standing orders contravenes the Rules Enabling Act in several ways beyond the vice of inconsistency. First, rules must be reviewed by an advisory committee. Second, rules may be adopted only after public notice and opportunity for comment. Third, rules adopted by district courts must be submitted to the judicial council of the circuit for review. Finally, all local rules must be sent to

186. FED. R. CRIM. P. 57(b) (emphasis added).

187. *Ray*, 375 F.3d at 993.

188. *Id.* (citing FED. R. CRIM. P. 57(b) advisory committee’s note to 1995 amendment).

189. FED. R. CRIM. P. 57(b) advisory committee’s note to 1995 amendment.

190. *Cf.* *Jordan, Situating Inherent Power*, *supra* note 89, at 314–15 (describing Federal Rule of Civil Procedure 83(b) as authorizing case-specific inherent authority); Myron J. Bromberg & Jonathan M. Korn, *Individual Judges’ Practices: An Inadvertent Subversion of the Federal Rules of Civil Procedure*, 68 ST. JOHN’S L. REV. 1, 8 n.30 (1994) (describing what is now Rule 83(b)’s regulation of “single-judge standing orders”).

191. Report, *supra* note 167, at 8 (citing *In re Fidelity/Micron Sec. Litig.*, 167 F.3d 735, 737 n.1 (1st Cir. 1999)).

192. 343 F.3d 910 (7th Cir. 2003).

193. *Id.* at 913–15.

194. *Id.* at 912–13.

the Director of the Administrative Office, who ensures their public availability.<sup>195</sup>

The court held that the order “violated all of these requirements when it used a nonpublic standing order to contradict [Federal Rules of Bankruptcy Procedure] 8006 and 8007, which—like all other federal rules—have the force of statutes.”<sup>196</sup>

The guidelines attached to the Judicial Conference’s report concluded that district-wide orders are appropriate for matters of internal administration, including such matters as “[d]ivision of workload.”<sup>197</sup> There, “notice and public comment are not necessary and in some cases not justified.”<sup>198</sup> The guidelines also recommended the use of orders to address: “a problem that is anticipated to be of such short duration that it will be resolved by the time a local rule can be implemented”; “what amounts to an emergency”; and rules of courtroom conduct.<sup>199</sup>

The guidelines identified matters that should be placed in local rules, including: filing requirements; pretrial practice; motion practice; alternative dispute resolution; and other matters with which litigants must comply.<sup>200</sup> The guidelines also noted that although electronic filing practices may be more convenient to address by standing order, they should nevertheless be addressed in a local rule.<sup>201</sup> “Filing requirements have a significant impact on lawyers and litigants and the local-rules comment process is important to developing workable and effective procedures.”<sup>202</sup>

Though the guidelines ultimately recommended that case assignment practices be addressed in orders, the attention that case assignment has received over the last five years warrants revisiting the issue. Just like filing requirements, case assignment decisions “have a significant impact on lawyers and litigants,”<sup>203</sup> and would benefit from the local rules comment process as well as a vote by district judges.

195. *Id.* at 913–14 (citing 28 U.S.C. §§ 2077(b), 2071(b)–(d)).

196. *Id.* at 914 (citing 28 U.S.C. § 2072(b)). Section 2075, “commonly known as the Bankruptcy Rules Enabling Act,” gives the Supreme Court the power to “prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure in cases under title 11” so long as the rules do not “abridge, enlarge, or modify any substantive right.” George M. Prescott, Jr., *Amphisbaena! How 11 U.S.C. § 522(c) Expands and Contracts State-Law Exemptions in Bankruptcy*, 9 AM. BANKR. INST. L. REV. 435, 456 n.167 (2001); 28 U.S.C. § 2075.

197. Guidelines, *supra* note 167, at 1.

198. *Id.*

199. *Id.* at 1–2.

200. *Id.* at 3–4.

201. *Id.*

202. *Id.*

203. *Id.*

The guidelines did not address how the district courts' statutory authority to divide their business under § 137 had an impact on whether certain matters should be adopted by local rule or general order.

## II. CASE ASSIGNMENT BY DESIGN

This part explores how commonplace nonrandom case assignment has become. First, it examines the growing body of scholarship regarding nonrandom case assignment in the federal courts, which has both recognized and challenged the idea that assigning cases at random is the norm. Scholars have revealed how nonrandom case assignment affects specific types of litigation brought in specific courts.

This part then adds a critical contribution: a review of every local case assignment rule and general order in three district courts, providing a district-wide snapshot of which parties and cases are affected by nonrandom case assignment and single-judge divisions. It demonstrates that case assignment affects both high-profile litigation as well as the most hidden parts of a district court's docket, including, for example, *pro se* habeas petitions.

### A. *Testing the Random Case Assignment Myth*

An FAQ posted to the U.S. Courts website states that “[e]ach court has a written plan or system for assigning cases” and “[t]he majority of courts use some variation of a random drawing.”<sup>204</sup> Nonrandom case assignment is acknowledged: judges with “special expertise” may be assigned to a certain type of case, such as “complex criminal cases, asbestos-related cases, or prisoner cases.”<sup>205</sup> Sometimes, “cases may be assigned based on geographical considerations.”<sup>206</sup>

Case-assignment scholarship has flourished in the last decade. It now has a robust empirical bent as a result of Adam S. Chilton and Marin Levy's landmark circuit court research.<sup>207</sup> Scholars have worked to dispel the notion that case assignment in the federal courts is always randomized. Several have done so by focusing on a particular type of case. Jennifer Sturiale has described how the seven-member Judicial Panel on Multidistrict Litigation (“JPML”),

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204. *FAQs: Filing a Case*, U.S. CTS., <https://www.uscourts.gov/faqs-filing-case#faq-How-are-judges-assigned-to-cases?> [<https://perma.cc/MTY2-5HSD> (staff-uploaded archive)].

205. *Id.*

206. *Id.*

207. *See, e.g.*, Chilton & Levy, *supra* note 1, at 24 (describing how the authors “created a dataset based on the oral argument panels of all of the twelve regional circuit courts during the five-year span between September 1, 2008, and August 31, 2013”).

appointed by the Chief Justice, decides how to assign multidistrict litigation.<sup>208</sup> Others have focused on how circuit panels are configured<sup>209</sup> and courts' intentional approach to utilizing visiting judges.<sup>210</sup>

By contrast, J. Jonas Anderson and Paul R. Gugliuzza explored how the Western District of Texas's Waco Division became "a patent litigation hotbed."<sup>211</sup> There, Judge Alan Albright invited patentees to file in the Waco Division, where, as the sole judge, he would inevitably be assigned their cases.<sup>212</sup> Anderson and Gugliuzza described the Waco situation as one example of a systemic problem: federal judges "competing with one another to entice certain types of cases and litigants into their courtrooms."<sup>213</sup>

I have explored how a district court's related cases rule shaped civil rights litigation by directing a series of cases to a single judge's docket, at the judge's invitation.<sup>214</sup> I also examined how the same court amended its local rules regarding related cases to create greater transparency and take away a single judge's sole discretion to deem a case related.<sup>215</sup>

This part next builds upon the growing body of scholarship by taking a district-wide approach to a court's case assignment rules and orders.

208. Jennifer E. Sturiale, *The Other Shadow Docket: The JPML's Power To Steer Major Litigation*, 2023 U. ILL. L. REV. 105, 107–08 (2023) (describing how the JPML, a "seven-member panel of judges appointed by the Chief Justice," "has the power to steer [multidistrict litigation] to a particular court and to a particular judge").

209. See, e.g., Levy, *Panel Assignment*, *supra* note 3, at 68 (describing how "a multi-year qualitative project involving interviews with thirty-five judges and senior administrators of the D.C., First, Second, Third, and Fourth Circuits" revealed that "none of the courts configure their panels in a strictly random fashion" and that many judges did not know how their own courts configure panels); Brown & Lee, *supra* note 3, at 1043–44 (describing how panel composition in the Fifth Circuit may have been configured purposefully to reach certain outcomes in 1960s desegregation cases, calling into question the integrity of the result).

210. Levy, *Visiting Judges*, *supra* note 45, at 112–15 (describing how junior visiting judges are assigned to circuit panels deliberately configured to maximize training opportunities); see also Macfarlane, *The Danger of Nonrandom Case Assignment*, *supra* note 124, at 212–13 (describing the district courts' tradition of permitting senior judges and visiting judges to select the number and category of cases they will take on).

211. See J. Jonas Anderson & Paul R. Gugliuzza, *Federal Judge Seeks Patent Cases*, 71 DUKE L.J. 419, 427 (2021) (presenting a case study of the Western District of Texas's Waco Division and describing the harmful effects of court competition and judge shopping).

212. *Id.* at 421–22.

213. *Id.* at 422.

214. Macfarlane, *The Danger of Nonrandom Case Assignment*, *supra* note 124, at 202–03 (describing how, over the course of fourteen years, cases involving stop-and-frisk were deemed related to previously-filed actions and assigned to a district judge who encouraged the related case designation); see also Marcel Kahan & Troy A. McKenzie, *Judge Shopping*, 13 J. LEGAL ANALYSIS 341, 361 (2021) (also reviewing the stop-and-frisk litigation and stating that a requirement that related cases be assigned to the same judge "can generate opportunities for strategic choices that benefit plaintiffs and, for some rules, defendants").

215. Katherine Macfarlane, *Analyzing the Southern District of New York's Amended "Related Cases" Rule: The Process for Challenging Nonrandom Case Assignment Remains Inadequate*, 69 N.Y.U. ANN. SURV. AM. L. 699, 717 (2014).

B. *A Three-District Study of Nonrandom Case Assignment*

This section describes the results of an original review of every local rule, general order, and internal operating procedure that affects case assignment in three different district courts. The study reveals several trends.

First, single-judge divisions are not uncommon. In the Northern District of Texas, Amarillo is not the only single-judge division, and Judge Kacsmaryk is not the only judge assigned a division's entire docket. In the Western District of Texas, Judge Albright sits in the Waco Division, one of four divisions in which all cases are assigned to a single judge. However, across each single-judge division in that district, only patent cases are pulled out of Waco and assigned at random to a pool of twelve designated district judges who sit in a multitude of divisions.

Second, exceptions to random case assignment are most often implemented through general orders issued by a district's chief judge as opposed to the local rules process, which requires participation of each district judge and a notice and comment period. Occasionally such orders are made by an individual judge with respect to the judge's own docket.

Third, certain newly filed cases are directly assigned to a district judge who has some prior experience with the party bringing the new case. The judge's prior experience typically consists of presiding over the party's criminal trial or ruling on the party's previous habeas petition or civil rights action. There, assignment is by design not necessarily because of a case's subject matter, but because of a party's identity.

Fourth, magistrate judges are consistently referred the same type of cases for pretrial supervision: social security appeals, and cases brought by incarcerated, pro se parties, including habeas petitions and civil rights cases. Absent referral, those cases would stay with their assigned district judges, just as all other cases do.

Finally, it is difficult to locate case assignment practices. They are scattered across different documents, appearing in orders that are sometimes over fifty years old, internal policy manuals, as well as in local rules. It takes legal acumen, and time, to sort through it all.

1. Northern District of Texas

To identify exceptions to random case assignment in the Northern District of Texas, I reviewed the court's local civil rules, local criminal rules, local bankruptcy rules, and a document titled "Appendices." Each set of rules and the "Appendices" document are available on the court's website.<sup>216</sup>

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216. *Rules & Orders*, U.S. DIST. CT. N. DIST. TEX., <https://www.txnd.uscourts.gov/rules-and-orders> [<https://perma.cc/4N92-9GZU>].

