





47  
48  
49

---

No. 92-9065

---

50 IN RE: UNITED STATES OF AMERICA,  
51 Petitioner.

52  
53  
54

---

No. 93-1032

---

55 IN RE: UNITED STATES OF AMERICA,  
56 Petitioner.

57  
58  
59  
60  
61  
62

---

No. 93-1094

---

63 IN RE: UNITED STATES OF AMERICA,  
64 Petitioner.  
65

66  
67  
68  
69  
70

---

No. 93-1192

---

71 IN RE: UNITED STATES OF AMERICA,  
72 Petitioner.

73

---

Petitions for Writs of Mandamus to  
the United States District Court  
for the Northern District of Texas

77  
78

---

(March 12, 1993)

79 Before JOLLY, DAVIS, and SMITH, Circuit Judges.

80 PER CURIAM:

81 In these petitions seeking writs of mandamus, we decide  
82 whether a federal district judge has the power, by a standing  
83 order, to direct the federal government to send a representative  
84 with full settlement authority to settlement conferences and, if  
85 so, whether he abused his discretion by so doing in these routine  
86 civil lawsuits involving the United States. In addition to  
87 requiring counsel to attend these conferences, the court also  
88 requires the attendance of a designated representative of each  
89 party with full authority to settle the case; that representative  
90 must appear in person )) availability by telephone is not suffi-  
91 cient. We conclude that although the district judge possesses the  
92 ultimate power to require the attendance at issue, it is a power to  
93 be very sparingly used, and here the district judge, albeit with  
94 the best of intentions, has abused his discretion.

95 I.

96 In each of the petitions before us, the federal government  
97 objects to this order as applied to it. By statute, the Attorney  
98 General of the United States has the power to conduct all litiga-  
99 tion on behalf of the United States, its agencies, and its  
100 officers, unless otherwise provided by law. 28 U.S.C. § 519  
101 (1988). Pursuant to authority given by 28 U.S.C. § 510 (1988), the  
102 Attorney General has developed a set of regulations delegating  
103 settlement authority to various officials. See 28 C.F.R. §§ 0.160-

104 0.172 (1991); see also directives reprinted at 28 C.F.R. pt. 0,  
105 subpt. Y app. (1991).

106 As we read these regulations, United States Attorneys often  
107 will be able to settle a case without approval from a higher  
108 authority, as the regulations provide that each local United States  
109 Attorney has settlement authority up to \$500,000. If the client  
110 agency disagrees with the United States Attorney over the terms of  
111 the settlement, however, an Assistant Attorney General must approve  
112 the settlement. 28 C.F.R. § 0.168(a). In addition, settlements in  
113 various classes of important cases always must be approved by the  
114 Deputy Attorney General or one of the Assistant Attorneys General.  
115 See 28 C.F.R. §§ 0.160, 0.161.<sup>1</sup>

116 II.

117 Although it is historically reserved for "extraordinary"  
118 cases, we have used the writ of mandamus as a "one-time-only device  
119 to `settle new and important problems' that might have otherwise  
120 evaded expeditious review." In re Equal Employment Opportunity  
121 Comm'n, 709 F.2d 392, 394 (5th Cir. 1983) (quoting Schlagenhauf v.  
122 Holder, 379 U.S. 104 (1964)). As district courts continue to  
123 become more heavily involved in the pretrial process, appellate  
124 courts may be asked more often to issue writs of mandamus to  
125 protect the asserted rights of litigants. Pretrial orders such as

---

<sup>1</sup> Even if a case is to be settled for not more than \$500,000, so that a United States Attorney could settle it under the regulations, his settlement authority disappears upon disagreement over the terms of the settlement by the client agency.

126 the ones before us raise important issues but are ill-suited for  
127 review after final judgment.

128 Because these cases present an important, undecided issue  
129 involving the efficient administration of justice, we may appropri-  
130 ately invoke mandamus review. See id. In fact, the district judge  
131 who issued the instant directives has acknowledged, in his  
132 responses to the petitions, that the issue is appropriate for  
133 review on petitions for writs of mandamus. We will grant the writ  
134 only "when there is `usurpation of judicial power' or a clear abuse  
135 of discretion." Id. at 395 (quoting Schlagenhauf, 379 U.S. at  
136 110). The government has the burden of establishing its right to  
137 issuance of the writ. Id.

