SEPARATION-OF-POWERS SUITS IN THE POST-TRUMP ERA

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INTRODUCTION

Professor Payvand Ahdout's article, *Enforcement Lawmaking and Judicial Review*,[1] makes a powerful case that, contrary to the views of many scholars, federal courts are not weak institutions that enable expansive exercises of executive power.[2] Instead, Ahdout argues, federal courts use their pretrial managerial authority in creative ways to subject executive actions to greater transparency and accountability.[3] Ahdout makes a strong case that, coupled with doctrinal developments in the law of standing, ripeness, and equitable remedies, the managerial powers of district judges have expanded the authority of the federal courts and allowed them to become a significant counterweight to the increasing power of the executive branch.[4] But Ahdout does more than simply describe the developments in the federal courts; she makes a normative argument that increased use of district courts' pretrial management powers in separation-of-powers suits is not only a good thing, but also something that should be encouraged to grow and develop further, free from interference by the Supreme Court.[5]

I agree with virtually all that Ahdout suggests about the substantive doctrines she discusses, including her prescriptive recommendations on those topics. I also agree with her descriptive analysis of the power of managerial judging to constrain executive power. My Response takes issue with the normative judgment that increased managerial judging in cases involving challenges to executive authority is an unalloyed positive whose growth should be encouraged. Pretrial management authority of district judges is subject to so few checks that it has the potential to be exercised in arbitrary and potentially abusive ways. In any discussion with government litigators, it does not take long to hear complaints about the ways in which district judges engage in pretrial management. Indeed, there are some astonishing examples of district judges who have abused their authority for years without any significant

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[1] 135 HARV. L. REV. 937 (2022).

[2] *Id.* at 939.

[3] *Id.* at 941.

[4] *Id.* at 939.

[5] *Id.* at 945.

check.[6] In other words, district judges may be a check on executive power, but who is going to check the checker?

There is a sound theoretical explanation for the occurrence of such arbitrary judicial power. The Framers were deeply ambivalent about the independence of federal judges. They were committed to giving federal judges the "good behavior" tenure enjoyed by their British counterparts, but they also feared that the absence of any significant interbranch checks on federal judges would lead to abuses of the judicial power.[7] They comforted themselves with the thought that legal precedent would regulate and limit judges' primary discretion, that appellate review would provide an intrabranch check that would limit judges' secondary discretion, and that the right to a jury trial would be the ultimate guarantee against abuse of judicial power.[8] Fast forward two hundred years, and one finds that the pretrial management authority of district judges is relatively unbound by precedent, virtually unreviewable on appeal, and beyond the reach of a common law jury. That explains the complaints of arbitrary case management, and it should give us pause before we engage in a full embrace of managerial judging as a counterweight to executive power.

Before explaining the case for this in detail, one has to acknowledge that the elephant in the room for the discussion of this issue is Donald Trump. Although Ahdout acknowledges, as she must, that the Trump Administration presented a unique set of enforcement-law issues,[9] the article endeavors to present a theoretical approach to judicial checks on excessive enforcement lawmaking that would apply regardless of the administration and without respect to the level of perceived lawbreaking or norm evasion. In particular, the article champions managerial-judging checks on executive action as a general solution that should, as a normative matter, be encouraged and developed over time.[10]

I think that a more cautious approach is warranted. For reasons I will detail below, I think that encouraging very active pretrial management in executive enforcement lawmaking cases poses a distinct separation-of-powers risk that federal district judges will abuse their authority in ways that will be both unnecessary to check excessive executive power and counterproductive to effective administration of the

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[6] Michael Berens & John Shiffman, *Thousands of U.S. Judges Who Broke Laws or Oaths Remained on the Bench*, REUTERS (June 30, 2020, 12:00 PM), https://www.reuters.com/investigates/special-report/usa-judges-misconduct [https://perma.cc/36UW-ALGD].

[7] Todd David Peterson, *Procedural Checks: How the Constitution (and Congress) Control the Power of the Three Branches*, 13 DUKE J. CONST. L. & PUB. POL'Y 209, 230 (2017).

[8] *See infra* p. 200.

[9] Ahdout, *supra* note 1, at 952 n.66.

[10] *Id.* at 945, 960.

executive's statutory and constitutional responsibilities. Given the unquestionably unique overreaching by the Trump Administration (in both volume and egregiousness), I might have been willing to take that risk to be able to hold the Executive accountable for its actions, but I am not sure that I would be willing to take that risk in a post-Trump political environment.[11] The risk of overreacting to the excesses of the Trump Administration is a danger that we should acknowledge and assess with care.

