SINGLE-MINDED CRITICISM OF SINGLE JUDGE DIVISIONS

Senator Mitch McConnell[*]

ABSTRACT

One-judge divisions are under political attack. Congressional Democrats have attempted to bully Texas federal district courts into changing their case assignment methods because they dislike the decisions coming out of Texas. They claim, of course, to dislike one-judge divisions because they allow litigants "to hand-pick individual district judges seen as particularly sympathetic to their claims." When the U.S. District Court for the Northern District of Texas refused to acquiesce to Democratic demands, the Senate Majority Leader and his allies turned to an unelected, unaccountable judicial bureaucracy called the Judicial Conference of the United States (JCUS) to carry out their schemes. In March 2024, the JCUS attempted to force federal district courts to adopt a random case assignment scheme for all injunctions and declarations against the government. But the JCUS is in the wrong branch of government to make binding law. Any problems with case assignment should be addressed by Congress—not the JCUS.

But the Democratic caper that the JCUS adopted is "reform for thee but not for me." It will not prevent litigants from handpicking outcomes in sympathetic districts such as the U.S. District Court for the Northern District of California in which 100% of the judges were nominated by Democratic presidents. Many such districts are available to liberal cause litigants.

Nor will this scheme solve a real problem. Our current system already addresses erroneous district court decisions adequately and efficiently via the appellate process. Circuit courts can review district court decisions within days if necessary, and circuit court decisions can undergo rehearings and en banc review and are even subject to U.S. Supreme Court review. The system works. The actual problem—the availability of universal

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injunctions—will go on unabated until Congress or the Supreme Court puts a stop to it.

Ultimately, if Democrats get their way it will force rural, Article III judges in the Northern District of Texas to spend entire days traveling to hear cases on short notice. Such a result is offensive and demonstrates how out of touch one of our two major parties is with the realities of rural America. Every federal judge in the Northern District of Texas went through the same nomination and vetting process as every federal judge in the Northern District of California. Forcing rural, Texas judges to spend their precious work time commuting is an absurd solution to a contrived problem. And attempting to use the JCUS to effectuate this change offends the core American principles of the separation of powers and democratic accountability.

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1. INTRODUCTION

Congressional Democrats are attempting to fundamentally undermine the independence of the judiciary by improperly coopting bureaucrats to change the clear terms of an enacted statute and functionally eliminate one-judge divisions for most civil litigants. When you want to change a law, our Constitution is clear that you need a new law, but Democrats instead have tried to coopt the Judicial Conference of the United States (JCUS)—an unelected, unaccountable judicial administrative body—to bypass the people's elected representatives. This ignores the checks and balances that are so fundamental to our system of government.

What are one-judge divisions? Simply put, they are geographic areas in which, if a plaintiff files a lawsuit, only one judge can hear the case.[1] Logically speaking, the larger and more sparsely populated a geographic area is, the more likely a judicial division is to have only one judge. We need more judges where more people are located because that is where the cases are. This is, among other things, a consequence of judicial economy. While underpopulated areas still need access to justice, it wouldn't make sense for them to have more judges than their docket volume demands.

One-judge divisions are most common in Texas. They are not unique to Texas—indeed my home-state of Kentucky has them in Paducah, Frankfort, and London—but they are an integral part of Texas's judicial history. One-judge districts are at least as old as the State of Texas itself.[2] Texas started with only one judge for the entire state when it was admitted into the Union in 1845.[3] From 1845 until 1857, a single judge, Judge John C. Watrous, heard every single federal case in the entire State of Texas.[4] In 1857, Congress split Texas into two districts—the Eastern and Western Districts of Texas—and each district continued to have one judge.[5] And when Congress created the Northern District of Texas, which seems to be the cause

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1 Josh Blackman, *About Single-Judge Divisions*, REASON: VOLOKH CONSPIRACY (Feb. 5, 2023, 3:33 PM), https://perma.cc/DJA8-5XDD.

2 *History*, U.S. DIST. CT. FOR THE N. DIST. OF TEX., https://perma.cc/4CTH-QN7A ("When Texas first joined the Union in 1845, the state was organized as one federal judicial district with court held at Galveston.").

3 *Id.*

4 *Id.* ("The first district judge was John C. Watrous.").

5 *Id.*

of the controversies we hear about the issue today, the district also started with one judge.[6]

Despite this history, Democrats—using the JCUS—have attempted to force a random case-assignment system onto district courts without congressional assent, presumably because they think that certain district judges cannot be trusted.[7] The argument goes that if you file a case in a one-judge division, you know who will hear it. Instead, Democrats want such cases randomly assigned among all the judges—near and far—in these divisions.

Indeed, the Senate Majority Leader has gone so far as to specifically cast aspersions on the Amarillo, Wichita Falls, Abilene, Lubbock, and San Angelo Divisions of the Northern District of Texas.[8] He has asserted that plaintiffs can "effectively choose the judge who will hear their cases."[9] And they believe this is problematic because "litigants . . . hand-pick individual judges seen as particularly sympathetic to their claims."[10] I intend to show that this is wrong.

This Essay, written for the inaugural issue of the *Journal of Law & Civil Governance at Texas A&M*, analyzes the recent conflict over one-judge divisions. Part 2 will explain the history of the venue statutes—why Congress chose to allow litigants to sue the federal government where they live, and why Congress chose not to place the burden on the Citizens to travel long distances to assert a claim against the federal government—and dispel the misconception that one-judge divisions enjoining government officials is a new phenomenon.[11] Part 3 will explain why Democratic attempts to force reform through the JCUS rather than through the legislature—the appropriate branch of government—are so dangerous. It will also address how out of

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6 *Id*. ("The Northern District was established as the third judicial district in Texas on February 24, 1879, with three divisional offices and one judge. The divisional offices were located at Dallas, Graham, and Waco."). Even the particular division that concerns Senator Schumer has been a one-judge division since its founding in 1908. *Id*.

7 *See, e.g.*, Letter from Sen. Charles E. Schumer, Majority Leader, U.S. Senate, to Hon. David C. Godbey, C.J., U.S. Dist. Ct. for the N. Dist. of Tex. (Apr. 27, 2023) (on file with the *Journal of Law and Civil Governance at Texas A&M*) [hereinafter Schumer Letter].

8 *Id.*

9 *Id.*

10 *Id.*

11 *See infra* Part 2.

touch with rural America the proposal is: that, somehow, Article III judges in rural Texas courthouses need to be supervised and kept on a leash by their urban counterparts.[12] Part 4 will address the fact that even if none of the previous issues existed with the proposal, the random assignment of injunctions and declarations would not fix the root problem of universal relief granted by district judges.[13] Lastly, Part 5 will conclude my thoughts.[14]

2. The United States Has a Long History and Tradition of One-Judge Divisions

2.1. In Suits Against the Federal Government, Venue Has Lain Where the Plaintiff Resides Since 1962

Congress first enacted a comprehensive, modern statutory scheme for judicial venue in 1948.[15] As part of that act, Congress established the venue rules for suits against the United States.[16] In civil actions "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department,"[17] the proper venue was only the district in which the plaintiff resided.[18] This statutory rule remains unchanged today—seventy-six years later.[19]

In 1962, Congress amended the venue statute to specify the venue rules in suits against federal agencies and officers of the United States acting in their official capacity.[20] Under this amendment, proper venue existed

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12 *See infra* Part 3.

13 *See infra* Part 4.

14 *See infra* Part 5.

15 Act of June 25, 1948, Pub. L. No. 80-773, §§ 1391–1406, 62 Stat. 869, 935–37 (codified as amended at 28 U.S.C. §§ 1391–1406).

16 *Id.* § 1402, 62 Stat. at 937.

17 *Id.* § 1346, 62 Stat. at 933.

18 *Id.* § 1402, 62 Stat. at 937.