Several local rules assign case assignment decisions to the district judges. Local Civil Rule 83.3 provides that “[t]he district judges shall determine the method by which all cases are assigned to individual judges.”<sup>217</sup> Local Criminal Rule 57.3 also provides the same for the criminal docket.<sup>218</sup> In criminal cases, “[a] party desiring to transfer a case from the assigned presiding judge to another judge of this court must file a motion to transfer.”<sup>219</sup>

Local Civil Rule 3.3(b) defines what the rules consider to be a related case.<sup>220</sup> Related cases rules typically permit a judge or party to identify a recently filed case as related to an earlier filed pending case. The recently filed case, if related, is assigned to the same judge as the earlier filed case. However, the Northern District’s local rules do not describe how related cases are assigned.

So far, the local rules suggest that case assignment decisions must be made by the court’s district judges, not by an individual judge.

Case assignment orders are referenced in the “Appendices” document. “Appendix III” consists of an “Index of Miscellaneous Orders,” which identifies sixty-four orders but does not indicate where the orders can be found.<sup>221</sup> Judging by the index, at least three of the orders appear relevant to nonrandom case assignment.

First, the Index identifies an “Order Establishing Procedures for Handling Petitions and/or Motions for Post Conviction Relief Under 28 U.S.C. 2254 and 2255 (Adopted 3-18-77; Amended 11-18-99; Amended 5-22-03; Amended 10-1510) [See LR 5.4].”<sup>222</sup> Because of the information provided in the parenthetical, I returned to the local rules. Local Civil Rule 5.4, “Post-Conviction Relief,” provides that “[a] prisoner application, motion, or petition filed under 28 U.S.C. § 2241, § 2254, or § 2255 must be filed in accordance with the current miscellaneous order establishing procedures for such applications, motions, or petitions.”<sup>223</sup>

The court’s “Miscellaneous Orders” page identifies categories of miscellaneous orders.<sup>224</sup> Most categories contain multiple orders. “Misc Order # 13,” for example, is a category that includes three orders, one of which is the order referenced in the index, “Procedure for Petitions and/or Motions for Post-Conviction Relief Pursuant to 28 U.S.C. § 2254 and 2255,” and dated

217. N.D. TEX. LOC. CIV. R. 83.3.

218. N.D. TEX. LOC. CRIM. R. 57.3.

219. *Id.*

220. N.D. TEX. LOC. CIV. R. 3.3(b).

221. N.D. TEX. LOC. R. app. III, <https://www.txnd.uscourts.gov/sites/default/files/documents/Appendices-1.pdf> [<https://perma.cc/H725-SAZC>].

222. *Id.*

223. N.D. TEX. LOC. CIV. R. 5.4.

224. *Miscellaneous Orders*, U.S. DIST. CT. N. DIST. TEX., <https://www.txnd.uscourts.gov/miscellaneous-orders> [<https://perma.cc/JGT2-E7ZT>].

March 18, 1977.<sup>225</sup> The order singles out certain cases for direct case assignment: “Section 2255 actions” must be assigned to the district judge who “originally handled the case.”<sup>226</sup> A Section 2255 motion asks the court to vacate, set aside, or correct the sentence a federal court has imposed, and claims the right to be released if the sentence violates “the Constitution or laws of the United States, or that the court was without jurisdiction . . . [or] the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.”<sup>227</sup> It is akin to a motion for reconsideration, but with much higher stakes.

The March 18, 1977 order is signed by the chief district judge and six other district judges.<sup>228</sup> In 1977, there were six active district judges in the Northern District of Texas.<sup>229</sup> Judge Sarah Hughes’s signature also appears on the order; she retired from active service in 1975 but continued to serve as a senior judge until 1982.<sup>230</sup> In 1977, an order bearing each active district court judge’s signature satisfied Federal Rule of Civil Procedure 83.<sup>231</sup> The public notice and comment requirements were added to Rule 83 in 1985.<sup>232</sup>

Second, the Index identifies an “Order Concerning the Creation of Three New District Judgeships in the Northern District of Texas and the Orderly Assignment of Cases Pending on the Docket (Adopted 10-27-78; Amended 5-13-82) [Now Special Order 3-1].”<sup>233</sup> Special Order 3-1 is not available on the court’s website.

Third, the Index identifies an “Order Pertaining to the Criminal Docket in the Dallas Division and the Assignment of Cases on Such Docket to Include the Name of the Honorable Sidney A. Fitzwater (Adopted 4-17-86) [Now Special Order 3-2].”<sup>234</sup> Special Order 3-2 is not available on the court’s website.

Appendix IV consists of an “Index of Special Orders” (“Index”).<sup>235</sup> The Index identifies twenty-five orders, and at least two are potentially relevant to case assignment. First, the Index identifies “Special Order No. 2: Order

225. Miscellaneous Order No. 13, Procedure for Petitions and/or Motions for Post-Conviction Relief Pursuant to 28 U.S.C. § 2254 and 2255 (N.D. Tex. March 18, 1977), [https://www.txnd.uscourts.gov/sites/default/files/orders/misc/MiscOrder13\\_31877Prisoner.pdf](https://www.txnd.uscourts.gov/sites/default/files/orders/misc/MiscOrder13_31877Prisoner.pdf) [<https://perma.cc/7L4D-CGBQ>].

226. *Id.*

227. 28 U.S.C. § 2255(a).

228. *Id.*

229. *History of Judges Succession*, U.S. DIST. CT. N. DIST. TEX., <https://www.txnd.uscourts.gov/history-judges-succession> [<https://perma.cc/7ADM-BS65>].

230. *Judge Sarah T. Hughes Collection*, UNT DIGIT. LIBR., <https://digital.library.unt.edu/explore/collections/SARAH/> [<https://perma.cc/YH4Y-C87B>] (describing how during her tenure as district judge, Hughes administered the presidential oath of office to Lyndon B. Johnson).

231. See Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 944–45 (1991) (explaining change in procedural requirements for adopting local rules).

232. *See id.*

233. N.D. TEX. LOC. R. app. III, at ix.

234. *Id.* at x.

235. N.D. TEX. LOC. R. app. IV, at xiii–xiv.

regarding Local Rules and rule changes [Includes Miscellaneous No. 17].<sup>236</sup> “Special Order No. 2” is a category that includes seventy-three individual orders.<sup>237</sup> The orders appear to memorialize each local rule update from 1977 to the present.

Second, the Index identifies “Special Order No. 3: Order regarding Judgeships, case assignments [Includes Miscellaneous Nos. 22 and 43].”<sup>238</sup> The court’s website includes forty-one individual orders grouped under the “Special Order No. 3” heading.<sup>239</sup> Many of these orders pertain to case assignment.

Special Order No. 3-349, signed by Chief Judge David Godbey on June 5, 2023, provides that “[e]ffective immediately,” “civil and criminal cases filed in the Dallas Division will be assigned by random draw” to Chief Judge Godbey, Judge Sam A. Lindsay, Judge Ed Kinkeade, Judge Jane J. Boyle, Judge Karen Gren Scholer, Judge Brantley Starr, Judge Ada E. Brown, Senior Judge A. Joe Fish, Senior Judge Sidney A. Fitzwater, and Senior Judge Barbara M.G. Lynn.<sup>240</sup>

The order assigns Senior Judges Fish and Fitzwater 9% of the civil cases each, and no criminal cases.<sup>241</sup> It assigns Senior Judge Lynn 12.5% of the criminal cases and no civil cases.<sup>242</sup> It assigns Chief Judge Godbey 10% of the civil cases and 12.5% of the criminal cases.<sup>243</sup> The remaining judges each receive 12% of the civil docket and 12.5% of the criminal docket.<sup>244</sup>

In the Northern District of Texas, the Dallas Division comes closest to achieving some form of random case assignment. Still, its practices are subject to numerous exceptions.

Special Order No. 3-349 provides that no senior judge will be assigned the following: “any patent case; case in which a TRO or preliminary injunction is requested or has been granted in state court prior to removal; bankruptcy appeal that seeks emergency relief, or complaint seeking class action certification under Fed. R. Civ. P. 23.”<sup>245</sup> If a judge is assigned a “multiple-defendant criminal case,” for every five defendants in the multiple-defendant

236. *Id.* at xiii.

237. *Special Order 2: Order Adopting Local Rules of Practice Before the Northern District of Texas (Historical)*, U.S. DIST. CT. N. DIST. TEX., <https://www.txnd.uscourts.gov/special-order-2> [<https://perma.cc/B9BJ-URHT>].

238. N.D. TEX. LOC. R. app. IV, at xiii.

239. *Special Order 3: Order Regarding Judgeships and Case Assignments*, U.S. DIST. CT. N. DIST. TEX., <https://www.txnd.uscourts.gov/special-order-3> [<https://perma.cc/9P57-JJTU>].

240. Special Order No. 3-349 (N.D. Tex. June 5, 2023), <https://www.txnd.uscourts.gov/sites/default/files/orders/3-349.pdf> [<https://perma.cc/ZW6U-KG88>].

241. *Id.*

242. *Id.*

243. *Id.*

244. *Id.*

245. *Id.*



case, that judge will be assigned one less case from the wheel.<sup>246</sup> The order also exempts “cases directly assigned under Special Order No. 3-250.”<sup>247</sup>

Special Order 3-250, signed by then-Chief Judge Fitzwater on August 24, 2011, provides that “[w]ith the consent of the district judges of this Court, this order governs the direct assignment of cases in the Dallas and Fort Worth divisions.”<sup>248</sup> The order includes several provisions that assign a new case brought by a former criminal defendant to the judge who presided over any prior criminal case involving the same individual: “An incoming transfer of probation jurisdiction case,” “[a]n incoming case involving a transfer for plea and sentence under Fed. R. Crim. P. 20,” “[a] petition for a writ of habeas corpus under 28 U.S.C. § 2241,” and “[a] motion filed under 28 U.S.C. § 2255.”<sup>249</sup> These exceptions to random case assignment send a new case to a judge that has already met the party bringing it, but only as a criminal defendant. Such cases may be the best candidates for random assignment.

An additional exception provides that a successive habeas corpus petition “challenging a sentence of death or an action seeking to stay execution related to a prior petition for writ of habeas corpus challenging a sentence of death” is directly assigned to the judge in the division “who previously presided over a case that challenged the same sentence of death, if any.”<sup>250</sup> Here too, the new petition would benefit from random assignment.<sup>251</sup>

When a new case is assigned to a district judge because the judge has previous experience with the party bringing the new case, magistrate judges often follow. Special Order 3-250 provides that:

In the Dallas division, when a new case is directly assigned or transferred to a judge because the judge was assigned to a prior case, and a magistrate judge was also assigned to the prior case, the new case will also be directly assigned to the magistrate judge assigned to the prior case.<sup>252</sup>

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246. *Id.*

247. *Id.*

248. Amended Special Order No. 3-250 at 1 (N.D. Tex. Aug. 24, 2011), [https://www.txnd.uscourts.gov/sites/default/files/orders/SO3\\_250.pdf](https://www.txnd.uscourts.gov/sites/default/files/orders/SO3_250.pdf) [<https://perma.cc/58NE-NV4Y>]. It is unclear if consent reflects a majority vote by the district’s judges and whether any other aspect of Federal Rule of Civil Procedure 83(a) was followed.

249. *Id.* The aspect of the order assigning § 2255 motions to the same judge who presided over the underlying criminal case repeats the assignment rule found in Miscellaneous Order 13, dated March 18, 1977. Miscellaneous Order No. 13, *supra* note 225, at 1.

