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The Text Of The Policy Approved By The Judicial Conference

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I obtained a copy of the report approved by the Judicial Conference.

First, why on earth could this memo not have been issued contemporaneously with the press release? This may be one of the most-botched governmental rollouts since HealthCare.gov. The Executive Committee should carefully re-assess their procedures here.

Second, the policy sweeps quite broadly, far beyond the national injunctions, but is prefaced by "should."

District courts *should* apply district-wide assignment to:

a. civil actions seeking to bar or mandate statewide enforcement of a state law, including a rule, regulation, policy, or order of the executive branch or a state agency, whether by declaratory judgment and/or any form of injunctive relief; and

b. civil actions seeking to bar or mandate nationwide enforcement of a federal law, including a rule, regulation, policy, or order of the executive branch or a federal agency, whether by declaratory judgment and/or any form of injunctive relief.

This policy does not apply solely to single-judge divisions, but applies to all courts.

Third, the policy is wildly underinclusive–it does nothing to address judge shopping in patent cases, which was the impetus of this policy. Third, the document says that the guidance "applies to" patent cases, but only where some sort of injunctive relief against the government if sought. Do most or many patent cases involve such relief? What about bankruptcy cases? "Case assignment in the bankruptcy context remains under study."

Fourth, the policy is pretty clear this is *guidance*. It uses the word "should."

These policies and the accompanying guidance inform the district courts' statutory authority and discretion to divide the business of the court pursuant to 28 U.S.C. § 137. They should not be viewed as impairing a court's authority or discretion. Instead, they set out various ways for courts to align their case assignment practices with the longstanding Judicial Conference policy of random case assignment. Simply put, these policies should serve the purpose of securing a "just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1.

As I explained last night, 28 U.S.C. § 137(a) gives the District Courts this power. The Committee does not even cite the Judicial Conference's power under 28 U.S.C. § 331, which is positive.

Fifth, let me return to the botched rollout. Several press outlets said that this policy was *mandatory* and already in effect. Courthouse News reported that based on Judge Sutton's representations that "[t]he policy is effective immediately but it is unclear when courts would begin implementing these procedures or how that process would work." And Bloomberg Law reported, "Judge Jeffrey Sutton, chair of the Judicial Conference's executive committee, said at a press briefing that the policy overrides any local orders that currently allow for one judge to hear all cases filed at their courthouse." Bloomberg added, "Sutton didn't rule out the rule applying to past or ongoing matters." I have been a fan of Judge Sutton for many years, but this private press briefing was not his finest moment. Even if the policy was approved by many judges whom I respect, Sutton's remarks were woefully misunderstood by reporters. Some of that blame can be placed on the press, perhaps, but much belongs to the messenger.

Sixth, the policy puts forward a balancing test to determine how a case should be assigned:

The policy is applicable in instances when the remedy sought has implications beyond the parties before the court and the local community, and the importance of having a case heard by a judge with ties to the local community is not a compelling factor.

Did Justice Breyer write this? Are we really going to have untrained legal staff in the clerk's office deciding what are "implications beyond the parties before the court and the local community" and whether "ties to the local community" is a "compelling factor"? These are difficult merits questions on which people can reasonably disagree. Are law clerks or individual judges going to have to be burdened with making these determinations at the *complaint* stage? Will this issue be litigated: does the complaint now explain why a case should not be reassigned? Would the defendant be able to file a reply explaining why the case should be reassigned?

Can *Amici* participate? Can a reassignment order be appealed? Mandamused? And, oh by the way, this policy is triggered if an amended complaint or motion is filed. This policy has now added untold layers on untold cases that seek *any* injunctive relief against state governments.

I regret that many of the judges who approved this policy have gone along with groupthink. They read about a problem, they don't like nationwide injunctions, they think certain judges in Texas whose initials are M and K make the judiciary look bad, so they cobbled together what looks like a facially neutral policy that will cause far more harm than good. You may think that my response is harsh. Wait till you see what *real* lawyers think–both on the right and the left. The burdens on the practice of law are substantial. No one will like this policy. I would not be surprised if most district courts read this guidance, and put it in the circular file.

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