19 Congress did add an exception for corporations suing the federal government, but the general rule of venue in suits against the federal government for individual *people* remains unchanged. *Compare id.* (original version), *with* 28 U.S.C. § 1402(a)(1) (current version).

20 Act of Oct. 5, 1962, Pub. L. No. 87–748, § 1391, 76 Stat. 744, 744 (codified as amended at 28 U.S.C. § 1391).

where the plaintiff resided if no real property was involved in the action.[21] This rule also remains unchanged.[22]

The venue rules for suits against the federal government are markedly different from those that govern suits against entities other than the federal government. In fact, the only non-federal-government scenario in which venue is proper where the plaintiff resides is when there "is no district in which an action may otherwise be brought . . . ."[23] The rule for suing *anyone* other than the federal government is exactly the opposite of the federal government rule: If a plaintiff sues the federal government, he must do so at home; but if the plaintiff sues anyone else, home is the last place he can sue. Why is this? Simply put, Congress believed that the federal government—with its vast resources and nationwide authority—can easily afford to defend itself anywhere within its borders.[24] Private litigants aren't so lucky. Time has shown the federal government to be up to this challenge as there are United States Attorneys located in every judicial district.[25] Just because an action of the federal government may be taken thousands of miles away in Washington, D.C. doesn't mean it won't affect citizens personally in all corners of the country, so it's fitting that citizens enjoy the benefit of a convenient forum to review these actions.[26]

Furthermore, many suits against the federal government are brought under the Administrative Procedure Act (APA), which requires a fixed administrative record with no live testimony from federal witnesses.[27] In other words, the federal government has all the evidence it needs to defend itself long before it must actually do so in federal court. Rather, the plaintiff must affirmatively produce evidence of standing in the form of affidavits or live

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21 *Id.* Venue would also be proper in the district in which (1) the defendant resided, or (2) the cause of action arose, or (3) any real property involved in the action is situated. *Id.* The second and third options were eventually materially amended. *Compare id.* (original version), *with* 28 U.S.C. § 1391(e)(1) (current version).

22 28 U.S.C. § 1391(e)(1).

23 *Id.* § 1391(b)(3).

24 *See* Reuben H. Donnelley Corp. v. Fed. Trade Comm'n., 580 F.2d 264, 267 (7th Cir. 1978).

25 *About the U.S. Attorneys' Offices*, U.S. DEP'T OF JUST., https://perma.cc/97F5-KHJZ.

26 *See* 28 U.S.C. § 1402.

27 *See* 5 U.S.C. §§ 556(e), 706(2).

witness testimony to avoid dismissal.[28] In other words, in APA suits the burdens of geography are born entirely by plaintiffs and not the government.

In light of this disparity, Congress unambiguously addressed this subject and opted to maximize the convenience of the aggrieved plaintiff seeking to check the greatest power in our justice system—the federal government.[29] In the view of Congress, it is the federal government that needs less statutory convenience because it is virtually omnipresent within our borders.[30] Why should an injured Citizen be forced to travel great distances to Washington, D.C. to make his case, like a medieval peasant forced to travel to the court of his feudal overlord? Why should an injured *State* be forced to travel to Washington, D.C. to challenge the constitutionality of a law being executed in its sovereign territory? While the resources of a State like Texas may be considerable, Texas does not permanently staff an office of attorneys in the middle of Washington, D.C. This problem is even more acute for smaller States like Kentucky. However, the United States *does* do precisely that in almost every division of every judicial district, including in Texas.[31]

Thus, Congress has spoken clearly.[32] Fairness to the parties is at the heart of venue.[33] And Congress has determined that it is fair to sue the United States, its agencies, or its officers anywhere an aggrieved citizen may live within its borders.[34]

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28 *See* Lujan v. Defs. of Wildlife, 504 U.S. 555, 560–61 (1992).

29 *See* 28 U.S.C. § 1402.

30 *About the U.S. Attorneys' Offices*, *supra* note 25.

31 *Id.*

32 *See* 28 U.S.C. § 1402.

33 Leroy v. Great W. United Corp., 443 U.S. 173, 183–84 (1979) ("In most instances, the purpose of statutorily specified venue is to protect the *defendant* against the risk that a plaintiff will select an unfair or inconvenient place of trial."); 14D CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3801 (4th ed. 2013).

34 *See* 28 U.S.C. § 1402.

2.2. Judges in One-Judge Divisions Have Long Enjoined Government Officials

One-judge divisions are as old as this country.[35] Injunctions against the government by judges in one-judge divisions are also nothing new.[36] In fact, one-judge divisions have been a key part of litigation strategy for prominent issues involving redistricting,[37] prison reform,[38] and desegregation.[39] But why are important cases brought to these courts? As I have just explained, litigants may seek to avoid the travel costs of suing in Washington, D.C., or perhaps they seek courts in physical proximity that might be the more receptive to their claims.[40] This strategy is old.[41] The late Judge Alvin Rubin of the Fifth Circuit described it as being "as American as the Constitution."[42] Although in theory all judges applying the law fairly would yield few

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35 Erwin C. Surrency, *Federal District Court Judges and the History of Their Courts*, 40 F.R.D. 139, 150 (1967) ("The Judiciary Act of 1789 provided for a single district court judge in each state—a total of thirteen district judges. When Rhode Island and North Carolina accepted the Constitution, these states were similarly organized, which established the pattern followed after that date. New states, as admitted to the Union, were organized into single districts with a single judge, regardless of the size of the district.").

36 *See, e.g.*, United States v. Tatum Indep. Sch. Dist., 306 F. Supp. 285, 288 (E.D. Tex. 1969) (granting injunction against Texas school district in desegregation case); United States v. Texas, 321 F. Supp. 1043, 1055 (E.D. Tex. 1970) (same); United States v. Texas, 356 F. Supp. 469, 473 (E.D. Tex. 1972) (same); United States v. Texas, 498 F. Supp. 1356, 1373 (E.D. Tex. 1980) (same); United States v. Texas, 523 F. Supp. 703, 708, 740 (E.D. Tex. 1981) (same); Doe v. Plyler, 458 F. Supp. 569, 593 (E.D. Tex. 1978) (granting injunction based on Equal Protection challenge to Texas law and school district policy); United States v. Texas, 506 F. Supp. 405, 408, 441 (E.D. Tex. 1981) (same); United States v. Texas, 628 F. Supp. 304, 323 (E.D. Tex. 1985) (granting injunction against State of Texas based on its teacher education policies).

37 Weaver v. Comm'rs' Ct., No. TY-73-CA-209 (E.D. Tex. March 15, 1974).

38 *See* Ruiz v. Estelle, 503 F. Supp. 1265, 1390 (S.D. Tex. 1980) (Justice, C.J.) (prison reform case) (sitting by designation on the U.S. District Court for the Southern District of Texas, Houston Division).

39 *See* cases cited *supra* note 36.

40 Hanna v. Plumer, 380 U.S. 460, 475 (1965) (Harlan, J., concurring) ("[L]itigants often choose a . . . forum merely . . . to try their cases before a supposedly more favorable judge.").

