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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*)[1] 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.[2] 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.[3] That information yields instructive insights on how the appellate courts and circuit judges can use ostensibly

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1. J. Robert Brown, Jr. & Allison Herren Lee, *Neutral Assignment of Judges at the Court of Appeals*, 78 TEX. L. REV. 1037 (2000).

2. *See id.* For earlier, albeit more limited, analysis of the assignments, see Jonathan L. Entin, *The Sign of "The Four": Judicial Assignment and the Rule of Law*, 68 MISS. L.J. 369 (1998).

3. *See* J. Robert Brown, Jr., *Circuit Practices: Appendix to the Neutral Assignment of Judges at the U.S. Court of Appeals* (Jan. 1, 2000), *at* http://www.law.du.edu/jbrown/.

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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4. *See, e.g.*, ROBERT M. COVER & OWEN M. FISS, THE STRUCTURE OF PROCEDURE ch. 2 (1979); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 9–10 (1959).

5. *Compare* Brown, Jr. & Lee, *supra* note 1, at 1111, *with* Tracey E. George, *The Dynamics and Determinants of the Decision to Grant En Banc Review*, 74 WASH. L. REV. 213, 273–74 (1999) *and* Phil Zarone, *Agenda Setting in the Courts of Appeals: The Effect of Ideology on En Banc Rehearings*, 2 J. APP. PRACTICE & PROCESS 157, 174 (2000). *See generally* Mark Hansen, *Mid-Atlantic Drift*, A.B.A. J., Aug. 1999, at 66, 67; Neil A. Lewis, *A Court Becomes a Model of Conservative Pursuits*, N.Y. TIMES, May 24, 1999, at A1.

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

7. *See* The Honorable Boyce F. Martin, Jr., *In Defense of Unpublished Opinions*, 60 OHIO ST. L.J. 177, 193–97 (1999); Gregory C. Sisk, *The Balkanization of Appellate Justice: The Proliferation of Local Rules in the Federal Circuits*, 68 U. COLO. L. REV. 1,

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.[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.[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,[10] which governs local rules, and the Judicial Improvements and Access to Justice Act of 1988[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.[12] The appeals courts have expressly ignored the instructions of the High Court and lawmakers

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7–24 (1997); Carl Tobias, *Local Federal Civil Procedure for the Twenty-First Century*, 77 NOTRE DAME L. REV. 533, 542–44, 569 (2002).

8. *See* Sisk, *supra* note 7, at 26–34; Tobias, *supra* note 7, at 556–58, 569. *See generally* CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 62, at 431–32 (5th ed. 1994).

9. *See* Comment, *The Local Rules of Civil Procedure in the Federal District Courts—A Survey*, 1966 DUKE L.J. 1011, 1012 n.6 (citing Letter from Charles Alan Wright to the *Duke Law Journal* (Nov. 16, 1965)); *see also* Charles Alan Wright, *Foreword: The Malaise of Federal Rulemaking*, 14 REV. LITIG. 1, 10 (1994) (remarking on the "phrase that has since been much quoted").

10. *See* FED. R. APP. P. 47 advisory committee's note (1995); FED. R. APP. P. 47, 514 U.S. 1141, 1142 (1995).

11. *See* 28 U.S.C. §§ 332(d)(4), 2071(c) (1994 & Supp. V 2000); *see also* H.R. REP. NO. 100-889, at 27 (1988). The 1995 federal rule revision "codified" the mandates in the 1988 Judicial Improvements Act and subjected local measures that repeat federal rules or statutes to review and change. *See* sources cited *supra* note 10.

12. *See* sources cited *supra* notes 10–11; *see also* 28 U.S.C. § 331 (1994 & Supp. V 2000) (authorizing the Judicial Conference as the policy-making arm of the federal courts and prescribing its duties).

by prescribing even more local measures, many of which conflict with or reiterate the Federal Rules of Appellate Procedure or Acts of Congress. The Judicial Conference, however, has never undertaken the rigorous scrutiny of these mechanisms that the Supreme Court and legislators envisioned.[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.[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.[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.[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

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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.

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 Federal Rules of Civil Procedure and the Federal Rules of Evidence*, 137 F.R.D. 53, 153 (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 Tobias, *Improving the 1988 and 1990 Judicial Improvements Acts*, 46 STAN. L. REV. 1589, 1616 (1994).

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 Experiments*, LAW & CONTEMP. PROBS., Summer 1988, at 67.

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. PITT. L. REV. 853, 874–75 (1988). *See generally* Erwin Chemerinsky & Barry 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 Procedural Reform*, 49 FLA. L. REV. 49, 68, 72–73 (1997).

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.