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The Judicial Conference Legislates From The Shadow Docket

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On Tuesday afternoon, a reporter from the *Washington Post* called to ask me about a new policy from the Judicial Conference designed to limit forum shopping. I inquired if she had a copy of the policy. She said no, but there was a press release. I was tempted to reply, "Democracy dies in darkness." Still, all we have is a press release.

The Judicial Conference of the United States has strengthened the policy governing random case assignment, limiting the ability of litigants to effectively choose judges in certain cases by where they file a lawsuit.

The policy addresses all civil actions that seek to bar or mandate state or federal actions, "whether by declaratory judgment and/or any form of injunctive relief." In such cases, judges would be assigned through a district-wide random selection process. . . .

The amended policy applies to cases involving state or federal laws, rules, regulations, policies, or executive branch orders. District courts may continue to assign cases to a single-judge division when they do not seek to bar or mandate state or federal actions, whether by declaratory judgment and/or any form of injunctive relief.

How will this policy operate? When does it actually go into effect? How are litigants to know what types of remedies will trigger the policy? Who the hell knows? Not even the district court judges have seen a copy of the policy. They learned about it when we did. Courthouse News reported that the policy will be circulated to judges later this week, and the chief judges will "have to meet to discuss the change." You think?

After years of complaints about the secretive "shadow" docket, the Chief Justice of the United States, the Chief Judges of the Circuit Courts, and various District Court judges, have the temerity to announce a secret policy that no one can see that will fundamentally change the way litigation operates in federal courts. Maybe it is posted on top of a tall column, like in Nero's day. Worse still, this policy change was plainly motivated by the same critics who harp about the shadow docket. The courts should resist the political currents, but here, the Judicial Conference has kowtowed to Senators Schumer and Whitehouse, and some scholars.

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Chief Judge Randy Crane of the Southern District of Texas expressed some doubts to the Reuters:

The chief judge of Texas' Southern District, Randy Crane, in a statement said the Judicial Conference's policy raised questions that need to be addressed before it could be implemented by courts. He said it also "seems to be a response to decisions adverse to certain political interests, given its timing."

And Judge Jim Ho of the Fifth Circuit Court of Appeals gave me permission to share his response:

"Judges are supposed to follow the laws enacted by Congress, not bend the rules in response to political pressure. If reformers are sincerely troubled by venue shopping, they can start by examining the serious concerns that have been voiced about our Nation's bankruptcy and patent dockets."

I've heard other judges may make similar statements. I'm happy to post any other remarks.

This rollout was poorly executed. Why would the Judicial Conference blindside the very judges who have to implement this policy? And why not make the policy publicly available so litigants can understand it? But the botched rollout is just the tip of the iceberg. This policy is badly flawed, and I doubt it will actually achieve what it was intended to achieve. Here are a few quick reactions.

First, I suspect it will be easy enough to circumvent this policy. Step 1, file a complaint that does not seek the triggering relief. Step 2, wait for the case to be assigned. Step 3, amend the complaint as a matter of course within 21 days, seeking the triggering relief. Perhaps this sort of behavior will give rise to Rule 11 sanctions, but why should lawyers be sanctioned for availing themselves of FRCP Rule 15(a)(1)(A). If courts prohibit the amended-complaint route, litigants can try other approaches. They can seek to certify a nationwide class, which has the effect of a non-party without using that label. But who knows? Maybe Rule 23 certifications will also give rise to sanctions? What other aspects of FRCP and the U.S. Code will this policy wipe out? State Attorneys General have very smart attorneys on staff who will figure out workarounds. Or maybe they can ask Chat GPT for advice, unless that too is barred by the federal courts. I suspect this policy will become obsolete as soon as it is released–whenever that may happen.

Second, is this policy consistent with federal statutes? Congress has established fairly intricate rules concerning venue, and the establishment of judicial districts. 28 U.S.C. § 124 establishes the four judicial district of Texas. And 28 U.S.C. § 137(a) 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.

As I read the statute, each division within a district court–including single judge divisions–needs to comply with Section 137. And the Judicial Council "of the circuit" can only step if the district judges are "unable to agree." For example, the Fifth Circuit Judicial Council can intervene if the Northern District of Texas cannot agree upon rules. I don't see how the Judicial Conference *of the United* States can override the "rules and orders of the court." Congress expressly *denied* the Judicial Conference any such power. At most, this policy can be *advisory*. That message was *not* conveyed to the press. Section 137 reinforces how it should be *Congress* that changes rules, not judges pretending to be legislators. Accordingly, I told the *Washington Post*:

But Josh Blackman, a professor at South Texas College of Law, questioned the Judicial Conference's authority to create the policy and said the issue should be decided by elected lawmakers. "I think the solutions come from Congress," Blackman said. "I don't know that this policymaking body has the authority to do what it did — even if they did, I think it's better coming from the legislature."