41 *Id.*

42 McCuin v. Tex. Power & Light Co., 714 F.2d 1255, 1261–62 (5th Cir. 1983).

differences between them, the fact is that judicial adjudication requires judgment and these judgments can differ among judges operating in good faith.[43] Judges are not fungible.[44] In fact, some States even expressly permit the striking of a judge by a party as a matter of right.[45]

Texas especially is no stranger to one-judge divisions.[46] Judge William Wayne Justice presided over the U.S. District Court for the Eastern District of Texas in Tyler after being appointed by President Lyndon B. Johnson in 1968.[47] During his career on the bench spanning several decades, he issued multiple sweeping government injunctions that desegregated Texas schools[48] and implemented state prison reforms.[49] But why did plaintiffs, most notably the United States, always choose to file these grievances against the State of Texas in the Eastern District of Texas? Because they would always be assigned to Judge Justice.[50] He was assigned every case that was filed in four of the six divisions of the Eastern District of Texas: Marshall, Paris, Sherman, and Tyler.[51] Plaintiffs that specifically wanted Judge Justice to hear their case

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43 *Compare* Collins v. Mnuchin, 938 F.3d 553, 562–63 (5th Cir. 2019) (Willett, J.) (holding that the structure of the Federal Housing Finance Authority (FHFA) is unconstitutional), *with* Collins, 938 F.3d at 591 (Haynes, J.) (laying out the remedy for the FHFA's unconstitutionality), Collins, 938 F.3d at 595 (Duncan, J., concurring) (on the appropriate remedy), Collins, 938 F.3d at 597, 608 (Oldham and Ho, JJ., concurring in part, dissenting in part) (on the appropriate remedy), Collins, 938 F.3d at 611 (Haynes, J., dissenting) (on statutory claims), Collins, 938 F.3d at 614 (Higginson, J., dissenting in part) (on the constitutionality of the FHFA), Collins, 938 F.3d at 620 (Costa, J., dissenting in part) (on jurisdiction), *and* Collins, 938 F.3d at 626 (Willett, J., dissenting in part) (on the appropriate remedy).

44 *McCuin*, 714 F.2d. at 1262.

45 ARIZ. R. CIV. P. 42.1; CAL. CIV. PROC. CODE § 170.6 (West 2011).

46 Josh Blackman, *The Judicial Conference Legislates from the Shadow Docket*, REASON: VOLOKH CONSPIRACY (Mar. 13, 2024, 2:01 AM), https://perma.cc/QS93-CKTS (discussing Judge William Wayne Justice).

47 *The Honorable William Wayne Justice 1920-2009*, UNIV. OF TEX., https://perma.cc/7267-R99H.

48 *See* cases cited *supra* note 36.

49 *See, e.g.*, Ruiz v. Estelle, 503 F. Supp. 1265, 1390 (S.D. Tex. 1980) (Justice, C.J.) (prison reform case) (sitting by designation on the U.S. District Court for the Southern District of Texas, Houston Division).

50 *See* FRANK R. KEMERER, WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY 76, 118 (1st ed. 1991).

51 *Id.*

needed only to file in one of those four divisions to ensure that a judge sympathetic to the civil rights movement would hear their case.[52] This is precisely what the United States did to force Texas to desegregate its schools and reform its prisons.[53] And at least until the 21st century, *no one* suggested that this practice undermined public faith in the independence of the federal judiciary.[54] In fact, Judge Justice was at one point asked point-blank by a reporter whether he thought he became "the forum of choice for civil rights forum-shoppers."[55] He replied: "I think the word got out that there was a judge in Tyler who was willing to follow the law."[56]

Judge Justice remains venerated today by civil rights activists and public interest groups. In fact, the University of Texas School of Law (UT Law) named its center for public interest law after him.[57] Judge Justice isn't the only UT Law grad to sit in a one-judge division and issue controversial rulings.[58] The fact that Judge Justice is revered while other UT Law graduates like Judges Matthew Kacsmaryk, Sean Jordan, and Wes Hendrix are reviled tells you that this has less to do with how the cases get assigned than *how* the judges rule in the cases.

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52 *Id.* at 118.

53 *See* cases cited *supra* notes 36, 38.

54 *See, e.g.*, Brief of Professor Stephen I. Vladeck as Amicus Curiae in Support of Petitioners at 7–10, United States v. Texas, 599 U.S. 670 (2023) (No. 22-58) [hereinafter Vladeck Brief] (criticizing one-judge divisions).

55 Lou Dubose, *Justice for the Dispossessed: William Wayne Justice, 1920-2009*, TEX. OBSERVER (Oct. 20, 2009, 12:00 AM), https://perma.cc/7BU9-KCFK.

56 *Id.*

57 *The Honorable William Wayne Justice 1920-2009*, *supra* note 47 (celebrating Judge Justice's decisions that "addressed race discrimination in schools and housing, inhumane treatment in facilities, the dilution of voting rights, inadequate education for immigrant and non-English speaking children, and the unnecessary institutionalization of the developmentally disabled").

58 *See, e.g.*, All. for Hippocratic Med. v. FDA, 668 F. Supp. 3d 507 (N.D. Tex. 2023) (Kacsmaryk, J.) (enjoining FDA Mifepristone regulations); ESI/Emp. Sols., L.P. v. City of Dallas, 450 F. Supp. 3d 700, 709 (E.D. Tex. 2020) (Jordan, J.) (enjoining Dallas sick leave ordinance); Texas v. Becerra, 623 F. Supp. 3d 696 (N.D. Tex. 2022) (Hendrix, J.), *judgment entered*, No. 5:22-CV-185-H, 2023 WL 2467217 (N.D. Tex. Jan. 13, 2023), and *aff'd*, 89 F.4th 529 (5th Cir. 2024), and *appeal dismissed*, No. 22-11037, 2023 WL 2366605 (5th Cir. Jan. 26, 2023), and *aff'd*, 89 F.4th 529 (5th Cir. 2024).

Simply put, the push to demonize one-judge divisions stems from the recent *outcomes* of cases.[59] No other reason explains the disparity. While the University of Texas Tarlton Law Library contains over fifty different obituaries and tributes and over twenty different articles praising Judge Justice contemporaneously,[60] the only treatment reserved for the modern one-judge divisions from UT Law is Twitter (now called "X") vitriol[61] and amicus briefs supporting venue transfers out of one-judge divisions[62] by attention-hungry academic bystanders.

2.3. One-Judge Divisions Are Indistinguishable from One-Party Districts

While the opposition to one-judge divisions isn't based on the divisions themselves but in the outcomes, it also leaves entirely unsettled a related phenomenon of single-party districts. Conservative one-judge divisions may provide a favorable venue for some litigants,[63] but recent history has shown that liberal litigants have entire district courts at their disposal.

The party of the appointing president is an imprecise measure of a judge's jurisprudence for a variety of reasons, but it's helpful in this context. At time of writing there are fourteen district courts where all the active judges were appointed by Democrats.[64] At the same time there are nine

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59 *See infra* Section 3.2.

60 *See, e.g.*, *The William Wayne Justice Papers*, TARLTON L. LIBR. (Feb. 6, 2024, 3:07 PM), https://perma.cc/Q7DP-EZGP; *Concerning William Wayne Justice*, UNIV. OF TEX., https://perma.cc/3G5F-F6U8.

61 Steve Vladeck (@steve_vladeck), TWITTER (Mar. 17, 2024, 9:15 PM), https://perma.cc/RX3Q-PXG2 (criticizing Judge Kacsmaryk for rejecting Professor Vladeck's argument that one-judge divisions should be a factor in venue transfer analysis).

62 *See, e.g.*, Vladeck Brief, *supra* note 54, at 8–10, 21–23 (arguing that suing in a one-judge division should factor into standing analysis).

63 *But see* Texas v. U.S. Dep't of Homeland Sec., No. 6:23-CV-00007, 2024 WL 1021068, at *17 (S.D. Tex. Mar. 8, 2024) (ruling against Texas); Kentucky v. Env't Prot. Agency, No. 3:23-CV-00007-GFVT, 2023 WL 2733383, at *1 (E.D. Ky. Mar. 31, 2023) (ruling against Kentucky); Apter v. U.S. Dep't of Health & Hum. Servs., 644 F. Supp. 3d 361, 372 (S.D. Tex. 2022) (ruling in favor of a Biden-Harris federal agency).

