

# DIVISIONAL JUDGE-SHOPPING

Alex Botoman\*

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## INTRODUCTION

In the final years of Barack Obama’s presidency, major administration initiatives on immigration, transgender rights, and employee pay met their end at the hands of federal judges in the far reaches of Texas. In the three cases challenging the administration’s actions, lawyers for the state of Texas—the lead plaintiff—trekked hundreds of miles from the state capital in Austin to seek nationwide injunctions in the towns of Brownsville, Sherman, and Wichita Falls.

The three venues had one important thing in common. Thanks to court-created judge-assignment rules, Texas was able to gain significantly more control over the judges selected to hear the cases by filing in smaller courthouses instead of in major cities like Houston, Dallas, or San Antonio. By going to Brownsville to file the challenge to President Obama’s Deferred Action for Parents of Americans and Lawful Permanent Residents (DAPA) and Deferred Action for Childhood Arrivals (DACA) II immigration initiatives, Texas ensured a fifty percent chance of drawing a judge who had harshly criticized the Department of Homeland Security in a series of previous rulings.<sup>1</sup> In the other two cases, Texas was able to choose its judge with almost complete certainty.<sup>2</sup> In all three cases, the assigned judges issued

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1. See S.D. Tex. General Order No. 2014-12 (Oct. 29, 2014) (providing that Judge Andrew S. Hanen would be assigned fifty percent of all civil cases filed in Brownsville); Alicia A. Caldwell, *Judge on Immigration Case Had Criticized U.S. Policy*, ASSOCIATED PRESS (Dec. 9, 2014), <http://bigstory.ap.org/article/135858ccf309405abcbe0589b001a7f2/judge-%20immigration-case-had-criticized-us-policy> (summarizing Judge Hanen’s previous criticism of the government’s immigration policies).

2. See *Texas v. United States*, 95 F. Supp. 3d 965 (N.D. Tex. 2015) (ruling by Judge Reed O’Connor blocking the federal Department of Labor from including same-sex spouses in a statutory definition of the word “spouse”); *Nevada v. U.S. Dep’t of Labor*, 218 F. Supp. 3d 520 (E.D. Tex. 2016) (ruling by Judge Amos Mazzant blocking a Department of Labor rule that would have increased the minimum salary threshold for exempting employees from overtime pay); E.D. Tex. General

injunctions prohibiting the federal government from implementing the challenged policies and regulations, raising serious concerns that Texas and its co-plaintiffs had manipulated court procedures to obtain favorable nationwide rulings in politically charged cases.

How did this happen? Ask most people—even most lawyers and law students—how judges are assigned to federal cases and they are likely to tell you that a judge from the district in which the case is filed is assigned at random to hear it.<sup>3</sup> But the process is much more complicated. Fifty-five of the nation’s ninety-four federal district courts are subdivided into geographic “divisions” that are used for judge assignment—essentially creating mini district courts within the district, each with its own judges.<sup>4</sup> In these districts, litigants can select the pool of judges eligible to be assigned to their cases by strategically choosing the division in which they file—a practice that this Note refers to as “divisional judge-shopping.”

Despite featuring in high-profile cases like the three filed by the state of Texas, divisional judge-shopping has drawn little attention. This Note attempts to fill the void by comprehensively surveying and reporting on the judge-assignment procedures used by the country’s ninety-four federal district courts, with an eye toward analyzing the extent to which they allow plaintiffs to engage in divisional judge-shopping. It argues that existing judge-assignment systems are insufficient to prevent divisional judge-shopping, especially in cases challenging federal and state laws, regulations, and policies. And it proposes that Congress implement standardized judge-assignment procedures in all districts to limit divisional judge-shopping opportunities.

This Note proceeds in four parts. Part I explores how the state of Texas exploited divisional judge-assignment systems to secure favorable judges in three cases challenging Obama administration initiatives. Part II reports the results of a survey of the judge-assignment procedures used in the country’s district courts. It explains

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Order No. 16-7 (July 15, 2016) (assigning ninety-five percent of civil cases filed in Sherman to Judge Mazzant); *infra* note 37 (describing the assignment practices that guaranteed that Judge O’Connor would be assigned to the transgender rights case).

3. See Katherine A. Macfarlane, *The Danger of Nonrandom Case Assignment: How the Southern District of New York’s “Related Cases” Rule Shaped Stop-and-Frisk Rulings*, 19 MICH. J. RACE & L. 199, 205–06 (2014) (noting that both lawyers and non-lawyers often assume random assignment).

4. See *infra* Part II; Appendix A.

generally how courts assign judges to cases and then focuses more closely on the use of divisions in judge assignment. Part III argues that divisional judge-shopping has the potential to seriously undermine public confidence in the judiciary, especially when procedures allow plaintiffs to judge-shop in politically charged cases challenging generally applicable laws, regulations, or policies. Part IV proposes a solution, arguing for a reconstituted federal divisional venue statute and mandatory district-wide assigning in cases challenging federal and state laws, regulations, and policies.

## I. TEXAS'S USE OF DIVISIONAL JUDGE-SHOPPING

### A. *Texas v. United States* (Immigration)

In 2014, President Obama announced major expansions to his 2012 DACA initiative,<sup>5</sup> which had allowed qualifying undocumented immigrants who had entered the United States as children to receive a two-year reprieve from the threat of removal.<sup>6</sup> The new initiatives, known as DACA II and DAPA, expanded the class of childhood arrivals eligible for relief and, for the first time, offered relief to qualifying undocumented *parents* of children with U.S. citizenship or lawful permanent resident status.<sup>7</sup> When combined with the original DACA program, DAPA and DACA II would have made as many as 5.2 million individuals eligible for temporary relief from removal—almost half of the estimated 11 million undocumented immigrants present in the United States at the time.<sup>8</sup>

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5. Michael D. Shear, *Obama, Daring Congress, Acts to Overhaul Immigration*, N.Y. TIMES (Nov. 20, 2014), <http://www.nytimes.com/2014/11/21/us/obama-immigration-speech.html>.

6. Memorandum from Janet Napolitano, Sec'y of Homeland Sec., to David V. Aguilar, Acting Comm'r, U.S. Customs and Border Prot., et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children* (June 15, 2012), <https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf>.

7. Memorandum from Jeh Charles Johnson, Sec'y of Homeland Sec., to León Rodriguez, Dir., U.S. Citizenship & Immigration Servs., et al., *Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children and with Respect to Certain Individuals Who Are the Parents of U.S. Citizens or Permanent Residents* (Nov. 20, 2014), [https://www.dhs.gov/sites/default/files/publications/14\\_1120\\_memo\\_deferred\\_action.pdf](https://www.dhs.gov/sites/default/files/publications/14_1120_memo_deferred_action.pdf).

8. Press Release, Migration Policy Inst., *As Many as 3.7 Million Unauthorized Immigrants Could Get Relief From Deportation Under Anticipated New Deferred Action Program* (Nov. 19, 2014), <http://www.migrationpolicy.org/>

Congressional Republicans were furious. House Speaker John Boehner charged Obama with acting like a “king,”<sup>9</sup> and Senator Rand Paul released a statement accusing the President of ignoring constitutional separation of powers.<sup>10</sup> But the eventual downfall of DAPA and DACA II was foreshadowed in a Tweet that night from then-Texas Attorney General (and later Governor) Greg Abbott that read: “Pres. Obama has circumvented Congress and bypassed the will of the American people. *I am prepared to immediately challenge this in court.*”<sup>11</sup> Thirteen days later, the state of Texas, eventually joined by more than twenty other states and state officials, filed suit in federal court in Brownsville, Texas, to enjoin the program.<sup>12</sup>

The United States District Court for the Southern District of Texas—the district that includes Brownsville—spans forty-three counties and also includes the cities of Houston, Corpus Christi, and Laredo.<sup>13</sup> The district has nineteen authorized judgeships (the fifth most of any district in the country),<sup>14</sup> and, when *Texas v. United States* was filed, it had fourteen active judges and nine senior status judges<sup>15</sup> hearing cases.<sup>16</sup> However, under the court’s rules, only some of those twenty-three judges were eligible to be assigned to the case. The

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news/mpi-many-37-million-unauthorized-immigrants-could-get-relief-deportation-under-anticipated-new; *see also* Amended Complaint for Declaratory and Injunctive Relief ¶ 3, *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (Civil No. B-14-254), 2014 WL 7497780 (alleging that DACA II and DAPA could provide relief to 4 million people).

9. John Boehner, Speaker, U.S. House of Reps., A Message Before the President’s Immigration Speech (Nov. 20, 2014), <https://youtu.be/p72ZtZcrhg0>.

10. Press Release, Senator Rand Paul, Sen. Paul Issues Statement on the President’s Abuse of Executive Amnesty (Nov. 20, 2014), <https://www.paul.senate.gov/news/press/sen-paul-issues-statement-on-the-presidents-abuse-of-executive-amnesty>.

11. Greg Abbott (@GregAbbott\_TX), TWITTER (Nov. 20, 2014, 7:36 PM), [https://twitter.com/GregAbbott\\_TX/status/535607534120226816](https://twitter.com/GregAbbott_TX/status/535607534120226816) (emphasis added).

12. Complaint for Declaratory and Injunctive Relief, *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (Civil No. B-14-254), 2014 WL 6806231.

13. 28 U.S.C. § 124(b) (2012).

14. *Id.* § 133(a). Only the Southern District of New York, Northern District of Illinois, Central District of California, and Eastern District of Pennsylvania have more authorized judgeships. *Id.*

15. Federal judges over the age of 65 who meet certain service requirements may elect to take senior status and continue hearing cases on their court while opening up their seats for new judges to be appointed. *Id.* § 371(b–d); Frederic Block, *Senior Status: An “Active” Senior Judge Corrects Some Common Misunderstandings*, 92 CORNELL L. REV. 533, 536 (2007).

16. S.D. Tex. General Order No. 2014-12 (Oct. 29, 2014).

district is divided into seven geographic divisions,<sup>17</sup> and each of the district's judges hears cases from only certain divisions.<sup>18</sup> The order dividing up the docket of the Southern District is posted publicly on the court's website, meaning that plaintiffs know their precise chances of drawing each judge depending on the division in which they file.<sup>19</sup>

At the time that Texas filed suit, all civil cases in Brownsville were assigned to either Judge Andrew Hanen or Senior Judge Hilda Tagle.<sup>20</sup> Judge Tagle, an appointee of Bill Clinton, became the first Hispanic female federal judge in Texas when she took the bench in 1998.<sup>21</sup> A review of her decisions reveals nothing to suggest that she would favor either side in the challenge to DACA II and DAPA.<sup>22</sup>

But Judge Hanen, a George W. Bush appointee, had a history of harshly criticizing the Department of Homeland Security (DHS), making his potential assignment to *Texas v. United States* an appealing prospect for the plaintiffs.<sup>23</sup> In one previous case, Judge Hanen had admonished DHS officials for failing to report a permanent resident who was wanted on drug charges to law enforcement when he contacted the Department for a replacement green card.<sup>24</sup> Hanen accused the officials of being "accessories after the fact" who "give[] individuals wanted for crimes . . . the papers necessary for them to . . . travel freely and then send[] them on their way to perpetrate

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17. 28 U.S.C. § 124(b) (2012).

18. S.D. Tex. General Order No. 2014-12 (Oct. 29, 2014).

19. For example, a plaintiff filing a case in the McAllen Division in December of 2014 would know that he had a 33.3 percent chance of drawing Chief Judge Ricardo H. Hinojosa, a 33.3 percent chance of drawing Judge Randy Crane, a 33.3 percent chance of drawing Judge Micaela Alvarez, and no chance of drawing any of the other twenty judges in the district. *Id.*

20. Each judge had a fifty percent chance of being assigned to each case. *Id.*

21. Ildefonso Ortiz, *Judge Tagle Cites Perseverance for Her Success*, BROWNSVILLE HERALD (Oct. 8, 2004), [http://www.brownsvilleherald.com/news/local/article\\_4d45bd14-c314-57d3-91ae-685b431b012b.html](http://www.brownsvilleherald.com/news/local/article_4d45bd14-c314-57d3-91ae-685b431b012b.html).

22. I surveyed all accessible decisions of Judge Tagle that concerned the Department of Homeland Security or national security and found none that appeared to indicate a predisposition for either side. *See, e.g.*, *Castro v. Freeman*, No. B-09-208, 2011 WL 11535494 (S.D. Tex. Nov. 22, 2011); *Ascencio-Guzman v. Chertoff*, No. B-94-215, 2009 WL 1064962 (S.D. Tex. Apr. 15, 2009).

23. *See* Anil Kalhan, *Deferred Action, Supervised Enforcement Discretion, and the Rule of Law Basis for Executive Action on Immigration*, 63 UCLA L. REV. DISCOURSE 58, 78–80 (2015) (detailing Judge Hanen's pointed words for the DHS in three cases leading up to *Texas v. United States*).