138 III.

139 A.

140 The district court claims inherent power to issue the order.  
141 As explained helpfully in Eash v. Riggins Trucking, 757 F.2d 557,  
142 562-64 (3d Cir. 1985) (en banc), there are three general categories  
143 of inherent powers.

144 The first category delineates powers that are "so fundamental  
145 to the essence of a court as a constitutional tribunal that to  
146 divest the court of absolute command within this sphere is really  
147 to render practically meaningless the terms `court' and `judicial  
148 power.'" Id. at 562. In other words, once Congress has created  
149 the court, article III of the Constitution vests the courts with  
150 certain implied powers. See Anderson v. Dunn, 19 U.S. (6 Wheat.)

151 204, 227 (1821). Within the scope of these powers, the other  
152 branches of government may not interfere; any legislation purport-  
153 ing to regulate these inherent powers would be invalid as an  
154 unconstitutional violation of the doctrine of separation of  
155 powers.<sup>2</sup>

156 Fortunately, history provides few examples of legislative  
157 attempts to interfere with the core inherent powers of the judicial  
158 branch. But as a result, prior jurisprudence has not identified  
159 exactly which inherent powers fall into this category, and we will  
160 not attempt to do so here. At least one decision of the Supreme  
161 Court appears to have identified one such power. See United States  
162 v. Klein, 80 U.S. (13 Wall.) 128, 146-47 (1872). Although the  
163 meaning of the opinion has been subject to some debate, Klein seems  
164 to hold that Congress may not interfere with a court's inherent  
165 power to decide cases by dictating the result in a particular case.  
166 80 U.S. at 146-47.

167 The second category of inherent powers encompasses those  
168 "necessary to the exercise of all others." Roadway Express v.  
169 Piper, 447 U.S. 752, 764 (1980) (quoting United States v. Hudson,  
170 11 U.S. (7 Cranch) 32, 34 (1812)). For the most part, these powers  
171 are those deemed necessary to protect the efficient and orderly  
172 administration of justice and those necessary to command respect  
173 for the court's orders, judgments, procedures, and authority. Id.

---

<sup>2</sup> See Michaelson v. United States, 266 U.S. 42, 64 (1924) (recognizing that the Constitution vests courts with some powers unalterable by legislation); Eash, 757 F.2d at 562 (noting that courts may exercise this category of powers despite legislation to the contrary).

174 Like the first category of inherent powers, this category also  
175 stems from article III, once Congress creates the court.  
176 Michaelson, 266 U.S. at 65-66. Congress may interfere with this  
177 category of inherent power within "limits not precisely defined,"  
178 so long as it does not abrogate or render the specific power  
179 inoperative. Id.

180 Courts have recognized several examples of this type of  
181 inherent power. The contempt sanction long has been recognized as  
182 among the most important of these powers. Id. at 65; Hudson, 11  
183 U.S. at 34. In addition, the Supreme Court has recognized the  
184 power to levy sanctions in response to abusive litigation  
185 practices. Roadway Express, 447 U.S. at 766 (court may assess  
186 attorneys' fees against counsel who abuses judicial processes);  
187 Link v. Wabash R.R., 370 U.S. 625, 630-31 (1962) (court may sua  
188 sponte dismiss case for failure to prosecute).

189 The third category of inherent powers includes those  
190 reasonably useful to achieve justice. Eash, 757 F.2d at 563. This  
191 category of powers recognizes that the legislature cannot foresee  
192 every tool the courts might need to employ to reach a just result  
193 in all cases. Where it appears that a court cannot adequately and  
194 efficiently carry out its duties without employing some special  
195 device, the court has inherent power to do so. Ex parte Peterson,  
196 253 U.S. 300, 312 (1920). This category of inherent power arises  
197 from mere necessity and, consequently, can be completely regulated  
198 by Congress. See id. As an example of this type of power, the  
199 Supreme Court has upheld the power of a district court to appoint

200 an auditor to aid in litigation involving a complex commercial  
201 matter. Id.; see also Ruiz v. Estelle, 679 F.2d 1115, 1161 (5th  
202 Cir. 1982), cert. denied, 460 U.S. 1042 (1983).

