FORUM SHOPPING, FORUM SHAMING, AND THE FEAR OF BEING BOOED

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Thank you, Judge Counts, for the kind introduction. I'm honored to follow in the footsteps of your previous keynote speakers—including Judge Counts and Judge Junell—past and present members of my court, like Chief Judge Richman and Judge Prado—as well as distinguished judges from our state court system.

Gatherings like this recognize the modest but important role that the judiciary plays in resolving our Nation's disputes.

Here in Midland, a single federal district judge has the solemn duty to resolve all of the disputes that arise under Article III of the Constitution.[1] Judge Counts has spent his entire life serving his country and his community—the United States Army, the Texas Army National Guard, a state and federal prosecutor, and fifteen years on the federal bench.[2]

The people of Midland can take comfort that their rights are protected by such a devoted and publicly spirited member of their community.

1.

But lately, some critics of the judiciary have chosen to bemoan, rather than celebrate, the fact that many Americans across the country are served by a single, local federal district judge.

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[*] Circuit Judge, U.S. Court of Appeals for the Fifth Circuit. This article is based on remarks delivered before the Midland County Bar Association on April 15, 2024. An abbreviated version of these remarks were delivered before the Northern District of Texas Bench Bar Conference of the Federal Bar Association on April 19, 2024.

[1] *See, e.g.*, Amended Order Assigning the Business of the Court (W.D. Tex. May 31, 2024), https://perma.cc/ZK6J-QEPC.

[2] *Counts, Walter David III*, FED. JUD. CTR., https://perma.cc/395B-WSFG.

Single-judge divisions have recently come under sharp attack from certain political quarters.[3] And now, the Judicial Conference of the United States has decided to credit these political attacks.

On March 12, the Judicial Conference announced that certain litigants who want to prevent a federal or state law or policy from taking effect should be forced to litigate before a judge in a randomly-chosen division—no matter how large the judicial district, and no matter how far away the randomly-chosen judge.[4]

The Judicial Conference isn't shy about why they're doing this. They're targeting single-judge divisions. Its announcement repeatedly mentions "single-judge divisions" as the purported evil they're trying to combat.[5]

Moreover, the Judicial Conference briefed a group of reporters on this new policy, and the extensive press coverage that resulted from that presentation makes clear that their focus is indeed single-judge divisions—especially those here in Texas.[6]

Consider how this proposal would operate in practice. Whether this new policy will affect you, and your ability to protect your constitutional rights, depends dramatically on where you live.

If you live in one of our biggest cities—in Dallas or Houston—nothing should change: You'll likely still appear before a judge who lives in your community.

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3 *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) [hereinafter Schumer Letter] (on file with the *Journal of Law & Civil Governance at Texas A&M*).

4 *Conference Acts to Promote Random Case Assignment*, U.S. CTS. (Mar. 12, 2024), https://perma.cc/W4WA-BXLY.

5 *Id.*

6 *See, e.g.*, Mattathias Schwartz, *New Federal Judiciary Rule Will Limit 'Forum Shopping' by Plaintiffs*, N.Y. TIMES (Mar. 12, 2024), https://perma.cc/L7Y8-SB27; Josh Gerstein, *Federal Courts Move Against 'Judge-Shopping,'* POLITICO (Mar. 12, 2024, 4:33 PM), https://perma.cc/BVR3-X5QY; Jacqueline Thomsen & Lydia Wheeler, *Federal Courts Aim to Curb Judge Shopping with New Policy*, BLOOMBERG (Mar. 12, 2024, 4:43 PM), https://perma.cc/HGC7-3B6S; Michael Macagnone, *Federal Courts Seek to Stop 'Judge Shopping' with New Rule*, ROLL CALL (Mar. 12, 2024, 4:17 PM), https://perma.cc/VZZ7-EES9; Avalon Zoppo, *'Really Good Idea': Judiciary Adopts Policy to Limit Judge Shopping*, NAT'L L.J. (Mar. 12, 2024, 3:31 PM), https://perma.cc/C5LF-9UQ6.

But if you live somewhere else, you'll likely be forced to appear before a judge who lives far away. In big states like Texas, we're talking about hundreds of miles away.

Just look at how this proposal would affect people in Midland. There are 17 federal district judges across the Western District of Texas.[7] The majority of those judges live elsewhere, in places like Austin, San Antonio, and El Paso[8]—hundreds of miles away from Midland.

So if the Judicial Conference proposal is adopted, a citizen of Midland who seeks relief will likely be forced to litigate before a judge who lives hundreds of miles away.

The same is true with the single-judge division in Amarillo—the division that has received the sharpest political criticism. Under this proposal, citizens in the Panhandle will more likely than not be forced to litigate their rights before a federal judge 400 miles away in Dallas.[9]

2.

We shouldn't impose greater burdens or different rules on Americans, just because they live outside our Nation's largest urban centers. The Constitution protects every citizen—not just those who live in big cities.

So I'm not surprised that the Judicial Conference proposal was immediately met with a firestorm of opposition—not just from federal judges, but also from leading members of the United States Senate,[10] as well as prominent members of the legal academy.[11]

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7 *Judges' Directory & Biographies*, U.S. DIS. CT. W. DIST. OF TEX., https://perma.cc/MH9L-7MZ7.

8 *Id.*

9 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").

10 *See* 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. (Mar. 14, 2024) (on file with the *Journal of Law & Civil Governance at Texas A&M*); Letter from Sen. John Cornyn, Sen., U.S. Senate, et al., to Hon. Robert Conrad, Director, Admin. Off. of U.S. Cts. (Mar. 21, 2024) [hereinafter Cornyn Letter] (on file with the *Journal of Law & Civil Governance at Texas A&M*).