24. *United States v. Cabrera*, 711 F. Supp. 2d 736 (S.D. Tex. 2010).

more crimes on the residents of the United States.”<sup>25</sup> A few years later, Judge Hanen made national headlines when he accused the DHS of “completing the criminal mission of [human traffickers]” when it reunited a ten-year-old girl with her undocumented mother who was living in Virginia, rather than deporting both of them (the mother had hired traffickers to smuggle the daughter across the border).<sup>26</sup> Hanen flatly declared that “the DHS should cease telling the citizens of the United States that it is enforcing our border security laws because it clearly is not.”<sup>27</sup>

Finally, four months before *Texas v. United States* landed on his docket, Judge Hanen issued an opinion in a third case excoriating the government for failing to remove an alien from the country after he had completed a federal prison sentence.<sup>28</sup> The opinion contained provocative headings such as “This Policy is An Open Invitation to the Cartel Bosses”<sup>29</sup> and blustered that “[t]he DHS and Justice Department should immediately announce to the courts [and] the public . . . what is patently obvious—that they will neither deport all of the known criminals who are illegally in the country; nor will they prosecute all of those criminals who, if deported, return illegally.”<sup>30</sup> Judge Hanen concluded by blaming the government for turning “Main Street America” into a “rogue’s gallery” by failing to enforce immigration laws.<sup>31</sup>

It was against this backdrop that the plaintiffs in *Texas v. United States* decided to file their case in Brownsville. Judge Hanen was assigned to the case, and true to predictions, he issued a sweeping nationwide injunction prohibiting the federal government from enrolling anyone in the DACA II and DAPA programs.<sup>32</sup>

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25. *Id.* at 737–38, 737 n.3.

26. *United States v. Nava-Martinez*, No. B–13–441–1, 2013 WL 8844097, at \*1 (S.D. Tex. Dec. 13, 2013).

27. *Id.* at \*3 n.4.

28. *United States v. Ramirez*, 38 F. Supp. 3d 818 (S.D. Tex. 2014).

29. *Id.* at 825.

30. *Id.* at 830.

31. *Id.* at 832.

32. *Texas v. United States*, 86 F. Supp. 3d 591, 677–78 (S.D. Tex. 2015). The decision was later affirmed by a divided panel of the Fifth Circuit and an equally divided Supreme Court. *Texas v. United States*, 787 F.3d 783 (5th Cir. 2015), *aff’d by an equally divided court*, 136 S. Ct. 2271 (2016). Hanen also issued an unprecedented sanctions order in response to perceived misrepresentations by government attorneys, ordering all attorneys from the Department of Justice in Washington, D.C., to attend an annual ethics class before appearing in court in any

### B. *Texas v. United States* (Transgender Rights)

The final year of President Obama's second term saw a rising controversy over bathroom use by transgender students. The issue featured most prominently in North Carolina's enactment of a law (commonly referred to as "HB2") that, among other things, prohibited individuals (including students) from using public restrooms designated for a sex other than that listed on their birth certificates.<sup>33</sup> In May 2016, the Departments of Education and Justice issued a joint Dear Colleague letter advising that the agencies had interpreted Title IX's prohibition on sex discrimination to require schools to allow students to use restrooms consistent with their gender identities.<sup>34</sup>

Again, the state of Texas, joined by Harrold (TX) Independent School District and a number of other states, state agencies, and state officials, went to court, filing suit in the Wichita Falls Division of the Northern District of Texas to enjoin the government from enforcing this interpretation.<sup>35</sup>

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of the twenty-six plaintiff states. *Texas v. United States*, No. B-14-254, 2016 WL 3211803, at \*13–14 (S.D. Tex. May 19, 2016); see also Orin Kerr, *A Puzzling Order by Judge Hanen in the DAPA Immigration Case*, WASH. POST.: VOLOKH CONSPIRACY (May 20, 2016), [https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/20/a-puzzling-order-by-judge-hanen-in-the-dapa-immigration-case/?utm\\_term=.9062378b8015](https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/20/a-puzzling-order-by-judge-hanen-in-the-dapa-immigration-case/?utm_term=.9062378b8015) (questioning the legal basis for the order). Judge Hanen later withdrew the sanctions order on the eve of President Trump's inauguration. Josh Gerstein, *Judge Drops Threat to Demand Personal Data on Dreamers*, POLITICO (Jan. 19, 2017, 7:10 PM), <http://www.politico.com/story/2017/01/immigration-dreamers-data-233869>.

33. See Public Facilities Privacy & Security Act, 2016 N.C. Sess. Laws 3; Shannon Price Minter, *"Déjà Vu All Over Again": The Recourse to Biology by Opponents of Transgender Equality*, 96 N.C. L. REV. 1161, 1165–68 (2017) (describing efforts by states, including North Carolina, to regulate transgender bathroom usage).

34. Catherine E. Lhamon & Vanita Gupta, *Dear Colleague Letter on Transgender Students*, U.S. DEPT OF EDUC. & U.S. DEPT OF JUSTICE (May 13, 2016), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

35. See *Texas v. United States*, 201 F. Supp. 3d 810 (N.D. Tex. Aug. 21, 2016). Although the government argued that the Dear Colleague letter merely provided non-binding guidance, the district court found that it constituted a challengeable final agency action under the Administrative Procedure Act because it committed the agencies to a view of the law that would have put the plaintiffs in jeopardy of losing federal funding had they not complied with the letter. *Id.* at 823–25.

The Northern District of Texas has twelve authorized judgeships and, like the Southern District of Texas, also has a number of senior status judges hearing cases.<sup>36</sup> But at the time, all federal civil cases filed in Wichita Falls, a town of about 100,000 people near the Oklahoma border, were assigned to Judge Reed O'Connor.<sup>37</sup> O'Connor, an appointee of President George W. Bush, was no stranger to cases involving lesbian, gay, bisexual, and transgender (LGBT) rights. The previous year, he had ruled that the Department of Labor lacked authority to define the term “spouse” in the Family and Medical Leave Act to include same-sex spouses,<sup>38</sup> a holding that was effectively abrogated only a few months later by the Supreme Court’s ruling in *Obergefell v. Hodges*.<sup>39</sup> In other words, Texas knew when it filed in Wichita Falls that the case would be assigned to a judge who had recently struck down an agency action that had favored LGBT rights.

Again, the move paid off. Judge O'Connor enjoined the government from enforcing the regulations in the Dear Colleague letter nationwide, finding that the word “sex” in Title IX referred to biological sex as determined at birth.<sup>40</sup> After President Trump took office, the Departments of Labor and Education rescinded the Dear Colleague letter and its interpretation of Title IX, citing Judge O'Connor’s decision.<sup>41</sup>

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36. See 28 U.S.C. § 133 (2012). In January 2016, five months before the case was filed, the cases for the Dallas Division *alone* were split among nine different judges. N.D. Tex. Special Order 3-299 (Dec. 22, 2015).

37. The order assigning all Wichita Falls cases to Judge O'Connor was amended after the transgender rights case was filed. The original order is no longer available on the court website. However, the title of the amended order, “Amended Order Regarding Assignment of All Civil and Criminal Cases in the Wichita Falls Division to Hon. Reed O'Connor and Preliminary Assignment of Certain Cases to a Magistrate Judge” reveals that at the time, Judge O'Connor was assigned to all Wichita Falls civil cases. See N.D. Tex. Special Order 3-259 (June 27, 2016).

38. *Texas v. United States*, 95 F. Supp. 3d 965, 978, 980–81 (N.D. Tex. 2015).

39. 135 S. Ct. 2584 (2015).

40. *Texas*, 201 F. Supp. 3d at 833–35.

41. Sandra Battle & T.E. Wheeler II, *Dear Colleague Letter*, U.S. DEP'T OF EDUC. & U.S. DEP'T OF JUSTICE (Feb. 22, 2017), <https://www.justice.gov/crt/page/file/942021/download>. The Supreme Court had agreed to hear a case challenging the Obama administration’s interpretation of Title IX, see *Gloucester Cty. School Bd. v. G.G.*, 137 S. Ct. 369 (2016) (mem.), but the Court reversed course after the Dear Colleague letter was withdrawn, remanding the case to the Fourth Circuit for further consideration. *Gloucester Cty. School Bd. v. G.G.*, 137 S. Ct. 1239 (2017) (mem.).

*C. Nevada v. U.S. Department of Labor (Employee Rights)*

The Fair Labor Standards Act (FLSA) requires employers to pay employees one-and-a-half times their regular pay for all hours worked in excess of forty in a week.<sup>42</sup> However, the FLSA contains an exemption to the forty-hour rule for workers employed in an “executive, administrative, or professional capacity” (the “EAP exemption”) and gives the Secretary of Labor authority to issue regulations delimiting the scope of the exception.<sup>43</sup> Department of Labor regulations had long required workers to make a minimum salary in order to qualify for the EAP exemption, and the minimum salary had remained at \$23,660 per year since 2004.<sup>44</sup> Concerned that the salary threshold was too low, resulting in workers being classified as exempt from the forty-hour rule even when they performed little executive, administrative, or professional work, the Department of Labor promulgated a new rule in 2016 that set the salary threshold for exemption at the 40th percentile of salaries for full-time workers in the lowest-wage census region, a formula that worked out to a salary of \$47,476 at the time.<sup>45</sup>

The state of Texas, joined by the state of Nevada and other plaintiffs, sought to enjoin the implementation of the new rule, this time filing in the Sherman Division of the Eastern District of Texas. While the Eastern District is the smallest of the four U.S. District Courts in Texas, it still had seven judges hearing cases at the time.<sup>46</sup> But even with seven judges active in the district, 95 percent of non-patent civil cases in Sherman were assigned to Judge Amos Mazzant.<sup>47</sup> While Mazzant was appointed to the court by President Obama, he had previously donated to Republican political candidates<sup>48</sup>—an unsurprising fact given that his nomination had required the support

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42. 29 U.S.C. § 207(a)(1) (2012).

43. 29 U.S.C. § 213(a)(1) (2012).

44. See Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 29 C.F.R. § 541 (2018).

45. *Id.* § 541.600(a).

46. See E.D. Tex. General Order No. 16-7 (July 15, 2016). The district has seven authorized judgeships, 28 U.S.C. § 133(a) (2012), but two were unfilled at the time of filing. However, the court also had two senior judges hearing cases at the time. E.D. Tex. General Order No. 16-7 (July 15, 2016).

47. E.D. Tex. General Order No. 16-7 (July 15, 2016).

48. Noam Scheiber (@noamscheiber), TWITTER (Nov. 26, 2016, 12:28 PM), <https://twitter.com/noamscheiber/status/802217321947426817>.

of Texas's two Republican senators.<sup>49</sup> Previous decisions of Judge Mazzant provide no obvious explanation for why the plaintiffs sought to have him hear their case. But given the overwhelming probability that he would be assigned to a case filed in the Sherman Division, there is little doubt that the choice was deliberate.

Judge Mazzant was drawn to the case and ultimately ruled in favor of the plaintiffs, finding that the DOL rule violated the FLSA because applying the higher salary threshold to all workers would exclude some from the EAP exception even if they performed executive, administrative, or professional duties.<sup>50</sup> He entered a preliminary injunction blocking the government from enforcing the rule nationwide<sup>51</sup> and later issued a final judgment permanently invalidating the rule.<sup>52</sup>

#### D. The Motivations Behind the Venue Choices

It is impossible to be certain that Texas chose the venue in these three cases purely for judge-shopping reasons. Responding to suggestions of judge-shopping, Texas Attorney General Abbott explained that the decision to file the immigration case in Brownsville was driven by the fact that "South Texas is at the epicenter of where border security is of concern for Texas and the entire nation."<sup>53</sup> Similarly, the Harrold Independent School District, a plaintiff in the challenge to the Obama administration's transgender bathroom guidance, is geographically located within the Wichita Falls Division of the Northern District of Texas, giving that case a bit of a local hook.<sup>54</sup>

But judge-shopping still seems to be the most likely explanation for the venue decisions. While Texas explained the decision to file in Brownsville as driven by border security, the case challenged policies that applied only to aliens who had continuously resided in the United States since 2010.<sup>55</sup> Undocumented aliens overwhelmingly live in large cities rather than in border areas like

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49. See Brannon P. Denning, *The Judicial Confirmation Process and the Blue Slip*, 85 JUDICATURE 218, 218–19 (2002).

50. *Nevada v. Dep't of Labor*, 218 F. Supp. 3d 520, 529–32 (E.D. Tex. 2016).

51. *Id.* at 533.

52. *Nevada v. Dep't of Labor*, No. 4:16-CV-741, 2017 WL 3837320 (E.D. Tex. Aug. 31, 2017).

53. Caldwell, *supra* note 1.

54. The school district is located in Wilbarger County, which is allocated by statute to the Wichita Falls Division. See 28 U.S.C. § 124(a)(6) (2012).

55. See Memorandum of Jeh Charles Johnson, *supra* note 7, at 3–4.

Brownsville, including an estimated 1.5 million in Dallas and Houston combined.<sup>56</sup> Had Texas truly wanted to try the case in a location where the policies would have the greatest impact, it would have picked one of its major cities instead.