250. *Id.*

251. Cases brought by incarcerated parties face a great deal of ill will in the federal courts. *See* Macfarlane, *Shadow Judges*, *supra* note 22, at 114–15; Katherine Macfarlane, *Prisoner Procedure*, in *A GUIDE TO CIVIL PROCEDURE: INTEGRATING CRITICAL LEGAL PERSPECTIVES* 58, 64–65 (Brooke Coleman et al. eds., 2022).

252. Amended Special Order No. 3-250, *supra* note 248, at 2.

Finally, Special Order 3-250 states that multidistrict litigation in the Northern District may also be assigned directly to a specific judge.<sup>253</sup>

Case assignment changes often happen after personnel changes. A new chief judge may need to reduce their caseload due to additional administrative responsibilities. Judge Godbey became Chief Judge of the Northern District on September 6, 2022.<sup>254</sup> He issued three significant case assignment orders on September 14, 2022.

Special Order No. 3-345 provides that each new case filed in the Lubbock, Abilene, and San Angelo Divisions will be assigned “by random draw” to Judge Wes Hendrix and Senior Judge Sam R. Cummings.<sup>255</sup> Judge Hendrix receives 100% of the division’s criminal cases and 67% of the civil cases.<sup>256</sup> Judge Cummings receives the remaining 33% of the civil docket.<sup>257</sup> Therefore, only the civil cases are assigned at random.

Special Order No. 3-343 provides that “[t]he clerk of court is to assign each new case filed in the Wichita Falls Division to Judge Reed O’Connor.”<sup>258</sup> Special Order No. 3-344 provides that “[t]he clerk of court is to assign each new case filed in the Amarillo Division to Judge Matthew Kacsmarky.”<sup>259</sup>

As a result, the criminal docket in Lubbock, Abilene, and San Angelo divisions is assigned exclusively to Judge Hendrix. The Wichita Falls division is a single-judge division, as is Amarillo. And though Judge Kacsmarky’s role as the sole Amarillo Division judge has garnered attention in recent months,<sup>260</sup> he has been assigned 95% of the division’s civil cases and 100% of its criminal cases since July 3, 2019.<sup>261</sup>

Finally, returning to the Appendices, Appendix V, consisting of “Miscellaneous Order No. 6,” includes four rules, each relevant to magistrate judges.<sup>262</sup> Rule 3 provides that when a district judge wants to refer or transfer a case to a magistrate judge in a division with more than one magistrate judge,

253. *Id.*

254. News Release, U.S. Dist. Ct. for the N. Dist. Tex., <https://www.txnd.uscourts.gov/sites/default/files/documents/GodbeyPressRelease.pdf> [<https://perma.cc/6K4T-LYTE>].

255. Special Order No. 3-345 at 1 (N.D. Tex. Sept. 14, 2022), <https://www.txnd.uscourts.gov/sites/default/files/orders/3-345.pdf> [<https://perma.cc/4JL6-EQMM>].

256. *Id.*

257. *Id.*

258. Special Order No. 3-343 at 1 (N.D. Tex. Sept. 14, 2022), <https://www.txnd.uscourts.gov/sites/default/files/orders/3-343.pdf> [<https://perma.cc/H34A-6ZAM>].

259. Special Order No. 3-344 at 1 (N.D. Tex. Sept. 14, 2022), <https://www.txnd.uscourts.gov/sites/default/files/orders/3-344.pdf> [<https://perma.cc/F6XU-NT75>].

260. Grace Beninghoff, *A Federal Judge in Amarillo Could Effectively Ban the Abortion Pill. Why Does He Get To Make That Call?*, TEX. MONTHLY (Feb. 28, 2023), <https://www.texasmonthly.com/news-politics/amarillo-federal-judge-could-effectively-ban-abortion-pill/> [<https://perma.cc/3Z7A-8KMZ>].

261. Special Order No. 3-327 at 1 (N.D. Tex. July 3, 2019), <https://www.txnd.uscourts.gov/sites/default/files/orders/3-327.pdf> [<https://perma.cc/D5T6-V4RL>].

262. N.D. TEX. LOC. R. app. V, at xv–xvii.

the clerk will select a magistrate judge pursuant to its “random assignment procedure.”<sup>263</sup>

Amarillo has just one magistrate judge.<sup>264</sup> Not only will Judge Kacsmaryk preside over each case filed in the Amarillo Division, but he will also always be assisted by the same magistrate.

## 2. Western District of Texas

To identify the Western District of Texas’s case assignment practices, I reviewed its local rules and divisional standing orders, each of which are available on the court’s website.<sup>265</sup>

The local rules contain one provision relevant to case assignment. The “Local Rules for the Assignment of duties to United States Magistrate Judges” are included in the Local Rules as Appendix C. Rule 2(a) provides that “[t]he method of assignment of duties to a magistrate judge and for the allocation of duties among the several magistrate judges of the court shall be made in accordance with orders of the court or by special designation of a judge.”<sup>266</sup> These rules give both individual judges and the court as a whole the ability to assign single cases, or entire categories of cases, to magistrate judges.

The Western District has made 166 standing orders available online.<sup>267</sup> A phone call to the courthouse confirmed that if an order is still posted to the court’s website, it is still in effect. A drop-down menu isolates several categories of orders, including twenty-two identified as “Districtwide” orders.<sup>268</sup> Three districtwide orders describe forms of nonrandom case assignment.

The first, titled “Amended Plan for Random and Direct Assignment of Cases in Multi-Judge Divisions,” was signed by then-Chief Judge Newell on May 28, 2003.<sup>269</sup> The plan “provides for the distribution of civil and criminal cases among the judges of this Court in multi-judge divisions by random draw or, in the situations outlined . . . , by direct assignment.”<sup>270</sup> Unless an exception applies, all civil and criminal cases are assigned “by a computer-generated

263. *Id.* at xvi.

264. *Amarillo*, U.S. DIST. CT. N. DIST. TEX., <https://www.txnd.uscourts.gov/location/amarillo> [<https://perma.cc/7FDF-Q7WP>].

265. *Appellate, Federal, and Local Rules*, U.S. DIST. CT. W. DIST. TEX., <https://www.txwd.uscourts.gov/court-information/appellate-federal-and-local-court-rules/> [<https://perma.cc/NPM5-WE4N>].

266. W.D. TEX. LOC. R. FOR THE ASSIGNMENT OF DUTIES TO U.S. MAGISTRATE JUDGES 2(a).

267. *Standing Orders*, U.S. DIST. CT. W. DIST. TEX., <https://www.txwd.uscourts.gov/judges-information/standing-orders/> [<https://perma.cc/KYM5-P9AE>].

268. *Id.* (select “Districtwide” from dropdown menu).

269. Plan A (Amended), Amended Plan for Random and Direct Assignment of Cases in Multi-Judge Divisions at 1, 4 (W.D. Tex. May 28, 2003) [hereinafter 2003 Amended Plan], <https://www.txwd.uscourts.gov/wp-content/uploads/2022/12/Amended-Plan-for-Random-and-Direct-Assignment-of-Cases-in-Multi-Judge-Divisions.pdf> [<https://perma.cc/HMN7-2437>].

270. *Id.* at 1.

program providing a proportionate distribution of case assignments in the percentages reflected in the most recent Order Assigning the Business of the Court.”<sup>271</sup>

There are many exceptions. For example, related cases may be assigned directly.<sup>272</sup> If a civil cover sheet indicates that a newly filed case “is related to an earlier numbered pending case,” the clerk must assign the new case to the judge presiding over the pending case.<sup>273</sup> The same rule applies to related criminal cases.<sup>274</sup>

If a party brings a subsequent habeas corpus petition, their petition is assigned to the same judge who heard the first one.<sup>275</sup> An incarcerated plaintiff who has previously brought a civil rights action and files another one, no matter the basis, will have their subsequent case assigned to the same judge who presided over the first.<sup>276</sup> Similarly, “[m]otions filed under 28 USC § 2255” are assigned to the judge who sentenced the moving party in the underlying criminal case.<sup>277</sup> “If a bankruptcy appeal has been assigned to a judge, all subsequent appeals in the same case shall be assigned to that judge.”<sup>278</sup>

Individual judges also have significant reassignment authority. A judge may reassign a case from their own docket to another judge’s docket “unless such reassignment is disapproved by the Chief Judge.”<sup>279</sup> When a judge to whom a new case has been assigned later decides that the case should not have been assigned to them, the clerk randomly reassigns the case.<sup>280</sup>

On May 1, 2023, Chief Judge Alia Moses signed an order setting forth additional case assignment rules and several exceptions to random case assignment.<sup>281</sup> First, the order assigns Chief Judge Moses 100% of the cases in the Del Rio Division.<sup>282</sup>

Second, it assigns Judge Robert Pitman: “[f]ifty percent (50%) of the civil docket in the Austin Division”; “[f]ifty percent (50%) of the criminal docket in the Austin Division”; and “[o]versight and management of the remaining fifty percent (50%) of the civil and criminal dockets in the Austin Division.”<sup>283</sup> Judge

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271. *Id.*

272. *Id.*

273. *Id.*

274. *Id.* at 3.

275. *Id.* at 1–2.

276. *Id.* at 2.

277. *Id.* at 2.

278. *Id.*

279. *Id.*

280. *Id.* at 2–3.

281. Amended Order Assigning the Business of the Court at 1, 7 (W.D. Tex. May 1, 2023) [hereinafter 2023 Amended Order], <https://www.txwd.uscourts.gov/wp-content/uploads/2022/12/AmendedOrderAssigningBusinessoftheCourt-050123-Updated.pdf> [<https://perma.cc/ZX4G-S98N>].

282. *Id.* at 1.

283. *Id.* at 3.

Pitman is the only active judge in the Austin Division.<sup>284</sup> An order signed by Judge Pitman refers certain cases filed in the Austin Division and assigned to him as follows:

(1) All cases brought pursuant to §§ 2241, 2254 (excluding cases in which a sentence of death was imposed), and 2255 (excluding cases in which a sentence of death was imposed), cases brought by federal prisoners and detainees challenging conditions of confinement, cases brought by prisoners pursuant to 42 U.S.C. § 1983, and cases seeking judicial review of social security decisions shall be assigned to [an Austin Division Magistrate Judge] for disposition of all non-dispositive pretrial matters as provided in 28 U.S.C. § 636(b)(1)(A), and for findings and recommendations on all case dispositive motions as provided in 28 U.S.C. § 636(b)(1)(B).

(2) Any case in which application to proceed in forma pauperis has been made, other than a case described in paragraph (1) above, shall be referred to [an Austin Division Magistrate Judge] for disposition of the application . . . , disposition of any motion for appointment of counsel, and for a prompt recommendation as to whether the case should be dismissed as frivolous pursuant to 28 U.S.C. § 1915(e). Upon completion of the above tasks, the Magistrate Judge shall return the case to the district court for further proceedings.<sup>285</sup>

Third, the original order assigns all cases in the Midland-Odessa and Pecos Divisions to Judge David Counts.<sup>286</sup> Fourth, Judge Alan D. Albright is assigned all cases in the Waco Division, with the exception of patent cases, which are assigned pursuant to a separate order issued on July 25, 2022.<sup>287</sup>

Fifth, Senior Judges James R. Nowlin, Sam Sparks, Robert A. Junell, and David A. Ezra are assigned “[a]ny civil case, criminal case, court related matter,

284. *Judges’ Directory and Biographies*, U.S. DIST. CT. W. DIST. TEX., <https://www.txwd.uscourts.gov/judges-information/judges-directory-biographies/> [<https://perma.cc/D4D8-AJLW>].