11 Josh Blackman, *The Judicial Conference Legislates from the Shadow Docket*, VOLOKH CONSPIRACY (Mar. 13, 2024, 2:01 AM), https://perma.cc/QS93-CKTS.

I was one of those early voices of opposition within the judiciary.[12] And with your indulgence, I'll spend a few minutes tonight explaining why I continue to oppose the Judicial Conference proposal.

3.

I'll begin by stating the obvious. There's nothing inherently wrong or suspicious about the fact that some judicial divisions in our federal system have only one resident district judge.

I spend many of my weekends in a small, one stoplight town in Texas. We have just one supermarket in that town.

Now, do I immediately assume that something illegal or untoward has happened, just because there's only one supermarket? Some blatant violation of federal antitrust law?

Of course not. It just means the town only needs one grocery store—not two.

And just as one grocery store doesn't mean monopolization, one federal district judge doesn't mean corruption.

Now, we *could* make people travel long distances to get to a federal judge—just like we *could* make people travel long distances to get to a grocery store. But that would not serve the American people well.

So it's not surprising that Congress has chosen to authorize the judiciary to hold court, not just in America's biggest cities, but in countless other cities across the country—to ensure that all Americans have the best possible access to the federal court system.[13]

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[12] *See, e.g.*, Nate Raymond, *Conservative US Judges Criticize New Rule Curbing 'Judge Shopping,'* REUTERS (Mar. 13, 2024, 2:42 PM), https://perma.cc/8Q8F-TBRU; Tobi Raji, *Judges, GOP Lawmakers Slam New Policy that Limits 'Judge Shopping,'* WASH. POST (Mar. 14, 2024, 6:01 PM), https://perma.cc/R567-W9S6; Suzanne Monyak & Lydia Wheeler, *Republicans Suggest Judges Can Ignore Forum-Shopping Curb*, BLOOMBERG (Mar. 14, 2024), https://perma.cc/B9Z8-ELGX; Tobi Raji, *U.S. Courts Clarify Policy Limiting 'Judge Shopping,'* WASH. POST (Mar. 16, 2024, 12:51 PM), https://perma.cc/8GK8-J4RC.

[13] 28 U.S.C. §§ 81–131, 133.

And make no mistake: It's up to Congress—not the judiciary—to decide where we can hold court. In fact, the first bill that Senator Cornyn ever enacted into law was a bill I got to work on as his chief counsel—a bill authorizing the Eastern District of Texas to hold court in Plano.[14]

Article I, Section 8 of the Constitution vests in Congress the authority to "constitute Tribunals inferior to the supreme Court."[15] So it's Congress that decides how many federal districts and divisions will exist in Texas, and where in Texas judges can sit.

4.

So if it's Congress that gets to decide that Americans in smaller cities and towns will have access to the federal courts, why is the Judicial Conference doing this?

The problem, they say, is forum shopping—litigants choosing to file suit in a particular location for strategic reasons.[16]

I first studied the issue of forum shopping two decades ago, back when I was on Capitol Hill. I learned that it's very important to explain exactly what you mean, if you say you're concerned about forum shopping.

It's important to explain, because the whole point of our adversarial legal system is that attorneys will do their best to zealously advocate for their clients. Indeed, we require them to.

Here's one recent example: A few weeks *after* the Judicial Conference announcement, Bloomberg ran an article with the following headline: *DOJ's Apple Suit Filed in New Jersey for Friendly Third Circuit*.[17]

The article begins with this opening line: "The US Justice Department's choice of New Jersey to file its landmark antitrust lawsuit against Apple Inc. was likely motivated by driving any future appeals to a circuit court relatively open to cracking down on monopoly power."[18]

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14 Act of Dec. 3, 2003, Pub. L. 108-157, § 1(a)(1)(B), 117 Stat. 1947 (codified as amended at 28 U.S.C. § 124(c)(3)).

15 U.S. CONST. art. I, § 8, cl. 9.

16 *Conference Acts to Promote Random Case Assignment*, *supra* note 4.

17 Danielle Kaye, *DOJ's Apple Suit Filed in New Jersey for Friendly Third Circuit*, BLOOMBERG (Mar. 27, 2024, 4:15 AM), https://perma.cc/N26C-VK2P.

18 *Id.*

Is Attorney General Merrick Garland going to fire these DOJ lawyers for engaging in this blatant forum shopping? I'm guessing not.

That's not even the highest profile example of recent forum shopping by DOJ. Last year, DOJ filed suit against Texas, challenging the State's efforts to secure the border in Del Rio.[19]

There's a federal court in Del Rio. And other similar suits have been filed in Del Rio.[20]

Yet DOJ filed in Austin—not Del Rio.[21] It's pretty obvious that DOJ's choice of forum was strategic. And it has not gone unnoticed. One district judge pointedly observed that "the United States sued Texas related to events occurring in the Western District of Texas's Del Rio Division, but it chose to bring suit over 200 miles away in the Austin Division."[22]

I don't expect Attorney General Garland to punish these DOJ lawyers for blatant forum shopping, either.

So let's not pretend that strategic thinking about venue selection is the exclusive province of one type of litigant or one end of the political spectrum. It happens regardless of who controls the government—or who controls the lawsuit.

Let's just be honest with the American people. Some plaintiffs like to file in a single-judge division in a particular state. Other litigants like to choose a big city in another state. But either way, the lawyers are engaging in the exact same strategic decision in choosing a forum.

There's a reason why the California Attorney General files certain suits in San Francisco, not Sacramento—and why the Maryland Attorney General files certain suits in Greenbelt, not Baltimore.

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19 *Justice Department Files Complaint Against the State of Texas for Illegally Placing Floating Buoy Barrier in the Rio Grande*, U.S. Dep't of Just. (July 24, 2023), https://perma.cc/K2NU-BK4B; Complaint at 1–2, United States v. Abbott, No. 1:23-CV-00853 (W.D. Tex. July 24, 2023).