While the Harrold Independent School District is located in the Wichita Falls Division, there is reason to believe that the state of Texas sought out the school district as co-plaintiff in order to have a geographic justification for putting the case before Judge O'Connor. Despite serving as a co-plaintiff, no attorney for the school district joined attorneys for the State of Texas on the initial complaint even though Texas school districts are independent government entities that can hire their own legal counsel.<sup>57</sup>

Additionally, the high and known probabilities that specific judges would be assigned to two of the cases (95 percent for Judge Mazzant and 100 percent for Judge O'Connor) support the inference that the venue choices were made with the intent to draw those judges. While Judge Hanen had only a 50 percent chance of being assigned to the immigration case—a high probability, but hardly a guarantee—it is reasonable to assume that the plaintiffs thought it a gamble worth taking given the judge's previously expressed vitriol towards the Department of Homeland Security.

## II. CASE ASSIGNMENT PROCEDURES NATIONWIDE

The practice of using intradistrict geography to assign judges to cases is not unique to Texas. Most of the ninety-four federal district courts assign judges at least in part based on geographic divisions. This Part reports the results of a comprehensive survey of judge-assignment procedures in the nation's district courts, with a focus on the role played by geographic divisions. Section II.A explains the mechanics of case assignment in the district courts and two common elements that

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56. Jeffrey S. Passell & D'Vera Cohn, *20 Metro Areas Are Home to Six-in-Ten Unauthorized Immigrants in U.S.*, PEW RES. CTR.: FACT TANK (Feb. 9, 2017), <http://www.pewresearch.org/fact-tank/2017/02/09/us-metro-areas-unauthorized-immigrants/>.

57. Complaint for Declaratory and Injunctive Relief at 17, *Texas v. United States*, No. 7:16-cv-00054-O, 2016 WL 4426495 (N.D. Tex. Aug. 21, 2016); see also TEX. ASSOC. OF SCH. BDS., *WORKING WITH YOUR SCHOOL ATTORNEY: THE HOW, WHEN, AND WHY OF OBTAINING LEGAL COUNSEL* (2014), [https://www.tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Governance/documents/working\\_with\\_sch\\_atty\\_aug14.pdf](https://www.tasb.org/Services/Legal-Services/TASB-School-Law-eSource/Governance/documents/working_with_sch_atty_aug14.pdf) (describing when and how Texas school districts can find and use an attorney).

many districts use in their assignment procedures: maintaining equal caseloads among judges and separating cases by their subject matter. Section II.B examines the origins of geographic divisions and how courts use them to assign cases.

### Methodology

The information reported in this Note was compiled through a comprehensive examination of case assignment procedures in all ninety-four federal district courts. There is no centralized database of court procedures, necessitating a court-by-court canvas. Many courts publish their case assignment procedures in local rules or general orders that are publicly available on the courts' websites. When case assignment procedures for a court were not available online, information was gathered through telephone calls to the office of the Clerk of the Court.<sup>58</sup> Unfortunately, courts vary widely in the level of detail that they provide regarding their case assignment procedures.<sup>59</sup> Some courts, like the federal courts in Texas discussed in Part I, post detailed case distribution procedures on the court website, making it easy to determine how many cases each judge receives from each division.<sup>60</sup> Others provide only general information, making it difficult to compare procedures between courts at a granular level.<sup>61</sup> Nevertheless, I was able to determine at a minimum for every court whether geographic divisions are used in making case assignments.<sup>62</sup>

#### A. General Case Assignment Procedures in the United States District Courts

For more than a century after the Founding there was no need for judge-assignment procedures because, for the most part, all district

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58. I am grateful for the generous assistance provided by the clerks and deputy clerks of the nation's federal district courts. This project would not have been possible without them.

59. See Ahmed E. Taha, *Judge Shopping: Testing Whether Judges' Political Orientations Affect Case Filings*, 78 U. CIN. L. REV. 1007, 1025 (2010) (noting the difficulty in determining the precise procedures used by many courts).

60. See S.D. Tex. General Order No. 2016-13 (Nov. 10, 2016).

61. See, e.g., U.S. DIST. COURT OF N.M., <http://www.nmd.uscourts.gov/> (last visited Nov. 10, 2017) (providing only general information on the case assignment procedures of the United States District Court of New Mexico).

62. See *infra* Appendix A.

courts had only one judge.<sup>63</sup> But today almost all of the federal district courts have multiple authorized judgeships.<sup>64</sup> The Southern District of New York leads the way with twenty-eight.<sup>65</sup> In addition to these active judgeships, most district courts have judges on senior status who hear a significant number of cases.<sup>66</sup> And some courts directly assign a percentage of their docket to magistrate judges, further increasing the number of jurists eligible for assignment to each case.<sup>67</sup> With senior judges and magistrates added in, even the smallest district courts normally have multiple judges available to hear each case, creating the need for a case assignment system.

### 1. The Mechanics of Random Case Assignment<sup>68</sup>

In all districts, responsibility for assigning judges to cases, pursuant to the procedures adopted by the court, is delegated to the

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63. See ADMIN. OFFICE OF THE U.S. COURTS, CHRONOLOGICAL HISTORY OF AUTHORIZED JUDGESHIPS IN U.S. DISTRICT COURTS, <http://www.uscourts.gov/judges-judgeships/authorized-judgeships/chronological-history-authorized-judgeships-district-courts> [hereinafter *Judgeship History*]. The Judiciary Act of 1789 created the first federal district courts and authorized a single judgeship for each district. 1 Stat. 73 (1789). It was not until the early 1900s that Congress began to regularly authorize multiple permanent judgeships for district courts. See *Judgeship History*, *supra*.

64. See 28 U.S.C. § 133(a) (2012) (establishing the number of authorized judgeships per district). The Eastern District of Oklahoma is the only Article III district court with a single authorized judgeship, but it shares an additional judge with the two other districts in the state. *Id.* The district courts for the Northern Mariana Islands and Guam, which are Article I courts with the same subject matter jurisdiction as the other federal district courts, also have only one judgeship each. 48 U.S.C. §§ 1424, 1424b, 1821, 1822 (2012).

65. 28 U.S.C. § 133(a) (2012).

66. See Block, *supra* note 15, at 540 (noting that over a one-year period that spanned 2005 and 2006, senior judges disposed of seventeen percent of terminated cases in the district courts and presided over 18.3 percent of all trials).

67. Magistrate judges are non-Article III judges who are authorized by Congress to perform a number of judicial functions, including, if the parties consent, conducting all proceedings and rendering final judgments in civil cases. 28 U.S.C. § 636(c) (2012). Some district courts initially assign a percentage of their civil cases directly to magistrate judges. See, e.g., D. Colo. Local Rules of Civil Procedure, Rule 40.1(c) (Dec. 1, 2014) (including magistrate judges in the direct assignment of civil actions). If the parties do not consent to having the case heard by the assigned magistrate judge, it is reassigned to a district judge. See *id.*, Rule 40.1(c)(8).

68. While all courts have their own assignment nuances, the process described here is representative of the general practices used by most district courts.

Clerk of the Court and deputy clerks.<sup>69</sup> Normally, the judge for each case is picked randomly from the pool of judges eligible to hear it. This does not mean that every judge in the pool has an equal chance of drawing the case—the probability that each judge has of being assigned to a particular type of case is set by the court’s case assignment procedures. Random assignment means only that the judge for a case is chosen by a blind draw rather than being assigned by hand.<sup>70</sup>

In the past, this random selection process was decidedly low-tech. For example, in the Southern District of New York, the clerk would randomly pick the name of the judge to be assigned to the case from a wooden wheel that contained cards with the names of the court’s judges.<sup>71</sup> Today the process is computerized.<sup>72</sup> The Case Management/Electronic Case Filing (CM/ECF) system used by clerks throughout the federal court system to manage court dockets includes an automated case assignment module.<sup>73</sup> To prepare the system for assigning, the clerk creates electronic “decks,” each of which corresponds to a different category of cases, as specified by the court’s case assignment procedures.<sup>74</sup> The clerk then gives each judge a certain number of “cards” in each deck, corresponding to the judge’s assigned probability for handling each category of cases.<sup>75</sup> For example, in a four-judge district in which each judge is to be assigned to twenty-five percent of the court’s civil cases, each judge might receive twenty-five

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69. See, e.g., Local Rules for the United States District Courts for the Southern and Eastern Districts of New York, Rules for the Division of Business Among District Judges, Southern District Rule 4(b) (Nov. 1, 2017).

70. Because the term “random” sometimes connotes an equal probability of occurrence, at least one court has preferred the term “neutral assignment.” See *Jenkins v. Bellsouth Corp.*, No. CV-02-1057-S, 2002 WL 32818728, at \*6 n.20 (N.D. Ala. Sept. 13, 2002) (describing the difference between random assignment and neutral assignment).

71. Arnold H. Lubash, *Judge-Shopping in Federal District Court: Lawyers’ Quest for Leniency*, N.Y. TIMES (Mar. 4, 1987), <http://www.nytimes.com/1987/03/04/nyregion/judge-shopping-in-federal-court-lawyers-quest-for-leniency.html>.

72. Some published court assignment procedures do not specify whether or not the court uses a computerized assignment system. However, all are consistent with the computerized system described here. And all of the clerks that I spoke to reported using the CM/ECF system to assign cases, supporting the assumption that its use is widespread, if not universal.

73. See C.D. Cal. General Order No. 14-03 at 1–2 (June 2, 2014) (providing a detailed description of the case assignment module).

74. *Id.*

75. *Id.*

cards in a 100-card civil deck. The deck is restocked at some predetermined point (for example, when there are only ten cards remaining).

The system is almost infinitely flexible. Decks can be created for any category and subcategory of cases—some courts have as many as a dozen of them.<sup>76</sup> By altering the number of cards in the deck that each judge starts with relative to his colleagues, a court can change the percentages of cases in each category that each judge is assigned to.<sup>77</sup>

## 2. Common Case Assignment Elements

Congress has given district courts a tremendous amount of latitude to create their own procedures. The relevant statute says only that “[t]he business of a court . . . shall be divided among the judges as provided by the rules and orders of the court.”<sup>78</sup> Because of this decentralized process, almost no two courts use identical case assignment procedures. But there are some assignment elements that many courts have in common.

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76. See D. Minn. Order for Assignment of Cases (July 5, 2017) (describing twelve different types of case decks).

77. There are some exceptions to the general rule of random case assignment. Many districts have “related case rules” that allow for cases that cover issues related to a case already pending before the court to be assigned to the judge who is presiding over the pending case. See, e.g., Local Rules for the United States District Courts for the Southern and Eastern Districts of New York, E.D.N.Y. Guidelines for the Divisions of Business Among District Judges Rule 50.3.1 (Nov. 1, 2017) (allowing related cases to be assigned to the judge presiding over a pending relevant case). In cases heard by three-judge district courts, the chief judge of the circuit designates two of the three judges. 28 U.S.C. § 2284(b)(1) (2012). In cases from multiple districts that are consolidated for pretrial proceedings, the Judicial Panel on Multidistrict Litigation designates the presiding judge. 28 U.S.C. § 1407 (2012). And in rare circumstances, the chief judge of the district will make case assignments by hand. See, e.g., N.D. Iowa Pub. Admin Order No. 16-AO-0002-P ¶ 9 (Mar. 16, 2016) (explaining that the chief judge may take action to equalize case assignments); W.D. Ky. General Order No. 2015-06 (Aug. 4, 2015) (explaining that the chief judge may make the assignment when there are multiple recusals); D. Neb. General Rules 1.4(a)(3)(A) (Dec. 1, 2017) (explaining that the chief judge may reassign cases for “good cause”).

78. 28 U.S.C. § 137 (2012). Only if the judges of the district court cannot agree will the supervising circuit court step in to create the district’s assignment procedures. *Id.*

Courts generally attempt to assign an equal number of cases to each active judge over a specified period.<sup>79</sup> This rule is not without its limits though. Senior status judges can elect to take a reduced caseload.<sup>80</sup> And the chief judge often takes on fewer cases to compensate for time spent on administrative matters.<sup>81</sup>

Courts also often differentiate between different types of cases when making assignments. At the most basic level, almost all courts have separate assignment decks for civil and criminal cases.<sup>82</sup> From there, practices diverge. Some courts place all civil cases into a single assignment deck.<sup>83</sup> It is also common for districts to assign most civil cases out of the same deck while designating a few discrete categories of cases for separate assignment—for example capital habeas cases.<sup>84</sup> Other districts categorize cases on a more systemic basis. The Eastern District of Pennsylvania uses separate decks for diversity and federal question cases.<sup>85</sup> The District of Massachusetts places all cases into three broad categories based on the nature of the suit.<sup>86</sup> And perhaps no district can match the District of Minnesota, which, in addition to a

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79. See, e.g., N.D. Ill. Internal Operating Procedures 11(b) (June 4, 2009) (providing that each active judge, other than the chief judge, shall appear in the automated assignment system an equal number of times).

80. Block, *supra* note 15, at 540.

81. Susan Willett Bird, Note, *The Assignment of Cases to Federal District Court Judges*, 27 STAN. L. REV. 475, 486 n.65 (1975); see E.D. Pa. Local Rules of Civil Procedure 40.1(b)(1) (June 15, 2017) (providing that the chief judge shall be assigned to half as many cases as the other active judges); see generally Catherine D. Perry, *Lessons Learned as a New Chief Judge*, 38 LITIG. J. 14 (2011) (describing the administrative responsibilities of chief judges).