I. How District Judges Can Abuse Their Managerial Authority

Ahdout has a lot of faith in the ability of district judges to manage cases fairly, so one might well ask, how much mischief could a district judge cause during pretrial? It turns out that the answer to that question is: quite a bit. The most notorious example of judicial abuse of managerial power is the protracted pretrial process in the Native American Trust Fund litigation against the Department of Interior.[12] From the time the case was initially filed in 1996 until 2006 when the D.C. Circuit finally had enough and removed District Judge Royce Lamberth as the presiding judge in the case, Judge Lamberth so abused his pretrial case-management authority that it prompted my colleague Professor Dick Pierce to describe it as "Judge Lamberth's reign of terror at the Department of Interior."[13] I will not recapitulate the entire history of the case, which is so compellingly described in Pierce's article; it will suffice to cite the article's summary of some of Judge Lamberth's more outrageous actions:

> Judge Lamberth has held two Secretaries of Interior, a Treasury Secretary, and two Assistant Secretaries of Interior in contempt. Judge Lamberth has also issued orders in which he has compelled eighty government employees to defend themselves against charges of contempt. It is the first case in which a judge has ordered a cabinet department to disconnect its computers from the Internet. Judge Lamberth issued the first such order in December 2001 and the second such order in July 2003, shortly after he allowed the Department of Interior (DOI) to reconnect most, but not all, of its systems. Finally, it is the first case since 1973 in which a court has issued a structural injunction against a federal agency. On September 25, 2003, Judge Lamberth issued an opinion that contains over two hundred pages of detailed instructions for the DOI. In that order, he compelled the DOI to

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[11] That, of course, assumes that we are in a post-Trump political environment, an assumption that is not at all clearly correct.

[12] The case spawned many judicial decisions. *See, e.g.*, Cobell v. Norton, 283 F. Supp. 2d 66 (D.D.C. 2003), *vacated in part*, 392 F.3d 461 (D.C. Cir. 2004); Cobell v. Norton, 334 F.3d 1128 (D.C. Cir. 2003).

[13] *See* Richard J. Pierce, Jr., *Judge Lamberth's Reign of Terror at the Department of Interior*, 56 Admin. L. Rev. 235 (2004).

> implement an elaborate accounting plan on a timetable of his choosing. He emphasized that he is retaining jurisdiction over implementation of the plan and that he intends to enforce it through use of his contempt power.[14]

Judge Lamberth repeatedly used the threat of contempt sanctions to intimidate government attorneys.[15] Indeed, there was virtually no Department of Justice (DOJ) attorney working on the case who had not been cited for contempt of court.[16]

Judge Lamberth required the Department of Interior to disconnect all of its computers from the Internet for a period of over one year because he believed that the network security of the computers was inadequate,[17] and the judge's orders affected not just the Bureau of Indian Affairs, but also "the Office of the Inspector General, the Office of the Solicitor, the National Park Service, the Fish and Wildlife Service, the Bureau of Land Management, the Minerals Management Service, the Office of Surface Mining, the U.S. Geological Survey, the Bureau of Reclamation, and the Office of Hearings and Appeals."[18] Without access to the Internet, DOI employees found it "impossible for the DOI to accomplish its many missions effectively and efficiently."[19] Only in 2006, after years of such abusive pretrial case management, did the D.C. Circuit take the extraordinary action of removing Judge Lamberth from the case.[20]

Of course, this case is an extreme example (although the D.C. Circuit had to take a similar action in removing another district judge after a long period of abusive pretrial management),[21] but it shows how much power a judge has even at the pretrial stage. One would hope that most district judges would wield their substantial pretrial case-management authority in a responsible fashion. Unfortunately, my prior research suggests that attorneys at the DOJ do not feel that they do. As a consultant for the National Commission on Judicial Discipline and Removal, I was asked to survey every United States Attorney's Office and every litigating division of the DOJ to determine if they believed

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[14] *Id.* at 235–36 (citations omitted).

[15] *Id.* at 244–45.

[16] *See id.* at 240, 242–43.

[17] *Id.* at 245–46.

[18] *Id.* at 246.

[19] *Id.* at 247.

[20] *See* Eric M. Weiss, *At U.S. Urging, Court Throws Lamberth off Indian Case*, WASH. POST (July 12, 2006), https://www.washingtonpost.com/archive/politics/2006/07/12/at-us-urging-court-throws-lamberth-off-indian-case/72b9f5cd-e668-4d9f-98f9-10d83e5052b7 [https://perma.cc/ZDH6-U669].

[21] *See* United States v. Microsoft Corp., 253 F.3d 34, 107–16 (D.C. Cir. 2001) (recounting Judge Thomas Penfield Jackson's abusive pretrial management and ordering that he be removed as the presiding judge in the case).

there was a substantial problem with corruption in the federal judiciary.[22] Without exception, the DOJ attorneys I contacted believed there was no significant corruption problem within the federal judiciary.[23] What piqued my interest, however, was the fact that about half of the respondents made unsolicited comments about the tendency of district judges to abuse their pretrial case-management powers, and many stated that the problem became more pronounced the longer a district judge served.[24]

What would have prompted these responses? As I explain below, if the Framers had understood the extent of judges' pretrial case-management authority, they would not have been surprised to hear that judges abused such authority, and they would have been reluctant to depend on managerial judging as a reliable and fair check on executive power. There is a sound theoretical foundation for concerns that the powers of pretrial case management might well be abused by district judges in ways that could unjustifiably hamstring the ability of the executive branch to implement perfectly legal policies in an effective way.

II. THE THEORETICAL PROBLEM WITH MANAGERIAL JUDGING

The Founding generation was profoundly ambivalent about the judicial independence guaranteed by Article III of the Constitution.[25] On the one hand, they included in the Constitution the guarantee that federal judges "shall hold their Offices during good Behavior,"[26] language derived directly from the English Act of Settlement of 1701, which provided English judges would serve "*[q]uam diu se bene [g]esserint*," or as long as he shall behave himself well.[27] The failure of colonial judges to receive the same tenure protections was one of the principal grievances in the Declaration of Independence, which complained that the King had "made judges dependent upon his will alone for the tenure of their offices, and the amount and payment of their salaries."[28] Indeed, the Framers went one step further than the English by rejecting judicial removal on joint address of Congress (which was allowed in England).[29]

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[22] *See* Todd D. Peterson, *The Role of the Executive Branch in the Discipline and Removal of Federal Judges*, *in* 1 RESEARCH PAPERS OF THE NATIONAL COMMISSION ON JUDICIAL DISCIPLINE AND REMOVAL 243, 245, 353–55 (1993).