285. Order at 1, *In re* Ct. Docket Mgmt. for Austin Div. (W.D. Tex. Feb. 21, 2020) [hereinafter Order, Austin Division] (Judge Pitman), <https://www.txwd.uscourts.gov/wp-content/uploads/2022/12/Court-Docket-Management-for-US-District-Judge-Pitman.pdf> [<https://perma.cc/7M3W-AHTR>]; 28 U.S.C. § 636(b)(1)(A)–(B) (stating that “a judge may designate a magistrate judge to hear and determine any pretrial matter . . . , except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action”; magistrate judges may also “conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement”).

286. 2003 Amended Plan, *supra* note 269, at 3–4.

287. *Id.* at 4.

or administrative duty assigned or transferred to him by another judge by mutual consent.”<sup>288</sup> Relatedly, “any judge may reassign any case, matter or proceeding to another judge by mutual consent” and “[w]henver a judge receives a case due to disqualification or recusal, the receiving judge may transfer one of his or her cases, of equal weight or as close as possible[] to the disqualified or recused judge.”<sup>289</sup>

The order “is in lieu of prior similar orders of the Court on assignment of the business of the Court.”<sup>290</sup>

On July 25, 2022, then-Chief Judge Garcia signed an order providing for the random assignment of patent cases originally filed in the Waco Division, which otherwise would be assigned directly to Judge Albright. Chief Judge Garcia stated that “[u]pon consideration of the volume of new patent cases assigned to the Waco Division, and in an effort to equitably distribute those cases, . . . in accordance with 28 U.S.C. § 137, all civil cases involving patents . . . filed in the Waco Division” are to be randomly assigned to the following district judges “until further order of the Court”: Chief Judge Garcia; Judge Biery; Judge Moses; Judge Lee Yeakel; Judge Kathleen Cardone; Judge Frank Montalvo; Judge Xavier Rodriguez; Judge Robert Pitman; Judge David Counts; Judge Alan Albright; Judge Jason Pulliam; and Senior Judge David Ezra.<sup>291</sup> None of the Waco Division’s patent cases will be assigned to Senior Judges Nowling, Junell, and Sparks.<sup>292</sup>

In addition to Waco, the Pecos,<sup>293</sup> Del Rio,<sup>294</sup> and Midland-Odessa<sup>295</sup> divisions are single-judge divisions. Though Judge Pitman refers certain civil cases to magistrate judges,<sup>296</sup> he remains responsible for all dispositive motions in the Austin cases he refers.<sup>297</sup> Across each of these single-judge divisions, only Waco’s patent cases are assigned at random to the district as a whole. That is, the district court has singled out patent cases for a tailored form of case assignment, but in only one of its four single-judge divisions.

Some of the district’s orders are division- and subject matter-specific. An Austin Division order signed by Judges Yeakel and Pitman refers social security

288. *Id.* at 4–5. This provision repeats the transfer rule in the 2003 Amended Plan. *Id.* at 2.

289. 2023 Amended Order, *supra* note 281, at 6.

290. *Id.* at 7.

291. Patent Litigation Order, *supra* note 24.

292. This order was likely influenced by the thoughtful scholarship that focused on patent litigation in the Waco Division, the involvement of two senators, and a callout by Chief Justice Roberts. See Stephen Paulsen, *The Rise and Fall of a Texas Patent Court*, COURTHOUSE NEWS SERV. (Oct. 28, 2022), <https://www.courthousenews.com/the-rise-and-fall-of-a-texas-patent-court/> [<https://perma.cc/2CX7-4ZR8>]; *infra* Section III.A.

293. 2023 Amended Order, *supra* note 281, at 3–4.

294. *Id.* at 1.

295. *Id.* at 3–4.

296. See Order, Austin Division, *supra* note 285, at 1.

297. See *id.*

appeals to an Austin Division Magistrate Judge “for disposition of all non-dispositive pretrial matters . . . , and for findings and recommendations on all case dispositive motions.”<sup>298</sup>

An additional Austin Division order specific to Judge Nowlin and signed by him similarly provides that certain cases assigned to him will be referred to an Austin Division Magistrate Judge, “pursuant to the Clerk of the Court’s standard procedure.”<sup>299</sup> In addition to the two categories of cases identified for referral by Judge Pitman, Judge Nowlin also refers all pretrial proceedings in “prisoner cases brought pursuant to 42 U.S.C. § 1983 and all cases brought by federal prisoners or detainees challenging conditions of confinement in which a trial will be had.”<sup>300</sup>

An El Paso Division order, signed by Judges Martinez, Montalvo, Cardone, and Guaderrama, and Senior Judge Briones, refers civil rights cases brought by incarcerated plaintiffs and immigration detainees to a magistrate judge for “all preliminary proceedings” including “to issue a scheduling order, to hear and determine any pretrial matter, to guide discovery, and to issue proposed findings of fact and recommendations . . . [regarding] any dispositive motion prior to trial.”<sup>301</sup>

In the Midland-Odessa and Pecos Divisions, an order signed by Judge Counts refers all preliminary proceedings in social security cases to magistrate judges.<sup>302</sup> An additional order signed by Judge Counts assigns “[a]ll civil actions originally filed, removed to, or otherwise transferred to the Western District of Texas, Midland/Odessa and Pecos Divisions, respectively,” except for habeas corpus petitions, bankruptcy appeals, patent cases, and prisoner civil rights actions to the divisions’ magistrate judges.<sup>303</sup> Judge Counts is the only

298. Standing Order at 1, *In re* Ct. Docket Mgmt. of Cases Seeking Jud. Rev. of Soc. Sec. Decisions for the Austin Div. (W.D. Tex. Oct 10, 2019) [hereinafter Standing Order, Austin Social Security Decisions], <https://www.txwd.uscourts.gov/wp-content/uploads/2022/12/Standing-Order-Regarding-Court-Docket-Management-of-Cases-Seeking-Judicial-Review-of-Social-Security-Decisions-for-the-Austin-Division-101019.pdf> [https://perma.cc/M468-RWKJ].

299. Order at 1, *In re* Ct. Docket Mgmt. for Austin Div. (W.D. Tex. Nov. 25, 2003) (Senior Judge Nowlin) [hereinafter Order, Austin Division Nowlin], <https://www.txwd.uscourts.gov/wp-content/uploads/2022/12/Court-Docket-Management-for-Senior-US-District-Judge-Nowlin.pdf> [https://perma.cc/XT4S-BR7C].

300. *Id.* at 1–2.

301. Standing Order at 1, Standing Referral Order Re: Prisoner and Immigration Detainee Civil Rights Cases (W.D. Tex. Apr. 4, 2016), <https://www.txwd.uscourts.gov/wp-content/uploads/2022/12/Standing-Referral-Order-Re-Prisoner-and-Immigration-Detainee-Civil-Rights-Cases.pdf> [https://perma.cc/WMN5-7HDC].

302. Standing Order Referring Social Security Matters at 1 (W.D. Tex. Nov. 28, 2018), <https://www.txwd.uscourts.gov/wp-content/uploads/2022/12/Standing-Order-Referring-Social-Security-Matters.pdf> [https://perma.cc/N3KY-C7XY].

303. Standing Order on Case Management at 1, *In re* Court Docket Management (W.D. Tex. July 27, 2022), <https://www.txwd.uscourts.gov/wp-content/uploads/2022/12/Standing-Order-on-Case-Management-072722.pdf> [https://perma.cc/H4EU-TJ5W].

active judge in both the Midland/Odessa and Pecos divisions.<sup>304</sup> Magistrate Judge Robert Griffin sits in Midland/Odessa, and Senior Judge Ronald Junell sits in Pecos.<sup>305</sup> There is no magistrate judge assigned to Pecos. When Judge Counts refers cases to a magistrate, he always refers them to Magistrate Judge Griffin.

An order signed by Judges Garcia, Rodriguez, Biery, Pulliam and Senior Judge Ezra assigns “all cases seeking judicial review” of social security decisions to San Antonio Division Magistrate Judges “for findings and recommendations on all case-dispositive motions.”<sup>306</sup> An order signed by the same judges refers pending applications to proceed in forma pauperis to the magistrate judges, but exempts cases in which “the applicant (a) is incarcerated, (b) is challenging the conditions of his confinement when he was incarcerated, (c) is seeking habeas relief, or (d) is appealing a [social security] decision.”<sup>307</sup>

In the Waco Division, an order signed by Judge Albright refers his civil cases to “either United States Magistrate Judge Jeffrey C. Manske or United States Magistrate Judge Derek T. Gilliland” except for: “[c]ases brought under 28 U.S.C. §§ 2241, 2254, and 2255”; “[c]ases brought by detainees and prisoners under 42 U.S.C. § 1983 and [Bivens actions]”; “patent cases”; and “[c]ases that include ex parte applications for temporary restraining orders.”<sup>308</sup> The order also refers all criminal matters assigned to Judge Albright to Magistrate Judge Manske “for disposition of all non-dispositive pretrial matters” and “for findings and recommendations on all case-dispositive motions.”<sup>309</sup>

### 3. Southern District of Florida

To identify the case assignment practices in the Southern District of Florida, I reviewed the court’s local rules, internal operating procedures, judge

304. *Judges’ Directory and Biographies*, *supra* note 284.

305. *Id.*

306. Standing Order at 1, *In re* Ct. Docket Mgmt. of Cases Seeking Jud. Rev. of Soc. Sec. Decisions for the San Antonio Div. (W.D. Tex. Oct. 8, 2019) [hereinafter Standing Order, San Antonio Social Security], <https://www.txwd.uscourts.gov/wp-content/uploads/2022/12/Standing-Order-Regarding-Court-Docket-Management-of-Cases-Seeking-Judicial-Review-of-Social-Security-Decisions-for-the-San-Antonio-Division-100819.pdf> [<https://perma.cc/7TQM-VU2J>].

307. Standing Order at 1, *In re* Ct. Docket Mgmt. of Cases Involving Applications to Proceed in Forma Pauperis for the San Antonio Div. (W.D. Tex. Oct. 8, 2019) [hereinafter Standing Order, San Antonio Forma Pauperis], <https://www.txwd.uscourts.gov/wp-content/uploads/2022/12/Standing-Order-Regarding-Court-Docket-Management-of-Cases-Involving-Applications-to-Proceed-In-Forma-Pauperis-for-the-San-Antonio-Division-100819.pdf> [<https://perma.cc/M5AC-8LYY>].

308. Magistrate Referral Order at 1, *In re* Ct. Docket Mgmt. for Waco Div. (W.D. Tex. May 23, 2023), <https://www.txwd.uscourts.gov/wp-content/uploads/2023/01/Order-Regarding-Court-Docket-Management-for-Waco-Division-052323.pdf> [<https://perma.cc/KH9B-HWJC>].

309. *Id.*



pairing reference sheet, and administrative orders, all of which are available on the court's website.<sup>310</sup>

The local rules reference but do not establish case assignment practices. For example, Rule 3.8 requires attorneys of record "to bring promptly to the attention of the Court and opposing counsel" the existence of related or similar actions or proceedings.<sup>311</sup> Rule 87.4, which governs bankruptcy appeals, provides that "[a]ppeals from orders or judgments entered by the Bankruptcy Court shall generally be assigned in accordance with the Court's Internal Operating Procedures."<sup>312</sup> In a bankruptcy case in which prior appeals have been taken, a subsequent appeal is regarded as a similar action that the court and opposing counsel must be notified of under Rule 3.8.<sup>313</sup>

The local rules include a "Table of Repealed and Relocated Local Rules."<sup>314</sup> Rule 3.4, which governed "Assignment of Actions and Proceedings," was repealed and "relocated" to the court's Internal Operating Procedures.<sup>315</sup> Similarly, Rule 3.7, which governed "Reassignment of Cases due to Recusal," was also repealed and relocated to the same place.<sup>316</sup>

The court's Internal Operating Procedures ("IOP") collects "various administrative orders, minutes of Executive Committee and Judges' meetings, and previously unwritten customs and practices of the Court" "in summary form."<sup>317</sup> The twenty-five page IOP is devoted primarily to case assignment rules. In its "Assignment of Actions and Proceedings" section, the IOP provides that "[a]ll civil and criminal cases . . . shall be assigned on a blind random basis so that the District workload is fairly and equally distributed among the active Judges."<sup>318</sup>

After establishing random assignment as the norm, the IOP identifies exceptions. Acting pursuant to the court's administrative orders, the clerk "may be required to directly assign a case to a particular Judge."<sup>319</sup> The types of cases

310. *Home*, U.S. DIST. CT. S. DIST. FLA., <https://www.flsd.uscourts.gov> [<https://perma.cc/SJL2-6FTZ>].

