A Note on the Neutral Assignment of Federal Appellate Judges

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Neutral Assignment of Judges at the Court of Appeals (Neutral Assignment) substantially increases comprehension of the federal intermediate appellate courts. The most striking aspect of the recent article by Professor J. Robert Brown, Jr. and Ms. Allison Herren Lee is the revelation of new information which strongly suggests that the United States Court of Appeals for the Fifth Circuit did not randomly assign members of the federal bench to three-judge panels which heard cases involving desegregation and that this practice facilitated substantive results which favored integration. The material's release may well provoke controversy; however, Neutral Assignment is much more than a period piece. Indeed, that article has considerable salience for contemporary appellate procedure.

Professor Brown and Ms. Lee have conducted painstaking research to compile an invaluable empirical data set of judicial assignment practices which all of the appeals courts apply. That information yields instructive insights on how the appellate courts and circuit judges can use ostensibly

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neutral assignments to constitute panels in ways that will foster specific substantive determinations. The material, thus, affords *Neutral Assignment* a decidedly modern ring. For example, federal court observers perennially express concern that procedures be neutral and that process not be employed to reach substance.\(^4\) Brown and Lee concomitantly confirm several recent studies which have ascertained that a majority of members on the United States Court of Appeals for the Fourth Circuit invoke the rehearing en banc mechanism to reverse three-judge panel opinions which the majority considers too liberal politically.\(^5\)

An equally remarkable, albeit less provocative, phenomenon revealed by the empirical data that Brown and Lee adduce is the enormous variation in the local appellate procedures which govern practice in the appeals courts. *Neutral Assignment* is replete with illustrations of the substantial discrepancies that obtain among the appellate courts in the sharply circumscribed corner of procedure which implicates panel assignments. These encompass the significant differences that attend responsibility for, and the timing of, panel assignments as well as the dissemination of information about the composition of particular three-judge panels.\(^6\)

It is important to capitalize on the perception that procedural disparities extend far beyond the narrow confines of panel assignments proffered by Brown and Lee. In fact, the stunning disuniformity manifested in this area is symptomatic of a considerably more ubiquitous phenomenon. The discrepancies actually pervade every significant feature, and many less critical dimensions, of contemporary appellate practice. Each of the appeals courts has applied burgeoning numbers of local requirements which conflict with or repeat the Federal Rules of Appellate Procedure, congressional legislation, or the local strictures in the remaining appeals courts. Illustrative are the diverse local commands that cover such fundamental matters as briefing, oral argument, and the citation to and publication of opinions.\(^7\) The exponential proliferation of local measures,

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6. See generally Brown, Jr., supra note 3.

many of which are inconsistent or duplicative, threatens to fracture additionally the already fragmented state of modern appellate practice, increasing expense and delay and complicating efforts of litigants and attorneys to participate in appeals before multiple appellate courts.\textsuperscript{8} The developments reveal how profoundly prescient was Professor Charles Alan Wright’s trenchant characterization of the local rules as the “soft underbelly” of federal procedure three and a half decades ago.\textsuperscript{9}

All of these ideas mean that the individuals and institutions which are responsible for preserving and promoting uniform appeals court practice and procedure must expeditiously and decisively implement actions that will stop balkanization or at least ameliorate further fragmentation. For instance, specific appellate courts could voluntarily canvass their own local strictures and eliminate or modify measures which conflict with or repeat the federal rules. Those appeals courts and the Judicial Conference of the United States might correspondingly discharge certain duties that the United States Supreme Court and the United States Congress have expressly conferred upon the courts and the Judicial Conference. The 1995 amendment to Federal Rule of Appellate Procedure 47,\textsuperscript{10} which governs local rules, and the Judicial Improvements and Access to Justice Act of 1988\textsuperscript{11} required the appellate courts and the Judicial Conference to review and abrogate or change local appeals court strictures that contravene or duplicate the Federal Rules of Appellate Procedure or federal statutes.\textsuperscript{12} The appeals courts have expressly ignored the instructions of the High Court and lawmakers...
by prescribing even more local measures, many of which conflict with or
The Judicial Conference, however, has never undertaken the rigorous
scrutiny of these mechanisms that the Supreme Court and legislators
evisioned.\textsuperscript{13}

