

Judge-Shopping Policy Revisal May Make Issue Worse

By **Robert Niemeier** and **William Milliken** (March 25, 2024, 4:46 PM EDT)

At the March meeting of the Judicial Conference of the U.S., the conference announced a revised policy regarding random assignment of certain civil cases to limit the ability of litigants to judge-shop.[1]

The revised policy recommends that U.S. district courts randomly assign many types of civil cases among all judges in a district, as opposed to only the judges in the division where the cases are filed.[2] The policy change comes following concerns over the ability of litigants to choose their judge by filing their action in judicial divisions having only a single judge.[3]

In 2021, U.S. Supreme Court Chief Justice John Roberts expressed concerns regarding the practice among patent litigants of selecting a judge by filing their actions in single-judge divisions.[4] This was followed in 2022 by calls for reform from members of Congress regarding the concentration of patent cases in certain single-judge divisions.[5]

More recently, the practice of litigants to judge-shop by filing their cases in single-judge divisions has received national attention as a result of a number of politically charged cases brought by plaintiffs seeking to overturn or limit policies and regulations enacted by the U.S. government.[6]

Several such high-profile cases were filed in single-judge divisions in Texas, including recent litigation filed in the single-judge Amarillo Division of the Northern District of Texas related to the regulatory approval of the drug mifepristone, which is commonly used in medicated abortions.[7]

In its announcement, the Judicial Conference cited both of these concerns as rationales for the new policy.[8] However, it appears likely that the new policy is not primarily motivated by concerns related to patent litigation judge-shopping and is unlikely to be effective at curbing the practice.

Concern over judge-shopping and concentration of patent cases has been largely focused on the district courts in Texas, where the large geographic size and relatively low population density in much of the state make single-judge divisions a common fixture.

In particular, two single-judge divisions are noted for their immense patent dockets: U.S. District Judge Rodney Gilstrap's Marshall Division in the U.S. District Court for the Eastern District of Texas and U.S. District Judge Alan Albright's Waco Division in the U.S. District Court for the Western District of Texas.



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Combined, these two judges were assigned nearly 30% of the approximately 11,000 patent cases filed in the country from 2021 through 2023.[9]

Judge Gilstrap's Marshall Division has been a popular destination for patent litigants for nearly two decades. Currently, 90% of civil cases filed in the Marshall Division are assigned to Judge Gilstrap,[10] and at times, he has been assigned to 100% of patent cases filed in the Marshall Division.[11]

The Marshall Division has maintained its popularity even through significant changes to the law. Following the 2017 Supreme Court decision in *TC Heartland LLC v. Kraft Foods Group Brands LLC*[12] that limited the proper venue for patent cases, many assumed that the ability of patent owners to file in the Eastern District of Texas and thereby select Judge Gilstrap would be limited.

While the Eastern District did initially see a downturn in cases, it remained one of the top three patent venues and retook the top spot as the most active patent venue in 2023.[13]

By contrast, the Waco Division in the Western District is a newcomer as a patent destination. The Western District of Texas went from fewer than 100 patent cases in 2018 — the year Judge Albright took the bench — to nearly 1,000 cases in 2021, with 95% of those cases assigned to Judge Albright.[14]

Both courts have acquired a reputation as being favorable for patent owners,[15] and both offer accelerated schedules for patent matters[16] [17] and lower rates of stays pending proceedings at the U.S. Patent and Trademark Office relative to some other popular patent litigation venues.[18]

The ability for litigants to select these two judges with a high probability and the enduring popularity of the single-judge Marshall Division along with the meteoric rise of the single-judge Waco Division, as a popular venue for patent litigants, have led to the aforementioned calls for changes to case assignments.

While the Eastern District of Texas has not made any significant change to its case assignment policies in response to the recent criticisms, the Western District of Texas modified its case assignment policy in July 2022.

The new policy enacted by Judge Albright now requires patent cases filed in the Waco Division to be randomly assigned among the majority of judges in the Western District.[19] This change has seen success in limiting judge-shopping.

While the Western District remained one of the most popular patent destinations following the policy change, in 2023 it saw a decline in the overall number of patent cases filed year-over-year by nearly 50%.[20] Judge Albright was assigned to only 40% of patent matters in the district in 2023, down from 80% in 2022 and 95% in 2021.[21]

The announcement of the March policy change suggests the Judicial Conference aimed to expand measures like those implemented in the Western District of Texas to restrict judge-shopping in not only patent cases, but in other civil matters relating to nationwide enforcement of law.[22]

However, the wording of the policy and related guidance suggests that the conference was largely motivated to respond to recent judge-shopping in politically charged cases.

The revised policy would require civil cases that "seek to bar or mandate nationwide enforcement of a

federal law, including a rule, regulation, policy, or order of the executive branch or a federal agency, whether by declaratory judgment and/or any form of injunctive relief" to be randomly assigned among all judges in a district.[23]

While the conference's guidance states that it "applies to all civil cases, including patent cases,"[24] the language of the policy itself appears to exclude most patent cases.

Patent cases are generally actions between private parties and do not involve barring or mandating enforcement of a federal law, rule, regulation, policy, or order of the executive branch or a federal agency. They would therefore be outside the scope of the new policy.

Even if a patent cause of action were interpreted to be within the meaning of the policy, the policy may still not reach most patent cases. The policy states that it applies where the actions are brought "by declaratory judgment and/or any form of injunctive relief." [25]

However, patent owners rarely bring cases under the Declaratory Judgment Act and, in cases where a plaintiff is not seeking injunctive relief, the case would plainly fall outside the scope of the new judge assignment policy.