311. S.D. FLA. LOC. R. 3.8.

312. S.D. FLA. LOC. R. 87.4.

313. *Id.*

314. S.D. FLA. LOC. R. at 70, tbl. of repealed and relocated local rules.

315. *Id.*

316. *Id.* The repeal was purportedly accomplished pursuant to Federal Rule of Civil Procedure 83(a)'s notice and comment procedures. Administrative Order No. 2011-100 at 1, *In re* Amendments to the Local Rules (S.D. Fla. Nov. 29, 2011), <https://www.flsd.uscourts.gov/sites/flsd/files/adminorders/2011-100.pdf> [<https://perma.cc/WL25-CGXX>] (repealing and relocating Local Rules 3.4, "Assignment of Actions and Proceedings," 3.6, "Recusals," 3.7, "Reassignment of Cases due to Recusal, Temporary Assignment or Emergency" to IOP).

317. INTERNAL OPERATING PROCS. OF THE U.S. DIST. CT. FOR THE S. DIST. OF FLA., *supra* note 145, § 4.

318. *Id.* § 2.01.01(a).

319. *Id.* § 2.01.01(e).

that are “typically” directly assigned include “[n]on-capital motions to vacate a sentence under 28 U.S.C. § 2255; multi-district cases (MDL); and non-capital actions filed under 18 U.S.C. § 2241 when there is an underlying case in the District.”<sup>320</sup>

IOP 2.01.01 provides that “[t]he assignment schedule shall be designed to prevent any litigant from choosing the Judge to whom an action or proceeding is to be assigned, and all attorneys shall conscientiously refrain from attempting to vary this Local Rule.”<sup>321</sup> However, judges may confer “and directly transfer” all or any part of a case on their docket to any judge who consents to the transfer.<sup>322</sup>

Magistrate judges are not assigned at random. Instead, they are paired with certain district judges for three years.<sup>323</sup> Whenever a district judge is assigned to a case, their paired magistrate judge is assigned to the same case. In configuring the pairings, the chief judge considers “the equal distribution of workload among the magistrate judges” and “the preferences of the district judges, including senior judges, taking into consideration their seniority and their past referral practices.”<sup>324</sup> Though district judges have “full discretion” to determine “the type and volume of matters” they refer to a magistrate judge, they may only make referrals to their “paired” magistrate judge.<sup>325</sup> However, if a district judge wants to work with a magistrate judge who is not paired with the judge, the judge may confer with the other magistrate judge’s paired judge to obtain the district judge’s permission.<sup>326</sup> When a new magistrate judge is appointed, the pairings are updated.<sup>327</sup>

Visiting judges are not assigned cases at random. They are assigned cases “at the discretion of the Chief Judge.”<sup>328</sup>

Cases involving the death penalty are not assigned at random. Instead, each active judge receives one such case from the assignment wheel and may not be assigned another death penalty case “until every other judge has received one and the wheel has been refilled.”<sup>329</sup> “The Chief Judge may assist the

320. *Id.*

321. *Id.* § 2.01.01(c). This reference to a “local rule” is likely an unintentional leftover from when the assignment rules were local rules.

322. *Id.* § 2.07.00.

323. *Id.* § 2.08.01.

324. *Id.*

325. *Id.*

326. *Id.*

327. *See, e.g.*, Administrative Order 2023-9 at 1, *In re* Amended Magistrate Judge Pairing Assignment Plan for Mia., Fort Lauderdale, West Palm Beach, Fort Pierce and Key West (S.D. Fla. Jan. 27, 2023), <https://www.flsd.uscourts.gov/sites/flsd/files/adminorders/2023-9.pdf> [<https://perma.cc/HCL2-3UN9>].

328. INTERNAL OPERATING PROCS. OF THE U.S. DIST. CT. FOR THE S. DIST. OF FLA., *supra* note 145, § 2.11.00.

329. *Id.* § 2.12.00.

assigned judge by reassigning any other criminal cases assigned to that judge until the completion of the death case.”<sup>330</sup>

Related cases are not assigned at random. When a newly filed action “involves subject matter which is a material part of the subject matter of another action or proceeding” already pending, or the case would unnecessarily duplicate judicial labor “if heard by a different Judge,” the judges to whom the cases are assigned determine which case will be transferred.<sup>331</sup>

The court has posted thousands of administrative orders on its website, some of which date back to 1984.<sup>332</sup> It is unclear which orders are still in effect. I reviewed all orders posted to the court’s website from June 28, 2018, to the present and identified several that implement nonrandom case assignment.

For example, a March 10, 2023 order signed by Chief Judge Cecilia Altonaga assigns “all newly filed Social Security cases” to magistrate judges, but does not also assign a paired district judge.<sup>333</sup> The order provides that “[a]ny party who objects to the assignment of a Magistrate Judge as the presider may opt out by filing a motion for case reassignment within whatever deadline the Magistrate Judge gives the parties.”<sup>334</sup> If the motion is granted, the case is then randomly reassigned to a district judge, and the originally-assigned magistrate judge follows.<sup>335</sup>

The order alters the court’s IOP, which provides that district judges retain “full discretion concerning the type and volume of matters referred,” and also alters the magistrate judge pairing system.<sup>336</sup> Further, requiring parties to file a motion to object to the assignment of a magistrate judge runs counter to Federal Rule of Civil Procedure 73’s consent framework. The rule provides that “[w]hen a magistrate judge has been designated to conduct civil actions or proceedings, the clerk must give the parties written notice of their opportunity to consent.”<sup>337</sup> “To signify their consent, the parties must jointly or separately file a statement consenting to the referral,” and “[a] district judge or magistrate judge may be informed of a party’s response to the clerk’s notice only if all parties have consented to the referral.”<sup>338</sup>

330. *Id.*

331. *Id.* § 2.15.00.

332. *All Administrative Orders*, U.S. DIST. CT. S. DIST. FLA, <https://www.flsd.uscourts.gov/administrative-orders> [<https://perma.cc/63JY-ZC5F>].

333. Administrative Order 2023-18 at 1, *In re* Random Assignment of Soc. Sec. Cases to U.S. Magistrate Judges (S.D. Fla. Mar. 10, 2023), <https://www.flsd.uscourts.gov/sites/flsd/files/adminorders/2023-18.pdf> [<https://perma.cc/BJ6A-2PZ8>].

334. *Id.*

335. *Id.*

336. INTERNAL OPERATING PROCS. OF THE U.S. DIST. CT. FOR THE S. DIST. OF FLA., *supra* note 145, § 2.08.01(b)(2).

337. FED. R. CIV. P. 73(b)(1).

338. *Id.*

The court's practice treats consent as the default, rather than something that must be obtained from the parties. Instituting motion practice to refuse magistrate judge jurisdiction creates additional work, and also reveals the identity of the party objecting to magistrate judge jurisdiction to everyone with docket access. Moreover, even if a party objects and their motion succeeds, the case is referred to a district judge, but the objected-to magistrate judge remains on the case. The process established by the order disincentivizes objection. Still, this may nevertheless be the best practice for the Southern District of Florida. However, because the changes were made by the chief judge, and without a majority vote or notice to the public, it is difficult to tell whether the order represents consensus.<sup>339</sup>

Finally, a July 2, 2021 order signed by Chief Judge Altonaga announces the formation of a "Pro Se Prisoner Committee," comprised of the Chief Judge, Judge Jose Martinez, Judge Roy Altman, Senior Judge Patricia Seitz, Magistrate Judge Alicia Otazo-Reyes, and Magistrate Judge Lisette Reid.<sup>340</sup> The order states that the committee will consider "hiring and staffing as well as leave policy, pro se prisoner case assignments, workload equity and day-to-day supervision of the Pro Se Law Clerks."<sup>341</sup> I could not locate any additional information about assignment of pro se prisoner cases.

### III. CHALLENGING CASE ASSIGNMENT

This part explores how scholars and members of Congress have proposed to reform case assignment. It then proposes a novel challenge to case assignment practices. Applying Part I's constitutional validity framework, it revisits the case assignment controversies in the Northern District of Texas, the Western District of Texas, and the Southern District of Florida, proposing that the orders that shaped high-profile case assignment in these districts may be invalid.

#### A. *Nationwide Reform*

Congress is paying attention to case assignment. A bill introduced by Representative Sherrill would require that a case seeking an order "enforceable in each district and division of the United States . . . be brought only in a

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339. Moreover, though some courts have recognized that a party may implicitly consent to magistrate judge jurisdiction, none have gone so far as to require that a motion be filed to obtain permission to decline magistrate judge jurisdiction. *See, e.g.*, *Kadonsky v. United States*, 216 F.3d 499, 502 (5th Cir. 2000) (finding party consented to magistrate jurisdiction even though they "did not sign the form consent commonly used and officially recognized by Fed. R. Civ. P. 73," but instead "sign[ed] a document evincing his willingness to proceed before a magistrate judge").

340. Administrative Order 2021-63 at 1, *In re Establishment of Pro Se Prisoner Comm. for the S. Dist. of Fla.* (S.D. Fla. July 2, 2021), <https://www.flsd.uscourts.gov/sites/flsd/files/adminorders/2021-63.pdf> [<https://perma.cc/M8PD-2UQJ>].

341. *Id.*

division of a judicial district which has two or more active judges assigned.”<sup>342</sup> Senator Mazie Hirono’s bill would give the U.S. District Court for the District of Columbia “original and exclusive jurisdiction over any civil action for declaratory or injunctive relief . . . against the enforcement of any Federal law (including regulations and Executive orders) if the relief extends beyond the parties.”<sup>343</sup>

Both bills reflect concern about the outsized power federal district judges in Texas who sit in single-judge divisions have exerted over challenges to federal policy. However, under both bills, a district court could still manipulate case assignment. Representative Sherrill’s proposal could be thwarted in a multi-judge district by an order that assigned only criminal cases to one judge and only civil cases to another. Senator Hirono’s bill would pull cases of national significance out of Texas, but a judge similar to Judge Kacsmaryk could be appointed to that court and then, by case assignment order, be assigned only civil cases.

Case assignment scholars have proposed several different types of reform. Marin Levy has recognized that a system that mandates truly random case assignment would be unnecessarily inflexible.<sup>344</sup> She recommends that courts might nevertheless improve their practices by making their case assignment procedures more transparent.<sup>345</sup> Not only will transparency benefit the public, but it will also permit each judge to weigh in on case assignment practices that reflect distinct policy choices.<sup>346</sup>

J. Robert Brown, Jr. and Allison Herren Lee also recommend transparency, but they go a step further, arguing for constraining judicial discretion.<sup>347</sup> They would like judges’ personal preferences to “give way” in order “to preserve the appearance of judicial impartiality.”<sup>348</sup> However, “[a] system designed to limit the possibility of result-oriented assignments,” Brown and Lee have explained, “will generate opposition.”<sup>349</sup>

Justin Van Orsdol has argued for a fresh start: take away each circuit court’s ability to enact local rules,<sup>350</sup> which would be superseded by uniform, national rules establishing courts’ internal operating procedures.<sup>351</sup>

342. End Judge Shopping Act of 2023, H.R. 3163, 118th Cong. § 2(a) (2023).

343. Stop Judge Shopping Act, S. 1265, 118th Cong. § 2 (2023).

344. See Levy, *Panel Assignment*, *supra* note 3, at 94.

345. *Id.* at 114.