[23] *Id.* at 277.

[24] *See id.* at 354.

[25] *See* U.S. CONST. art. III, § 1.

[26] *Id.*

[27] Act of Settlement, 1701, 12 & 13 Will. 3, c. 2 (Eng.).

[28] THE DECLARATION OF INDEPENDENCE para. 9 (U.S. 1776).

[29] 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 428–29 (Max Farrand ed., 1911) [hereinafter 2 Farrand].

The only interbranch check on federal judges was thus "the cumbersome process of impeachment."[30]

On the other hand, many were deeply concerned about the limited checks on judicial power. No state provided the same level of judicial independence as the federal Constitution.[31] Antifederalists objected that the independence of the federal judiciary would inevitably lead to abuses of authority. For example, one critic argued:

> [T]hey have made the judges *independent*, in the fullest sense of the word. There is no power above them, to controul [sic] any of their decisions. There is no authority that can remove them, and they cannot be controuled [sic] by the laws of the legislature. In short, they are independent of the people, of the legislature, and of every power under heaven. Men placed in this situation will generally soon feel themselves independent of heaven itself.[32]

Antifederalists also expressed fears that the Framers' focus on protecting against legislative overreaching led the Framers to ignore the potential for abuse of judicial power. Another critic argued that the Framers were "not sufficiently attentive to the circumstances, that the measures of popular legislatures settle down in time, and gradually approach a mild and just medium; while the rigid systems of the law courts naturally become more severe and arbitrary, if not carefully tempered and guarded by the constitution."[33] Because federal courts would "be independent of the people," they would be "suitable tools for the purposes of tyranny and oppression."[34]

The Framers had several responses to these concerns. First, they relied on limits to the primary discretion of trial judges. Primary discretion is the extent to which trial judges are free to act without legal standards. As described by Professor Maurice Rosenberg, "[w]hen the law accords primary discretion in the highest degree in a particular area, it says in effect that the court is free to render the decision it chooses; that decision-constraining rules do not exist here; and that even looser principles or guidelines have not been formulated."[35] The Framers depended on judicial precedent to limit the primary discretion of federal trial judges. Hamilton famously defended Article III in *The Federalist*

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[30] *See* Martha Andes Ziskind, *Judicial Tenure in the American Constitution: English and American Precedents*, 1969 SUP. CT. REV. 135, 153.

[31] *See* Gerhard Casper, *The Judiciary Act of 1789 and Judicial Independence*, *in* ORIGINS OF THE FEDERAL JUDICIARY 281, 284–85 (Maeva Marcus ed., 1992) (stating that ten states retained some measure of political control over sitting judges and only three states maintained an unqualified good-behavior standard, while no state provided protection against reduction in salary).

[32] 2 THE COMPLETE ANTI-FEDERALIST 438 (Herbert J. Storing ed., 1981).

[33] 1 *id.* at 50.

[34] 4 *id.* at 241.

[35] Maurice Rosenberg, *Judicial Discretion of the Trial Court, Viewed from Above*, 22 SYRACUSE L. REV. 635, 637 (1971); *see also id.* (discussing differences between primary and secondary discretion).

No. 78 by arguing that the judicial branch would be the weakest of the branches because judges "have neither Force nor Will, but merely judgment."[36] Indeed, Hamilton argued, "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them."[37] As Chief Justice Marshall later stated, even in cases in which the trial judge is given discretion, the choices are not left to the court's "inclination, but to its judgment; and its judgment is to be guided by sound legal principles."[38]

The Framers ensured that precedent would control the primary discretion of federal judges by limiting federal judicial power to litigated cases or controversies.[39] The Constitutional Convention rejected the idea of judicial participation in a council of revision in part because of fears that such authority would give judges too much discretionary power.[40] Soon after the adoption of the Constitution, the Supreme Court rejected legislation designed to give federal courts authority to act outside of the context of a litigated case or controversy. In *Hayburn's Case*,[41] the Court refused to accept the power to review military pension claims because they were not "properly judicial, and to be performed in a judicial manner."[42] Chief Justice Marshall famously underscored this point in *Marbury v. Madison*[43]:

> [W]hether the legality of an act of the head of a department be examinable in a court of justice or not, must always depend on the nature of that act. If some acts be examinable and others not, there must be some rule of law to guide the court in the exercise of its jurisdiction. In some instances there may be difficulty in applying the rule to particular cases; but there cannot, it is believed, be much difficulty in laying down the rule.[44]

Federal trial judges have limited secondary discretion as well. Secondary discretion exists "when the rules of review accord the lower court's decision an unusual amount of insulation from appellate revision. In this sense, discretion is a review-restraining concept. It gives the trial judge a right to be wrong without incurring reversal."[45] Even

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[36] THE FEDERALIST NO. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

[37] *Id.* at 529.