20 *See* Plaintiff's Original Complaint at 28–29, Texas v. U.S. Dep't of Homeland Sec., No. 2:23-CV-00055 (W.D. Tex. Oct. 24, 2023) (seeking injunction preventing the federal government from destroying concertina wire fencing at the border); State of Texas's Original Complaint at 1, Texas v. Mayorkas, No. 2:23-CV-00024 (W.D. Tex. May 23, 2023) (challenging federal government's creation of a border crossing app).

21 Complaint, *supra* note 19, at 1.

22 Texas v. Garland, No. 5:23-CV-00034-H, 2023 WL 4851893, at *11 (N.D. Tex. July 28, 2023).

It's because, if you file in the San Francisco Division of the Northern District of California, or in the Greenbelt Division in Maryland, you have a 100% chance of drawing a judge appointed by a President of a particular party.[23]

It's inevitable that lawyers will try to predict which strategies will best serve their clients. It's what we expect in an adversarial system of justice, in which Congress gives plaintiffs the flexibility to select their venue, under the laws that organize our federal judiciary.[24]

5.

The concern, then, must not be about lawyers pursuing their clients' best interests within the bounds of the law. The concern must be about what judges are doing.

We expect lawyers to favor their clients when they choose where to file their cases. But we expect judges not to play favorites.

Judges aren't supposed to pick which cases they'll decide, or which laws they'll follow.

So if there's a real concern about forum shopping in our country, it's that certain judges aren't just taking cases as they come. The concern is that some judges are trying to direct which cases they get. And that they're tilting their decisions in order to attract the cases they most want.

Some people use the term "forum shopping." But the real concern may be what academics call "forum *selling*."[25] And it's a concern that I take very, very seriously.

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[23] Josh Blackman, *Forum Shopping in California*, VOLOKH CONSPIRACY (Feb. 5, 2023, 8:44 PM), https://perma.cc/Z758-URVS.

[24] *See, e.g.*, McCuin v. Tex. Power & Light Co., 714 F.2d 1255, 1261 (5th Cir. 1983) ("The existence of these choices not only permits but indeed invites counsel in an adversary system, seeking to serve his client's interests, to select the forum that he considers most receptive to his cause."); Texas v. U.S. Dep't of Homeland Sec., 661 F. Supp. 3d 683, 693 (S.D. Tex. 2023) ("It is no well-kept secret that litigation involves strategy," and "that a plaintiff's choice of venue involves strategic thinking.").

[25] *See, e.g.*, Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 245–47 (2016) (explaining forum selling); Paul R. Gugliuzza & J. Jonas Anderson, *The New Judge Shopping Fix Has Two Huge Loopholes*, SLATE (Mar. 20, 2024, 6:10 PM), https://perma.cc/9WY5-EUTJ.

5.1.

I mentioned that I had the honor of serving as chief counsel to Senator John Cornyn two decades ago. Serving on the Senate Judiciary Committee staff remains to this day the best job I've ever had. One big reason is that you constantly get to work on the most interesting legal issues facing our country.

Senator Cornyn was deeply concerned about forum selling in the federal bankruptcy courts. He had previously served as Texas Attorney General during the Enron bankruptcy.[26] He was very frustrated when the Enron bankruptcy proceeded in a bankruptcy court in New York, not here in Texas, where so many people were so badly hurt.

Legal academics have written extensively about the extreme and egregious problem of forum selling by federal bankruptcy courts. One law professor even wrote a whole book about it. He called it: *Courting Failure: How Competition for Big Cases Is Corrupting the Bankruptcy Courts*.[27]

After extensive study and analysis, Prof. Lynn LoPucki concluded that federal bankruptcy judges seek fame and stature, not only by openly soliciting the Nation's biggest bankruptcy cases—but also by distorting their rulings, in hopes of tempting attorneys to file the big cases in their courts.[28]

Bankruptcy law can be a bit arcane. So let me give you a simple example of the professor's concerns: He's concerned that bankruptcy judges are taking money away from workers, pensioners, shareholders, and small businesses—and giving that money to bankruptcy lawyers.[29] Why? To encourage the lawyers to keep filing those big cases in their courts.[30]

Increasing attorney fees to get big bankruptcy cases is what the professor calls the, quote, "dark side" of forum selling in bankruptcy law.[31]

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26 *See About John*, U.S. SENATE, https://perma.cc/52AB-SWWM (explaining that now-Senator Cornyn served as Texas Attorney General from 1999–2002); *In re* Enron Corp., No. 01-16034, 2004 WL 6075307, at *46 (Bankr. S.D.N.Y. July 15, 2004) (explaining that the Enron Corporation filed for bankruptcy on December 2, 2001).

27 LYNN M. LOPUCKI, COURTING FAILURE: HOW COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY COURTS (2005).

28 *Id.* at 98–102, 104, 133.

29 *See id.* at 132–33.

30 *Id.*

31 *Id.* at 40.

Most trial judges strictly scrutinize applications for attorney's fees, to ensure that the fees are reasonable, and not excessive. But rather than enforce these limits, some bankruptcy judges are exceeding them.

As the professor puts it: "Cutting lawyers' fees is not a career-enhancing activity for . . . bankruptcy judges."[32] And in fact, some bankruptcy judges do precisely the opposite.

As the professor explained in the *Wisconsin Law Review*, "bankruptcy judges who want to attract large reorganization cases to their district will be under pressure to award attorney fees in excess of existing market rates. . . . At the conclusion of a large case, reorganization lawyers often seek, and bankruptcy judges often award, bonuses or premiums in excess of the lawyers' hourly rates."[33]

We're talking about big dollars here. The professor looked at the big bankruptcy filings in just one single year. Of the 79 cases filed nationally in 2000, Delaware got 45 of them—over half.[34] And in just those 45 cases alone, the "total professional fees and expenses . . . easily topped $1 billion."[35] That's just one year's worth of big bankruptcy filings in one state.