82. See, e.g., W.D. Ky. General Order No. 2015-06 (Aug. 4, 2015) (describing different assignment decks for civil and criminal cases); S.D. Miss. Internal Rule 1 §§ I–II (Sep. 1, 2015) (describing different assignment decks for civil and criminal cases).

83. See, e.g., W.D. Ky. General Order No. 2015-06 (Aug. 4, 2015) (placing all civil cases into one assignment deck).

84. See, e.g., W.D. Wash. Local Civil Rule 104(f)(3) (Apr. 24, 2017) (providing that all active judges shall receive one capital case during their tenure before any judge receives a second).

85. E.D. Pa. Local Rules of Civil Procedure 40.1(b)(1) (June 15, 2017).

86. It appears that the categories are based on the perceived difficulty of the type of suit. For example, Category I includes death penalty, patent, antitrust, voting, and RICO cases, as well as class actions, all of which are considered among the more complex types of cases. D. Mass. Local Rules, Rule 40.1(a)(1) (July 1, 2017).

master civil deck, has separate decks for ten different categories of civil cases.<sup>87</sup>

There is a prized tradition in the federal system of judges being generalists,<sup>88</sup> so on most courts, all active judges are assigned to an equal number of cases from every deck.<sup>89</sup> Senior judges, however, are given more discretion to control their dockets.<sup>90</sup> Some, for instance, choose to hear only civil cases.<sup>91</sup> Despite this discretion for senior judges and notwithstanding a few other atypical assignment procedures,<sup>92</sup> the general rule is that cases of all types are distributed equally among a court's active judges.

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87. D. Minn. Order for Assignment of Cases § 2 (July 5, 2017).

88. See Diane P. Wood, *Generalist Judges in a Specialized World*, 50 SMU L. REV. 1755, 1756–61 (1997).

89. See, e.g., D. Mass. Local Rules, Rule 40.1(a)(3) (July 5, 2017) (“[E]ach [active] judge shall be assigned as nearly as possible the same number of cases in each category.”); D. Minn. Order of Assignment for Cases § 1 (providing that each active judge shall start with the same number of cards in each deck).

90. See, e.g., Block, *supra* note 15, at 540–41 (“[Senior judges] can decide that they no longer wish to preside over certain types of cases. For example, many EDNY senior judges stop handling pro se litigation.”).

91. See N.D. Okla. Gen. Order No. 16-06 (June 1, 2016) (ordering the Clerk of the Court to assign Judge Kern, a senior judge, no criminal cases).

92. In some circumstances, active judges are assigned to a disproportionate percentage of a certain type of case relative to their colleagues. For example, in the Western District of North Carolina, all non-capital habeas and 42 U.S.C. § 1983 cases filed by *pro se* prisoners are assigned to the chief judge, who maintains responsibility for overseeing the court's *pro se* clerks. *In re Allocation of Charlotte Division Cases and Assignment of Following Preliminary Matters*, Misc. No. 3:13-MC-135 § 6 (W.D.N.C., Aug. 20, 2013). And fourteen districts are currently participating in a congressionally created pilot program that funnels patent and plant variety matters to judges who indicate an interest in hearing them. Pilot Program in Certain District Courts, Pub. L. No. 111-349, 124 Stat. 3674 (2011); see Randall R. Rader, *Addressing the Elephant: The Potential Effects of the Patent Cases Pilot Program and Leahy-Smith America Invents Act*, 62 AM. U. L. REV. 1105, 1106–07 (2013) (describing the Patent Pilot Program). Under the program, these cases are assigned via the district's normal procedures, but judges are free to decline an assignment, at which point the case is reassigned to a judge who has volunteered to hear those cases. *Id.* Even beyond the pilot program, the Eastern District of Texas appears to have intentionally enabled judge-shopping in patent cases by having a single judge handle the vast majority of patent cases in each division and imposing no divisional venue rules. Jonas Anderson, *Judge Shopping in the Eastern District of Texas*, 48 LOY. U. CHI. L.J. 539, 546–50 (2016).

## B. Case Assignment by Divisions

Where courts differ most significantly is in whether they use divisions in making judge assignments. Divisions are geographic subunits within the territory of a judicial district, generally comprised of counties; for example, the Western Division of the Central District of California consists of Los Angeles, San Luis Obispo, Santa Barbara, and Ventura Counties.<sup>93</sup> Divisions are normally organized around a single location where all cases from the division are heard.<sup>94</sup> Divisions can be created either by statute or by district courts themselves as a way to allocate cases among different court locations.<sup>95</sup>

There is evidence that the original purpose of divisions was to provide litigants with a convenient local forum in days when travel was arduous. In the Founding Era, local access to the federal government was a major concern. The Judiciary Act of 1789, which established the first federal courts, created the first precursors to divisions by requiring the single district judge in ten of the original thirteen districts to hold court in multiple locations.<sup>96</sup> Having the district judge “ride the district” paralleled the practice, established in the same act, of having the Supreme Court justices ride circuit.<sup>97</sup> Both were designed to bring the federal judiciary to the people.<sup>98</sup>

### 1. Determining Divisional Venue

So how do district courts determine the division to which a case is assigned? From 1948 until 1988, a federal statute provided that “any civil action . . . against a single defendant in a district containing more

93. 28 U.S.C. § 84(c)(2) (2012).

94. *See, e.g., id.* (“Court for the Western Division shall be held at Los Angeles.”).

95. *See id.* §§ 81–131 (establishing the district courts in all 50 states). Congress has dictated by statute where court for each district and division should be held. *Id.*

96. Judiciary Act of 1789, ch. 20, § 3, 1 Stat. 73 (1789) (providing, for example, that court for the District of Maine shall be held alternately at Portland and Pownalsborough).

97. *See id.* § 4.

98. *Cf. Wytke Holt, “The Federal Courts Have Enemies in All Who Fear Their Influence on State Objects”: The Failure to Abolish Supreme Court Circuit Riding in the Judiciary Acts of 1792 and 1793*, 36 *BUFF. L. REV.* 301, 306 (1987) (arguing that circuit riding was designed in part to give litigants two Supreme Court justices at the trial of their cases in order to heighten the legitimacy of those trials and lessen the “need to take appeals to a distant Supreme Court, which would have been prohibitively expensive for most people”).

than one division must be brought in the division where he resides.”<sup>99</sup> Today, however, the federal venue statute deals only with districts rather than divisions.<sup>100</sup> District courts remain free to create and enforce their own divisional venue rules through local rules and standing orders, and many do. But absent court rules, if venue is proper in the district, plaintiffs are free to file in any of the district’s divisions.<sup>101</sup>

Court-created divisional venue rules vary widely. At one end of the scale are districts that make venue proper in only one division. One such district, the Central District of California, has established an order of priority that determines the division that a case is assigned to in situations where, under the district’s venue rules, venue would be proper in multiple divisions.<sup>102</sup> Other districts have divisional venue rules that largely track the federal district venue statute, conditioning divisional venue on the residence of the defendant or the location where a substantial part of the events giving rise to the claim occurred.<sup>103</sup> And some districts have no rules at all, allowing plaintiffs to file in any one of the court’s divisions.<sup>104</sup>

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99. 28 U.S.C. § 1393 (1982), *repealed by* the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 1001, 102 Stat. 4642, 4663 (1988).

100. 28 U.S.C. § 1391(b) (2012); *Reyes v. JA & M Developing Corp.*, No. 12-61329-CIV, 2012 WL 3562024, at \*2 (S.D. Fla. Aug. 17, 2012) (“Propriety of venue is, by statute, concerned with the judicial district, not the divisions within a judicial district. Prior to 1988, appropriate divisional venue was also required.”).

101. *In re Gibson*, 423 F. App’x 385, 388 (5th Cir. 2011); *see also Johnson v. Lewis*, 645 F. Supp. 2d 578, 581 (N.D. Miss. 2009) (noting that with the repeal of the divisional venue statute, “the freedom of plaintiffs to file suit in various divisions within a district increased, as did the potential for mischief in this context”); Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241, 255 (2016) (reporting that in the Eastern District of Texas, “plaintiffs can choose to file in any division simply by selecting it from a drop-down menu in the electronic filing system”).

102. C.D. Cal. General Order No. 14-03 § I.B.1.a.(1)(c) (June 2, 2014) (giving preference to assigning cases to the Southern Division in Santa Ana and then the Eastern Division in Riverside over the busier Western Division in Los Angeles).

103. *See* N.D. Ga. Local Rules of Civil Procedure, Rule 3.1(B) (June 1, 2017); *see also* 28 U.S.C. § 1391(b) (2012) (federal district venue statute). Other districts take the residence of the plaintiff into account. *See* D. Mass. Local Rules of Civil Procedure, Rule 40.1(D) (July 1, 2017).

104. Klerman & Reilly, *supra* note 101, at 255 (reporting that plaintiffs in the Eastern District of Texas can choose their desired division from a drop-down menu when electronically filing their case).

## 2. Judge Assignment by Division

In theory, divisional venue determines only the courthouse where the case will be heard, not the judge who will hear it. But to eliminate the need for district riding, many courts today use divisions to assign judges as well. In districts with multiple courthouses, the home chambers of the judges are often distributed throughout the district such that most court locations have at least one resident district judge.<sup>105</sup> Rather than requiring judges to ride the district, many courts now allow judges to largely remain in their home courthouse and hear cases only from the division that courthouse serves. While divisional assignment practices vary from district to district, courts generally fit into three overarching categories: 1) districts that assign all cases district-wide; 2) districts that assign all cases by division; and 3) districts that assign most cases by division with exceptions for certain categories of cases.

**District-wide Assignment** — Thirty-six of the nation's ninety-four district courts do not use divisions in assigning cases, instead making all judges in the district eligible to be assigned to every case.<sup>106</sup> For thirteen of these districts, the reason for assigning cases district-wide is simple: the district has only one courthouse.<sup>107</sup> Eight other districts have multiple courthouses, but all judges have their chambers in the same location, so assigning cases by divisions would not lessen any travel burdens.<sup>108</sup>

In the other fifteen districts that assign cases district-wide despite having judges based in multiple locations, either the judge travels to the division that the case is assigned to for any in-person proceedings (riding the district) or the litigants travel to the judge's

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105. It appears this largely occurs through happenstance as judges who live in different parts of the district are appointed and seek to maintain chambers near their residence. In the past, judges in some districts were required to maintain their chambers at the district's headquarters location. STEVEN FLANDERS, FED. JUDICIAL CTR., CASE MANAGEMENT AND COURT MANAGEMENT IN UNITED STATES DISTRICT COURTS 11 (1977) (reporting that in the 1970s, judges in the Northern District of Alabama and the District of New Mexico were required to relocate, maintaining their chambers in Birmingham and Albuquerque, respectively). But the practice appears to have been abandoned—I found no evidence that any districts use it today.

106. Subject to the exceptions discussed *supra* Section II.A.2. *See also infra* Appendix A.

107. *See infra* Appendix A.

108. *Id.*

home courthouse.<sup>109</sup> These courts have adopted several procedures to lessen the need for travel. All use electronic filing systems today, meaning that attorneys no longer need to travel to the courthouse to file documents.<sup>110</sup> While the district court judge may be assigned from anywhere in the district, some courts will also assign the case to a magistrate judge in the division where the case was filed so that many pre-trial proceedings can be handled locally.<sup>111</sup> Additionally, a number of courts use telephone and video conferencing to allow judges to hold hearings without forcing either the litigants or the judges to travel.<sup>112</sup>

**Assignment by Divisions** — In courts that assign judges by divisions, cases are distributed among the judges who are designated to hear cases in the division where the case was filed. In the simplest systems, judges are assigned only to cases from the division where their chambers are located.<sup>113</sup> When there is only one judge who keeps chambers in a division, that judge often hears all of the division's cases.<sup>114</sup>

Divisional assigning on its own does not lead to judge-shopping. For example, the Southern District of New York assigns cases to its Manhattan and White Plains locations based on divisions, but the White Plains courthouse (the smaller of the two) has four active judges, making it unlikely that plaintiffs can shop for a specific judge

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109. *Id.* From conversations with court clerks, it appears that the decision as to whether the judge travels or litigants travel is often left up to the judge in each case.

110. *See Johnson v. Lewis*, 645 F. Supp. 2d 578, 583 (N.D. Miss. 2009) (“The work of attorneys who practice before this court can be done at any location with internet access.”).

111. *See* N.D. Ind. General Order No. 2016-10 § 2 (Aug. 1, 2016).

112. *See id.* (“[T]he judge should consider the use of videoconferencing or other means to eliminate the need for physical presence in a courthouse other than the courthouse in which the case was filed.”). A 2003 survey of ninety district courts found that eighty-five percent of them reported having access to videoconferencing equipment. ELIZABETH C. WIGGINS ET AL., FEDERAL JUDICIAL CENTER SURVEY ON COURTROOM TECHNOLOGY 2-3 (2003). While more recent data is not available, it is safe to assume that the number of courtrooms equipped with videoconferencing technology has only increased since then.

113. *See, e.g.*, N.D. Ill. Internal Operating Procedures 11(d) (2015) (providing that cases filed in the district's Western Division shall be assigned to the judge with his or her duty station in that division).