203 By employing the above three categories, we may now establish  
204 a method for reviewing purported exercises of inherent powers.  
205 Initially, we must determine in which category the invoked power  
206 belongs. If the power belongs in the first category, any statute  
207 that seems to interfere with the power is unconstitutional under  
208 the doctrine of separation of powers.

209 If the power belongs in the second category, we must ascertain  
210 whether a valid statute or rule attempts to regulate the court's  
211 use of the power. If such a law exists, we then must determine  
212 whether the law abrogates or renders the power practically  
213 inoperative. Michaelson, 266 U.S. at 66.

214 Where the law sufficiently weakens the court's inherent  
215 powers, we will strike it down as an unconstitutional violation of  
216 the doctrine of separation of powers and will review the court's  
217 actions for abuse of discretion. When, however, the law can be  
218 characterized as an appropriate regulation of inherent powers, we  
219 will prevent the district court's exercise of power if that  
220 exercise either violates the law or constitutes an abuse of  
221 discretion.

222 Finally, where there is no law or rule that governs the  
223 invoked inherent power, we review the district court's actions for  
224 abuse of discretion. Link, 370 U.S. at 633. Of course, we need  
225 not address the issues in the order set out above. We also note

226 that, while we review the court's exercise of such powers only for  
227 abuse of discretion, we define the powers narrowly, as they are  
228 shielded from effective democratic control and must be exercised  
229 with restraint. Roadway Express, 447 U.S. at 764.

230 Finally, if the power fits in the third category, we also must  
231 determine whether a valid statute or rule prevents the court from  
232 exercising a specific inherent power. If so, the district court  
233 may not exercise that power.

234 B.

235 The district court's standing order invokes its inherent power  
236 to manage its own docket to achieve the just and efficient  
237 disposition of cases. Landis v. North Am. Co., 299 U.S. 248, 254  
238 (1936) (court has inherent power "to control the disposition of the  
239 causes on its docket with economy of time and effort for itself,  
240 for counsel, and for litigants"); Edwards v. Cass County, 919 F.2d  
241 273, 275 (5th Cir. 1990); Taylor v. Combustion Eng'g, 782 F.2d 525,  
242 527 (5th Cir. 1986).<sup>3</sup> On the basis of our discussion above, we  
243 conclude that this power fits most appropriately in the second

---

<sup>3</sup> Several of our sister circuits, similarly, have opined that such general inherent authority resides in the district courts. See, e.g., In re Novak, 932 F.2d 1397, 1405, 1407 (11th Cir. 1991) ("[T]he power to direct parties to produce individuals with full settlement authority at pretrial settlement conferences is inherent in the district court."); Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 656 (7th Cir. 1989) (en banc) (district courts have "inherent power, governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases"). We reiterate that such inherent power, though broad, is subject to the abuse-of-discretion standard.

244 category.<sup>4</sup>

245 C.

246 We are able to conclude, based upon the foregoing, that,  
247 subject to the abuse-of-discretion standard, district courts have  
248 the general inherent power to require a party to have a  
249 representative with full settlement authority present )) or at  
250 least reasonably and promptly accessible )) at pretrial  
251 conferences. This applies to the government as well as private  
252 litigants. We find no statute or rule that attempts to regulate  
253 the court's use of that inherent power. But a district court must  
254 consider the unique position of the government as a litigant in  
255 determining whether to exercise its discretion in favor of issuing  
256 such an order.<sup>5</sup>

---

<sup>4</sup> In defense of its standing order, the district court also asserts the authority of the local district rules and of FED. R. CIV. P. 83, which permits district courts to adopt local rules and states that "[i]n all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act." The local rules require "[t]he parties in every civil action [to] make a good-faith effort to settle" and to enter into settlement negotiations at the earliest possible time. N.D. TEX. R. 9.1.

The district court makes this argument only in its reply brief and relies primarily upon inherent power to justify its standing order. Moreover, we do not read the local rule to authorize, in every case, the sweeping order that is at issue here. Nor can local rules be relied upon at the expense of other considerations of federal law. See In re Dresser Indus., 972 F.2d 540, 543 (5th Cir. 1992).