It's not just Delaware. New York cashes in on this forum selling, too. As Senator Cornyn wrote in 2005 in the *Legal Times*, "In the Enron case . . . creditors expect to receive less than 20 cents on the dollar, while attorneys, accountants, and other advisers may collect more than $1 billion in fees."[36] That's from just one single bankruptcy case in New York.[37]

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32 *Id.* at 42.

33 Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11, 45–46; *see also* Gugliuzza & Anderson, *supra* note 25 ("Bankruptcy is another area in which judge shopping has caused problems: courts with predictable case assignments in Delaware, Texas, and New York have openly appealed to what legal scholar Lynn LoPucki calls 'case placers'—the executives and lawyers of the bankrupt company who hope the judge will reward them with a sweetheart compensation deal and high professional fees.").

34 LOPUCKI, *supra* note 27, at 128.

35 *Id.*

36 John Cornyn, *They Owe Us: Companies Seeking Bankruptcy Relief Should Face Creditors in Their Home Court*, LEGAL TIMES, June 6, 2005, at 1.

37 *See In re* Enron Corp., No. 01-16034, 2004 WL 6075307 (Bankr. S.D.N.Y. July 15, 2004).

So when General Cornyn became Senator Cornyn, he decided to do something about this problem. He introduced legislation to end the problem of forum selling in the federal bankruptcy courts.[38]

I remember attending a Senate Judiciary Committee hearing in 2005, when Senator Cornyn discussed his proposal with then-Harvard Law Professor Elizabeth Warren.[39] She praised his proposal. She said, and I quote: "I do not think this is an issue of Republicans or Democrats, an issue of liberals or conservatives. It is a good government issue[] . . . that there will be full and fair access for everyone, every creditor, everyone who has been injured or affected by the process."[40] As she explained, "those cases need to stay home, not go to a distant location where they think they may get a better deal."[41]

The Cornyn legislation didn't pass that year. So now that Professor Warren has become Senator Warren, she and Senator Cornyn introduce legislation every Congress hoping to stop forum shopping in the bankruptcy courts.[42]

But the law still hasn't passed. Why not? I think you can guess.

Just ask yourself this: Which states have historically benefited the most from forum selling in the bankruptcy courts? It's Delaware and New York.[43]

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38 S. 314, 109th Cong. (2005).

39 *Bankruptcy Reform: Hearing Before the Comm. on the Judiciary*, 109th Cong. 26–28 (2005).

40 *Id.* at 28.

41 *Id.*

42 *E.g.* S. 2827, 117th Cong. (2021); S. 5032, 116th Cong. (2020); S. 2282, 115th Cong. (2018).

43 The phenomenon appears to have spread to other states in recent years. *See, e.g.*, James Nani & Ronnie Greene, *Sex, Secrets Trigger Downfall of Star Texas Bankruptcy Judge*, BLOOMBERG L. (May 1, 2024), https://perma.cc/HK4J-ZBHT ("Judge David R. Jones . . . worked for years to make Houston a destination for high-dollar bankruptcy litigation . . . . [Among the] local attorneys who brought cases before him . . . is Elizabeth Freeman, who had known Jones for years, clerked for him—and had an intimate relationship with him. . . . Jones became chief bankruptcy judge for Houston in 2015 and set about putting in place a slew of rules that turned the district into a national powerhouse. . . . He approved hourly fees of $1,400 or more that were in line with New York or Delaware rates. . . . With those cases come enormous fees for the bankruptcy bar, some of whose members may have known about Jones' relationship with

At that same hearing where Professor Warren praised Senator Cornyn's proposal, then-Senator Joe Biden had a very different reaction. He threatened to launch, quote, "an incredibly long fight over this amendment."[44]

Now, let me be clear: I'm no longer a Senate staffer. I'm a federal judge. As a federal judge, it's my job to follow the laws set by Congress, and leave politics to the political branches.

So I'm not here to advocate or oppose any particular legislation. I respect that members of Congress will dutifully represent their citizens as they see fit. How each of them chooses to do their jobs is not for me to question.

But anyone who is sincere about ending forum selling should be aware of this extensive body of work before they make any final decisions.

5.2.

Bankruptcy law isn't the only area where there's strong bipartisan concern that federal judges are engaged in forum selling. Let's look at patent law.

Forum shopping in patent cases has become a national joke. I'm not being rhetorical. I mean this quite literally.

I'd invite you to watch an episode of the HBO show *Last Week Tonight with John Oliver*. In 2015, comedian John Oliver did a long segment on, of all things, patent litigation.[45] It's hilarious—or at least as hilarious as anyone can be about patent litigation.

Freeman but were hesitant to speak out."). The United States Trustee has condemned the bankruptcy practice in Houston as "forum shopping and venue manipulation taken to a new and unprecedented extreme," while a bankruptcy law professor and former bankruptcy judge has described it as a "swamp." *Id.*; *see also* James Nani & Ronnie Greene, *How Four Judges Kept Romance Allegations Quiet for Two Years*, BLOOMBERG L. (May 1, 2024), https://perma.cc/ML99-ZTZZ.

44 *Bankruptcy Reform*, *supra* note 39, at 29.

45 *Patents: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Apr. 20, 2015), https://perma.cc/DRQ2-A3HU.