114. *See, e.g.*, W.D. Va. Standing Order 2016-8 (Dec. 1, 2016) (explaining that the Abington, Danville, and Lynchburg Divisions have a single resident judge who hears all of the division's cases).

simply by filing there.<sup>115</sup> Divisional judge-shopping attempts only have a realistic chance of success in divisions with a small number of judges. But these divisions are common. In at least eighty-one divisions, spread across thirty district courts, one or two judges hear all the division's cases.<sup>116</sup> This is true even in some districts that have many authorized judgeships. For example, the Northern District of Illinois has thirty-three active and senior judges, but thirty-one of them are based in Chicago, leaving only two judges (one of them a senior judge) to handle cases from the Western Division headquartered in Rockford.<sup>117</sup> In districts with loose divisional venue rules, having divisions with only a few assigned judges makes it easy for plaintiffs to judge-shop.

**Quasi-divisional Assigning** — A few districts use divisional assigning for most cases but reserve certain types of cases for assignment across all the judges in the district. Due to the limited information that many districts provide about their assignment procedures, it is not possible to know exactly how many of them use a quasi-divisional system. But four districts—the Northern District of California, District of Maine, District of Montana, and District of Nebraska—have published procedures that contain exceptions to what is otherwise a divisional assigning system.

These four courts differ in the types of cases that are assigned district-wide rather than by divisions. The Northern District of California pulls patent, trademark, and copyright cases, securities class actions, prisoner petitions, and capital habeas corpus cases out of its divisional assigning system.<sup>118</sup> Maine uses divisional assigning for all cases except those certain classes of cases that either are not linked to a specific division or that disproportionately arise within a specific

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115. See *The Hon. Charles L. Briant Jr. Federal Building and Courthouse White Plains, New York*, S.D.N.Y., [http://www.nysd.uscourts.gov/site\\_whiteplains.php](http://www.nysd.uscourts.gov/site_whiteplains.php) (last visited Nov. 23, 2017) (listing the judges with chambers in White Plains).

116. See *infra* Appendix A.

117. N.D. Ill. Internal Operating Procedure 11(d) (Nov. 24, 2015) (“[C]ases in the Western Division [sic] shall at filing be assigned to the district judge and referred generally to the magistrate judge whose duty stations are in that division . . .”). Judges Kapala and Reinhard are the only judges who keep chambers in Rockford. See *Judge Information*, N.D. ILL., <http://www.ilnd.uscourts.gov/Judges.aspx?eFRCR82Cx5Y=> (last visited Nov. 23, 2017) (The chambers location for each judge can be found by clicking on the judge's name).

118. N.D. Cal. General Order No. 44 § (D)(3) (June 20, 2017).

division in a way that might result in unbalanced caseloads.<sup>119</sup> In Montana, cases relating to elections (including reapportionment, voting rights, and campaign finance/disclosure cases) are assigned across all of the district's judges.<sup>120</sup> And the District of Nebraska assigns cases district-wide when the United States is the plaintiff or the State of Nebraska, its agencies, or employees are the defendants.<sup>121</sup>

It is notable that three of these districts have provided for district-wide assigning in either election cases or cases where the state is a party—all of which are cases that could have a statewide impact and where geographic convenience is less of a concern because the government parties are equally at home in all forums within the state.

### III. CURRENT PRACTICES ARE INSUFFICIENT TO STOP DIVISIONAL JUDGE-SHOPPING IN THE MOST IMPORTANT CASES

In districts that assign judges by divisions, have loose divisional venue rules, and designate only one or two judges to hear cases in each division, plaintiffs can choose their judge simply by choosing the division of a court in which they file their case. This is problematic, given the threat that judge-shopping poses to the integrity of the judicial system.<sup>122</sup> But divisional assignment can also make the judicial process more efficient. Assigning judges to cases in their local division cuts down on travel by judges and litigants.<sup>123</sup>

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119. D. Me. Local Rules of the United States District Court for the District of Maine, Rule 3(b) (Dec. 1, 2017). These categories include cases referred to the court from other Districts, appeals from Bankruptcy Court decisions, and cases arising in Kennebec County in which the State of Maine is the plaintiff or defendant. *Id.*

120. D. Mont. Standing Order No. DLC-23, § 1 (Jan. 6, 2015).

121. D. Neb. General Rules, Rule 1.4(a)(5)(A) (Dec. 1, 2016). The district also assigns all pro se, prisoner, social security, and social security cases district-wide. *Id.*

122. See *United States v. Phillips*, 59 F. Supp. 2d 1178, 1180 (D. Utah 1999) (stating that judge-shopping is condemned because it undermines public confidence in the assignment process and hurts the integrity of the judicial system); *Murray v. Sevier*, No. 92-1073-K, 1992 WL 75212, at \*1 (D. Kan. 1992) (“Where judge shopping has been found to exist, the district court has the authority to act to preserve the integrity and control of its docket.”); see also Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 300 (1996) (noting that judge-shopping is “universally condemned” by the courts).

123. See *Johnson v. Merchant*, 628 F. Supp. 2d 695, 698 (N.D. Miss. 2009) (“It would be impossible for [the district’s] judges to efficiently manage their dockets

Ideally, district courts would be able to effectively police divisional judge-shopping while retaining the benefits of a divisional assignment system. And in many cases they *are* able to do so through divisional venue rules and case-by-case determinations. But these protections often break down in lawsuits, like the Texas cases, that challenge the validity of generally applicable laws or regulations. This Part argues that the assignment systems in place in many district courts must be modified in order to ensure that the plaintiffs in these cases are unable to engage in divisional judge-shopping.

## A. The Harms of Judge-Shopping

Judge-shopping is generally viewed as odious for two reasons.<sup>124</sup> First, because different judges might decide the same case in predictably different ways, judge-shopping by one party can influence case outcomes in a way that is unfair to the non-shopping party. Second, judge-shopping creates a perception of partiality that undermines the legitimacy and credibility of the courts.

### 1. Unfairness

It is no secret that judge assignments can be outcome determinative. In a perfect legal system, courts would apply the applicable law consistently, reaching the same result no matter the judge. But as Justice Douglas once said, “[j]udges are not fungible.”<sup>125</sup> Each has his or her own background, life experiences, and judicial philosophy that can lead to different results on the same set of facts.<sup>126</sup> Furthermore, judges memorialize their decisions in written opinions, making it possible to predict a judge’s decision in a future case by examining his or her previous rulings in analogous cases.<sup>127</sup>

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if required to maintain a near-constant state of preparation to travel to various trials on their calendar.”).

124. See Norwood, *supra* note 122, at 300; see also Anderson, *supra* note 92, at 550–55 (discussing the harms of judge-shopping).

125. Chandler v. Judicial Council of the Tenth Cir., 398 U.S. 74, 137 (1970) (Douglas, J., dissenting).

126. See, e.g., Jeffrey A. Segal & Albert D. Cover, *Ideological Values and the Votes of U.S. Supreme Court Justices*, 83 AM. POL. SCI. REV. 557, 561–62 (1989) (finding a correlation between Supreme Court justices’ ideological values and their votes in civil liberties cases).

127. There have been several statistical models developed to predict the votes of Supreme Court justices based upon their past decisions. See Oliver Roeder, *Why the Best Supreme Court Predictor in the World Is Some Random Guy in*

We tolerate the possibility that outcomes can vary by judge only because these outcomes are distributed impartially through random judge assignment. But judge-shopping introduces bias into the system.<sup>128</sup> By skewing the assignment process to increase the probability of drawing favorable judges, shopping parties gain an advantage over their non-shopping opponents. While courts have generally found that the unfairness created by judge-shopping does not rise to the level of a violation of constitutional due process,<sup>129</sup> it still marks a departure from the level playing field that courts are supposed to provide to litigants.<sup>130</sup> When successful judge-shopping changes the outcome of a case, the losing party can credibly complain about starting at a disadvantage. The possibility of appellate review is no answer, given that many district court decisions are reviewed deferentially, leaving any harm caused by judge-shopping baked into the case.<sup>131</sup>

It is also possible that the very act of judge-shopping can create a self-fulfilling prophecy. The pressure to conform to expectations can be powerful. Judges who feel like they have been hand-picked by a party may second-guess themselves if they are initially inclined to rule against the party who shopped for them. Of course, judge-shopping does not invariably help the shopper. Most judges take pride in their independence, so it is possible that a judge who feels like he or she has

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*Queens*, FIVETHIRTYEIGHT (Nov. 17, 2014, 12:04 PM), <https://fivethirtyeight.com/features/why-the-best-supreme-court-predictor-in-the-world-is-some-random-guy-in-queens/>.

128. See *supra* Part II.A. The fact that the random assignment of one judge as opposed to another could change the outcome of a case presents a paradox: we recoil at the idea of deciding cases by coin flip at the time of filing while at the same time accepting a system that has the potential to do just that via a judicial opinion. See Ori Aronson, *Forum by Coin Flip: A Random Allocation Model for Jurisdictional Overlap*, 45 SETON HALL L. REV. 63, 89–90 (2015). But it is a paradox that need not be resolved in relation to judge-shopping because distributing outcomes randomly is undoubtedly preferable to giving an interested litigant control over the outcome.

129. Courts have consistently rejected due process claims, even when the judge-shopping was done by prosecutors in criminal cases. See *Francolino v. Kuhlman*, 365 F.3d 137, 141–42 (2d Cir. 2004) (collecting cases).

130. See *Republic of Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 73 (3d Cir. 1992) (“Our legal system will endure only so long as members of society continue to believe that our courts endeavor to provide untainted, unbiased forums in which justice may be found and done.”).

131. For example, the preliminary injunctions like those issued in the three Texas cases are reviewed under an abuse of discretion standard. See *Texas v. United States*, 809 F.3d 134, 146 (5th Cir. 2015).

been selected through judge-shopping may closely scrutinize the shopping party's position to attempt to counteract any bias. Either way, the judicial system will no doubt function more justly when judges do not deal with external pressure that judge-shopping creates.

## 2. Judicial Legitimacy

Even when judge-shopping does not actually change case outcomes, it can create the appearance that an adjudication was biased or unfair. As one scholar noted, when "a baseball umpire . . . reverses his call when the crowd boos . . . you always fear it was the booing that influenced the umpire."<sup>132</sup> Alexander Hamilton famously called the judiciary the "least dangerous" branch of government.<sup>133</sup> Lacking the powers of the purse or the sword,<sup>134</sup> courts gain their authority exclusively from their legitimacy and credibility in the mind of the public.<sup>135</sup> This legitimacy depends on the judiciary's "reputation for impartiality and nonpartisanship."<sup>136</sup> When courts allow litigants to manipulate judicial procedures to secure a chosen judge, it creates the perception that they do not care about enforcing a fair playing field. This can undermine the judicial branch's reputation for fairness and impartiality, which can in turn diminish the authority of courts themselves.

Of course, judge-shopping is not the only means by which litigants attempt to manipulate venue rules to gain an advantage. Courts often view shopping for favorable jury pools and laws as more permissible than shopping for judges.<sup>137</sup> These forms of forum-shopping are commonly justified by the common law maxim that "the plaintiff is the master of his forum" and should be given significant latitude to choose a court without consideration being given to his or her motives

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132. Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done Amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 325 (1997) (citing John M. Goshko & Nancy Reckler, *Controversial Drug Ruling Is Reversed: N.Y. Judge Now Finds Evidence Admissible*, WASH. POST (Apr. 2, 1996), at A1).

133. THE FEDERALIST NO. 78 (Alexander Hamilton).

134. *See id.*

135. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 865 (1992) ("The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.").

136. *Mistretta v. United States*, 488 U.S. 361, 407 (1989).

137. *See Norwood*, *supra* note 122, at 299–302.

for doing so.<sup>138</sup> Acceptance of these practices is difficult to justify, and there are strong arguments that forum-shopping should be viewed as verboten.<sup>139</sup> But for the purposes of this Note, it is enough to say that light-handed treatment of forum-shopping is not a reason to treat divisional judge-shopping lightly. Divisional judge-shopping is simply another form of judge-shopping, which has consistently been treated as odious.

## B. Court Treatment of Judge-Shopping

Litigants have exhibited almost limitless creativity in finding ways to judge-shop.<sup>140</sup> Some have filed multiple cases asserting substantially the same claim and then voluntarily dismissed all of those assigned to undesirable judges.<sup>141</sup> Some have voluntarily dismissed their case and then refiled it in hopes of drawing a different judge.<sup>142</sup> Some have abused “related case” rules in an attempt to have their case directed to a judge who had ruled favorably in a previous case.<sup>143</sup> Some have filed frivolous motions for recusal of the assigned judge<sup>144</sup> or have retained counsel with a personal connection to the

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138. See George D. Brown, *The Ideologies of Forum Shopping—Why Doesn't a Conservative Court Protect Defendants?*, 71 N.C. L. REV. 649, 668–69 (1993).

139. Norwood, *supra* note 122, at 304–05.

140. See *id.* at 295–96 (collecting cases). The Federal Rules of Civil Procedure equip plaintiffs with tools that support these creative strategies. *E.g.*, Fed. R. Civ. P. 41(a) (permitting plaintiffs to voluntarily dismiss an action without prejudice before the defendant files an answer or motion for summary judgment).