Imagine that: the Judicial Conference legislates from the shadow docket. A litigant who has his case reassigned can probably challenge the lawfulness of this policy. It won't be difficult for a judge, or an appellate court, to find the rule ultra vires.

Third, is this policy consistent with binding circuit precedent? There are volumes of caselaw that govern intradistrict and interdistrict transfers. For example, under Fifth Circuit precedent, you can only override a plaintiff's choice of venue within the district if it is "clearly more convenient." Can the Judicial Conference trump Fifth Circuit precedent, and force a case to be reassigned by random draw? This is a huge power grab by the Judicial Conference.

Fourth, the impetus of this policy was perceived abuses of the patent system. (Speaking of patents, I'm glad Chief Justice Roberts and Chief Judge Kimberly Moore found something productive to work on together, as Judge Pauline Newman remains trapped in Article III purgatory). Yet the press release does not even mention how the rules for patent selection have changed, nor does it mention judge shopping in bankruptcy and other areas. The Court is targeting a method of forum shopping used primarily on the right. Attorneys General in California or New York don't have to forum shop because virtually every judge in San Francisco or Brooklyn will be philosophically simpatico–even if nominated by a Republican president. And I don't need to remind people that it is virtually impossible to draw a conservative federal judge in Austin–and the press should stop calling a Reagan-appointee from Hawaii who sits in Austin, and has consistently ruled against Texas, a judicial *conservative*.

Fifth, this policy simply nibbles at the edges of the problem. I understand that many conservative judges do not like nationwide injunctions. I'm sympathetic to those criticisms. Chief Judge Sutton of the Sixth Circuit, who seems to be the lead spokesperson of this new policy, has highlighted the problem of nationwide injunctions in his opinions. And he expressed a similar sentiment in his briefing to the press:

But on Tuesday, Sutton stressed that the policy change isn't "something that relates to just one state." "I actually think the story is about national injunctions. That's been a new development, really [in] the last 10 years and maybe the last two or three administrations, where that has become a thing. And it makes sense that some advocates are going to do the best by their clients. And, you can understand how some of those pressures work depending on who's running the administration. But I, for one, I'm really proud that we did this. I thought it was a really good idea," Sutton said.

"The current issue relates to nationwide injunctions or statewide injunctions, so when it comes to those claims, it's a little hard to say you need one division of one state to handle it since by definition it extends at a minimum throughout the state and possibly to the whole country," Sutton added.

Congress, and not the obscure Judicial Conference should take the lead at addressing single-judge divisions. If this policy is indeed just advisory–a message that did not come through in the press release–it seems to be little more than virtue signaling.

Single judge divisions have been problematic for generations. Those problems go far beyond nationwide injunctions. Judge William Wayne Justice, who deliberately moved around his single judge division assignments, single-handedly controlled the Texas prison system for nearly two decades. And throughout the Civil Rights Era, litigants routinely judge shopped to single-judge divisions. The Judicial Conference has historically been silent in the face of such judge-shopping. And unlike with nationwide injunctions, which the Supreme Court consistently stays, localized injunctions are unlikely to attract appellate review.

The upshot of this ruling is that conservative litigants will have greater difficulties obtaining nationwide relief while liberal litigants can continue business as usual. This is unilateral disarmament that targets specific conservative judges for their rulings. 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. In any other context, such a reactive policy would be viewed as retaliation. I suspect something is lurking in the background: Chief Justice Roberts is tired of reversing the Fifth Circuit at his day job, so he used his side-hustle to divest those pesky Trump judges of jurisdiction.

There are more problems, but that is enough for now. As a general matter, the Judicial Conference has remained silent about serious abuses of power (Judge Moore's stealth impeachment of Judge Newman and Judge Sullivan's sitting on the judicial selection committee). Meanwhile, the Judicial Conference caves into criticism from Schumer and others, without even the courtesy of seeking comments from the District Court Judges nationwide. This is a body that operates in the shadows, and lacks fortitude.

I do not know if dissents are permissible from the Judicial Conference, but none have been published. Thankfully, it's not too late for secret policy to be reconsidered. Or the District Court Judges can tell the Judicial Conference to mind their own business.

Author Biography: Josh Blackman is a constitutional law professor at the South Texas College of Law Houston, an adjunct scholar at the Cato Institute, and the President of the Harlan Institute.