64 The U.S. District Courts for the District of Alaska, Western District of Arkansas, Eastern District of California, Northern District of California, Central District of Illinois,

districts where at least 75% of the active judges were appointed by Democrats.[65] Assuming President Biden is able to fill the two current vacancies, the critically important District Court for the District of Columbia will be 70% appointed by Democratic presidents. When liberals wanted to challenge Republican immigration policies, there was a reason they often filed in the Northern District of California—even though it's 500 miles from the Southern Border.[66]

The issue of abortion drugs provides a stark, apples-to-apples comparison. When conservatives sought to challenge the regulatory regime around the abortion-drug Mifepristone, they brought the suit in Amarillo, Texas, where Judge Kacsmaryk heard it and ruled in their favor.[67] As recently as 2020 on the other hand, the American College of Obstetricians & Gynecologists, alongside the Sistersong Women of Color Reproductive Justice Collective and the American Civil Liberties Union, obtained their own nationwide injunction barring the U.S. Food and Drug Administration's (FDA) requirement of in-person doctor's visits for Mifepristone prescriptions.[68] The plaintiffs obtained their broad relief from the District Court of Maryland. Surely their choice of forum had nothing to do with the fact that eight of their ten active judges were nominated by Democrats.[69]

Southern District of Iowa, Middle District of Louisiana, District of Montana, District of Nevada, District of South Dakota, District of Vermont, Eastern District of Washington, Western District of Washington, and Western District of Wisconsin. *United States District Court,* BALLOTPEDIA (July 14, 2024), https://perma.cc/NUH6-AQLZ; Liz Ruskin, *Trump-Appointed Judge in Alaska Resigns After Just 4 years*, ALASKA PUB. MEDIA (July 5, 2024), https://perma.cc/TS3J-VNF3 (Leaving only a single active judge who was appointed by President Obama, a Democrat).

65 The U.S. District Courts for the District of Connecticut, District of Maryland, District of Massachusetts, Eastern District of Michigan, Western District of Missouri, District of New Jersey, Northern District of New York, Southern District of New York, and District of Oregon. *Current Federal Judges by Appointing President and Circuit*, BALLOTPEDIA (July 14, 2024), https://perma.cc/2V6L-AXH2.

66 *See, e.g.*, Cnty. of Santa Clara v. Trump, 250 F. Supp. 3d 497, 540 (N.D. Cal. 2017) (challenging Republican immigration policies in the Northern District of California).

67 *See* All. for Hippocratic Med. v. FDA (*AHM I*), 668 F. Supp. 3d 507, 507 (N.D. Tex. Apr. 7, 2023).

68 Am. Coll. of Obstetricians & Gynecologists v. FDA, 472 F. Supp. 3d 183, 189 (D. Md. 2020).

69 *District Judges*, U.S. DIST. CT. FOR THE DIST. OF MD., https://perma.cc/VR5V-H6SY.

We hear remarkably few complaints from Democrats and their academic adjuncts when liberal impact litigators choose these favorable forums. Again, this is because the problem isn't the practice of forum selection; it's forum selection that seems to lead to conservative outcomes.

Unless Democrats and the JCUS are willing or able to address the continued presence of one-party districts, their efforts to rein in one-judge divisions ring hollow. While this is unsurprising on the part of Democrats, it's puzzling on the part of the JCUS. Chief Judge Sutton, the chairman of the JCUS's Executive Committee, said that "the story is about national injunctions."[70] But the proposed policy from the JCUS did nothing to change the availability of these injunctions in one-party districts.

We were left with a rule that, though neutral on its face, would predictably gore only one side's ox. As one writer famously observed, it is "the majestic equality of the laws, which forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread."[71] Well, the JCUS policy prevents liberals and conservatives alike from forum shopping in Amarillo.

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70 Blackman, *supra* note 46.

71 ANATOLE FRANCE, THE RED LILY 91 (Winifred Stephens Whale trans., Dodd-Mead & Co. definitive ed. 1924) (1894).

3. CURRENT ATTEMPTS TO REMOVE ONE-JUDGE DIVISIONS UNDERMINE SEPARATION OF POWERS

3.1. Democrats Are Pushing Their Scheme to Randomly Assign Cases in District Courts Through the Wrong Branch of Government

The separation of powers is one of the most basic and fundamental concepts in American politics.[72] It is not merely theoretical. It exists to preserve liberty and, at its core, preserve democratic accountability.[73]

Democrats don't see it this way. They care about outcomes and will use any government tool at their disposal to achieve them. When they can't get their way in the judiciary, for example, they often try to bend the judiciary to do their bidding. Thus, here, as my colleague from Texas, John Cornyn, said of the Senate Majority Leader, he "has long sought to bully courts into changing their case assignments."[74] In 2023, Senator Schumer proposed a random case selection scheme to the U.S. District Court for the Northern District of Texas.[75] That scheme would have put cases seeking declarations or injunctions against the federal government into a district-wide wheel for random assignment, like the wheel that the U.S. District Court for the Northern District of New York uses.[76] But it's not clear that what works in New York will work in Texas.[77] Chief Judge David Godbey was right to

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72 U.S. Citizenship applicants must study the separation of powers. *See Civics (History and Government) Questions for the Naturalization Test*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Jan. 2019), https://perma.cc/5BHA-RKBQ (testing, in questions 13–16, on separation of powers).

73 *See* Mitch McConnell, *Liberal Bureaucrats Threaten Democracy*, WALL ST. J. (June 11, 2024 12:45 PM), https://perma.cc/JV72-9NKJ.

74 Letter from Sen. John Cornyn et al., to Hon. Robert Conrad, Director, Admin. Off. of U.S. Cts. (Mar. 21, 2024) (on file with the *Journal of Law and Civil Governance at Texas A&M*) [hereinafter Cornyn Letter].

75 Schumer Letter, *supra* note 7.

76 *See id.* Cases filed in the U.S. District Court for the Northern District of New York are randomly assigned to judges in all divisions—regardless of where the case is filed. *Case Assignment Plan for the Northern District of New York*, U.S. DIST. CT. FOR THE N. DIST. OF N.Y. (2017), https://perma.cc/XG2E-WY9P.

77 *See infra* Section 3.2.

swiftly reject Senator Schumer's first attempt to bully the Northern District of Texas into submission.[78]

When efforts to bully Chief Judge Godbey failed, Senator Schumer shifted the battlefield to the JCUS, a relatively obscure judicial agency made up of federal judges performing administrative functions.[79] The JCUS is composed of the Chief Justice of the U.S. Supreme Court, the Chief Judge of the Court of International Trade, the chief judges of the circuit courts of appeals, and the chief judge from one district court in each circuit.[80] In March 2024, the JCUS announced a new policy, supposedly binding on all district courts, that looked remarkably like the Democratic proposal presented by Senator Schumer.[81]

Democrats, unsurprisingly, rejoiced. As I noted at the time in a letter led by Senator Cornyn, "Senator Schumer crowed that it will prevent 'MAGA-right plaintiffs' from being able to 'all but guarantee a handpicked MAGA-right judge.'"[82] The Democratic Chairman of the Judiciary Committee, Senator Dick Durbin, agreed, arguing that "America has seen what happens when MAGA Republicans use the courts to advance their unpopular agenda because they cannot prevail in the court of public opinion. Preventing this abuse of the system will help restore the public's trust in our court system and strengthen our democracy."[83]

But the JCUS is in the wrong branch of government to make binding changes on this issue.[84] The statute governing the JCUS allows the agency to

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78 Letter from Hon. David C. Godbey, C.J., U.S. Dist. Ct. for the N. Dist. of Tex., to Sen. Charles E. Schumer, Majority Leader, U.S. Senate (May 16, 2023) (on file with the *Journal of Law and Civil Governance at Texas A&M*) [hereinafter Godbey Letter].

79 Cornyn Letter, *supra* note 74 ("When the Northern District of Texas did not cave to Senator Schumer's demands, Senator Schumer and eighteen of his Democrat colleagues appealed to the Judicial Conference to implement their preferred scheme of case assignments.").

80 *About the Judicial Conference*, U.S. CTS., https://perma.cc/8Q8C-4G2Z.