Oliver ridiculed the fact that so many of our Nation's biggest patent cases are filed in a single division in the Eastern District of Texas.[46]

I can't do the episode justice—you'll have to watch it yourself. I'll just quote one portion, where Oliver explains how fearful companies are of being sued in the town of Marshall, Texas:

"Samsung . . . has spent almost a million dollars on community projects like this ice skating rink, right in front of the courthouse. Samsung was so frightened of patent lawsuits they felt forced to build an outdoor ice rink in Texas. Do you know how hard that is to maintain? It's like building a bowling alley in space."[47]

Legal scholars who specialize in patent law have come to the same conclusion as bankruptcy law professors: "[J]udges slant procedures and rulings to blatantly favor patent owners."[48] Why? To attract the biggest patent cases to their courts.

And the economic consequences are enormous, just as they are on the bankruptcy docket. According to a 2014 article in the *Harvard Business Review*, "[P]atent trolls cost defendant firms $29 billion per year in direct out-of-pocket costs; in aggregate, patent litigation destroys over $60 billion in firm wealth each year."[49]

Not surprisingly, then, forum selling on the patent docket has attracted bipartisan concern, just as it has with the bankruptcy docket.

Senators Thom Tillis and Patrick Leahy have objected that judges are, quote, "engag[ing] in inappropriate conduct intended to attract and retain certain types of [patent] cases and litigants."[50]

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46 *Id.* at 7:10–8:45.

47 *Id.* at 8:16–8:42.

48 Gugliuzza & Anderson, *supra* note 25.

49 James Bessen, *The Evidence Is In: Patent Trolls Do Hurt Innovation*, HARV. BUS. REV. (Nov. 2014), https://perma.cc/LX3H-SMW6.

50 Letter from Sen. Thom Tillis & Sen. Patrick Leahy to Hon. John Roberts, Presiding Officer, Jud. Conf. of the U.S., (Nov. 2, 2021) (on file with the *Journal of Law & Civil Governance at Texas A&M*).

Judges are "openly solicit[ing] cases at lawyers' meetings and other venues and urg[ing] patent plaintiffs to file their infringement actions in [their] court[s]," and "repeatedly ignor[ing] binding case law and abus[ing] [their] discretion in denying transfer motions."[51]

I thought it was interesting that the Senators expressed specific concern about judges wrongly denying venue transfer motions, in hopes of keeping big cases in their courts. So, I looked into it.

I have found a long string cite of mandamus reversals of the Marshall Division for wrongfully denying motions to transfer venue.[52] Justice Scalia described the Marshall Division as a "renegade jurisdiction[]," while the Fifth Circuit observed that "[m]andamus petitions from the Marshall Division are no strangers to the federal courts of appeals."[53]

Another single-judge division in Texas has been mandamused by the Federal Circuit on at least 28 separate occasions for wrongfully denying venue transfer in patent cases—including three times on a single day.[54]

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51 *Id. See also, e.g.,* Allan Pusey, *Marshall Law: Patent Lawyers Flock to East Texas Court for its Expertise and 'Rocket Docket,'* DALL. MORNING NEWS, Mar. 26, 2006, at 1D (noting that, "when [Judge T. John Ward] came to the bench, [he] sought out patent cases").

52 *See In re* Google LLC, No. 2022-140, 2022 WL 1613192 (Fed. Cir. May 23, 2022); *In re* Netflix, Inc., No. 2022-110, 2022 WL 167470 (Fed. Cir. Jan. 19, 2022); *In re* Google LLC, 949 F.3d 1338 (Fed. Cir. 2020); *In re* BigCommerce, Inc., 890 F.3d 978 (Fed. Cir. 2018); *In re* Cray Inc., 871 F.3d 1355 (Fed. Cir. 2017); *In re* Google Inc., 588 F. App'x 988 (Fed. Cir. 2014); *In re* Nintendo of Am., Inc., 756 F.3d 1363 (Fed. Cir. 2014).

53 Tr. of Oral Arg. at 11, *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (No. 05-130); *In re* Radmax, Ltd., 720 F.3d 285, 287 n.1 (5th Cir. 2013).

54 *See In re* Honeywell Int'l Inc., No. 2023-152, 2024 WL 302397 (Fed. Cir. Jan. 26, 2024); *In re* Samsung Elecs. Co., No. 2023-146, 2023 WL 8642711 (Fed. Cir. Dec. 14, 2023); *In re* TikTok, Inc., 85 F.4th 352 (5th Cir. 2023); *In re* Microsoft Corp., No. 2023-128, 2023 WL 3861078 (Fed. Cir. June 7, 2023); *In re* Google LLC, 58 F.4th 1379 (Fed. Cir. 2023); *In re* Amazon.com, Inc., No. 2022-157, 2022 WL 17688072 (Fed. Cir. Dec. 15, 2022); *In re* Apple Inc., No. 2022-137, 2022 WL 1676400 (Fed. Cir. May 26, 2022); *In re* Apple Inc., No. 2022-128, 2022 WL 1196768 (Fed. Cir. April 22, 2022); *In re* Volkswagen Grp. of Am., Inc., 28 F.4th 1203 (Fed. Cir. 2022); *In re* Apple Inc., No. 2021-181, 2021 WL 5291804 (Fed. Cir. Nov. 15, 2021); *In re* Google LLC, No. 2021-178, 2021 WL 5292267 (Fed. Cir. Nov. 15, 2021); *In re* Atlassian Corp., No. 2021-177, 2021 WL 5292268 (Fed. Cir. Nov. 15, 2021); *In re* Quest Diagnostics Inc., No. 2021-193, 2021 WL 5230757 (Fed. Cir. Nov. 10, 2021); *In re* Dish Net. L.L.C., No. 2021-

By my count, that's nearly half of all challenges to that court's transfer denials reviewed by appeals courts—an extraordinary rate, considering that mandamus is supposed to be an extraordinary form of relief.

Now, let me ask you this: How many times has the Amarillo Division been successfully mandamused for wrongfully denying venue transfer? By my count, the number is—zero.