141. Welk v. GMAC Mortg., LLC, 720 F.3d 736, 738 (8th Cir. 2013); Harper v. Rudek, 487 F. Appx. 467, 467–68 (10th Cir. 2012); Murray v. Sevier, No. 92–1073–K, 1992 WL 75212, at \*1–2 (D. Kan. 1992).

142. Emerson v. Toyota Motor North America, No. 14–cv–02842–JST, 2014 WL 6985183, at \*3 (N.D. Cal. 2014) (plaintiff dismissed her case in the Central District of California and refiled in the Northern District of California); Vaqueria Tres Monjitas, Inc. v. Rivera Cubano, 341 F. Supp. 2d 69, 71 (D.P.R. 2004) (plaintiffs voluntarily dismissed their case and then refiled it the same day).

143. Letter From F. Franklin Amanant Requesting Reassignment, Tummino v. Torti, 603 F. Supp. 2d 519 (E.D.N.Y. 2009) (No. 05-CV-366) (requesting that the case be assigned randomly because the plaintiffs had incorrectly labeled it as related to a previous case); *cf.* Macfarlane, *supra* note 3, at 219–26 (describing how a series of cases challenging New York Police Department practices came to be assigned to a single judge in the Southern District of New York).

144. O'Callaghan v. Harvey, 233 F. App'x 181, 182 n.1 (3d Cir. 2007); United States v. Sarno, 41 F. App'x 603, 608–09 (4th Cir. 2002); Obert v. Republican Western Ins. Co., 190 F. Supp. 2d 279, 296 (D.R.I. 2002).

judge in an attempt to force the judge to recuse himself or herself.<sup>145</sup> Others have even filed suits against judges themselves in an attempt to force recusal.<sup>146</sup> In all of these situations, courts have consistently and forcefully condemned the judge-shopping attempts.<sup>147</sup> Importantly, in these instances, courts have been able to identify judge-shopping on a case-by-case basis, even when done through methods that are technically permitted by court rules.<sup>148</sup>

### C. Court Treatment of Divisional Judge-Shopping

Courts appear to have had more trouble identifying *divisional* judge-shopping on a case-by-case basis, likely because it is often difficult to determine a plaintiff's motive for filing in a certain division of the court. There are, however, a few cases addressing the issue. Shortly after the federal divisional venue statute was repealed, two judges in small divisions of the Western District of Missouri adopted a policy of transferring cases when it appeared that they had no local

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145. *In re BellSouth Corp.*, 334 F.3d 941, 944–46 (11th Cir. 2003). On at least two occasions, the Second Circuit has forced attorneys from a law firm to withdraw from a case when they were added as counsel after the identity of the judges on the panel was revealed and one of the judges was formerly an attorney at the firm, calling into question his ability to remain on the panel. *Tilton v. SEC*, No. 15-2103 (2d Cir. July 14, 2016), [http://pdfserver.amlaw.com/nlj/tilton\\_ca2\\_order.pdf](http://pdfserver.amlaw.com/nlj/tilton_ca2_order.pdf). (order striking counsel); *In re F.C.C.*, 208 F.3d 137, 138–39 (2d Cir. 2000).

146. *Azubuko v. Royal*, 443 F.3d 302, 304 (3d Cir. 2006); *Thompson v. Eva's Village & Sheltering Program*, 162 F. App'x 154, 157 (3d Cir. 2006).

147. *See, e.g., United States v. Phillips*, 59 F. Supp. 2d 1178, 1180 (D. Utah 1999) (stating that judge-shopping is condemned because it undermines public confidence in the assignment process and hurts the integrity of the judicial system); *Murray v. Sevier*, No. 92–1073–K, 1992 WL 75212, at \*1 (D. Kan. 1992) (“Where judge shopping has been found to exist, the district court has the authority to act to preserve the integrity and control of its docket.”).

148. For example, Federal Rule of Civil Procedure 41(a)(1) allows plaintiffs to voluntarily dismiss their case once without prejudice. But when plaintiffs voluntarily dismiss their case and then refile it, courts have been diligent in ensuring that the action was not taken for the purpose of drawing a different judge. *See Emerson v. Toyota Motor North America*, No. 14–cv–02842–JST, 2014 WL 6985183, at \*4 (N.D. Cal. 2014) (“[T]he Court is troubled by the appearance of judge-shopping arising from Plaintiff's voluntary dismissal of the Central District action and immediate re-filing in the Northern District.”); *Welk v. GMAC Mortg., LLC*, 850 F. Supp. 2d 976, 999–1000 (D. Minn. 2012); *Vaqueria Tres Monjitas, Inc. v. Rivera Cubano*, 341 F. Supp. 2d 69, 71 (D.P.R. 2004). *But see Wolters Kluwer Fin. Servs., Inc. v. Scivantage*, 564 F.3d 110, 115 (2d Cir. 2009) (holding that plaintiffs are entitled to voluntarily dismiss under Rule 41 for any reason, even to flee a jurisdiction or judge).

connection to the division and were filed there only to influence the selection of the trial judge.<sup>149</sup> In another case, a judge in the Western District of North Carolina, noting that none of the thirty plaintiffs resided in the division where the case was filed, found that plaintiffs' counsel had engaged in divisional judge-shopping.<sup>150</sup> And in the context of motions to transfer venue between divisions of a district,<sup>151</sup> courts have been wary of litigants using the device for judge-shopping purposes.<sup>152</sup> However, these reported cases involving divisional judge-shopping are few and far between, suggesting that courts are either unable to identify it with confidence or have largely acquiesced in the practice.<sup>153</sup>

This is not surprising. First, it can often be difficult to distinguish divisional judge-shopping from forum-shopping, which courts have often tolerated.<sup>154</sup> Many courts use geographic divisions to generate jury pools, making it difficult to determine whether a plaintiff is filing in a certain division to draw a specific judge or merely to get a more favorable jury.<sup>155</sup> Second, the tradition that the plaintiff is the master of his forum can lead a court to "robotically pursue[] the list of possible venues in the given venue law and shut[] off when it discovers that the chosen forum is a permissible venue option" without considering whether the plaintiff is choosing a forum for an improper

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149. *Hague v. Shalala*, 93-6009-CV-SJ-6, 1993 WL 264529, at \*1 (W.D. Mo. Jun. 29, 1993).

150. *Deadwyler v. Volkswagon of Am., Inc.*, 134 F.R.D. 128, 138 (W.D.N.C. 1991).

151. Motions to transfer divisions generally raise the specter of divisional judge-shopping by the defendant rather than the plaintiff.

152. See *Nevada v. Bank of America Corp.*, No. 3:11-cv-00135-RCJ-WGC, 2011 WL 5190935, at \*1 (D. Nev. Oct. 27, 2011) (refusing to transfer a case between divisions because the possibility that the clerk would reassign the case to a judge in the new division "rais[ed] the specter of judge-shopping").

153. In fact, scholars have suggested that some courts have created divisional assigning systems precisely to *allow* plaintiffs to judge-shop by divisions. See Klerman & Reilly, *supra* note 101, at 254-57.

154. See *supra* Part III.A.2; Norwood, *supra* note 122, at 301 ("[O]ur judicial system, in practice, supports shopping for juries and laws.").

155. Norwood, *supra* note 122, at 301-02. For examples of districts using geographic divisions for jury pools, see, e.g., D. Md. Plan for the Random Selection of Grand and Petit Jurors, <http://www.mdd.uscourts.gov/sites/mdd/files/JuryPlan.pdf>; D.N.J. Plan of Implementation Pursuant to the Jury Service and Selection Act of 1968 (June 17, 2009), <http://www.njd.uscourts.gov/sites/njd/files/JuryPlan.pdf>.

purpose like judge-shopping.<sup>156</sup> Finally, in districts that assign judges by divisions, plaintiffs could be seen as judge-shopping no matter the division in which they file. For example, if Judge W hears all the cases from Division A and Judges X, Y, and Z split the cases from Division B, the plaintiff could be accused of judge-shopping even if he filed in Division B because by doing so he would guarantee that Judge W wouldn't hear his case. Judges on divisional assigning courts likely have little appetite for investigating the motives of the plaintiff in every case filed in the district.

Instead of making case-by-case inquiries, many districts rely on court-created divisional venue rules to limit the plaintiff's choice of divisions and thereby reduce the opportunities for divisional judge-shopping.<sup>157</sup> These rules, which often condition venue on the residence of the parties or the location where events giving rise to the case took place, can be effective in preventing judge-shopping in some cases, especially in local disputes between a single plaintiff and a single defendant.<sup>158</sup>

But divisional venue rules can break down in cases with multiple potential plaintiffs or cases challenging the validity of generally applicable laws or regulations. A state or federal government defendant is equally a resident of every division in a district, so any rule limiting venue to the division where the defendant resides provides no restriction in such cases. Generally applicable laws and regulations apply equally in every division, making each division equally appropriate under a rule that makes venue proper where the events giving rise to the case took place. And even rules conditioning venue on the residence of the plaintiff in cases where a state or the United States are the defendants<sup>159</sup> can be often be circumvented. Interest groups that wish to have a challenge to a law heard in a certain division can simply shop for a test plaintiff who meets the venue requirements for that division. In short, divisional venue rules—currently the judiciary's primary defense against divisional judge-shopping—are often insufficient to prevent the practice in cases

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156. *Id.* at 269.

157. *See supra* Part II.B.1 for a discussion of divisional venue rules.

158. *See id.* In simple cases, divisional venue rules often limit venue to a single division. *Id.*

159. *See* D. Mass. Local Rules of Civil Procedure, Rule 40.1(D)(1)(d) (Apr. 1, 2008) (providing that when the Commonwealth of Massachusetts or the United States is a party, venue will be proper in the division where the majority of the other parties reside).

where the government is a party or a generally applicable law or regulation is being challenged.

#### D. Eliminating Judge-Shopping in Suits Challenging Federal and State Laws and Regulations Is of Paramount Importance

It is concerning that divisional venue rules break down in cases challenging generally applicable laws and regulations because these are the cases where judge-shopping inflicts the most harm to the public at large and to the integrity of the judicial system. The judiciary has always prioritized maintaining its image as an apolitical branch of government. As Chief Justice Roberts famously proclaimed in his confirmation hearings, “Judges are like umpires. Umpires don’t make the rules, they apply them.”<sup>160</sup> But there has been a recent increase, extending to the highest levels of government, in judges being seen as political actors. Federal judicial nominations have become increasingly contentious,<sup>161</sup> culminating in Senate Republicans’ refusal to hold hearings or vote on Judge Merrick Garland’s nomination to the Supreme Court in 2016.<sup>162</sup> Further, President Trump has been intensely critical of judges who enjoined his so-called “Travel Ban,” referring to one jurist as a “so-called judge”<sup>163</sup> and labeling one Ninth Circuit ruling a “political decision.”<sup>164</sup>

As Chief Justice Roberts recently noted, politicization of the judiciary could have dire consequences for a branch that relies on

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160. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.).

161. While it was common throughout most of the twentieth century for Supreme Court justices to be confirmed by either a voice vote or an overwhelming majority in the Senate, no justice has received more than ninety votes in favor of confirmation since Ruth Bader Ginsburg in 1993. *Supreme Court Nominations, Present—1789*, U.S. SENATE, <https://www.senate.gov/pagelayout/reference/nominations/Nominations.htm> (last visited Nov. 23, 2017).

162. Doug G. Ware, *Nomination Expires for Obama Supreme Court Appointee Merrick Garland*, UPI (Jan. 3, 2017, 4:25 PM), [http://www.upi.com/Top\\_News/US/2017/01/03/Nomination-expires-for-Obama-Supreme-Court-appointee-Merrick-Garland/4841483472115/](http://www.upi.com/Top_News/US/2017/01/03/Nomination-expires-for-Obama-Supreme-Court-appointee-Merrick-Garland/4841483472115/).

163. Donald J. Trump (@realdonaldtrump), TWITTER (Feb. 4, 2017, 7:12 AM), <https://twitter.com/realdonaldtrump/status/827867311054974976>.

164. Ken Thomas & Darlene Superville, *Trump Calls Ruling on Travel Ban a ‘Political Decision’*, ASSOCIATED PRESS (Feb. 10, 2017), <http://bigstory.ap.org/article/db65629152ae4349b996a9c207a1c705/trump-responds-ruling-travel-ban-see-you-court>.

impartiality and non-partisanship for its legitimacy.<sup>165</sup> While courts cannot control how they are portrayed by the other branches, they can take steps to ensure that they do not exacerbate the situation by sitting idly by as their procedures are manipulated for political purposes.

