

United States Senate
WASHINGTON, DC 20510

Judge Robert Conrad
Director
Administrative Office of U.S. Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Guidance for Civil Case Assignment in the District Courts

Dear Judge Conrad:

We were surprised by news stories last week that the Judicial Conference of the United States had required district courts to enact procedures randomly assigning across their districts cases in which plaintiffs seek nationwide injunctions.¹ We found this deeply troubling because it would direct the courts to change in sum and substance the effect of federal venue laws and the operation of statutorily created judicial divisions. These matters are properly decided by the legislative branch, not the courts.

The reaction from our Democratic colleagues was swift and jubilant. Senator Schumer crowed that it will prevent “MAGA-right plaintiffs” from being able to “all but guarantee a handpicked MAGA-right judge.”² Senator Durbin echoed this view, saying, “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.”³

Senator Schumer, of course, has long sought to bully courts into changing their case assignments. Less than a year ago he sent a letter to the Chief Judge of the Northern District of Texas, suggesting that the court adopt his preferred scheme for

¹ See, e.g., Michael Macagone, *Federal courts seek to stop ‘judge shopping’ with new rule*, ROLL CALL, Mar. 12, 2024, <https://rollcall.com/2024/03/12/federal-courts-seek-to-stop-judge-shopping-with-new-rule/> (“The federal judiciary announced a new rule Tuesday to discourage so-called “judge shopping” nationwide by making sure high-profile lawsuits seeking to overturn statewide or national policies are randomly assigned among a larger pool of judges.”); Ian Millhiser, *Republicans will no longer get to handpick their judges when they sue Biden*, VOX, Mar. 12, 2024 (“A spokesperson for the Judicial Conference of the United States confirmed via email that this new policy applies ‘to all 94 US district courts.’”).

² Tobi Raji, *Judges, GOP lawmakers slam new policy that limits ‘judge shopping’*, WASH. POST, Mar. 14, 2024, <https://www.washingtonpost.com/national-security/2024/03/14/judges-gop/>.

³ Suzanne Monyak & Lydia Wheeler, *Republicans Suggest Judges Can Ignore Forum-Shopping Curb*, BLOOMBERG LAW, Mar. 14, 2024, <https://news.bloomberglaw.com/us-law-week/judge-shopping-curb-draws-partisan-backlash-in-senate>.

random assignment of cases to change the effect of federal venue laws.⁴ 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.

Left blissfully undisturbed in Senator Schumer's ideal world and in the reported Judicial Conference policy is the certainty "Resistance-left plaintiffs" have of drawing a "Resistance-left judge" in some particular venues across the country.⁵ Assigning cases across all judges in these districts does nothing to thwart *outcome shopping* on the left, regardless of which judge they draw. For Senator Schumer and his allies in the legal academy, that was the goal, and it appeared that the Judicial Conference may have helped them along.

The Chairman of the Judicial Conference's Executive Committee argued that, in fact, the policy would respond to the rise in nationwide injunctions.⁶ But the reported policy itself would have done precisely nothing to curb such practices. Congress could end the practice and has, indeed, considered proposals along those lines.⁷ So could the Supreme Court.⁸ The Judicial Conference's effort would merely alter case assignments to change *who could possibly get* nationwide relief, not whether such relief is available.

We—like Alexander Hamilton—believe the courts are at their best when they remind the political branches to stay in their respective lanes,⁹ not when the courts decide to swerve into politics themselves.¹⁰ The reported policy recommendations, apart from being unequal in their application and ill-suited to their supposed

⁴ See Letter from Majority Leader Sen. Charles Schumer to Chief Judge David C. Godbey, Apr. 27, 2023, at https://www.democrats.senate.gov/imo/media/doc/following_devastating_decisions_on_abortion_lgbt_protections_and_immigration_majority_leader_schumer_pushes_to_end_contemptible_practice_of_texas_forum_shopping.pdf.

⁵ See, e.g., Madeline Conway, *Sessions dismisses Hawaii judge in travel ban case as 'sitting on an island in the Pacific'*, POLITICO, Apr. 20, 2017, <https://www.politico.com/story/2017/04/20/jeff-sessions-judge-hawaii-island-in-the-pacific-237412>.

⁶ See Nate Raymond, *US federal judiciary moves to curtail 'judge shopping' tactic*, REUTERS, Mar. 12, 2024, <https://www.reuters.com/world/us/us-federal-judiciary-adopts-policy-curtail-judge-shopping-2024-03-12/> ("U.S. Circuit Judge Jeffrey Sutton, the newly appointed chair of the Judicial Conference's executive committee, said the change was prompted by the 'plethora of national, statewide injunctions' being issued by judges in such cases.").