[38] United States v. Burr, 25 F. Cas. 30, 35 (C.C.D. Va. 1807) (No. 14,692d).

[39] *See* U.S. CONST. art. III, § 2, cl. 1.

[40] *See* 2 Farrand, *supra* note 29, at 75 (remarks of Elbridge Gerry); *id.* at 79 (remarks of Nathanial Ghorum); *see also* James T. Barry III, Comment, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235, 253–54 (1989) (stating that council of revision opponents argued such participation would lead to judicial dominance of the executive branch).

[41] 2 U.S. (2 Dall.) 409 (1792).

[42] *Id.* at 410.

[43] 5 U.S. (1 Cranch) 137 (1803).

[44] *Id.* at 165.

[45] Rosenberg, *supra* note 35, at 637.

if a trial judge's primary discretion were substantially limited by precedent, judicial power could be abused if a trial judge had unlimited secondary discretion because his decisions were unreviewable. Although the Constitution does not mandate appellate review (except perhaps by the Supreme Court), the First Congress immediately created a federal court system in which federal trial judges would be subject to appellate review, which provided substantial limits on their secondary discretion.[46] Thus, although there were very limited interbranch checks on judicial authority, the guarantee of appellate review created a substantial intrabranch check on the power of federal trial courts.

Finally, the authority of federal trial judges was significantly limited by the right to a jury trial, which diffused decisional authority in a way that protected against judicial abuse of power. Antifederalists had strongly objected to the exclusion of the right to a jury trial from the Constitution. In 1788, Luther Martin argued:

> [J]ury trials which have so long been considered the surest barrier against arbitrary power, and the palladium of liberty, — with the loss of which the loss of our freedom may be dated, are taken away by the proposed form of government, not only in a great variety of questions between individual and individual, but in every case whether civil or criminal arising under the laws of the United States, or the execution of those laws.[47]

Other Antifederalists joined in this protest about the absence of a constitutional right to a jury trial, which was a necessary check on the potential abuse of judicial power.[48]

Hamilton attempted to allay these concerns by suggesting that the Supreme Court would not be able to overturn the findings of common law juries, arguing that "[t]he legislature of the United States would certainly have full power to provide that in appeals to the Supreme Court there should be no re-examination of facts where they had been tried in the original causes by juries."[49] Ultimately, of course, this concern was addressed for civil cases by the Seventh Amendment, which provided that, in suits at common law where the amount in controversy exceeded twenty dollars, "the right of trial by jury, shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."[50] In addition, the First Congress acted quickly to prevent federal trial judges from using their equity powers to bypass the common law jury. The

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[46] *See* Judiciary Act of 1789, ch. 20, §§ 11, 22, 1 Stat. 73, 78–79, 84–85 (conferring appellate jurisdiction on circuit courts from judgments of district courts and regulating appellate review of lower court rulings by higher courts).

[47] 2 THE COMPLETE ANTI-FEDERALIST, *supra* note 32, at 70 (emphasis omitted).

[48] *See* 3 *id.* at 58–63, 159–60; 5 *id.* at 36–40, 112–15, 129–36.

[49] THE FEDERALIST NO. 81, at 489–90 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

[50] U.S. CONST. amend. VII.

Judiciary Act of 1789[51] restricted equity jurisdiction in several ways, and sections 19, 26 and 30 of the Act imposed limits on judicial factfinding to preserve the common law right to a jury trial.[52] Thus, the right to a jury trial became a constitutionally mandated check on federal judicial power.

In summary, the Founding generation had substantial concerns about the potential for abuse of power by an independent federal judiciary. These concerns were ultimately allayed in three ways. First, the role of precedent in litigated cases or controversies limited the primary discretion of federal judges. Second, appellate review limited the secondary discretion of federal trial judges. Finally, the constitutional right to a jury trial provided the ultimate check on independent federal trial judges. Unfortunately, as I will explain below, the pretrial case-management authority of district judges evades every one of those checks. Had the Framers known about the growth of managerial judging, they would have been profoundly worried about the abuse of such unchecked power.

III. THE GROWTH OF PRETRIAL MANAGEMENT

I will only briefly sketch a picture of the pretrial managerial powers of federal district judges in order to lay the foundation for an explanation of why we should be wary of such unchecked authority. Managerial judging, as described in Professor Judith Resnik's seminal article,[53] involves exercising a panoply of powers to regulate the development of a case from the filing of the complaint up to the trial of a civil case.[54] The Federal Rules of Civil Procedure, first enacted in 1938, laid the foundation for managerial judging.[55] Rule 26 permitted extensive discovery, and the rule also provided a multitude of discovery methods.[56] Rule 26 allowed district judges to limit the scope of discovery and the use of various discovery devices.[57] In addition, Rule 37 allowed a district judge to compel discovery and impose sanctions on parties for failing to comply with the discovery rules.[58] Rule 16 further allowed a court to "order the attorneys and any unrepresented parties to appear for one or

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[51] Ch. 20, 1 Stat. 73.

[52] *Id.* §§ 19, 26, 30. Section 16 of the Act restated the general common law rule that suits in equity would not be permitted in any case in which a "plain, adequate and complete remedy may be had at law." *Id.* § 16; Casper, *supra* note 31, at 291.

[53] *See* Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374 (1982).

[54] *Id.* at 378.

[55] *See id.* at 379.

[56] FED. R. CIV. P. 26.