81 *Conference Acts to Promote Random Case Assignment*, U.S. CTS., https://perma.cc/BK34-UVLT ("The amended policy applies to cases involving state or federal laws, rules, regulations, policies, or executive branch orders.").

82 Cornyn Letter, *supra* note 74.

83 *Id.*

84 This is true regardless of whether one considers the JCUS as part of the judicial branch or the "fourth branch of government" known as the administrative state. *See* Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth*

"submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business."[85] Notably, the power to make suggestions and recommendations does not include the power to make binding law.[86]

Only Congress and the Supreme Court have the power to curb nationwide injunctions and declarations.[87] And only Congress can set binding rules for the assignment of cases in lower courts.[88] Congress's rule is firmly in place in 28 U.S.C. § 137, which provides:

> The business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court. *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. If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose the judicial council of the circuit shall make the necessary orders.[89]

There is simply no authority under which the JCUS can bind district courts in anything, as I made clear at the time along with Senators Cornyn

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Branch, 84 COLUM. L. REV. 573, 582 (1984) (referring to agencies as the "fourth branch of government"). The U.S. Constitution confers lawmaking authority on Congress—not the courts or agencies. Obergefell v. Hodges, 576 U.S. 644, 686 (2015) (Roberts, C.J., dissenting) ("But this Court is not a legislature. . . . Under the Constitution, judges have power to say what the law is, not what it should be."); Gundy v. United States, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting) (arguing that U.S. Constitution does not give Congress power to delegate legislative authority to agencies).

85 28 U.S.C. § 331.

86 *Id.*

87 *Id.* (providing for congressional power); *see, e.g.*, Dep't of Homeland Sec. v. New York, 140 S.Ct. 599, 601 (2020) (Gorsuch, J., concurring) (noting that U.S. Supreme Court has power to "take up some of the underlying equitable and constitutional questions raised by the rise of nationwide injunctions").

88 *See* 28 U.S.C. § 137.

89 *Id.* (emphasis added).

and Tillis.[90] This was, and is, a question for Congress—not for an unelected, unaccountable judicial advisory body like the JCUS—to decide.[91] It's unsurprising that Democrats would seek to outsource this legislation to a judicial administrative state given their broader ideological commitments.[92] But judges should know better, and the JCUS is part of the wrong branch of government to legislate.[93] Luckily they seemed to recognize it, if belatedly.[94]

The Biden-Harris Department of Justice (DOJ) and various liberal activists (insofar as there's a difference) have also argued that the JCUS's Committee on Civil Rules could force random assignment of cases across a division.[95] DOJ based its suggestion on the existence of one-judge divisions,

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90 Letter from Sen. Mitch McConnell, Minority Leader, U.S. Senate, et al., to Hon. David C. Godbey, C.J., U.S. Dist. Ct. for the N. Dist. of Tex. (May 16, 2023) (on file with the *Journal of Law and Civil Governance at Texas A&M*).

91 *Compare* 28 U.S.C. § 331 (governing the JCUS), *with* 28 U.S.C. § 137 (governing case assignment). Although some have suggested that the JCUS could try to bind district courts under the Rules Enabling Act, 28 U.S.C. §§ 2071–2077, this strategy would fail under 28 U.S.C. § 137. *See* Mattathias Schwartz, *An Effort to End 'Judge-Shopping' Turns Into a 'Political Firestorm,'* N.Y. TIMES (Apr. 5, 2024), https://perma.cc/7QAE-6XCB. The Rules Enabling Act does not give the U.S. Supreme Court the authority to set rules regarding the business of the district courts. *See* 28 U.S.C. §§ 2071(a), 2072. In any event, the most specific law is where Congress tells the district courts to adopt rules for their business. 28 U.S.C. § 137. Using an inference the Rules Enabling Act forbids to somehow then overrule another law exactly on point would be quite absurd.

92 *See* McConnell, *supra* note 73 ("The Constitution vests each branch of the federal government with an exclusive power, responsive to the people in elections. In each branch, liberals seek to remove that power from democratic accountability and vest it in unelected bureaucrats. This practice might come from a good-faith trust in 'experts,' or a sincere belief that sound policy is too valuable to risk in elections. But at its core, it is a rejection of democratic accountability in favor of the administrative state.").

93 28 U.S.C. § 331.

94 *See* Memorandum from the Jud. Conf. of the U.S., Comm. on Ct. Admin. and Case Mgmt. (Mar. 15, 2024) (on file with the *Journal of Law and Civil Governance at Texas A&M*).

95 Letter from Brian Boynton, Principal Deputy Assistant Att'y Gen., U.S. Dep't of Just., to Hon. Robin Rosenbaum, Chair, Advisory Comm. on Civ. Rules (Dec. 21, 2023), https://perma.cc/D74W-R2CD [hereinafter Boynton Letter]; Letter from Amanda Shanor, Assistant Professor, Wharton Sch. of the Univ. of Pa., to H. Thomas Byron III,

stating, "While single-judge divisions are not new, concerns about single-judge divisions and forum shopping have increased in recent years, particularly with respect to litigation against the federal government seeking nationwide relief, which can affect the rights and obligations of people across the country."[96] It went on to cite favorably the bullying tactics of Senate Democrats and the agitation of a left-wing law professor formerly in Texas who is active on Twitter.[97]

DOJ proposed that the JCUS adopt a rule on random assignment under its Rules Enabling Act authority.[98] It argues that "[t]he division of labor among judges in any district is procedural by any reasonable definition."[99] It goes on to assert that the Rules Enabling Act does not conflict with Section 137 because Section 137 doesn't abrogate the Rules Enabling Act and is best seen as a "default" against which rules can be promulgated.[100] DOJ spends a fair amount of time gussying up this flawed analysis, going so far as to argue that Section 2072(b) of the Rules Enabling Act allows the Supreme Court to abrogate any law that gets in the way of proper procedure.[101]

Nonsense. To begin with, DOJ's argument is based on a category error. The random assignment of cases is not a question of civil procedure but court administration. At the heart of court administration in the lower courts is the power of *Congress* "[t]o constitute Tribunals inferior to the Supreme Court."[102] Congress has spoken on the question of how district courts shall administer the division of their cases through Section 137. It is left up to the district courts how they will operationalize case division "as provided by the rules *and orders* of the court."[103] DOJ concedes that the presence of "orders" in the statute—as well as the use of standing orders by many courts to effectuate these policies—seems to undercut the argument that this is a rules question, retreating therefore to "the force of the structural point" that local

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Sec'y, Comm. on Rules of Prac. & Proc., Admin. Off. of the U.S. Cts. (Sept. 1, 2023), https://perma.cc/K25V-ZJA6.

96 Boynton Letter, *supra* note 95, at 1–2.

97 *See id.* at 2.

98 *See* 28 U.S.C. § 2072(a).

99 *See* Boynton Letter, *supra* note 95, at 3.

100 *See id.* at 4.

101 *See id.* at 4–5.

102 U.S. Const. art. I, sec. 8, cl. 9.

103 28 U.S.C. § 137 (emphasis added).

rules governing case assignment must comply with the Federal Rules.[104] What DOJ calls a "structural point" looks more like circular reasoning.[105] The Rules of Civil Procedure can no more dictate case-assignment practices than they can dictate where district-judges sit; it is an administrative prerogative of Congress.

Simple statutory construction shows why DOJ is wrong. Section 137 has its roots in the Judicial Code of 1911.[106] Two decades later, Congress enacted the Rules Enabling Act in 1934.[107] Against that backdrop, Congress then enacted Section 137 in 1948, directing that cases "*shall* be divided" among the judges.[108] That's it. Knowing full well that the Rules Enabling Act was out there, Congress gave a directive *to the district courts*, over which it has constitutive authority, as to how they *must* administer their dockets. DOJ responds, "There is no hint that Congress intended to amend the 1911 provision to foreclose rulemaking under the Rules Enabling Act. Had Congress intended that result, after adoption of the Rules Enabling Act, it would have left some evidence in the statute's text or legislative history,"[109] but this is both wrong and irrelevant. The statute's text is evidence itself: Congress mandated how the courts will manage their dockets. And as to legislative history, we all know that's the last refuge of a textual scoundrel.