346. *Id.*

347. Brown & Lee, *supra* note 3, 1110–11.

348. *Id.*

349. *Id.* at 1110. Some of those personal preferences include refusing to sit on panels in a particular geographic area due to “the small number of palatable restaurants,” and refusing to sit with a particular colleague due to the colleague’s habit of “nap[ping] in the afternoon.” *Id.* at 1104.

350. Van Orsdol, *supra* note 42, at 1138.

351. *Id.*

J. Jonas Anderson and Paul Gugliuzza have proposed amending § 137, the statute that gives district courts some of its case assignment power, to include the bracketed language below:

The business of a district court having more than one judge shall be [randomly] divided among the judges as provided by the rules and orders of the court. The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe. [Notwithstanding the rules and orders of the court, no judge in a district court having more than one judge shall have greater than a 50 percent probability of being assigned a given case].<sup>352</sup>

They have also considered a more limited alternative, in which randomization would only apply in patent litigation, “since that is the area in which nonrandom assignment is currently leveraged by plaintiffs to judge shop.”<sup>353</sup> Under either proposal, single-judge divisions “would have to randomize cases between the single judge in the division and at least one other judge.”<sup>354</sup> Congress could adopt that relatively straightforward change, the authors argue, as could the Judicial Conference.<sup>355</sup> Until then, they hoped that their article would “encourage Judge Albright or, failing that, the Federal Circuit or Congress, to take a close look at the procedural practices in and the decisions coming out of the Western District to ensure the court is a fair forum for all litigants who appear before it.”<sup>356</sup>

At least two members of Congress were listening (or reading). Senators Leahy and Tillis shared their concerns about forum and judge shopping in the Western District of Texas in a letter to Chief Justice Roberts.<sup>357</sup> As the Senators noted, the Waco Division’s practices “create[d] an appearance of impropriety which damages the federal judiciary’s reputation for the fair and equal administration of the law.”<sup>358</sup> The Senators cited the Anderson and Gugliuzza article, even though it had yet to be published.<sup>359</sup> On July 25, 2022, Western District of Texas Chief Judge Orlando Garcia entered an order altering the case assignment rules for patent actions filed in the court’s Waco Division. Now, “all

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352. Anderson & Gugliuzza, *supra* note 211, at 478; *see also* CHIEF JUSTICE JOHN G. ROBERTS, JR., 2021 YEAR-END REPORT ON THE FEDERAL JUDICIARY 5 (2021), <https://www.supremecourt.gov/publicinfo/year-end/2021year-endreport.pdf> [<https://perma.cc/4JVN-2JPM>] (acknowledging the impact of judicial assignment in patent cases in federal trial courts and emphasizing the importance of public confidence in the courts).

353. Anderson & Gugliuzza, *supra* note 211, at 478.

354. *Id.* at 479.

355. *Id.* at 477–78.

356. *Id.* at 477.

357. Letter from Thom Tillis & Patrick Leahy, *supra* note 23.

358. *Id.* at 1.

359. *Id.* at 1 n.1.

civil cases involving patents . . . filed in the Waco Division on or after July 25, 2022[] shall be randomly assigned” to twelve district judges, including Judge Albright.<sup>360</sup>

Steve Vladeck has argued that plaintiffs like the State of Texas and conservative interest groups have “tak[en] advantage of a loophole in federal procedure,” seeking out “a handful of district judges appointed by Mr. Trump to thwart major features of President Biden’s agenda.”<sup>361</sup> Vladeck highlights that “if judge shopping is a problem in the patent context, it’s a problem outside it as well.”<sup>362</sup> He proposes several types of reform. First, “[d]istrict courts can, as Texas’ Western District just did, change their rules of judge distribution on their own” and “can also agree to transfer cases out of their single-judge divisions to avoid the appearance of procedural manipulation.”<sup>363</sup> Echoing the Anderson and Gugliuzza proposal, Congress could require district courts “to ensure that no case has a greater than 50 percent chance of being assigned to a single judge.”<sup>364</sup> Finally, he recommends that “suits seeking nationwide relief against a federal policy be heard by three district judges, not one.”<sup>365</sup>

On August 8, 2023, during the American Bar Association’s annual meeting, its House of Delegates passed a resolution urging federal courts to

eliminate case assignment mechanisms that predictably assign cases to a single United States District Judge without random assignment when such cases seek to enjoin or mandate the enforcement of a state or federal law or regulation and where any party . . . in such a case objects to the initial, non-random assignment within a reasonable time[] and urges that, in such situations, case assignments are made randomly and on a district-wide rather than division-wide basis.<sup>366</sup>

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360. Patent Litigation Order, *supra* note 24.

361. Steve I. Vladeck, *Don’t Let Republican ‘Judge Shoppers’ Thwart the Will of Voters*, N.Y. TIMES (Feb. 5, 2023), <https://www.nytimes.com/2023/02/05/opinion/republicans-judges-biden.html> [perma.cc/EXU8-PQY5 (staff uploaded, dark archive)].

362. *Id.*

363. *Id.*

364. *Id.*

365. *Id.*; see also Brief of Professor Stephen I. Vladeck as Amicus Curiae in Support of Petitioners at 3, *U.S. v. Texas*, 143 S. Ct. 1964 (2023) (No. 22-58) (arguing that Texas’s use of judge shopping to win nationwide injunctive relief will undermine public faith in the judiciary).

366. *Annual Meeting 2023 - House of Delegates Resolution 521*, AM. BAR ASS’N (Aug. 2023), [https://www.americanbar.org/news/reporter\\_resources/annual-meeting-2023/house-of-delegates-resolutions/521/](https://www.americanbar.org/news/reporter_resources/annual-meeting-2023/house-of-delegates-resolutions/521/) [https://perma.cc/UD2F-5HGR (staff-uploaded archive)].

In *Utah v. Walsh*,<sup>367</sup> the DOJ objected to the initial nonrandom assignment and moved for transfer to a division where cases were assigned at random to multiple judges.<sup>368</sup> As described below, they lost.

### B. *Local Litigation*

As described above, case assignment is procedure. Though the Constitution grants Congress the power to create procedural law, the district courts may only do so within the bounds of their delegated authority. This final section identifies general orders and other practices that have shaped high-profile litigation and may also have exceeded the courts' rulemaking authority.

#### 1. Reproductive Rights Litigation in the Northern District of Texas

Northern District of Texas Judge Matthew Kacsmaryk has issued a series of decisions that, his critics argue, significantly curtailed reproductive rights.<sup>369</sup> Earlier this year, Judge Kacsmaryk rescinded the abortion drug Mifepristone's FDA approval.<sup>370</sup> He is now presiding over a case that the State of Texas and an individual affiliated with the anti-abortion group Center for Medical Progress have brought against Planned Parenthood.<sup>371</sup> If successful, the case could bankrupt the organization.<sup>372</sup>

The Department of Justice ("DOJ") has argued that the State of Texas and conservative groups have sought out Judge Kacsmaryk because of the likelihood they will win in his courtroom. In a case assigned to Judge Kacsmaryk in which Texas and other states are challenging a Department of Labor regulation, the DOJ moved to transfer venue from the Amarillo Division to the U.S. District Court for the District of Columbia.<sup>373</sup> Alternatively, the DOJ argued that the case should be transferred to another division within the district "in which more than one District Judge sits" to "avoid any appearance of judge-shopping by Plaintiffs."<sup>374</sup> Filing the case in Amarillo was "merely the latest example of an

367. No. 23-cv-016-Z, 2023 WL 2663256 (N.D. Tex. Mar. 28, 2023).

368. Motion to Transfer Venue at 17, *Walsh*, No. 23-cv-016-Z (Feb. 7, 2023) (requesting that the court "transfer this case to a Division in which more than one judge sits for random assignment consistent with that Division's assignment rules").

369. Carrie N. Baker & Gracie Griffin, *In 'Baseless' Texas Lawsuit, Matthew Kacsmaryk Could Singlehandedly Shut Down Planned Parenthood*, MS. MAG., <https://msmagazine.com/2023/08/03/texas-lawsuit-planned-parenthood-kacsmaryk/> [<https://perma.cc/9K5H-VWXA>] (last updated Oct. 25, 2023 11:30 AM).

370. *All. for Hippocratic Med. v. U.S. Food & Drug Admin.*, 668 F. Supp. 3d 507, 560 (N.D. Tex. 2023), *aff'd in part, vacated in part*, 78 F.4th 210 (5th Cir. 2023), *cert. granted*, 144 S. Ct. 537 (2023).

371. *United States v. Planned Parenthood Fed'n*, No. 21-cv-022-Z, 2022 WL 19006361 (N.D. Tex. Sept. 20, 2022); Baker & Griffin, *supra* note 369.

372. Baker & Griffin, *supra* note 369.

373. Motion to Transfer Venue, *supra* note 368, at 1.

374. *Id.* at 1–2 ("[N]ew civil cases filed in the Dallas, Fort Worth, Lubbock, Abilene, and San Angelo Divisions are assigned randomly among multiple judges in all relevant circumstances.").



ongoing practice” of Texas’s strategy of “filing most of [its] lawsuits against the federal government in single-judge divisions or divisions where they are almost always guaranteed to procure a particular judge assignment.”<sup>375</sup> Judge Kacsmayk denied the motion.<sup>376</sup>

Though the DOJ couched its motion in terms of 28 U.S.C. § 1404, the change of venue statute, their judge-shopping argument is really about fundamental fairness. In a fair system, gamesmanship should not prevail. Yet direct assignment of certain cases might also be fair. Direct assignment considers judges’ workloads, expertise, and even their health. Many judges like knowing what cases they will be assigned.

An argument based on the district court’s constitutional authority would proceed differently. Judge Kacsmayk is the sole judge in the Amarillo Division as a result of Special Order No. 3-344, signed by Chief Judge David Godbey on September 14, 2022, one of several orders issued weeks after he became Chief Judge.<sup>377</sup>

In the Northern District of Texas, both the local civil rules and the local criminal rules state that the district judges make case assignment decisions.<sup>378</sup> The orders signed exclusively by the district’s chief judges violate the local rules. To bring about the change the orders purport to implement, the proposed orders must be adopted pursuant to Federal Rule of Civil Procedure 83(a), with suitable public notice and opportunity to comment, followed by presentation to all of the district’s judges for a vote. In the end, the practice of assigning all cases in single-judge divisions to one judge may continue. However, a public discussion of what randomized assignment might look like in those divisions would at least restore some confidence in the process.

Section 137 does not necessarily authorize the chief judge’s orders. As described above, 28 U.S.C. § 137 gives a district court the authority to decide how to divide up its business, “as provided by the rules and orders of the court,”<sup>379</sup> which the chief judge of the district is responsible for enforcing. The statute creates some ambiguity with respect to whether a chief judge can act unilaterally. However, it also states that “[i]f 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.”<sup>380</sup> That provision implies that district judges must agree on the division of business rules and orders. The Tenth Circuit has held that pursuant to § 137, “it is unquestioned that the division of the court’s business in a multi-judge district is the

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375. *Id.* at 16.