[57] *Id.* 26(c)(1).

[58] *Id.* 37.

more pretrial conferences" to discuss matters relating to case timing and management.[59]

As litigation became more protracted and expensive and the numbers of federal cases rose, the Supreme Court recognized expanded trial court authority to manage the pretrial process and impose sanctions even beyond those expressly recognized in the Federal Rules. For example, in *National Hockey League v. Metropolitan Hockey Club*,[60] the Court upheld (over a contrary decision by the Third Circuit) a district judge's dismissal of an antitrust action because of the plaintiff's failure to respond to interrogatories as ordered by that court.[61] The Court emphasized that an appellate court should not reverse the case-management decisions of a trial court absent an abuse of discretion.[62]

As document technology expanded from carbon copies, to photocopies, to electronically stored information, the time and cost of discovery expanded exponentially. District judges, faced with dramatically expanded dockets, became increasingly active in managing the pretrial phase of litigation to control litigation burdens. The foundation of these efforts was the "assumption . . . that all but the simplest cases will benefit from complete pretrial procedures."[63] Active involvement in managing discovery inevitably involves an assessment of issues relating to the merits of a case. A subcommittee of the Federal Courts Study Committee found that discovery orders can "force attorneys to make early predictions about which theories they can profitably pursue, and, if badly done, may substantially prejudice one of the parties."[64]

A district judge's case-management powers extend beyond discovery management. As a subcommittee of the Federal Courts Study Committee found:

> Many judges are more direct — using pretrial conferences to "persuade" the parties to "dispose of the many immaterial or uncontested issues that arise at the outset of a typical lawsuit." Forcing the parties to narrow the issues for trial reduces trial time by eliminating peripheral issues and focusing the issues that remain. In addition, case management advocates say that the process of narrowing the issues leads to the disposition of more cases through pretrial motions for summary judgment or judgment on the pleadings.[65]

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[59] *Id.* 16(a).

[60] 426 U.S. 639 (1976).

[61] *Id.* at 639, 643.

[62] *Id.* at 642; *see also* Roadway Express, Inc. v. Piper, 447 U.S. 752, 763–64 (1980); Link v. Wabash R.R. Co., 370 U.S. 626, 633 (1962).

[63] Robert F. Peckham, *The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition*, 69 CALIF. L. REV. 770, 779 (1981).

[64] 1 FED. CTS. STUDY COMM., WORKING PAPERS AND SUBCOMMITTEE REPORTS 50 (1990).

[65] *Id.* (footnote omitted).

Such practices give a district judge substantial unreviewable power over the disposition of a case during pretrial.

The Civil Justice Reform Act[66] (CJRA) further expanded pretrial management authority. As described by its sponsor, then–Senator Joseph Biden, the CJRA "implements, for the first time, a national strategy to attack the problems of cost and delay in civil litigation."[67] The CJRA required every federal judicial district to adopt an extensive plan to encourage district judges to manage cases more actively in order to achieve more efficient resolution of their expanding caseloads.[68] The CJRA effectively created a statutory mandate for district judges to take a much more active role in pretrial case management.

As district judges became more active case managers, they also greatly expanded their role in facilitating and encouraging rapid settlement of cases. In an address to newly appointed federal judges, an experienced district judge said (in an interesting contrast to Chief Justice Roberts's famous remark at his confirmation hearings[69]): "I urge that you see your role not only as a home plate umpire in the courtroom, calling balls and strikes. Even more important are your functions as mediator and judicial administrators."[70] To encourage district judges to take a more active role in settlement, the Federal Judicial Center produced seminars to train judges in how to promote settlements and developed treatises to provide settlement strategies to district judges.[71] The most recent amendment of Rule 16 of the Federal Rules of Civil Procedure gives district judges additional powers to advance settlement and requires parties to attend settlement conferences with clients authorized to consider settlement.[72] By the year 2000, the emphasis on settlement had created a "settlement culture" in the courts.[73]

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66 Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended at 28 U.S.C. §§ 471–482).

67 Joseph R. Biden, Jr., *Equal, Accessible, Affordable Justice Under Law: The Civil Justice Reform Act of 1990*, 1 CORNELL J.L. & PUB. POL'Y 1, 4 (1992).

68 28 U.S.C. § 471.

69 *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55 (2005) (statement of John G. Roberts, Jr.) ("Judges are like umpires. Umpires don't make the rules, they apply them.").

70 Marc Galanter, *". . . A Settlement Judge, Not a Trial Judge:" Judicial Mediation in the United States*, 12 J.L. & SOC'Y 1, 3 (1985).

71 *See, e.g.*, D. MARIE PROVINE, FED. JUD. CTR., SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES (1986); HERBERT L. WILL ET AL., FED. JUD. CTR., THE ROLE OF THE JUDGE IN THE SETTLEMENT PROCESS (1977).