Beyond questions of whether the March policy actually covers most patent cases, the policy also faces headwinds to be adopted by the district courts. The policy is only a recommendation, and the district courts are free to control their assignment of cases as they see fit.[26]

Criticism of the new policy from members of Congress and judges, seemingly motivated by the political cases rather than patent cases, followed shortly after the March announcement by the Judicial Conference.[27][28] Among the critics were U.S. Court of Appeals for the Fifth Circuit Judge James Ho and several senators who encouraged district courts to disregard the conference's policy recommendation and to continue assigning cases as they see fit.[29]

Those speaking out against the Judicial Conference's districtwide assignment proposal include Sen. Thom Tillis, R-N.C., who appears to have made an about-face from his stance in 2021 where he was one of the leading voices challenging the concentration of patent cases in the Western District of Texas.

Chief U.S. District Judge Alia Moses of the Western District of Texas has also expressed concerns about the feasibility of implementing districtwide assignments in view of the distance between courthouses.[30]

Absent voluntary modification of case assignment procedures by the district courts, the policy could only be implemented in the district courts by an act of Congress or by amending the Federal Rules of Civil Procedure, which requires ratification by the Supreme Court.

Given the polarized reaction to the proposed policy, either option appears difficult to accomplish in the immediate future.

In view of these headwinds, it is unlikely that the Eastern District of Texas will adopt the districtwide assignment policy or diminish its status as a premier destination for patent plaintiffs. As chief judge of the district, Judge Gilstrap would be primarily responsible for revising the case assignment policy.

Judge Gilstrap has presided over the vast majority of patent cases in the Eastern District since taking the

bench and has shown no sign of wishing to alter that practice. Notably, Judge Gilstrap did not opt to revise the case assignment policies for patent cases in the Eastern District following the Western District's change in 2022.

Moreover, even if the Judicial Conference's new policy were broadly adopted, it is likely that, absent other changes, the Eastern District of Texas would endure as a popular venue for patent litigants.

As discussed above, district courts or individual judges could narrowly interpret the policy to exclude the vast majority of patent cases and thus maintain the concentration of patent cases in single-judge divisions.

It is also likely that the Eastern District of Texas would endure as a popular patent venue even if the policy were adopted and covered all patent cases.

Unlike the Western District, the patent rules and procedures developed by Judge Gilstrap and his predecessor, Judge John Ward, that govern the scheduling and prosecution of patent cases and attract many litigants to the Marshall Division have been adopted as the local rules of the Eastern District and apply to cases assigned to any judge in the district.

While other judges may apply the rules differently or rule distinctively on disputes than Judge Gilstrap, the structure and familiarity of the local patent rules, as well as many years of precedent interpreting the rules, will remain attractive to patent litigants.

The revised policy may also ironically revive the Waco Division and Judge Albright as a preeminent destination for patent litigation.

While Judge Moses has thus far opted to continue the policy of districtwide assignment of patent cases filed in the Waco Division instituted by her predecessor, that could soon change. Judge Moses expressed skepticism regarding the conference's districtwide assignment policy, which may indicate a willingness to revisit the 2022 patent case assignment policy as well.

The polarized reaction to the conference's policy and a failure by other district courts to adopt the policy may provide an additional rationale to roll back the patent case assignment policy. If Judge Moses were to vacate the current patent case assignment order and allow patent cases filed in the Waco Division to once again be assigned exclusively to Judge Albright, his courtroom would likely return to its former status as a top destination for patent plaintiffs.

Thus, despite a stated goal of limiting the ability of litigants to judge-shop in patent cases, the revised policy and guidance from the conference do not appear likely to hinder the practice in the most popular venues for patent litigants.

Rather, the policy may actually exacerbate the issue by tying the issue of judge-shopping in patent cases to that in polarizing political cases, making reform more difficult and potentially even undoing prior efforts at reform.

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[1] <https://www.uscourts.gov/news/2024/03/12/conference-acts-promote-random-case-assignment>.

[2] Guidance for Civil Case Assignment in District Courts.

[3] <https://www.uscourts.gov/news/2024/03/12/conference-acts-promote-random-case-assignment>.

[4] <https://www.law360.com/articles/1452178/chief-justice-names-patent-venue-among-top-priorities->

[5] <https://www.law360.com/articles/1437464/tillis-leahy-blast-albright-in-plea-to-chief-justice>.

[6] <https://www.law360.com/articles/1602048/>.

[7] Id.

[8] <https://www.uscourts.gov/news/2024/03/12/conference-acts-promote-random-case-assignment>.

[9] Source: Lex Machina.

[10] Eastern District of Texas General Order No. 23-01 (January 6, 2023).

[11] Eastern District of Texas General Order No. 21-16 (October 22, 2021).

[12] *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 581 U.S. 258 (2017).

[13] <https://www.law360.com/articles/1794801>.

[14] Source: Lex Machina.

[15] <https://www.law360.com/articles/1794801>.

[16] See Eastern District of Texas Local Patent Rules 3–4.

[17] See January 23, 2024 Standing Order Governing Proceedings (OGP) 4.4–Patent Cases.

[18] Source: Lex Machina.

[19] <https://www.law360.com/articles/1515032/wdtx-ends-albright-s-patent-grip-with-random-assignments>.

[20] Source: Lex Machina.

[21] Id.

[22] <https://www.uscourts.gov/news/2024/03/12/conference-acts-promote-random-case-assignment>.

[23] Guidance for Civil Case Assignment in District Courts.

[24] Id.

[25] Id.

[26] Id.

[27] <https://www.washingtonpost.com/national-security/2024/03/14/judges-gop/>.

[28] <https://www.law360.com/articles/1814460>.

[29] <https://www.washingtonpost.com/national-security/2024/03/14/judges-gop/>.

[30] Id.