Indeed, recent years have shown a commendable trend in the Supreme Court not to assume that Congress delegated untrammeled legislative authority to other branches of government. Usually this is in the context of the executive branch, but it applies to the judiciary, too. Whether it's the emergence of the Major Question Doctrine[110] or the overturning of *Chevron* deference,[111] the assumption can't be that Congress gave courts—or the JCUS—a roving commission to rewrite Section 137's crystal-clear directive in the Rules Enabling Act. No one ever elected JCUS committee chairmen to

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104 *See* Boynton Letter, *supra* note 95, at 4.

105 *See id.*

106 Pub. L. No. 61-475, § 23, 36 Stat. 1087, 1090.

107 28 U.S.C. §§ 2071–2077.

108 28 U.S.C. § 137 (emphasis added).

109 *See* Boynton Letter, *supra* note 95, at 5.

110 *See, e.g.*, Biden v. Nebraska, 143 S. Ct. 2355, 2376 (2023) (Barrett, J., concurring) (addressing the major questions doctrine).

111 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2270 (2024).

set legislative policy, to say nothing of the Rules Committee's law-professor retainers.

Judge Leventhal of the D.C. Circuit famously said that using legislative history was "looking over a crowd and picking out your friends."[112] If the JCUS relies on shoddy legislative history to justify a sweeping power grab on one-judge divisions, it will be doing just that—and those friends will be the Biden-Harris DOJ, Senate Democrats, the Brennan Center, the American Bar Association, and a left-wing professor on Twitter.

3.2. Article III Judges in Small Courthouses Are Just as Senate-Confirmed as Judges in Large Courthouses

The reason for the moral panic over one-judge divisions is clear: Democrats don't like it when courts reach conservative results. This is why one-judge divisions come in for special scrutiny over their injunctions but one-party divisions do not.[113] The only argument against this simple fact is that there is supposedly something untoward about being able to pick a preferred judge rather than a preferred outcome. Under this approach, the theory goes that one-judge divisions are bad because they allow litigants "to hand-pick individual district judges seen as particularly sympathetic to their claims,"[114] at least when we're not dealing with civil rights.[115]

As noted above,[116] Democrats' lack of complaints about, say, the Northern District of California, is telling.[117] Democratic machinations would do nothing to slow injunctions from California courts, only potentially Texas courts.[118] Litigants have a 100% chance of landing a Democratic-appointed

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112 Exxon Mobil Corp. v. Allapattah Servs., Inc., 545 U.S. 546, 568 (2005) (quoting Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 IOWA L. REV. 195, 214 (1983)).

113 *See* Blackman, *supra* note 46 ("The message is clear: Judge Kacsmaryk cannot be trusted to issue nationwide injunctions but every likeminded judge on the Northern District of California-San Francisco Division can be trusted."); Cornyn Letter, *supra* note 74.

114 Schumer Letter, *supra* note 7.

115 *See supra* Section 2.2.

116 *See supra* Section 2.3.

117 Blackman, *supra* note 46.

118 Schumer Letter, *supra* note 7.

judge in the Northern District of California.[119] Every judge there is likely to enjoin actions taken by Republican presidents.[120] In fact, I'm almost at a loss to think of the last time that the Northern District of California ruled *for* a Republican president.[121] Whereas Republican-appointed judges in one-judge divisions do rule against Republican priorities.[122]

Yet, these same critics are silent about California.[123] Why? I propose that it's because they like the results coming out of California.[124] Democrats are not trying to fix a perceived problem in good faith here.[125] Rather, they are engaged in trying to rig the judicial system in favor of progressive outcomes.[126]

Congress should never implement a plan that would handicap the courts' ability to review executive action in order to benefit one political party.[127] If Democrats have their way, it would be as if we passed a law that

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119 *See* Josh Blackman, *Forum Shopping in California*, REASON: VOLOKH CONSPIRACY (Feb. 5, 2023, 8:44 PM), https://perma.cc/A23B-ZUMU; *see also United States District Court for the Northern District of California*, BALLOTPEDIA, https://perma.cc/78C8-YPBM (showing that democratic presidents nominated 13 judges to U.S. District Court for the Northern District of California and that republican presidents nominated zero).

120 *See* Blackman, *supra* note 46; *see also* Blackman, *supra* note 119.

121 *But see* California v. Bureau of Land Mgmt., 612 F.Supp.3d 925, 931, 933 (N.D. Cal. 2020) (upholding an Obama-era fracking rule changed and defended by the Trump Administration).

122 *See, e.g.*, Texas v. U.S. Dep't of Homeland Sec., 2024 WL 1021068, at *17 (S.D. Tex. Mar. 8, 2024) (Judge Tipton dismissing Texas' suit against the Biden-Harris parole program for lack of standing); Dayton Area Chamber of Comm. v. Becerra, 2023 WL 6378423, at *14 (S.D. Ohio, Sept. 29, 2023) (Judge Newman denying a preliminary injunction against forced price negotiation for pharmaceuticals).

123 *See* Blackman, *supra* note 46.

124 *See id.*

125 *See* Cornyn Letter, *supra* note 74.

126 *See id.*

127 *See* David H. Moore, *Taking Cues from Congress: Judicial Review, Congressional Authorization, and the Expansion of Presidential Power*, 90 NOTRE DAME L. REV. 1019, 1028 (2015) (explaining importance of using system of checks and balances to defend against Presidential encroachment).

only bans nationwide injunctions against Democrat presidents. "Nationwide injunctions for me, but not for thee."[128]

Such a plan would be anathema to checks and balances.[129] When the Legislative and Executive Branches act outside of their constitutional authority, the Judicial Branch has the power to review their actions.[130] Because the federal judiciary is a tiered system, such actions often go through several levels of review before a final decision is made.[131] When the system is altered to ensure that federal courts will reliably review only Republican actions, the concept of checks and balances becomes nothing more than spilled ink.[132]

What's more, the Democratic posture here suggests that only judges in places like San Francisco are qualified to opine on the Constitution.[133] Says who? We in the Senate vet judicial nominees with the same rigor regardless of what courthouse they will sit in.[134] And judicial nominees take the same oath to uphold the same Constitution regardless of what courthouse they sit in.[135] Nevertheless, Democratic plans would disadvantage judges in more rural areas as well as the litigants who would be forced to travel or present arguments to a traveling judge.[136]

Senator Schumer points to the Northern District of New York as evidence that a random case wheel is a viable solution.[137] But the Northern District of New York is not comparable to the Northern District of Texas.[138]

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128 *See* Sen. Mitch McConnell, *Democrats Continue Partisan Attacks on Federal Judiciary*, THE NEWSROOM (Mar. 14, 2024), https://perma.cc/Y53J-9FPQ.

129 THE FEDERALIST NO. 51 (James Madison) (Jacob E. Cooke ed., 1961); *see also* 19 TEX. ADMIN. CODE § 113.16(b)(15) (showing that Texas teaches concept of checks and balances to middle schoolers).

130 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177–79 (1803).

131 *See infra* Part 4 (explaining tiered federal court system).

132 *See* Cornyn Letter, *supra* note 74.

133 *See* Schumer Letter, *supra* note 7 (seeking to block perceived "partisan" injunctions in Texas but not in California).

134 *Supreme Court Evaluation Process,* AM. BAR ASS'N, https://perma.cc/34AE-B4SJ (explaining judicial vetting process).

135 *Text of the Oaths of Office for Supreme Court Justices*, U.S. SUP. CT., https://perma.cc/B7YS-D5BE.