72 FED. R. CIV. P. 16(c). At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. *Id.* "If appropriate, the court may require that a party or its representative be present or reasonably available by" telephone in order to consider possible settlement of the dispute. *Id.*

73 James J. Alfini, *Risk of Coercion Too Great: Judges Should Not Mediate Cases Assigned to Them for Trial*, 6 DISP. RESOL. MAG. 11, 11 (1999); *see also* J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. REV. 1713, 1723 (2012) ("[S]ettlement . . . has become the dominant

Judges have adopted a wide range of techniques for encouraging settlement, ranging from the clearly acceptable (acting as a catalyst to encourage settlement discussions and providing a check on unreasonable negotiating positions) to the highly questionable (threatening sanctions and threatening adverse decisions on the merits).[74] For the most part, there are few rules regulating the settlement process or the involvement of district judges in that process.[75] As a result, district judges have tremendous power to run the settlement process as they see fit and use their power as the decisionmaker on the merits to push or coerce parties into settlements that they do not want.[76] On a more profoundly theoretical level, Professor Owen Fiss famously argued against settlement on the ground that, among others, it favored the powerful over the disempowered who needed judicial decisionmaking to enforce their rights.[77] As Fiss suggested: "Settlement is for me the civil analogue of plea bargaining: Consent is often coerced; the bargain may be struck by someone without authority; the absence of a trial and judgment renders subsequent judicial involvement troublesome; and although dockets are trimmed, justice may not be done."[78] Scholars are still debating Fiss's thesis decades later.[79]

The far-reaching powers of federal judges during the pretrial process have created significant differences of opinion with respect to the efficacy and wisdom of managerial judging.[80] Notwithstanding this debate, one must acknowledge that, as an empirical matter, the momentum

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mode of civil dispute resolution."); Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 320 (1991) (describing a case proceeding to trial without a settlement as a "failure").

[74] *See* Leroy J. Tornquist, *The Active Judge in Pretrial Settlement: Inherent Authority Gone Awry*, 25 WILLAMETTE L. REV. 743, 751–52 (1989) (listing examples of pretrial settlement activities by judges).

[75] *See* Ellen E. Deason, *Beyond "Managerial Judges": Appropriate Roles in Settlement*, 78 OHIO ST. L.J. 73, 104 (2017) ("The current version of Rule 16 accommodates this variety of judicial approaches and settlement styles by its silence on this matter, which translates into granting judges nearly complete discretion for conducting settlement proceedings." (footnote omitted)).

[76] *Id.* at 108–10; *see also* John C. Cratsley, *Judges and Settlement: So Little Regulation with So Much at Stake*, 17 DISP. RESOL. MAG. 4, 4 (2011). *See generally* Deborah Hensler, *A Research Agenda: What We Need to Know About Court-Connected ADR*, 6 DISP. RESOL. MAG. 15 (1999).

[77] Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984).

[78] *Id.* at 1075.

[79] *See, e.g.*, Symposium, *Against Settlement: Twenty-Five Years Later*, 78 FORDHAM L. REV. 1117 (2009).

[80] *See, e.g.*, Robert G. Bone, *Improving Rule 1: A Master Rule for the Federal Rules*, 87 DENV. U. L. REV. 287, 301 (2010); Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1974–75 (2007); Paul R.J. Connolly, *Why We Do Need Managerial Judges*, 23 JUDGES' J. 34, 34–36 (1984) (arguing against Resnik's conclusion that judicial case management is unnecessary); Deason, *supra* note 75, at 108–27 (criticizing unconstrained judicial involvement in settlement discussions); Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1604–05 (2003) (defending judicial discretion during pretrial); Peckham, *supra* note 63, at 770 (arguing that judges' new role as pretrial managers is

behind managerial judging and the increasing workload of district judges have entrenched pretrial case-management practices in virtually all district courts. In 1986, Judge Posner stated, after noting the objections that have been raised to managerial judging:

> Whatever the abstract merits of these objections, they are unlikely to persuade. The rise of the "pro-active" judge, the search for cheap and fast substitutes for the conventional Anglo-American trial, the convergence of the American and Continental systems . . . — all these developments are well under way and are probably irreversible.[81]

With ever-increasing district court caseloads and the massive increase in discovery complexity prompted by the explosion of electronically stored information, it is even less likely that we will reverse course on managerial judging. As I will suggest below, the inevitable use of managerial judging does not warrant a full embrace of the practice as an important check on executive power.

IV. HOW MANAGERIAL JUDGING EVADES THE FRAMERS' CHECKS ON ABUSE OF JUDICIAL POWER

The above description of the powers of managerial judges hints at how these pretrial powers escape the limits on judicial discretion that the Framers expected to control judicial authority. First, unlike decisions on issues on the merits, pretrial management decisions are largely unregulated by precedent or rules that constrain district judges' primary discretion. The written rules governing pretrial proceedings grant such broad authority that district judges have virtually unfettered power to regulate discovery, to control the issues that will be part of a case, and to influence the settlement process. As the Federal Courts Study Committee found:

> There are no standards for making these "managerial" decisions, the judge is not required to provide a "reasoned justification," and there is no appellate review. Each judge is free to consult his or her own conception of the importance and merit of a case and the proper speed with which it should be disposed.[82]

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necessary); Todd D. Peterson, *Restoring Structural Checks on Judicial Power in the Era of Managerial Judging*, 29 U.C. DAVIS L. REV. 41, 76–77 (1995) (criticizing managerial judging as unbound by precedent); Resnik, *supra* note 53, at 432 (concluding that judges' increased role in influencing litigation is unnecessary); Tornquist, *supra* note 74, at 743 (examining pros and cons of judicial involvement in settlement conferences).

[81] Morrison v. Murray Biscuit Co., 797 F.2d 1430, 1433 (7th Cir. 1986) (citing Resnik, *supra* note 53, at 386).