Senators and representatives could also treat the proliferation of local
appeals court requirements by adopting the 1991 proposed rule
amendment which the federal rule revision entities withdrew in apparent
deference to contemporaneous experimentation using measures that
conserve cost and time implemented under the Civil Justice Reform Act
of 1990.\textsuperscript{14} The recommended rule alteration would have authorized
courts that secured Judicial Conference approval to test, for not more
than five years, promising local procedures which contradicted or
repeated the federal provisions or congressional statutes.\textsuperscript{15} This
approach would increase uniformity while fostering experimentation
with salutary techniques and empowering appeals courts to apply
efficacious mechanisms that address unusual local problems which the
Federal Rules of Appellate Procedure frequently do not resolve.\textsuperscript{16}

Those persons and organizations that have responsibility for the
maintenance and promotion of consistent appeals court practice and
procedure should promptly institute the actions suggested. For example,
the appellate courts and the Judicial Conference ought to survey

\textsuperscript{13}. See supra notes 6–9 and accompanying text; see also Sisk, supra note 7, at 51–
52 (mentioning some Conference scrutiny). See generally Wright, supra note 9, at 10.
In fairness, Congress appropriated no resources for local procedural review by the courts
or the Conference. See Tobias, supra note 7, at 572.

\textsuperscript{14}. See Committee on Rules of Practice and Procedure of the Judicial Conference
of the United States, Proposed Rules: Preliminary Draft of Proposed Amendments to the
(1991) (proposing the 1991 amendment to Federal Rule of Civil Procedure 83(b)). See
generally A. Leo Levin, Beyond Techniques of Case Management: The Challenge of the
Civil Justice Reform Act of 1990, 67 ST. JOHN'S L. REV. 877, 891–92 (1993); Carl
1589, 1616 (1994).

\textsuperscript{15}. See Committee on Rules of Practice and Procedure of the Judicial Conference
of the United States, supra note 14, at 153. See generally A. Leo Levin, Local Rules as
Experiments: A Study in the Division of Power, 139 U. PA. L. REV. 1567, 1582–83
(1991); Laurens Walker, Perfecting Federal Civil Rules: A Proposal for Restricted Field

\textsuperscript{16}. In fairness, the appellate courts might have applied inconsistent or repetitive
local measures to experiment, to address peculiar local difficulties, or to treat rising
dockets with scarce resources. However, the ideas recommended here would be
responsive to these needs and to the problem of local procedural proliferation. See
Robert E. Keeton, The Function of Local Rules and the Tension with Uniformity, 50 U.
Friedman, The Fragmentation of Federal Rules, 46 MERCER L. REV. 757, 783–91
(1995); Levin, supra note 14, at 888–94; Carl Tobias, Some Realism About Federal
carefully local requirements and abolish or modify any strictures that they deem conflict with or duplicate federal rules or statutes. Congress might correspondingly allocate the requisite resources to facilitate the expeditious performance of these assignments, while lawmakers could amend Federal Rule of Appellate Procedure 47 to authorize appeals court experimentation with disuniform or repetitive measures that may improve appellate practice or treat peculiar local complications. Those activities should rectify local procedural proliferation or at least moderate the additional fragmentation of federal appellate practice and procedure which judicial assignments illustrate, phenomena that the meticulous research of Professor Brown and Ms. Lee so clearly reveals. 17

17. They admonish the judiciary to implement random assignments, lest Congress "mandate that circuits assign cases and judges in a neutral and objective manner based upon principles of random selection . . . [and] lock the courts into a mandatory system specified by" legislation pending in Congress, an admonition that may similarly apply to the proliferation of local appellate procedures. Brown, Jr. & Lee, supra note 1, at 1107; see also S. 1484, 106th Cong. (1999). But see Levin, supra note 15, at 1585-87.