136 *See* Cornyn Letter, *supra* note 74.

137 *See* sources cited *supra* note 76.

138 *See* Godbey Letter, *supra* note 78; *New York*, BRITANNICA (Apr. 9, 2024), https://perma.cc/9WBS-CVHF (noting that state of New York is 54,555 square

For starters, the Northern District of Texas is approximately 75% larger than the *entire state of New York*.[139] As Chief Judge Godbey notes, the Northern District of Texas "stretches more than 400 miles across, both North to South and East to West."[140] It is larger than forty states.[141]

And also unlike the Northern District of New York—which does not have a single city with over 150,000 residents[142]—the Northern District of Texas includes eight such cities: Dallas, Fort Worth, Arlington, Lubbock, Irving, Garland, Grand Prairie, and Amarillo.[143] The Northern District of Texas also includes numerous "sparsely populated, rural counties in [its] North, West, and South reaches."[144] Its expansive reach and diverse range of dense urban centers and sparsely populated rural counties warrant consideration when assigning time-sensitive cases.[145]

A random case assignment plan would have judges regularly spend two days round-trip commuting for short-notice hearings.[146] Judges

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miles); *Northern District of Texas*, U.S. ATT'Y'S OFF., https://perma.cc/5VRY-S8ND (noting that Northern District of Texas is approximately 96,000 square miles—75% larger than entire state of New York).

139 *See* Godbey Letter, *supra* note 78.

140 *Id.*

141 *Compare id.* (stating that the Northern District of Texas is 96,000 square miles), *with* Olivia Munson, *What Is the Biggest State in the US? The States from Largest to Smallest by Land Area*, USA TODAY (Dec. 9, 2022, 9:00 AM), https://perma.cc/R4AP-6UM8 (showing that forty states are smaller than the Northern District of Texas).

142 The U.S. District Court for the Northern District of New York has five divisions: Syracuse, Albany, Binghamton, Utica, and Plattsburgh. *Court/District History*, U.S. DIST. CT. FOR THE N. DIST. OF N.Y., https://perma.cc/53Q3-93M4. Syracuse—the biggest city in the District—has fewer than 150,000 people. *New York Cities by Population*, N.Y. DEMOGRAPHICS, https://perma.cc/P788-MUEX.

143 The Northern District of Texas comprises 100 of the 254 counties in Texas. *Court Information*, U.S. DIST. CT. FOR THE N. DIST. OF TEX., https://perma.cc/229E-YV55. Eight of the cities in the Northern District of Texas rank in the top twenty most populous Texas cities: Dallas, Fort Worth, Arlington, Lubbock, Garland, Irving, Amarillo, and Grand Prairie. *Texas Cities by Population (2024)*, WORLD POPULATION REV., https://perma.cc/K26F-ZSPY.

144 Godbey Letter, *supra* note 78.

145 *See* sources cited *note* 143.

146 *Court Information*, *supra* note 143; *see also Even for the Constitution, Everything is Bigger in Texas*, JOSH BLACKMAN (Oct. 19, 2024), https://perma.cc/DU7Y-LYK3 (noting that U.S. Supreme Court held that amount of driving time needed to cross Texas was undue burden on constitutional right).

Kacsmaryk, Hendrix, and Cummings, in particular, would have to travel from Amarillo and Lubbock to Fort Worth and Dallas to conduct most of their hearings on declarations and injunctions.[147] Those drives are not short.[148] The Supreme Court has even held that the amount of driving time needed to cross part of Texas creates an undue burden for certain litigants.[149] Of course, practicality and efficiency have nothing to do with it; it's about judges' judicial philosophies.[150]

Requiring such extensive commute times would only hurt the judicial economy and inhibit Texans' ability to seek justice efficiently in a District that arguably needs more federal judges.[151] And again, every federal judge in the Northern District of Texas went through the same nomination and vetting process as every federal judge in California.[152] Forcing rural, Texas judges to spend their precious work time commuting is a preposterous solution to a contrived problem.[153]

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147 *Judges*, U.S. DIST. CT. FOR THE N. DIST. OF TEX., https://perma.cc/H5TS-UXDJ.

148 Driving Directions from Amarillo to Dallas, GOOGLE MAPS, https://perma.cc/E5C8-4QZM (follow "Directions" hyperlink; then search starting point field for "Amarillo, TX" and search destination field for "Dallas, TX") (showing that Amarillo is 5.5 hours from Dallas).

149 *See* Josh Blackman, *supra* note 1.

150 *See* Schumer Letter, *supra* note 7.

151 The Northern District already has a busy docket. For example, the Fort Worth Division—based in a city home to almost one million people—has the same number of federal judges as much smaller divisions like Del Rio, Tyler, McAllen, Brownsville, and Beaumont, and fewer judges than Laredo. *See Judges' Directory & Biographies*, U.S. DIST. CT. FOR THE W. DIST. OF TEX., https://perma.cc/9RNS-L98R; *Eastern District Judges*, U.S. DIST. CT. FOR THE E. DIST. OF TEX., https://perma.cc/ZD9S-WQY2; *McAllen Division*, U.S. DIST. & BANKR. CT. FOR THE S. DIST. OF TEX., https://perma.cc/RD8M-7F6P; *Brownsville Division*, U.S. DIST. & BANKR. CT. FOR THE S. DIST. OF TEX., https://perma.cc/V7HC-QD7U; *Laredo Division*, U.S. DIST. CT. & BANKR. CT. S. DIST. OF TEX., https://perma.cc/2E4F-5NXL.

152 *Supreme Court Evaluation Process*, *supra* note 134.

153 Cornyn Letter, *supra* note 74. Chief Judge Alia Moses of the Western District of Texas has also raised concerns about the practicality of random case assignment. *See* Tobi Raji, *U.S. Courts Clarify Policy Limiting 'Judge Shopping*,*'* WASH. POST (Mar. 16, 2024), https://perma.cc/HJN2-YYZ4.

4. RANDOM CASE ASSIGNMENTS WILL NOT FIX THE ROOT PROBLEM

The root problem here is not that parties know which judge they will draw in Texas injunction and declaration cases.[154] Nor is the root problem that parties know what the outcome will be in California injunction and declaration cases.[155] Rather, the root problem is that any litigants can go to a single judge anywhere and invalidate a rule or a law always and everywhere.[156]

Accordingly, even if Democrats' random case assignment scheme had gone through the proper channel—Congress—it would not address the root problem for three reasons. First, lawyers could easily work around the Schumer scheme to litigate in their forum of choice.[157] Second, if they fail on workarounds, then there will be more—not fewer—injunctions. And third, our robust system of tiered judicial review already enables appellate courts to overturn erroneous district court decisions in an efficient manner.[158]

As a preliminary matter, the random assignment of these types of cases would likely soon be circumvented. Lawyers are smart and have an almost universal obligation to zealously pursue their clients' legitimate interests.[159] It won't take these intelligent lawyers long to find ways to ensure that they have their forum of choice. As long as the possibility of easy, universal injunctions exists, plaintiffs will find a way to get them.[160]

For example, as Professor Josh Blackman recently pointed out, these reforms could be circumvented in a simple three-step process.[161] First, file a complaint that does not seek a nationwide injunction against the

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154 *See supra* Section 3.1.

155 *Id.*

156 *Id.*

157 *See* text accompanying *infra* notes 159–69.

158 *See* text accompanying *infra* notes 171–84.

159 *See* MODEL RULES OF PRO. CONDUCT Preamble (AM. BAR ASS'N 2024).

160 *See* Sen. Mitch McConnell, *McConnell on SHOP Act: Comprehensive, Non-Partisan, Will Strengthen Confidence In Our Federal Judiciary*, REPUBLICAN LEADER (Apr. 11, 2024), https://perma.cc/9T6F-YDT2; Sen. Mitch McConnell, *McConnell Remarks on Restoring Trust in the Judiciary*, REPUBLICAN LEADER (Mar. 20, 2024), https://perma.cc/EA27-6UND.