[82] FED. CTS. STUDY COMM., *supra* note 64, at 55 (footnote omitted).

Given this absence of constraints, the Framers would have been unsurprised at the Committee's conclusion that "[t]his, in turn, promotes arbitrariness."[83]

Second, because there is virtually no appellate review of pretrial management actions, district judges have virtually unlimited secondary discretion. Many pretrial actions are not even on the record of a case, and therefore could never be subject to appellate review.[84] This includes many pretrial conferences with the district judge, which are largely "closed . . . and off the record."[85] Even actions that are on the record, such as discovery orders, are immune from interlocutory appeal, except in the very rarest of cases in which a judge so exceeds her powers that mandamus will lie.[86] Appeals at the end of the trial court phase of the case may come far too late to remedy judicial overreaching and, in any event, as Wright and Miller acknowledge: "A discovery order can always be reviewed on appeal from a final judgment in the case, even though . . . the harmless error doctrine, together with the broad discretion the discovery rules vest in the trial court, will bar reversal save under very unusual circumstances."[87] The result is that "discovery decisions are rarely appealed."[88] Ahdout touts a case in which a discovery order was remanded by the court of appeals on mandamus,[89] but that is the rare exception to the usual situation in which district judges are free to handle pretrial management without any fear of appellate review.

Third, the right to a jury trial imposes no check on the pretrial management authority of federal judges. Indeed, trials are now so rare in federal court that district judges handle most of their cases without ever having to defer to a common law jury.[90] The Framers feared that the expansion of the trial court's equity powers might thwart the check imposed by the jury trial, but instead, that check has been thwarted by the disappearance of the common law trial and the expansion of pretrial

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[83] *Id.*

[84] *See* Resnik, *supra* note 53, at 425–26.

[85] *See* Connolly, *supra* note 80, at 42.

[86] *See* JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 13.2, at 593–94 (5th ed. 2015).

[87] 8 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2006 (3d ed. 2021).

[88] PAUL L. FRIEDMAN ET AL., FINAL REPORT OF THE CIVIL JUSTICE REFORM ACT ADVISORY GROUP FOR THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA 66 (1993).

[89] Ahdout, *supra* note 1, at 963.

[90] Indeed, a recent study showed that, although civil case filings in federal courts "have increased fourfold since the early 1960s, the percentage of civil cases disposed of by jury trial decreased from approximately 5.5% in 1962 to 1.2% by 2002 and to 0.8% in 2013." Shari Seidman Diamond & Jessica M. Salerno, *Reasons for the Disappearing Jury Trial: Perspectives from Attorneys and Judges*, 81 LA. L. REV. 119, 122 (2020); *see also* SUJA A. THOMAS, THE MISSING AMERICAN JURY: RESTORING THE FUNDAMENTAL CONSTITUTIONAL ROLE OF THE CRIMINAL, CIVIL, AND GRAND JURIES (2016).

management powers that, as Professor Richard Marcus pointed out, are reminiscent of equity power.[91] Thus, the checks the Framers hoped would prevent federal trial judges from abusing their authority have been rendered all but meaningless in the context of pretrial case management.

If you had told the Framers that federal trial judges would have none of these constraints on them to prevent the abuse of judicial power, they would have deeply feared that the judges would inevitably abuse that power. The Framers would have concurred with Lord Camden's view that such unbridled discretion "'in the best it is oftentimes caprice'; and in the worst, 'every vice, folly and passion to which human nature can be liable.'"[92] The complaints of arbitrary and mercurial case management reflect the unregulated and unreviewable discretion inherent in pretrial management. A conference on managerial judging conducted an experiment that showed how arbitrary and inconsistent pretrial management decisions could be:

> The participating judges were divided into separate workshop sessions, each of which was asked to propose approaches for managing the same hypothetical case. The reports from the workshops disclosed dramatic differences in the ways that individual judges would have handled the case. Based on her intuition that the case had little merit, one trial judge would have required thousands of plaintiffs to file individual, verified complaints — a move that would have made it all but impossible for the plaintiffs' lawyer to pursue the cases. On the other hand, another trial judge confronting exactly the same hypothetical case would have ordered the defendants to create a multi-million dollar settlement fund.[93]

Rulings like these can make or break cases at the pretrial stage, and, without rules to guide them or appellate review to check them, district judges inevitably will be tempted to rule based upon their own prejudices and preconceived ideas about the merits of the case.

These problems with managerial judging prompt some difficult normative questions. First, are there ways to control pretrial discretion to minimize the potential for judicial abuse of power but still allow for the management of complex cases? It would certainly be possible to place more limits on a district judge's primary discretion by creating rules to regulate the pretrial process, such as the differentiated case-management systems adopted by some district courts, which "involve[] formalization

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[91] *See* Richard L. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725, 726–27 (1989) (discussing judicial shift from common law trial to pretrial matters with features reminiscent of equity).

[92] *See* Rosenberg, *supra* note 35, at 642.

[93] E. Donald Elliott, *Managerial Judging and the Evolution of Procedure*, 53 U. CHI. L. REV. 306, 317 (1986).

of a number of discrete and well-structured approaches to case scheduling and management, followed by early assignment of cases to them."[94] Within this track approach, certain management techniques are partially predetermined by rules.[95] Secondary discretion could be limited by assigning more management duties to magistrate judges, with appeals to district judges to provide at least some level of appellate review.[96] These types of reforms could limit the potential for abuse of pretrial discretion while still allowing judges to address the problems caused by massively complex litigation.