⁷ S. 2464, 116th Congress (2019).

⁸ See, e.g., *Dep't of Homeland Sec. v. New York*, 589 U.S. ____ (2020) (Gorsuch, J., concurring) ("I hope, too, that we might at an appropriate juncture take up some of the underlying equitable and constitutional questions raised by the rise of nationwide injunctions.").

⁹ See "The Federalist No. 78, [28 May 1788]," Founders Online, National Archives, <https://founders.archives.gov/documents/Hamilton/01-04-02-0241> (discussing that the independence of the judiciary enables it to hold even unpopular laws unconstitutional).

¹⁰ See Antonin Scalia, "The Crisis in Judicial Appointments," in CHRISTOPHER J. SCALIA & EDWARD WHELAN (EDS.), *SCALIA SPEAKS* 223, 231 (2017).

purpose, would have constituted a remarkable encroachment on the separation of powers. Fortunately it seems that cooler heads have prevailed.

Late Friday we were informed of the actual policy and its attendant guidance by the Judicial Conference's Case Assignment and Case Management Committee. While the Committee had, indeed, recommended assignment across districts with all the problems that would ensue for access to justice, in his memo the Committee Chairman was clear: "[The policies] should not be viewed as impairing a court's authority or discretion." The guidance itself reaffirms this correct view, noting, "[28 U.S.C. 137(a)] provides individual courts wide latitude to establish case assignment systems, permitting flexibility in managing their caseloads efficiently and in a manner that best suits the various needs of the district and the communities they serve." The guidance goes on to make various suggestions as to how districts should conduct their business but in the end, they are just that: suggestions.

And rightly so. The Constitution vests Congress with the sole authority to determine the structure of the lower courts. The Judiciary Act of 1789 created the circuit and district court framework. Over the years, Congress has passed laws creating new districts, new divisions, and clarifying where courts in each division can hear cases. This was the Founders' design.

Because this recommendation is only a recommendation, it seems that the Judicial Conference is respecting the primacy of Congress.

The federal judiciary is the crown jewel of our constitutional republic, its key feature being that it is separate and independent from the political branches of government. Chief Justice Roberts recently noted judicial independence and separation of powers as reasons for him not to appear before the Senate Judiciary Committee.¹¹ When President George Washington and Secretary of State Thomas Jefferson asked the Supreme Court a list of legal questions about treaties,¹² a unanimous Supreme Court responded back that making such extra judicial decisions would violate the separation of powers.¹³

Independence of the judiciary is as vital as separation of powers. Hamilton wrote forcefully of the need for an independent judiciary in Federalist 78. He believed that the life tenure of federal judges "[i]n a monarchy . . . is an excellent barrier to the despotism of the prince" and "in a republic . . . is a no less excellent barrier to the encroachments and oppressions of the representative body. And it is the best

¹¹ See Letter from Chief Justice John Roberts to Chairman Se. Dick Durbin, Apr. 25, 2023, at <https://www.documentcloud.org/documents/23789636-roberts-letter-to-durbin-4-25-2023>.

¹² Enclosure Questions for the Supreme Court, July 18, 1793, at <https://founders.archives.gov/documents/Washington/05-13-02-0164-0002>.

¹³ Letter from Supreme Court Justices to President George Washington, Aug. 8, 1793, at <https://founders.archives.gov/documents/Washington/05-13-02-0263>.

expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws.”¹⁴


We are pleased that the judiciary has chosen not to interfere in the legislative process. It is our expectation that this is the last we hear about this issue from the Judicial Conference.

Sincerely,


John Cornyn
U.S. Senator



Mitch McConnell
U.S. Senator


Michael S. Lee
U.S. Senator


Thom Tillis
U.S. Senator


John N. Kennedy
U.S. Senator


Steve Daines
U.S. Senator


Ted Cruz
U.S. Senator


Lindsey O. Graham
U.S. Senator


Tom Cotton
U.S. Senator


John Boozman
U.S. Senator

¹⁴ “The Federalist No. 78, [28 May 1788],” Founders Online, National Archives, <https://founders.archives.gov/documents/Hamilton/01-04-02-0241>.



Marsha Blackburn
U.S. Senator



Bill Hagerty
U.S. Senator



Eric Schmitt
U.S. Senator



Tedd Budd
U.S. Senator



Charles E. Grassley
U.S. Senator



Josh Hawley
U.S. Senator



Marco Rubio
U.S. Senator



Shelley Moore Capito
U.S. Senator



John Thune
U.S. Senator