376. Order at 12, *Utah v. Walsh*, No. 23-cv-016-Z (N.D. Tex. March 28, 2023).

377. See Special Order No. 3-344, *supra* note 259, at 1.

378. N.D. TEX. LOC. CIV. R. 83.3; N.D. TEX. LOC. CRIM. R. 57.3.

379. 28 U.S.C. § 137(a).

380. *Id.*

responsibility of the judges and not the responsibility of the chief judge acting unilaterally.”<sup>381</sup> Though chief district judges have authority to take action to decide urgent matters on their own, that authority is not boundless.<sup>382</sup>

Likewise, Federal Rule of Civil Procedure Rule 83(b)’s codification of a court’s inherent authority does not justify district-wide orders issued by a single judge, such as a chief judge. Inherent authority exists in each judge’s courtroom and gives an individual judge power to make certain decisions about the judge’s own cases.

The Judicial Conference’s Standing Committee has considered which district-wide policies should be adopted pursuant to Federal Rule of Civil Procedure 83(a), and which are more suitable for general orders adopted by a chief judge unilaterally. It concluded that certain matters are best addressed by local rules, including those that cover matters in which lawyers and litigants have a substantial interest.<sup>383</sup> Though the guidelines issued by the Judicial Conference recommended that matters regarding the division of workload are best addressed in orders, the authority it cited did not support that conclusion. Moreover, the guidelines emphasized the need to follow the local rules’ process for issues that “have a significant impact on lawyers and litigants and the local-rules comment process is important to developing workable and effective procedures.”<sup>384</sup>

Notice and comment provisions were added to Rule 83 “to enhance the local rulemaking process by requiring appropriate public notice of proposed rules and an opportunity to comment on them.”<sup>385</sup> The Advisory Committee was concerned that “[a]lthough some district courts apparently consult the local bar before promulgating rules, many do not, which has led to criticism of a process that has district judges consulting only with each other.”<sup>386</sup> Given the local and national interest in how the Northern District assigns its cases, especially from counsel who practice in the district, a public process is in order.

## 2. Patent Litigation in the Western District of Texas

The Western District of Texas’s July 25, 2022, order created a special procedure for patent cases in the Waco Division.<sup>387</sup> All cases filed in the Waco Division are still assigned to Judge Albright, except for patent cases, in which the parties have the privilege of randomized assignment to a pool of twelve judges.

381. *Utah-Idaho Sugar Co. v. Ritter*, 461 F.2d 1100, 1103 (10th Cir. 1972).

382. *Id.* at 1103–04.

383. Report, *supra* note 167, at 1.

384. Guidelines, *supra* note 167, at 3.

385. FED. R. CIV. P. 83 advisory committee’s note to 1985 amendment.

386. *Id.*

387. *See Patent Litigation Order*, *supra* note 24.

The patent-specific order may have silenced Judge Albright's critics, but it had no impact on other single-judge divisions, or parties whose § 2255 motions collaterally challenging their sentences are automatically assigned to the judges who sentenced them.<sup>388</sup> So long as orders continue to control case assignment in the Western District of Texas, the district's next chief judge could change course and restore Judge Albright's patent docket. Also, a different single-judge division could turn into a patent hotspot.

Patent orders aside, one aspect of case assignment in the Western District is unassailable. The district's local rules provide that "[t]he method of assignment of duties to a magistrate judge and for the allocation of duties among the several magistrate judges of the court shall be made in accordance with orders of the court or by special designation of a judge."<sup>389</sup> A local rule that permits judges to refer whichever cases they choose to magistrate judges is likely an unnecessary rule. The practice is already authorized by statute.<sup>390</sup>

Still, assigning only certain cases to a magistrate judge is not necessarily a good policy. Magistrate judges serve eight-year terms, and their reappointment is voted upon by the district judges.<sup>391</sup> Unlike a district court judge, whose life tenure theoretically encourages judicial independence, a magistrate judge who wants to be reappointed may not be able to rule quite as freely, especially in cases in which the magistrate knows how the district judge might rule.<sup>392</sup>

Judith Resnik has explored "what is deemed worthy work for Article III judges, what role is accorded non-Article III judges, and what explanations are

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388. See 2003 Amended Plan, *supra* note 269, at 2. Moreover, in the month immediately following the order's issuance, Judge Albright was still assigned a disproportionate share of patent cases. Between July 22, 2022, and August 21, 2022, of the thirty-nine patent actions filed in the Western District of Texas, five were assigned to Judge Ezra, four to Judge Cardone, three to Judge Rodriguez, three to Judge Yeakel, three to Judge Rodriguez, two to Judge Pulliam, one to Judge Pitman, one to Judge Counts, one to Judge Montalvos, two to Judge Moses, and fourteen to Judge Albright. Still, this represented a decrease from the share he received the previous month. Of the 117 patent actions filed in the Western District of Texas between June 21, 2022, and July 21, 2022, three were assigned to Judge Yeakel, one to Judge Pitman, one to Judge Ezra, and, with the exception of one unassigned case, the remainder were assigned to Judge Albright.

389. W.D. TEX. LOC. RULES FOR THE ASSIGNMENT OF MAGISTRATE JUDGES 2(A).

390. 28 U.S.C. § 636(b), (c).

391. See § 631(a) ("Where there is more than one judge of a district court, the appointment, whether an original appointment or a reappointment, shall be by the concurrence of a majority of all the judges of such district court, and when there is no such concurrence, then by the chief judge."); § 631(e) ("The appointment of any individual as a full-time magistrate judge shall be for a term of eight years.").

392. However, many brave magistrate judges take unpopular positions in referred cases, often at the expense of their reappointment or elevation. See, e.g., L. Carol Ritchie, *Judge Strikes Down Idaho's Same-Sex Marriage Ban*, NPR (May 13, 2014, 10:35 PM), <https://www.npr.org/sections/thetwo-way/2014/05/13/312312698/idaho-judge-strikes-down-same-sex-marriage-ban> [<https://perma.cc/F3DJ-WA99>] (describing Magistrate Judge Candy Dale's decision).

offered about the assignments of differently chartered judges.”<sup>393</sup> Identifying certain cases for non-Article III judges is an expressive choice. Here, the cases singled out for magistrate judge referral are generally brought by incarcerated parties, parties who are likely to be unrepresented, or both. Magistrates commonly preside over social security appeals, § 1983 civil rights actions brought by incarcerated plaintiffs, and applications to proceed in forma pauperis.<sup>394</sup> These are unpopular assignments. And because the parties who bring them are so often unrepresented, they may be unable to meaningfully challenge a magistrate judge’s report and recommendation. A more equitable system would refer a percentage of the entire docket to magistrate judges rather than those cases in which the parties are unlikely to object. But as a matter of constitutional power, courts and individual judges that refer cases in this manner are acting in accordance with Congress’s statutory wishes.

Setting aside the orders providing for referral to magistrate judges, the district court has made significant policy choices in orders issued unilaterally by its chief judges. Those orders assign 100% of cases filed in single-judge divisions to one judge.<sup>395</sup> They also directly assign cases brought by an incarcerated plaintiff alleging civil rights violations to a judge who is presumed to have some preexisting knowledge about the plaintiff because the judge presided over the plaintiff’s criminal trial. That kind of familiarity is not necessarily a case assignment virtue and may result in confirmation bias.

The district’s orders also grant judges the power to transfer cases amongst themselves. That provision alone gives rise to at least an appearance of partiality when one judge sends a cherry-picked case to another colleague.

The Western District may be bypassing Federal Rule of Civil Procedure Rule 83(a) because it is time-consuming, not because case assignment is unimportant. As the Seventh Circuit has explained, “[a]dopting local rules through the device of [district-wide] orders contravenes the Rules Enabling Act.”<sup>396</sup> The reasons that support using the local rules process in the Northern District of Texas apply to the Western District of Texas too.

Moreover, the sheer number of orders in the Western District is reason to invoke the more formal local rules process. The Federal Rules were intended to address most procedural issues in the district courts. Federal Rule of Civil

393. Judith Resnik, *Housekeeping: The Nature and Allocation of Work in Federal Trial Courts*, 24 GA. L. REV. 909, 913 (1990).

394. See Order, Austin Division, *supra* note 285, at 1–2; Standing Order, Austin Social Security Decisions, *supra* note 298, at 1; Order, Austin Division Nowlin, *supra* note 299, at 1–2; Standing Order Referring Social Security Matters, *supra* note 302, at 1; Standing Order, San Antonio Social Security, *supra* note 306, at 1; Standing Order, San Antonio Forma Pauperis, *supra* note 307, at 1; Administrative Order 2023-18, *supra* note 333, at 1.

395. See, e.g., 2023 Amended Order, *supra* note 281, at 1, 3–4.

396. *In re Dorner*, 343 F.3d 910, 913–14 (7th Cir. 2003) (citing 28 U.S.C. §§ 2077(b), 2071(b), 2071(c), 2071(d)).

Procedure 83 represents a grant of rulemaking authority in which “detail was to be kept at a minimum” and “[s]uperfluous rulemaking was to be avoided.”<sup>397</sup> The proliferation of local rules has been a cause for concern since 1938, and persists.<sup>398</sup> Using an even less transparent process to adopt a voluminous set of district-wide orders also runs counter to federal procedure’s uniformity, clarity, and trans-substantivity goals.

At a minimum, the Western District of Texas’ case assignment practices should all be placed in one document that the public can easily access. Individual variations should be limited.

### 3. Former President Trump in the Southern District of Florida

The Southern District of Florida’s internal operating procedures are clear and thorough. The district’s procedure is easy to identify and follow.

However, this district is taking a shortcut. Its local rules at one time did reach case assignment. Then the local rules that controlled case assignment were renamed internal operating procedures. Now, when changes are made to case assignment rules, they are no longer vetted pursuant to the Federal Rules.<sup>399</sup> The case assignment rules in the Southern District of Florida were not modified; they were simply moved. Nor were they rescinded—they continue to be enforced, just not as local rules. As the Eleventh Circuit has held, if there are case assignment rules in place, whether prescribed by the district judges or the Judicial Council, the rules apply “until modified or rescinded.”<sup>400</sup>

There are several aspects of the district’s internal operating procedures that might have affected the assignment of cases involving former President Trump.

When the New York Times asked the Southern District of Florida’s clerk if “normal procedures were followed and Judge Cannon’s assignment was random,” the clerk responded that “[n]ormal procedures were followed.”<sup>401</sup> Those “normal procedures” permit a judge to transfer all or any part of a case to a judge who agrees to take all or any part of it.<sup>402</sup> It also allows for nonrandom assignment when

an action or proceeding is filed in the Court which involves subject matter which is a material part of the subject matter of another action or proceeding then pending before this Court, or for other reasons the

397. *Rule 83 and the Local Federal Rules*, *supra* note 117, at 1258.

398. *Id.* at 1259.

399. *See supra* Section II.B.3 (describing how the district’s case assignment was originally governed by local rules adopted pursuant to Federal Rule of Civil Procedure 83).

400. *Utah-Idaho Sugar Co. v. Ritter*, 461 F.2d 1100, 1103 (10th Cir. 1972).

401. *See Savage, Trump Appointee Will Remain*, *supra* note 15.