Additionally, ensuring fair and impartial judge assignment in these cases is important because the effects of challenges to generally applicable laws, regulations, and policies can extend well beyond the original parties. While judge-shopping is always concerning, in cases between two private parties, any hardships that can be attributed to a judge-shopped outcome are typically borne only by the parties to the case. But challenges to laws and regulations are different. The plaintiffs in these cases most often seek to enjoin the government from applying the challenged provision to *any* party in the future.<sup>166</sup> These injunctions can obtain nationwide reach, meaning that plaintiffs can completely halt a federal initiative throughout the country by successfully shopping for a single favorable judge.<sup>167</sup> The same concerns apply in cases challenging *state* laws or regulations where a ruling from a single federal judge can stop the enforcement of a law throughout the state.<sup>168</sup> Because the effects of these cases are felt well

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165. Transcript of Oral Argument at 37–38, *Gill v. Whitford*, No. 16-1161 (U.S. 2017) (statement of Chief Justice Roberts, in a case challenging the constitutionality of political gerrymanders, expressing concern that the Court’s status and the integrity of its decisions would suffer “serious harm” to the status if the “intelligent man on the street” thought that the Court had preferred one political party over another); see also *Mistretta v. United States*, 488 U.S. 361, 407 (1989), discussed *supra* Part III.A.

166. See, e.g., Complaint for Declaratory and Injunctive Relief at 13, *Washington v. Trump*, No. C17-0141JLR, 2017 U.S. Dist. LEXIS 16012 (W.D. Wash. Feb. 3, 2017) (requesting that the court enjoin the federal government from applying Sections 3(c), 5(a)–(c), 19(c), and 5(e) of the Executive Order of January 27, 2017, entitled “Protecting the Nation from Foreign Terrorist Entry into the United States”); Amended Complaint for Declaratory and Injunctive Relief at 2–3, *Texas v. United States*, 86 F. Supp. 3d 591 (S.D. Tex. 2015) (listing a number of states that are seeking an injunction against the United States).

167. The practice of issuing nationwide injunctions is controversial but outside the scope of the Note. For an explanation of the rise of nationwide injunctions and an argument that they should no longer be issued, see Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417 (2017); see also Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095 (2018) (arguing that courts should only issue nationwide injunctions when they are necessary to provide complete relief to the relevant party).

168. See, e.g., *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 995–97 (S.D. Ohio 2013) (permanently enjoining the State of Ohio from refusing to recognize same-sex marriages).

beyond the original parties, it is especially important to ensure that judge assignments are made with the highest degree of impartiality.

#### IV. A FIX FOR DIVISIONAL JUDGE-SHOPPING

Because external controls, such as divisional venue rules and case-by-case policing, are unable to prevent divisional judge-shopping in the most crucial cases, changes must be made to judge-assignment systems themselves. District courts already have the statutory authority to make such changes.<sup>169</sup> However, it seems unlikely that all ninety-four districts will come together to fix the problem on their own. District courts generally operate independently of each other, making any kind of coordinated effort difficult.<sup>170</sup> While the Judicial Conference of the United States and circuit judicial conferences<sup>171</sup> could recommend that district courts adopt standardized judge-assignment procedures, they have no authority to override the current statute that gives district courts the power to create their own procedures.<sup>172</sup> In short, implementing procedures to prevent divisional judge-shopping nationwide will likely require Congressional action.

##### A. Exploring Potential Solutions

So, what should Congress do? This Section will evaluate ways that district court judge-assignment procedures could be modified to prevent divisional judge-shopping.

**Eliminating Divisional Assignment** — The simplest, and most brute force, way to prevent divisional judge-shopping would be to eliminate judge assignment by divisions altogether. Under this system,

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169. See 28 U.S.C. § 137 (2012); see also *supra* text accompanying note 78.

170. See Barry Friedman & Erwin Chemerinsky, *The Fragmentation of Federal Rules*, 79 JUDICATURE 67, 68–69 (1995) (explaining how “[a]n increasing array of procedural issues are now dealt with in federal courts locally”). *But see* Anderson, *supra* note 92, at 557–58 (arguing that the simplest way to stop judge-shopping in the Eastern District of Texas would be for the chief judge to change the court’s assignment rules).

171. The judicial conferences are organizations made up of judges that, among other things, advise on policies relating to the federal courts. See *About the Judicial Conference*, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/about-federal-courts/governance-judicial-conference/about-judicial-conference> (last visited Nov. 3, 2017); 28 U.S.C. §§ 331, 333 (2012) (establishing the Judicial Conference of the United States and the circuit judicial conferences).

172. See 28 U.S.C. § 137 (2012) (granting federal courts the power to create their own rules of business).

all active judges would be eligible for assignment to every case filed in the district, regardless of where their chambers are located. When a case brought in one division is assigned to a judge with chambers in a different division, either the litigants would have to travel to the judge's location for hearings and trial or the judge would ride the district to hear cases in courthouses other than his or her home location.

While this proposal has the benefit of completely eradicating divisional judge-shopping, it would be the equivalent of shooting sparrows with a cannon. Forcing litigants to travel to courthouses in the far reaches of a district would undercut the goal of facilitating access to justice—the entire reason that district courts hold proceedings in multiple locations in the first place.<sup>173</sup> The burdens could be quite significant, especially in run-of-the-mill cases involving local disputes—it would be hard to justify requiring a plaintiff and defendant from Missoula, Montana to travel almost 350 miles to Billings to try their case when there is a federal courthouse in their hometown.

Allowing cases to remain in local courthouses but requiring judges to ride the district to hear them would be similarly inefficient. District-riding was the norm for much of the country's history, but that was because the limited number of judges per district left no other option.<sup>174</sup> Keeping judges on the move would likely hurt the quality of judicial decision-making.<sup>175</sup> With the chambers of different judges now distributed throughout judicial districts, it is inefficient to force judges to constantly travel when there are cases that need resolving in their home courthouses.

Finally, in many cases between private parties, district-wide assignment is unnecessary because divisional venue rules are

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173. See Judiciary Act of 1789, ch. 20, § 3, 1 Stat. 73 (1789); see also *supra* text accompanying note 96.

174. See *Judgeship History*, *supra* note 63 (demonstrating that it was not until the early 1900s that Congress began to regularly authorize more than one judgeship per judicial district).

175. *Johnson v. Merchant*, 628 F. Supp. 2d 695, 698 (N.D. Miss. 2009) (“It would be impossible for . . . judges to efficiently manage their dockets if required to maintain a near-constant state of preparation to travel to various trials on their calendar . . .”). See also Kevin Robinson, *Judicial Vacancies Straining Federal Court*, PENSACOLA NEWS J. (Nov. 2, 2016), <http://www.pnj.com/story/news/2016/11/02/judicial-vacancies-straining-federal-court/93111758> (quoting the chief judge of the Northern District of Florida regarding the hardships of riding the district).

sufficient to prevent divisional judge-shopping. Conditioning divisional venue on the residence of the defendants or the location where the events underlying the dispute took place will normally limit the plaintiffs in private disputes to only one or a few of a district's divisions.<sup>176</sup> Requiring all of these cases to be assigned on a district-wide basis would provide little added benefit while creating significant burdens.

**Party Consent to Divisional Assignment** — As a variation on eliminating divisional judge assignment altogether, Congress could create a system where all cases would presumptively be assigned district-wide with the provision that litigants could stipulate to having the case heard by a judge with chambers in the division where the case is filed.

In theory, this would allow parties to local disputes to save themselves the cost of travel by consenting to having their case heard locally. It seems unlikely, however, that relying on self-interested litigants to agree to divisional assigning will create an efficient outcome for the judicial system as a whole. Consent to divisional assigning might only be given in a small number of cases, creating inefficiencies similar to those that would be created by eliminating divisional assigning altogether.

**Preemptory Challenges for Judges** — One way to dissuade judge-shopping would be to give each party one preemptory challenge that it could use to remove the assigned judge from the case. If a plaintiff engaged in divisional judge-shopping, the defendant could use her preemptory challenge to get a new judge assigned to the case.

At least eighteen states allow preemptory challenges for judges in their court systems.<sup>177</sup> And some academics have argued that the federal judicial recusal statute was originally intended to create preemptory challenges for judges, at least in evaluating requests that a judge recuse himself or herself from a case.<sup>178</sup> But the federal courts

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176. See *supra* Part II.B.1 (discussing common divisional venue rules); Part III.B (explaining how divisional venue rules break down in cases challenging laws and regulations in a way that they don't break down in cases between private parties).

177. Debra Lyn Bassett & Rex R. Perschbacher, *The Elusive Goal of Impartiality*, 97 IOWA L. REV. 181, 211 (2011).

178. *Id.* The statute provides that when a party files a "timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall

have interpreted the recusal provision to allow judges to determine the merits of their own recusal requests and deny such requests if they determine the allegations of bias are inadequate.<sup>179</sup> As such, judicial preemptory challenges are generally foreign to the federal system.<sup>180</sup>

Introducing preemptory challenges into the federal system could discourage divisional judge-shopping *ex ante* in some circumstances. In a system where each party received one preemptory challenge, Texas would have had no motivation to file its challenge to President Obama's immigration initiatives in Brownsville because the federal government undoubtedly would have used its challenge to remove Judge Hanen in the event that he was assigned to the case.

In other circumstances, however, preemptory challenges might actually facilitate judge-shopping. In a three-judge division where the plaintiff thought that two of the judges were favorable, he could guarantee the assignment of a favorable judge by striking the unfavorable one if he was assigned. While the defendant could strike one of the unfavorable judges, he would be stuck with the other.

The introduction of preemptory challenges could also create the possibility of judge-shopping in cases where it would be otherwise unavailable. In addition, this practice, by tacitly acknowledging that one judge might be more favorable to a party than another, could run counter to the goal of upholding the legitimacy of the judiciary. In short, granting litigants preemptory challenges would be an overbroad response to the problem of divisional judge-shopping and could have negative consequences that outweigh any benefits.

**Setting a Ceiling on Each Judge's Probability of Being Assigned to Each Case** — Congress could deter divisional judge-

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proceed no further therein, but another judge shall be assigned to hear such proceeding." 28 U.S.C. § 144 (2012).

179. See *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966) (finding that the defendant's allegations of bias and prejudice by the trial judge were insufficient to merit recusal).

180. Judge Jack Weinstein, noting the special concerns present in a capital criminal case, once granted a preemptory challenge as a matter of discretion. *United States v. Escobar*, 803 F. Supp. 611, 611–19 (E.D.N.Y. 1992). But Judge Weinstein's decision is an aberration; federal courts have generally rejected the idea that litigants can use a preemptory challenge to change the trial judge. See *Nichols v. Alley*, 71 F.3d 347, 351 (10th Cir. 1995) (holding that the recusal statute is not "intended to bestow veto power over judges"); *In re Nat'l Union Fire Ins. Co. of Pittsburgh*, 839 F.2d 1226, 1231 (7th Cir. 1988) (rejecting the idea that the recusal statute gives litigants the privilege of making a preemptory challenge against a judge).

shopping by setting a ceiling on each judge's share of a division's cases. It is difficult to know exactly how low of a ceiling for each judge's probability of being assigned to each case would be necessary to deter judge-shopping. For the purposes of analysis, this section will examine a proposal that sets a 33.3 percent ceiling on an individual judge's probability of being assigned to each case, recognizing that the number is somewhat arbitrary and that there are arguments for a higher or lower ceiling.

A 33.3 percent ceiling would still allow district courts to assign cases by divisions to some extent, making the proposal a less drastic remedy than eliminating divisional assignment altogether. All but eight of the ninety-four district courts have at least three authorized judgeships, and with senior judges added in, almost all have more than three judges hearing cases, meaning that courts could maintain a 33.3 percent ceiling while still allowing some judges to hear cases in only some divisions of the court.<sup>181</sup>

This proposal would still significantly disrupt current court procedures. At least thirty district courts would have to make modifications because they currently have at least one division where a judge hears more than fifty percent of the division's cases. And while implementing a 33.3 percent ceiling would still allow for some divisional assigning, it would severely restrict the ability of many courts to do so. For example, in a district with three divisions that has three active judges and two senior judges, for the senior judges to maintain their option to hear cases in only their home division, all of the active judges would have to hear cases in at least two divisions and one would have to hear cases in all three divisions.<sup>182</sup> This would create concerns about burdensome travel similar to those implicated by a proposal to eliminate divisional assignment altogether. While limits on the ability of courts to assign a judge to a large percentage of the cases

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181. See 28 U.S.C. § 133 (2012) (setting out the number of authorized judgeships in each judicial district). Of the eight district courts with fewer than three authorized judgeships, only the District of North Dakota currently assigns cases by divisions. See *infra* Appendix A.

182. The assignment system in this hypothetical district could look something like this:

Division A: Senior Judge 1 (33.3%), Active Judge 1 (33.3%), Active Judge 2 (33.3%)

Division B: Senior Judge 2 (33.3%), Active Judge 2 (33.3%), Active Judge 3 (33.3%)

Division C: Active Judge 1 (33.3%), Active Judge 2 (33.3%), Active Judge 3 (33.3%).

filed in a division would hinder divisional judge-shopping, such a proposal would likely be more burdensome than necessary to eliminate the judge-shopping.

## B. Divisional Venue & Quasi-Divisional Assigning: A Solution for Divisional Judge-Shopping

Measures to prevent divisional judge-shopping should be narrowly tailored to eliminate the practice while creating as few burdens as possible on the administration of civil cases in the district courts. Foremost among those burdens is the inefficiency that arises when judges or litigants are forced to travel to a distant courthouse for proceedings. Therefore, an optimal system will allow for as many cases as possible to be heard locally while still preventing plaintiffs from being able to select their judge by choosing to file in a certain division. I propose a two-part solution. First, Congress should reinstate a nationwide divisional statute to limit plaintiffs' choice of divisions. Second, Congress should mandate that cases challenging the validity of generally applicable laws, regulations, or policies be assigned district-wide.