Unfortunately, a more regulated and reviewable system of pretrial management does not mesh with Ahdout's vision of an activist district court checking the power of the executive branch. Ahdout's conception of judicial checks invites judicial management not to reduce the length and expense of litigation, but rather to regulate the exercise of executive authority. Discovery orders are not for the procedural purpose of streamlining the judicial process but rather for more substantive purposes, such as the creation of more transparency in executive decisionmaking.

For that reason, cases involving challenges to enforcement lawmaking are even more vulnerable to arbitrary rulings during the pretrial phase of the case. A district judge who is sympathetic to the policies being challenged will go easy on the government and swiftly move to resolve the challenge favorably to the Executive. Conversely, a judge with the opposite political perspective is free to impose draconian discovery requirements and other demands on the government that will impede the Executive's ability to proceed with its policy, and the judge can do this without even issuing a decision on the merits that could be reviewed on appeal. Judge Lamberth's handling of the Native American Trust Fund cases shows the extremes to which a judge may go in burdening the executive branch, but even lesser and more rational pretrial orders may be very disruptive and may unduly delay important government action without the need for a decision on the merits to justify the action and provide a basis for review. Encouraging such judicial authority invites district judges to issue orders based on their own perception of the wisdom of the executive policy at issue in the litigation, and that is a recipe for abuse of power.

Moreover, government litigators are particularly vulnerable to abusive district judges. Although Congress has passed legislation to provide new checks on abuse of judicial power, those checks are unhelpful to

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[94] Terence Dunworth & James S. Kakalik, *Preliminary Observations on Implementation of the Pilot Program of the Civil Justice Reform Act of 1990*, 46 STAN. L. REV. 1303, 1324 (1994).

[95] *Id.*

[96] *See* CARROLL SERON, FED. JUD. CTR., THE ROLES OF MAGISTRATES: NINE CASE STUDIES 78, 112 (1985).

government litigators. The Judicial Conduct and Disability Act of 1980[97] (JCDA) provides a formal mechanism for making a complaint to the chief judge of a circuit about the improper actions of any judge in that circuit.[98] This procedure provides little help for abuses of pretrial management authority in cases against the government. First, the JCDA allows a complaint to be dismissed if it is "directly related to the merits of a decision or procedural ruling."[99] By excluding complaints based upon a "procedural ruling" the JCDA provides little help in rectifying a district judge's abuse of pretrial management authority. Moreover, as quintessential repeat players in court, government lawyers are particularly unlikely to file a complaint against a district judge whom they face on a regular basis. When asked about the DOJ's use of the JCDA, Department attorneys "were incredulous at the suggestion that a Department attorney would risk souring relations between the Department and a federal judge by making a complaint" under the JCDA.[100] When queried in 1994 about complaints filed under the JCDA, the Department could only identify three complaints filed by main Justice and six filed by United States Attorney offices.[101] Thus, it is pretty clear the JCDA is no remedy for arbitrary pretrial management decisions in cases challenging executive enforcement lawmaking.

Thus, there are substantial dangers in depending on increased use of managerial judging to check executive authority. Managerial district judges have tremendous power to do harm, and their use of it is not subject to any reliable checks. That should make us pause before advancing the use of such authority without the development of checks on how district judges use it.

At the heart of the problem of evaluating the risks and benefits of managerial judging in checking executive authority is the question whether the dramatic challenges posed to the rule of law by the Trump Administration are likely to recur with sufficient frequency that we are willing to welcome the relatively unchecked power of federal judges to do mischief in controlling pretrial because it seems the lesser of two evils. The unchecked power of a President who is willing to ignore both the law and the legal norms that have regulated executive power dwarfs the

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97 Pub. L. No. 96-458, 94 Stat. 2035 (codified as amended at 28 U.S.C. §§ 351–364).

98 For an explanation of the complaint process, see Stephen B. Burbank, *Procedural Rulemaking Under the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, 131 U. PA. L. REV. 283, 285–86 (1982). *See also* Jeffrey N. Barr & Thomas E. Willging, *Decentralized Self-Regulation, Accountability, and Judicial Independence Under the Federal Judicial Conduct and Disability Act of 1980*, 142 U. PA. L. REV. 25, 32–34 (1993).

99 28 U.S.C. § 352(b)(1)(A)(ii).

100 Peterson, *supra* note 22, at 353.

101 *Id.* at 355.

unchecked power of a district judge in managing a civil case.[102] If, however, we believe that the executive branch will return to the model that characterized the pre-Trump presidencies, we might be much less willing to tolerate the mischief that managerial judges can create.[103]

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[102] *See* Charlie Savage, *Democrats Begin Effort to Curb Post-Trump Presidential Powers*, N.Y. TIMES (Oct. 19, 2021), https://www.nytimes.com/2021/09/21/us/politics/trump-democrats.html [https://perma.cc/8C3G-9LRN].

[103] This problem is not unlike separation-of-powers suits to enforce congressional subpoenas. My own view is that this issue is far more crucial with respect to the regulation of executive excess than suits over enforcement law because it is critical to maintaining the authority of Congress to conduct effective oversight of the executive branch and brings true transparency to the process of executive lawmaking.