Moreover, critics of the Amarillo Division like to focus on the FDA abortion pill case, which is now pending before the U.S. Supreme Court.[55] But in that case, the defendants didn't even bother to request a venue transfer—let alone seek mandamus relief from a federal court of appeals.

5.3.

So what does the Judicial Conference proposal do about forum selling on our Nation's bankruptcy and patent dockets, given the extensive academic scholarship and bipartisan outrage in Congress?

It does—nothing.

It's a profoundly peculiar omission, as any objective observer would have to acknowledge. Even *Slate* felt compelled to observe that "The New Judge Shopping Fix Has Two Huge Loopholes," to quote one recent headline.[56] The two loopholes identified by *Slate*? Bankruptcy and patents.[57]

182, 2021 WL 4911981 (Fed. Cir. Oct. 21, 2021); *In re* NetScout Sys., Inc., No. 2021-173, 2021 WL 4771756 (Fed. Cir. Oct. 13, 2021); *In re* Pandora Media, LLC, No. 2021-172, 2021 WL 4772805 (Oct. 13, 2021); *In re* Google LLC, No. 2021-171, 2021 WL 4592280 (Oct. 6, 2021); *In re* Juniper Networks, Inc., No. 2021-156, 2021 WL 4519889 (Fed. Cir. Oct. 4, 2021); *In re* Apple Inc., No. 2021-187, 2021 WL 4485016 (Fed. Cir. Oct. 1, 2021); *In re* Google LLC, No. 2021-170, 2021 WL 4427899 (Fed. Cir. Sep. 27, 2021); *In re* Juniper Networks, Inc., 14 F.4th 1313 (Fed. Cir. 2021); *In re* Hulu, LLC, No. 2021-142, 2021 WL 3278194 (Fed. Cir. Aug. 2, 2021); *In re* Uber Techs., Inc., 852 F. App'x 542 (Fed. Cir. 2021); *In re* Samsung Elecs. Co., 2 F.4th 1371 (Fed. Cir. 2021); *In re* TracFone Wireless, Inc., 852 F. App'x 537 (Fed. Cir. 2021); *In re* Intel Corp., 841 F. App'x 192 (Fed. Cir. 2020); *In re* Apple Inc., 979 F.3d 1332 (Fed. Cir. 2020); *In re* Adobe Inc., 823 F. App'x 929 (Fed. Cir. 2020).

55 *See generally* All. for Hippocratic Med. v. U.S. Food & Drug Admin., 668 F. Supp. 3d 507 (N.D. Tex. 2023); *see also* U.S. Food & Drug Admin. v. All. for Hippocratic Med., 144 S. Ct. 537 (2023) (granting certiorari).

56 Gugliuzza & Anderson, *supra* note 25.

57 *Id.*

5.4.

Moreover, the Judicial Conference proposal not only focuses on the wrong problem—it also proposes the wrong solution.

The Judicial Conference explains that its real concern is single-judge divisions issuing nationwide injunctions that affect the entire country.[58]

But if nationwide injunctions are a problem, then let's get rid of them![59] And while we're at it, let's also get rid of their close cousin—vacatur of agency actions under the Administrative Procedure Act.[60]

But if we're going to do it, we have to do it in an even-handed manner.

If nationwide injunctions and agency vacatur are a problem, then they're a problem whether they're issued by judges in big cities or small towns.

They're a problem regardless of who controls the White House, and who files the lawsuit.

We shouldn't condition nationwide injunctions based on where you live—or what political views you hold.

5.5.

So why haven't we gotten rid of nationwide injunctions yet?

I assume it's because too many people like nationwide injunctions—at least when the outcome suits their interests.

But assuming that neither Congress nor the Supreme Court will take action to stop nationwide injunctions or agency vacatur, all is not lost. In fact, we already have a solution readily available and on the books today.

It's called—appellate review.

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58 *Conference Acts to Promote Random Case Assignment*, *supra* note 4.

59 *See*, *e.g.*, Trump v. Hawaii, 585 U.S. 667, 713 (2018) (Thomas, J., concurring); Labrador v. Poe, 144 S. Ct. 921, 923–928 (2024) (Gorsuch, J., concurring in the grant of stay) (addressing issues with nationwide injunctions); *see also* Feds for Med. Freedom v. Biden, 63 F.4th 366, 387 (5th Cir. 2023) (en banc) ("Some Justices have expressed concerns that [nationwide] injunctions can contravene equitable principles because '[e]quitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit.'") (collecting cases).

60 *See*, *e.g.*, Josh Blackman, *Let's Not Set Aside the Scholarly Debate About Vacatur*, VOLOKH CONSPIRACY (Dec. 3, 2022), https://perma.cc/F34C-597W.

You don't have to be a law professor to understand that, if a district court issues a constitutional decision that people disagree with, there's an entire army of federal appellate judges, not to mention Supreme Court Justices, who aren't at all shy about reviewing—and when appropriate, reversing—those rulings.

That's just not true when it comes to forum selling on the bankruptcy and patent dockets.

The kinds of bankruptcy and patent rulings that most attract future filings also happen to be subject to highly deferential review on appeal. They're often fact-intensive decisions like the approval of exorbitant attorney fees, which are hard to reverse on appeal.

As Senator Cornyn observed back in 2005, "bankruptcy law confers upon bankruptcy judges an enormous amount of discretion—discretion that is largely out of the reach of appellate review."[61]

6.

So how did the Judicial Conference get things so backwards?

Why is it ignoring robust bipartisan opposition to forum selling in our Nation's bankruptcy and patent courts—and instead catering only to a narrow set of concerns at one end of the political spectrum?

Why is it worried about only a small handful of constitutional rulings that are guaranteed to get robust, de novo review on appeal while doing nothing about inflated attorney's fees and other judicial distortions that wreak such enormous economic havoc on our country?