### 1. Reinstating the Divisional Venue Statute

From 1948 until 1988, a federal divisional statute provided that "any civil action . . . against a single defendant in a district containing more than one division must be brought in the division where he resides."<sup>183</sup> The provision was repealed with the recommendation of the Judicial Conference of the United States, largely because Congress had noticed no adverse effects from the repeal of divisional venue in *criminal* cases twenty years earlier.<sup>184</sup> The benefit of hindsight has shown that Congress underestimated the mischief that its decision would encourage. Many of the factors that may have prevented a rise of judge-shopping in criminal cases following the abolition of divisional venue did not transfer to the civil context. While federal prosecutors are charged with seeking justice

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183. 28 U.S.C. § 1393 (2012).

184. Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702 § 1001, 102 Stat. 4642, 4663 (1988); H.R. REP. NO. 100-889, pt. 3, at 66-67 (1988) (explaining the rationale for eliminating divisional venue in criminal cases and equating it with civil cases).

rather than merely securing convictions,<sup>185</sup> plaintiffs' attorneys have no such concerns—their goal is only to win their case. Additionally, federal prosecutors may have avoided funneling cases to certain divisions because, as repeat players before the court, a pattern that could indicate judge-shopping would be easy to detect. However, private attorneys are less likely to appear frequently before the same federal court, making it hard to discern a pattern that could undercut facially plausible reasons for filing suit in certain divisions.

Many district courts have recognized and mitigated the harm done by the repeal of the divisional venue statute by implementing their own divisional venue rules.<sup>186</sup> Nonetheless, some courts still allow plaintiffs to choose to file in any division,<sup>187</sup> creating a need for Congress to step in to create standardized minimum restrictions on divisional choice. To create symmetry with the standards for venue at the district level, the new divisional venue statute should mostly mirror the district venue statute, making venue proper in any division where a defendant other than a state or federal government party resides<sup>188</sup> or in the division where a substantial part of the events or omissions giving rise to the claim occurred.<sup>189</sup> If venue is not proper in any of the court's divisions under those criteria, but venue is otherwise proper in the district,<sup>190</sup> the case could be brought in any of the district's divisions.

To be sure, this revamped divisional venue statute would not completely eliminate opportunities for divisional judge-shopping. Just as the district venue statute can make venue proper in multiple districts,<sup>191</sup> so could a divisional venue statute make venue proper in multiple divisions. Such a statute, however, would at least ensure that

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185. See *Connick v. Thompson*, 563 U.S. 51, 65–66 (2011) (“Prosecutors have a special duty to seek justice, not merely to convict.”) (citation and internal quotation marks omitted).

186. See *supra* Part III.C.

187. See *Klerman & Reilly*, *supra* note 101, at 255 (reporting that in the Eastern District of Texas, “plaintiffs can choose to file in any division simply by selecting it from a drop-down menu in the electronic filing system”).

188. Making the residence of the defendant a divisional venue criterion only for non-government defendants is necessary to prevent divisional judge-shopping against government defendants who are equally resident in all divisions of a district.

189. See 28 U.S.C. § 1391(b) (2012) (establishing the criteria for venue in a district).

190. See *id.*

191. *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 432 (2d Cir. 2005).

a case has some connection to the chosen division and would likely restrict the plaintiff's choice to only a few, rather than all, of the divisions of the district. District courts would still be free to implement additional restrictions on divisional venue through their local rules, just as they did under the previous divisional venue statute.<sup>192</sup>

## 2. District-Wide Assigning for Cases Challenging State and Federal Laws and Regulations

Implementing a divisional venue statute alone would still be inadequate to prevent divisional judge-shopping in suits challenging the validity of generally applicable state and federal laws and regulations for the same reasons that similar court-created rules have failed.<sup>193</sup> To take the specter of divisional judge-shopping off the table, Congress should mandate that courts assign these cases across all of the district's judges.

Some districts already use similar assignment procedures.<sup>194</sup> As mentioned above, the Districts of Maine and Nebraska eliminate the possibility of divisional judge-shopping in most cases challenging state laws and regulations by requiring district-wide assignment in some cases where the state is a defendant.<sup>195</sup> To extend similar protections to cases challenging federal laws and regulations, Congress could take this party-based approach, requiring district-wide assignment in cases with state or federal parties as defendants. But such a rule would be over-inclusive, encompassing, for example, tort suits against federal employees brought under the Federal Tort Claims Act.<sup>196</sup> A divisional venue statute would be enough to prevent divisional judge-shopping in these cases involving local injuries.<sup>197</sup> Instead, to ensure that district-wide assignment is mandated only in cases where a divisional venue statute provides insufficient protection against

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192. See *Moysi v. Trustcorp, Inc.*, 725 F. Supp. 336, 338 (N.D. Ohio 1989) (describing the local venue rules in place in the district prior to the repeal of the divisional venue statute).

193. See *supra* Part III.C.

194. See *supra* Part II.B.2.

195. D. Me. Local Rules of the United States District Court for the District of Maine, Rule 3(b) (Dec. 1, 2017); D. Neb. General Rules, Rule 1.4(a)(5)(A) (Dec. 1, 2016).

196. See 28 U.S.C. § 2679(d)(1) (2012) (providing that upon certification by the Attorney General that a suit is against a federal employee acting within the scope of his employment, the United States is substituted as the defendant).

197. See *supra* Part IV.B.1.

judge-shopping, Congress should take a subject-matter based approach, requiring it only for cases seeking to enjoin the enforcement of state and federal laws or regulations.

Mandating district-wide assigning in these cases would not come without costs. Any departure from a divisional assigning system will increase travel burdens on either judges or litigants, depending on whether a district elects to have judges ride the district or require litigants to travel to the home courthouse of the assigned judge. Still, the burdens would likely be no more significant than those that currently exist in districts that have only a single courthouse or already assign all cases district-wide.<sup>198</sup> And in any event, the harm posed by judge-shopping in these politically charged cases is too important to ignore.

#### CONCLUSION

With the rise of divisional judge-shopping in political cases like the three filed by the state of Texas, Congress must act to ensure that plaintiffs cannot manipulate divisional judge-assignment procedures to turn judges into weapons for achieving political goals. While a Republican Congress may have been content to allow states like Texas to use divisional judge-shopping to win Republican victories in the federal courts against Obama administration policies, the shoe is now on the other foot. With Republicans controlling the executive and legislative branches, Democratic states and advocacy groups will likely follow Texas's lead in exploiting the divisional assigning system to get perceivably favorable judges assigned to hear challenges to Republican laws, regulations, and policies. Perhaps this threat will spark Congressional action.

Eliminating divisional judge-shopping should be a bipartisan issue. Judge-shopping of all kinds undermines the integrity of the

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198. For example, almost all federal cases in Colorado, the eighth-largest state by area in the country, are heard in Denver. See *State Area Measurements and Internal Point Coordinates*; U.S. CENSUS BUREAU, <https://www.census.gov/geo/reference/state-area.html> (last visited Nov. 23, 2017). Litigants must petition the court to have their case heard in one of the district's other courthouses. In the District of Idaho, judges travel more than 380 miles from their home chambers in Boise to hear cases in Coeur d'Alene. Driving Directions from 550 W. Fort St., Boise, ID to 6450 N. Mineral Dr., Coeur D'Alene, ID, GOOGLE MAPS, <http://maps.google.com> (follow "Directions" hyperlink; then search starting point field for "550 W. Fort St., Boise, ID" and search destination field for "6450 N. Mineral Dr., Coeur D'Alene, ID").

judicial system and produces unfair results. For the courts to continue to be able to stand up to unlawful actions by the coordinate branches—a duty that may be more important now than ever before—they must be seen as doing so out of a commitment to unbiased legal analysis rather than as part of a political agenda. As long as court procedures allow politically motivated litigants to pick their judges, the judiciary risks enabling, rather than combatting, the growing view that judges are mere political actors. That is a risk that a country committed to an independent judiciary can ill afford to take.

## APPENDIX A – DISTRICT COURT ASSIGNMENT PROCEDURES

District	Assign By Divisions? (Y/N)	Only One Courthouse? (Y/N)	All Chambers in One Location (Y/N)	Divisions Where One Judge Hears >50% of the Cases
N.D. Ala.	Y	N	N	n/a
M.D. Ala.	N	N	Y	--
S.D. Ala.	N	Y	Y	--
D. Alaska	N	N	Y	--
D. Ariz.	Y	N	N	0
E.D. Ark.	N	N	Y	n/a
W.D. Ark.	Y	N	N	6
C.D. Cal.	Y	N	N	1
E.D. Cal.	Y	N	N	6
N.D. Cal.	Y	N	N	n/a
S.D. Cal.	N	N	Y	--
D. Colo.	N	N	Y	--
D. Conn.	N	N	N	--
D. Del.	N	Y	Y	--
D.D.C.	N	Y	Y	--
N.D. Fla.	Y	N	N	4
M.D. Fla.	Y	N	N	15
S.D. Fla.	Y	N	N	n/a
N.D. Ga.	Y	N	N	3
M.D. Ga.	Y	N	N	2
S.D. Ga.	Y	N	N	3
D. Guam	N	N	N	--

District	Assign By Divisions? (Y/N)	Only One Courthouse? (Y/N)	All Chambers in One Location (Y/N)	Divisions Where One Judge Hears >50% of the Cases
D. Haw.	N	Y	Y	--
D. Idaho	N	N	Y	--
N.D. Ill.	Y	N	N	1
C.D. Ill.	Y	N	N	n/a
S.D. Ill.	N	N	N	--
N.D. Ind.	N	N	N	--
S.D. Ind.	Y	N	N	1
N.D. Iowa	N	N	N	--
S.D. Iowa	N	N	Y	--
D. Kan.	N	N	N	--
E.D. Ky.	Y	N	N	4
W.D. Ky.	Y	N	N	3
E.D. La.	N	Y	Y	--
M.D. La.	N	Y	Y	--
D. Me.	Y	N	N	1
D. Md.	Y	N	N	n/a
D. Mass.	Y	N	N	2
E.D. Mich.	Y	N	N	n/a
W.D. Mich.	Y	N	N	1
D. Minn.	Y	N	N	n/a
N.D. Miss.	Y	N	N	2
S.D. Miss.	Y	N	N	3
E.D. Mo.	Y	N	N	1

District	Assign By Divisions? (Y/N)	Only One Courthouse? (Y/N)	All Chambers in One Location (Y/N)	Divisions Where One Judge Hears >50% of the Cases
W.D. Mo.	Y	N	N	n/a
D. Mont.	Y	N	N	5
D. Neb.	Y	N	N	n/a
D. Nev.	Y	N	N	n/a
D.N.H.	N	Y	Y	--
D.N.J.	Y	N	N	n/a
D.N.M.	Y	N	N	n/a
E.D.N.Y.	Y	N	N	0
N.D.N.Y.	Y	N	N	n/a
S.D.N.Y.	Y	N	N	0
W.D.N.Y.	Y	N	N	n/a
E.D.N.C.	N	N	N	--
M.D.N.C.	N	N	N	--
W.D.N.C.	Y	N	N	4
N.N.D.	Y	N	N	n/a
D.N. Mar. Is.	N	N	N	--
N.D. Ohio	Y	N	N	n/a
S.D. Ohio	Y	N	N	n/a
E.D. Okla.	N	Y	Y	--
N.D. Okla.	N	Y	Y	--
W.D. Okla.	N	Y	Y	--
D. Ore.	N	N	N	--
E.D. Pa.	Y	N	N	n/a

District	Assign By Divisions? (Y/N)	Only One Courthouse? (Y/N)	All Chambers in One Location (Y/N)	Divisions Where One Judge Hears >50% of the Cases
M.D. Pa.	Y	N	N	n/a
W.D. Pa.	Y	N	N	2
D.P.R.	N	Y	Y	--
D.R.I.	N	Y	Y	--
D.S.C.	Y	N	N	n/a
D.S.D.	Y	N	N	n/a
E.D. Tenn.	N	N	N	--
M.D. Tenn.	Y	N	N	n/a
W.D. Tenn.	Y	N	N	n/a
E.D. Tex.	Y	N	N	5
N.D. Tex.	Y	N	N	2
S.D. Tex.	Y	N	N	2
W.D. Tex.	Y	N	N	2
D. Utah	N	N	Y	--
D. Vt.	N	N	N	--
E.D. Va.	Y	N	N	0
W.D. Va.	Y	N	N	6
E.D. Wash.	N	N	N	0
D.V.I.	N	N	N	--
W.D. Wash.	Y	N	N	0
N.D. W. Va.	Y	N	N	4
S.D. W. Va.	Y	N	N	2
E.D. Wis.	Y	N	N	1

District	Assign By Divisions? (Y/N)	Only One Courthouse? (Y/N)	All Chambers in One Location (Y/N)	Divisions Where One Judge Hears >50% of the Cases
W.D. Wis.	N	Y	Y	--
D. Wyo.	N	N	N	--

n/a = Information not available from the court