402. INTERNAL OPERATING PROCS. OF THE U.S. DIST. CT. FOR THE S. DIST. OF FLA., *supra* note 145, § 2.07.00.

disposition thereof would appear to entail the unnecessary duplication of judicial labor if heard by a different Judge, the Judges involved shall determine whether the higher-numbered action or proceeding shall be transferred to the Judge assigned to the lower-numbered action.<sup>403</sup>

Finally, despite the default rule that all cases “be assigned on a blind random basis,” in the interest of justice and expediency, “the Court may modify the assignments made to active or senior Judges.”<sup>404</sup>

At least one aspect of the Southern District of Florida’s case assignment is authorized by statute. District judges enjoy a great deal of discretion with respect to the type of work they may refer to a magistrate judge.<sup>405</sup> The Southern District pairs magistrates with certain district judges, assigning them intentionally to the district judge’s cases for three years. The pairings are intended to ensure “the equal distribution of workload among the magistrate judges,” but also consider “the preferences of the district judges, including senior judges” as well as “their seniority and their past referral practices.”<sup>406</sup>

A January 27, 2023 order identifies Magistrate Judge Reinhart as Judge Cannon’s paired magistrate judge in West Palm Beach.<sup>407</sup> As a result, when Judge Cannon is assigned to a West Palm Beach case, the district automatically assigns Magistrate Judge Reinhart to it as well. Magistrate Judge Reinhart was paired with Judge Cannon in each of the three cases assigned to Judge Cannon involving former President Trump.<sup>408</sup>

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Suggesting that a district court’s general orders are subject to notice, comment, and voting requirements is a bold proposal. If correct, a significant number of general orders may be invalid. But this approach favors function over form. Otherwise, district courts could evade the conditions by which they exercise their delegated authority simply by choosing the right label. The Eleventh Circuit has explained that “the name given to local procedures is irrelevant.”<sup>409</sup> Rather, the focus should be on local procedure’s purpose; if the procedure is intended to “control practice in a district court . . . such procedures

403. *Id.* § 2.15.00.

404. *Id.* § 2.01.01(a).

405. 28 U.S.C. § 636(b).

406. INTERNAL OPERATING PROCS. OF THE U.S. DIST. CT. FOR THE S. DIST. OF FLA., *supra* note 145, § 2.08.01(a)–(b).

407. See Administrative Order 2023-9, *supra* note 327, at 3.

408. Notice of Judge Assignment to Judge Aileen M. Cannon, *Trump v. United States*, No. 22-cv-81294 (S.D. Fla. Aug. 22, 2022); Notice of Judge Assignment to Judge Aileen M. Cannon, *Castro v. Trump*, No. 23-cv-80015 (Jan. 6, 2023). The *Trump v. United States* docket identifies Magistrate Judge Reinhart as the “Referred To” judge, but other magistrate judges have also participated in the case.

409. *Brown v. Crawford Cnty.*, 960 F.2d 1002, 1008 n.8 (11th Cir. 1992).

effectively are local rules” and must comply with Rule 83(a).<sup>410</sup> The Wright and Miller treatise similarly provides that “local ‘policies’ that embody provisions comparable to local rules” are valid only if they are promulgated pursuant to Rule 83(a).<sup>411</sup>

Moreover, imposing a notice and comment requirement also imposes transparency wholly appropriate to rulemaking authority several steps removed from Congress. Federal Rule of Civil Procedure 83(a)’s public notice and comment provisions were added in 1985 and intended to subject local rules “to scrutiny similar to that accompanying the Federal Rules, administrative rulemaking, and legislation.”<sup>412</sup>

Subjecting general orders to Rule 83(a)’s requirements also ensures that practices that impact the entire court reflect the wishes of a majority of the court’s district judges.<sup>413</sup> Exempting general orders from Rule 83(a)’s majority vote requirement leaves the court’s business to a district’s chief judge. Chief judges at the district and appellate level are not elected, but “assume the position based on seniority.”<sup>414</sup> Chief judges serve tirelessly and honorably, but their decisions might not align with the wishes of the court’s majority.

#### CONCLUSION

This Article has described the constitutional provisions that authorize Congress to create procedure that shapes the federal courts, and how Congress has delegated that power. It explained how case assignment procedure takes the form of statutes, rules, and orders, and reaches everything from en banc voting to the assignment of patent cases in a single-judge division in the Western District of Texas.

This Article also defined what constitutes a valid use of rulemaking authority. District courts that enact case assignment procedure pursuant to Federal Rule of Civil Procedure 83(a) and its criminal procedure counterpart engage in rulemaking that complies with the conditions set by the body that delegated its power to the district courts. When district courts issue general orders or follow informal policies to create case assignment practices, they may

410. *Id.*

411. 12 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 3152 (3d ed.).

412. Macfarlane, *A New Approach*, *supra* note 123, at 137 (quoting FED. R. CIV. P. 83 advisory committee’s note to 1985 amendment).

413. FED. R. CIV. P. 83(a) (“[A] district court, acting by a majority of its district judges, may adopt and amend rules governing its practice.”).

414. *FAQs: Federal Judges*, U.S. CTS., <https://www.uscourts.gov/faqs-federal-judges> [<https://perma.cc/X6QN-P4JE>] (“The chief judge is the judge in regular active service who is senior in commission of those judges who are (1) 64 years of age or under; (2) have served for one year or more as a judge; and (3) have not previously served as chief judge.”).

be mandating adherence to invalid procedure. Case assignment practices must be constitutional.

Local procedure that steps outside its bounds is not just a theoretical problem. This Article explored how Federal Rule of Civil Procedure 83 and Federal Rule of Criminal Procedure 57 should have been followed, but were not, in ways that have impacted pending litigation. It considers the validity of case assignment orders in matters that have drawn national attention, as well as in actions affecting unrepresented and incarcerated parties with no advocate to elevate their cause.

The procedure analyzed in this Article all stems from how the Constitution assigns authority over the lower federal courts to Congress. Congress's power is remarkably different with respect to the Supreme Court.

Of course, no statute or rule governs the assignment of cases that reach the Supreme Court on the merits. The same nine Justices hear each case.<sup>415</sup> To the extent a potential conflict of interest exists, "individual Justices decide for themselves whether recusal is warranted," but unlike recusal decisions made by lower court judges, the Justices' decisions are unreviewable.<sup>416</sup> The Justices are not bound by the Code of Conduct for United States Judges that lower court judges must follow.<sup>417</sup> Though Congress has passed legislation directing the Justices to comply with financial reporting requirements and limitations on the receipt of gifts, Chief Justice Roberts has suggested that the laws may not be binding.<sup>418</sup>

At some point, the Senate's vetting of Supreme Court nominees might have accurately predicted whether a Justice would, when appropriate, consider recusal. The Senate convenes the Senate Judiciary Committee, which "investigates the judicial nominees, holds hearings on the nominees, takes a committee vote on the nominee, and makes a recommendation regarding confirmation to the full Senate," which then votes.<sup>419</sup> The Committee's hearings

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415. *But see* Trevor N. McFadden & Vetan Kapoor, *The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL'Y 827, 835–36 (2021) (citing SUP. CT. R. 22.3, 22) (stating that "[p]arties seeking a stay from the Supreme Court apply to the 'Circuit Justice,' who is 'assigned to the Circuit in which the case arose' and is authorized to 'grant the application, deny it, or refer it to the full Court for consideration'"); 28 U.S.C. § 42 (stating that the Chief Justice and the associate justices "shall from time to time be allotted as circuit justices among the circuits by order of the Supreme Court").

416. CHIEF JUSTICE JOHN G. ROBERTS, JR., 2011 YEAR-END REPORT ON THE FEDERAL JUDICIARY 8 (2011), <https://www.supremecourt.gov/publicinfo/year-end/2011year-endreport.pdf> [<https://perma.cc/R74S-YFY7>].

417. *Id.* at 3.

418. *See id.* at 6 (stating that "[t]he Court has never addressed whether Congress may impose those requirements on the Supreme Court").

419. April G. Dawson, *Laying the Foundation: How President Obama's Judicial Nominations Have Paved the Way for a More Diverse Supreme Court*, 60 HOW. L.J. 685, 688 (2017); *see also* John Tunney,



now feature nominees promising neutrality even though they have been selected to implement the ruling administration's agenda.<sup>420</sup>

Potential allegiance to the party whose president nominated you and whose senators confirmed you was intended to be counterbalanced by Article III's life tenure and fixed salary guarantees.<sup>421</sup> Both were considered "crucial" to judicial independence.<sup>422</sup> The Framers "never wavered from their desire to eliminate the problem they had experienced in the colonies of having judges who simply did what the king told them to do and who lacked the courage or latitude to do what was right or just."<sup>423</sup> We have no king, but recent revelations call judicial independence into question.<sup>424</sup>

Given the absence of rules controlling Supreme Court recusal, case assignment practices in the lower courts take on greater significance. There is more reason than ever to look to the validity of the practices that direct cases to certain judges. At a minimum, the public should be invited to weigh in.<sup>425</sup>

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*The Judicial Appointment Process*, 34 PEPP. L. REV. 275, 277 (2007) (explaining that "if one of the two Senators from the state where the District Court is located is opposed to the candidate on the basis of personal privilege, the Senator can 'blue slip' the candidate with the Chairman of the Judiciary Committee and effectively kill the nomination").

420. See Becky Sullivan, *What Conservative Justices Said—And Didn't Say—About Roe at Their Confirmation*, NPR, <https://www.npr.org/2022/05/03/1096108319/roe-v-wade-alito-conservative-justices-confirmation-hearings> [<https://perma.cc/QBC7-59TS>] (last updated June 24, 2022, 3:44 PM) (stating that as nominees, Trump-nominated justices "consistently avoided direct statements about *Roe*, including whether they'd vote to overturn it" and instead "commented on the importance of precedent and constitutional guarantees to privacy"); Lawrence Hurley, *Trump's Justices Decisive in Long Campaign To Overturn Roe v. Wade*, REUTERS, <https://www.reuters.com/legal/government/trumps-justices-decisive-long-campaign-overturn-roe-v-wade-2022-06-24/> [<https://perma.cc/MC9R-AUWU> (staff-uploaded archive)] (last updated June 24, 2022, 2:48 PM) (detailing that during his 2016 presidential campaign, former President Trump promised to appoint justices who would overturn *Roe v. Wade*).

421. *N. Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 59 (1982) (stating that "[t]he 'good Behaviour' Clause guarantees that Art. III judges shall enjoy life tenure, subject only to removal by impeachment" and "[t]he Compensation Clause guarantees Art. III judges a fixed and irreducible compensation for their services").

422. Michael J. Gerhardt, *The Constitutional Limits to Impeachment and Its Alternatives*, 68 TEX. L. REV. 1, 66–67 (1989).

423. *Id.*

424. See, e.g., Justin Elliott, Joshua Kaplan & Alex Mierjeski, *Justice Samuel Alito Took Luxury Fishing Vacation with GOP Billionaire Who Later Had Cases Before the Court*, PROPUBLICA (June 20, 2023, 11:49 PM), <https://www.propublica.org/article/samuel-alito-luxury-fishing-trip-paul-singer-scotus-supreme-court> [<https://perma.cc/TV9Q-YU33>]; Justin Elliott, Joshua Kaplan & Alex Mierjeski, *Clarence Thomas and the Billionaire*, PROPUBLICA (April 6, 2023, 5:00 AM), <https://www.propublica.org/article/clarence-thomas-scotus-undisclosed-luxury-travel-gifts-crow> [<https://perma.cc/78VW-NW7P>].

425. On November 13, 2023, the Supreme Court released a document titled "Code of Conduct for Justices of the Supreme Court of the United States." U.S. SUP. CT., CODE OF CONDUCT FOR JUSTICES OF THE SUPREME COURT OF THE UNITED STATES (2023), [https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices\\_November\\_13\\_2023.pdf](https://www.supremecourt.gov/about/Code-of-Conduct-for-Justices_November_13_2023.pdf) [<https://perma.cc/6VCC-9J2R>]. Adherence to its provisions is not mandatory, and the code contains no enforcement mechanism.