Let's be honest. The Judicial Conference is just responding to certain political critics.

And those critics aren't seriously concerned about forum selling—they just disagree with certain outcomes in certain cases.

Their objections to forum shopping aren't sincere—they're strategic.

I've already mentioned that DOJ is a rampant forum shopper—a point that the critics ignore.

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[61] Cornyn, *supra* note 36.

What's more, there are plenty of other examples of forum shopping that, again, the critics completely ignore. I'll briefly mention just three more examples here.

Right now, a number of attorneys are facing sanctions for manipulating court filings to circumvent judicial assignment rules in Alabama.[62] But these attorneys hold views that are favored by the critics. They're challenging an Alabama law that prohibits sex reassignment surgery for minors.[63]

So the critics don't seem to have a problem with that type of forum shopping—even when it includes allegations of attorney misconduct and fraud on the courts.

My second example: In Austin, senior federal district judges actually get to pick their cases. Under the governing case management order, cases aren't randomly assigned at all—they're assigned only with the consent of the senior judge.[64]

If critics think that random assignment is so crucial—even when the judge is hundreds of miles away—you'd think the critics would be most upset about Austin, where there's no travel burden, yet no random assignment for the most senior judges.

But the critics don't ever mention Austin—presumably they like the results they get in Austin.

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62 *See* Final Report of Inquiry at 50–51, *In re* Vague, No. 2:22-MC-03977 (M.D. Ala. Oct. 3, 2023) ("Lawyers sometimes consider potential judicial assignments in determining where to file a case, and there may be reasons why in certain cases some judges may be considered more favorable draws than others. . . . [T]he Panel does not condemn the lawyers for fretting about their chances of success before a particular judge. . . . But in this case, counsel did more than fret. They made plans and took steps in an attempt to manipulate the assignment of these cases. . . . [T]he Panel finds without hesitation that [counsel] purposefully attempted to circumvent the random case assignment procedures of the United States District Courts for the Northern District of Alabama and the Middle District of Alabama.").

63 *See, e.g.*, Nate Raymond, *LGBTQ Rights Lawyers Face Potential Sanctions over Alabama "Judge Shopping,"* REUTERS (Mar. 20, 2024), https://perma.cc/R7W8-6H95; Jacqueline Thomsen, *Lawyers Face Sanctions for Judge Shopping in Transgender Case*, BLOOMBERG L. (Mar. 21, 2024), https://perma.cc/MB3T-XRW8.

64 *See, e.g.*, Amended Order Assigning the Business of the Court (W.D. Tex. May 31, 2024) (noting that Senior District Judges James R. Nowlin, Sam Sparks, and David A. Ezra are only assigned cases with their "consent").

My final example: For decades, plaintiffs regularly filed constitutional lawsuits in the single-judge division where Judge William Wayne Justice sat. Professor Josh Blackman and Judge Wes Hendrix have done yeoman's work documenting this.[65]

Throughout our State's history, you could file in Tyler, or Sherman, or Marshall, or Paris—and you'd be guaranteed to draw William Wayne Justice.[66] It was an open secret among lawyers and courtwatchers that this was all done quite deliberately—not accidentally—to allow litigants to pick William Wayne Justice as their preferred judge.[67]

Do the critics condemn the sordid legacy of William Wayne Justice?

Not quite. The University of Texas Law School dedicates its entire Center for Public Interest Law to him.[68]

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65 Josh Blackman, *ABA House of Delegates Adopts Resolution Opposing Single-Judge Divisions*, VOLOKH CONSPIRACY (Aug. 10, 2023), https://perma.cc/KU49-6RTB; *see also* Texas v. Garland, No. 5:23-CV-034-H, 2023 WL 4851893, at *11 n.3 (N.D. Tex. July 28, 2023) (collecting cases).

66 *Id*.

67 *See, e.g.*, David Richards, *Wayne Justice*, TEX. OBSERVER (Oct. 21, 2009), https://perma.cc/S6DA-884P. ("In the not so secret world of lawyers, venue is frequently the linchpin of success in litigation. Where a case is tried may be the most important factor in outcome. In short order the handful of Texas civil rights lawyers began to beat a path to Tyler, where the Judge heard every case filed in federal court. He issued landmark decisions on reform of the Texas juvenile justice system, the Texas prison system and the education of alien school children, to name just a few. Predictably, the Tyler docket became overcrowded and a new judge was assigned to hear a portion of the cases. We were forced to scramble a bit in our venue search, for a while one was assured of getting Judge Justice if you filed in Sherman, Texas then that forum became uncertain. In my last filing before him I had to pursue the Judge to Paris, Texas, where for a short time he had the entire docket."); *see generally* MARK BARRINGER, COLLEGIALITY AND THE CONSTITUTION: THE EASTERN DISTRICT OF TEXAS 1846 TO 2006 (2020); FRANK R. KEMERER, WILLIAM WAYNE JUSTICE: A JUDICIAL BIOGRAPHY (1991).

68 *The William Wayne Justice Center for Public Interest Law*, UNIV. OF TEX. AT AUSTIN SCHOOL OF L., https://perma.cc/6LDD-Q8FX ("The William Wayne Justice Center for Public Interest Law educates students, faculty, and the legal community about public interest legal issues, and creates opportunities for the Texas Law community to increase access to justice and help underserved individuals and communities. We provide broad support to students, faculty and alumni interested in pro bono work and public service.").

If forum shopping at single-judge divisions is so uniquely troubling, shouldn't we at least rename that center—and stop honoring the one who started this whole thing?

7.

Look, I get what the critics are doing. This isn't about forum shopping. It's about forum shaming.

It's about shaming judges who won't distort their rulings to do their bidding—while rewarding those judges who do.