161 *See* Blackman, *supra* note 46.

government.[162] Second, wait for the case to be assigned to your jurist of choice.[163] Then, amend the complaint as a matter of course within 21 days, seeking a declaration or injunction against the government.[164] This is just one of many workarounds these lawyers will soon find.

Another example of an immediately available workaround is simply finding multiple plaintiffs. Many of the policies that have been subject to nationwide injunctions are those that naturally affect many people in the nation.[165] Under these conditions, it is usually not hard to find multiple plaintiffs who have standing to bring an action against the federal government.[166] Thus, again, the random case assignment scheme can be easily circumvented. Rather than consolidating their plaintiffs into a single action, lawyers would instead file a series of nearly identical separate civil actions in various districts and divisions until they are randomly assigned the jurist of their choice.[167] This can be accomplished with a relatively low $405 filing fee.[168] While this practice is significantly frowned upon inside an individual district—to the extent that I have proposed legislation to penalize the practice severely[169]—I don't see how you could stop it across multiple districts.

But let's assume these workarounds fail. What then? Litigants will seek more, not fewer, injunctions. The cases that grab the national attention often involve more than one plaintiff. And they often involve multiple states as plaintiffs. If a group of 26 plaintiffs was unsure if they would achieve their objective in district court, a natural response would be to break up into

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162 *Id.*

163 *Id.*

164 *Id.*

165 *See* JOANNA LAMPE, CONG. RSCH. SERV., LSB10664, NATIONWIDE INJUNCTIONS: RECENT LEGAL DEVELOPMENTS 2–3 (2021).

166 *See, e.g.,* Trump v. Hawaii, 585 U.S. 667, 699 (2018) (holding that anyone who had relatives excluded under policy had Article III standing to sue federal government).

167 *See* Jeff Collins, *California Realtor Groups Hit with Copycat Commission Rates Lawsuit*, ORANGE CNTY. REG. (Dec. 15, 2023, 11:55 AM), https://perma.cc/Z6CU-MM98 (showing similar litigation strategy of filling copycat cases in various districts when judgment only applies to parties before court).

168 *Fee & Payment Schedule*, U.S. DIST. CT. FOR THE N. DIST. OF TEX., https://perma.cc/M7PG-PQB7.

169 *See* Stop Helping Outcome Preferences (SHOP) Act, S. 4095, 118th Cong. § 3(a) (2024).

smaller coalitions as a hedge. If the goal is fewer injunctions, this proposal could ironically lead to more.

But all of this is beside the point when our system already has a mechanism to mitigate these problems. It appears that Democrats would have us believe that district judges are kings, answerable to no one else, decreeing final decisions reviewable by none.[170] But that is simply not the case. Decisions on declarations and injunctions are quickly appealed and quickly reviewed.[171]

Let's take the recent high-profile Mifepristone case as an example, as it came from one of the divisions that Senator Schumer cited in his letter.[172] In that case, a group of physicians challenged the Food and Drug Administration's (FDA) approval of Mifepristone, a drug that causes chemical abortions.[173] The Plaintiffs filed their motion for preliminary injunction on November 18, 2022, asking the court to order the FDA to "withdraw or suspend the approvals of chemical abortion drugs, and remove them from the list of approved drugs."[174] The court granted the motion in part, refusing to provide an injunction and instead granting vacatur—a remedy that is generally viewed as less drastic and simply restores the status quo prior to the unlawful agency action.[175] As a result, the court stayed "the effective date of FDA's September 28, 2000, approval of Mifepristone and all subsequent challenged actions related to that approval" on April 7, 2023.[176]

The Fifth Circuit Court of Appeals issued an opinion reviewing the district court's order on April 12, 2023—only five days later.[177] That's right, Democrats want to force their random case-assignment regime onto district

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170 *See* Schumer Letter, *supra* note 7.

171 *See, e.g.*, All. for Hippocratic Med. v. FDA (*AHM I*), 668 F. Supp. 3d 507, 507 (N.D. Tex. 2023).

172 *See* Schumer Letter, *supra* note 7.

173 *See AHM I*, 668 F. Supp. 3d at 520–21.

174 *See id.* at 559 (quoting Plaintiffs' Brief in Support of Their Motion for Preliminary Injunction at 7, *AHM I*, 668 F. Supp. 3d 507 (2:22-CV-223-Z)).

175 *See id.*

176 Of note, if these judges were blindly granting nationwide injunctions based only on politics instead of the law, it is odd that the court would have taken five months to carefully consider this motion. *See id.* at 520.

177 *See* All. for Hippocratic Med. v. FDA (*AHM II*), No. 23-10362, 2023 WL 2913725, at *1 (5th Cir. Apr. 12, 2023).

courts even though these cases can be reviewed by an independent panel of three judges *within five days*.[178] Then, that same case was reviewed again by three different judges on the Fifth Circuit.[179] This panel issued a decision on August 16, 2023.[180] In just over four months, a total of six judges checked the work of this district judge. And these appellate judges found that the district judge got it mostly right, affirming the vacatur in part in both cases.[181]

And still, the process doesn't end there. The Supreme Court granted the petition for writ of certiorari on December 12, 2023,[182] and dismissed the case for lack of standing at the end of its term.[183] So nine additional qualified jurists checked the work of this district judge.[184]

This ham-fisted policy reform would be both unnecessary and ineffective at reducing the frequency of nationwide injunctions. Our judicial system has a robust appellate review process.[185] So, even if a district court judge gets it wrong, it will not be long until scores of lawyers and judges check his work.[186]

As I have said before, there are problems with universal injunctions. But the solution is not to change who can issue them but to change whether they can be issued. Again, I have a bill to do just that.[187] But this is also an issue that the Supreme Court could fix should it choose to if presented with an appropriate vehicle.[188]

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178 *Compare AHM I*, 668 F. Supp. 3d at 599 (granting motion to vacate on April 7, 2023), *with AHM II*, 2023 WL 2913725, at *1 (modifying trial court's order dated April 12, 2023).

179 *See* All. for Hippocratic Med. v. FDA (*AHM III*), 78 F.4th 210, 210 (5th Cir. 2023).

180 *See id.*

181 *See id.* at 256; *see also AHM II*, 2023 WL 2913725, at *1.

182 *See* FDA v. All. for Hippocratic Med. (*AHM IV*), 144 S. Ct. 537, 537 (2023) (mem.).

183 *See* FDA v. All. for Hippocratic Med. (*AHM V*), 602 U.S. 367, 374 (2024).

184 *See id.*

185 *See, e.g.*, cases cited *supra* notes 176–84 (showing how efficiently the Mifepristone case passed through several panels of appellate review).

186 *Id.*

187 *See* sources cited *supra* notes 160, 169.

188 *See* sources cited *supra* note 87.

5. CONCLUSION

The activity of Democrats and the JCUS has been a serious departure from the norm. It is a threat to both the independence of the judiciary and our system of checks and balances. One-judge divisions are nothing new.[189] They have served and continue to serve an important role in ensuring access to the federal courts for those in rural parts of the country.

Moreover, as I have demonstrated, one-judge divisions enjoining government action is not a new phenomenon.[190] This new push to improperly meddle with case assignments demonstrates a fundamental lack of respect for these Senate-confirmed, rural, Article III judges.[191] It also undermines any good faith attempts to reform problems within the judiciary. Finally, this pressure campaign simply will not fix the problems that Democrats claim to want to address.[192] I hope my colleagues and our friends in the judicial bureaucracy will come to their senses and start to work within their constitutional roles to improve our system instead of breaking down the very norms that have made America so special.

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189 *See supra* Section 2.1.

190 *See supra* Section 2.2.

191 *See supra* Section 3.2.

192 *See supra* Part 4.