It's the same thing when critics accuse certain Supreme Court Justices of being unethical. They don't attack other Justices who engage in the same behavior—they applaud them, because they like their rulings.[69]

At the end of the day, there's really just one ethics rule that applies: You're unethical if you're a principled originalist.

It's the same thing when it comes to forum shopping: It's only forum shopping if it's done by a politically conservative plaintiff.

And we all know what's going on here. It's all a strategy to intimidate judges into doing what the critics want.

We've all heard about the political efforts to "pack" the court. But there's no need to "pack" the court—when you can just "pressure" the court, and get the results you want that way.

Now, to be clear, everyone in America has the First Amendment right to speak and be heard—no matter how wrong-headed their views.

But that doesn't mean that judges should cater to their views.

As judges, we're duty bound to enforce the rights of every American—not just the loudest critics on one end of the political spectrum.

But I worry that the judiciary is failing in this basic responsibility. I worry that the recent Judicial Conference proposal only confirms these fears. And I worry that it's not the only example.

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[69] Josh Blackman, *Judge James C. Ho's Remarks on Justice Thomas and Judge Kacsmaryk*, VOLOKH CONSPIRACY (Apr. 18, 2023), https://perma.cc/H3AG-9GUQ; *see also* James C. Ho, *The Attack on the Courts*, NAT'L REV. (July 25, 2024), https://perma.cc/3E6C-PT2E.

Many of us thought it was strange when, back in 2018, the Chief Justice criticized a sitting President of the United States for criticizing a federal judge.[70] We thought it was strange for one simple reason: We suspected that we'd never hear such a statement, if the shoe was on the other foot—if the critics were on the other end of the political spectrum, and if they were criticizing a judge appointed by that President.

And here's the problem with that. You can't proclaim that "we do not have Obama judges or Trump judges"[71]—but only speak up when it's an Obama judge who is criticized.

If you do that, then you're announcing that we *do* have Obama judges and Trump judges—because you're only willing to defend one, and not the other.

Standing up for judicial independence is sort of like standing up for the First Amendment. It's easy to do it when it's popular. But it's only when it's hard—when it's unpopular with the in-crowd—that it actually matters.

A principle isn't a principle until it costs you. As the Book of Psalms teaches, an oath is only an oath if you keep it "even when it hurts."[72]

Judicial independence for me but not for thee is not a principled stance—it's a politicization of the very judiciary you're trying to defend.

8.

During his confirmation hearing, Chief Justice Roberts analogized judges to umpires.[73] I agree with the metaphor. But I see the metaphor as cautionary, rather than aspirational.

Umpires, like all human beings, are vulnerable to peer pressure. No one likes being booed—and that includes umpires.

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70 Adam Liptak, *Chief Justice Defends Judicial Independence After Trump Attacks 'Obama Judge,'* N.Y. TIMES (Nov. 21, 2018), https://perma.cc/R256-K6E4.

71 *Id*.

72 *Psalm* 15:4 (New International).

73 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) ("Judges are like umpires. Umpires don't make the rules, they apply them.").

In fact, there's a book called *Scorecasting*, in which the authors closely examine the phenomenon known as home-field advantage.[74]

They conclude that home-field advantage is real—that the leading cause is the referees—and it's because referees don't like to be booed by the hometown crowd.[75]

The exact same thing can be said about judges. Yes, federal judges have life tenure—umpires don't. So in theory, federal judges *should* be more immune than umpires to the booing of the crowd.

But umpires live anonymous lives. You don't typically know the name of the umpire whose call you dislike. That's not true of federal judges.

So for umpires, the booing is fleeting. But for judges, the booing can last forever.

What's more, federal judges are typically picked based on glittering resumes chock full of prestigious credentials. People who have spent their entire lives chasing gold stars.

And what do they do, once they become federal judges? They're typically motivated by one thing: Getting more gold stars.

But doing this job right will not get you gold stars.[76]

If your plan is to follow the law in every case, regardless of public criticism, then guess what: You will get public criticism. Especially when the outcome is despised by the cultural elites who control the national discourse.

Look, I get it. It's no fun to be called unethical, or corrupt—or to be told that you're a bad judge. But that's the job. You agreed to do it. Some people even lobby and campaign for it. You can quit anytime. It's life tenure—not a life sentence.

If you're afraid of being booed, then you shouldn't be a judge. If you're going to do this job, then you should do it for public service, not public applause.

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74 *See generally* TOBIAS J. MOSKOWITZ & L. JON WERTHEIM, SCORECASTING: THE HIDDEN INFLUENCES BEHIND HOW SPORTS ARE PLAYED AND GAMES ARE WON (2011); *see also* James C. Ho, *Fair-Weather Originalism: Judges, Umpires, and the Fear of Being Booed*, 26 TEX. REV. L. & POL. 335, 341–43 (2022) (discussing *Scorecasting* and home-field advantage).

75 *See* sources cited *supra* note 74.

76 Ho, *supra* note 74, at 344–45 (discussing gold-star syndrome); *see also* James C. Ho, *Pressure Is a Privilege: Judges, Umpires, and Ignoring the Booing of the Crowd*, HERITAGE FOUND. (Dec. 6, 2023), https://perma.cc/8MAY-RJNJ.

Judges are supposed to follow the law, not distort the rules to avoid criticism. The last thing we should do is gerrymander the rules in response to political pressure.

If we cater to the forum shaming strategies of the critics, then we're no better than the forum-selling judges who distort their rulings to attract bankruptcy and patent cases. Whether we distort rules to attract cases or appease critics, we're committing the same sin.

I often tell my clerks that there are two types of personalities that you'll find in the legal profession: Fighters, and climbers.

As judges, we should follow the law—and, when necessary, stand up and fight for our legal system—not cower and cater to the noisiest critics.

Thank you.