<sup>5</sup> As we noted above, the Attorney General has power to develop regulations dealing with the settlement of lawsuits involving the federal government. The government contends that the district court's order interferes with those regulations; it makes the bold assertion that a court may never compel the Department of Justice to alter its regulations governing its procedures for handling litigation. We disagree. If that were the case, the executive branch could use the courts as it pleased. The executive branch is not above the law. United States v. Nixon, 418 U.S. 683 (1974). Moreover, the government misinterprets Touhy v. Ragen, 340 U.S. 462 (1951), the authority relied upon for this argument.

In Touhy, a low-level official of the Department of Justice, obeying an  
(continued...)

257           As the Supreme Court recently has observed, the executive  
258 branch's "most important constitutional duty [is] to `take Care  
259 that the Laws be faithfully executed.'" Lujan v. Defenders of  
260 Wildlife, 112 S. Ct. 2130, 2145 (1992). The purpose of the  
261 structure established by the Attorney General is to promote  
262 centralized decisionmaking on important questions. The Supreme  
263 Court has recognized the value of such centralized decisionmaking  
264 in the executive branch. Touhy, 340 U.S. at 468.

265           Centralized decisionmaking promotes three important  
266 objectives. First, it allows the government to act consistently in  
267 important cases, a value more or less recognized by the Equal  
268 Protection Clause. Second, centralized decisionmaking allows the  
269 executive branch to pursue policy goals more effectively by placing  
270 ultimate authority in the hands of a few officials. See Heckler v.  
271 Chaney, 470 U.S. 821, 831 (1985) (litigants should not interfere  
272 with agency discretion, as that could impede with agency policy  
273 goals). Third, by giving authority to high-ranking officials,

---

<sup>5</sup>(...continued)

internal departmental regulation, refused to produce papers demanded by a subpoena. Given the potentially sensitive nature of Justice Department documents, the Court held that he properly could refuse to turn over the documents. At best, this case stands for the proposition that courts should observe reasonable regulations of the Executive Branch that have strong underlying policy justifications. The Court's opinion and Justice Frankfurter's concurrence explain that the Court did not decide whether a district court could force the Attorney General to turn over documents. 340 U.S. at 469-73. Our holding today allows us to avoid deciding whether forcing the Attorney General to alter the settlement regulations would run afoul of the doctrine of separation of powers.

The government also relies upon a portion of the Judicial Improvements Act of 1990, 28 U.S.C.A. § 473 (West Supp. 1992), which gives district courts the power to adopt local rules to require parties with full settlement authority to attend settlement conferences. This statute does not affect the issue before us, as the district judge did not act pursuant to a local rule passed pursuant to this statute; instead, he primarily asserts inherent powers. See supra note 4.

274 centralized decisionmaking better promotes political  
275 accountability.

276 Given the reasonable policy justifications for the Justice  
277 Department's settlement regulations and the insignificant  
278 interference with the operation of the courts, the district court  
279 abused its discretion in not respecting those regulations. Where  
280 the interference with the courts is slight, courts should not risk  
281 becoming "monitors of the wisdom and soundness of Executive  
282 action." Laird v. Tatum, 408 U.S. 1, 15 (1972). The order at  
283 issue here imposes a major inconvenience on at least one of the  
284 parties without the showing of a real and palpable need.

285 The district court contends that the government is not special  
286 and should not be treated differently from private litigants. The  
287 government is in a special category in a number of respects,  
288 however, in addition to its need for centralized decisionmaking.  
289 "It is not open to serious dispute that the Government is a party  
290 to a far greater number of cases on a nationwide basis than even  
291 the most litigious private entity . . . ." United States v.  
292 Mendoza, 464 U.S. 154, 159 (1984).

293 This court, as well, has recognized that the government  
294 sometimes must be treated differently. Obviously, high-ranking  
295 officials of cabinet agencies could never do their jobs if they  
296 could be subpoenaed for every case involving their agency. As a  
297 result, we have held that such subpoenas are appropriate only in  
298 egregious cases. See, e.g., In re Office of Inspector Gen., 933  
299 F.2d 276, 278 (5th Cir. 1991); In re Equal Employment Opportunity

300 Comm'n, 709 F.2d 392, 398 (5th Cir. 1983). "[T]he efficiency of  
301 the EEOC would suffer terribly if its commissioners were subject to  
302 depositions in every routine subpoena enforcement proceeding." Id.

303 In determining whether to require the government (or, for that  
304 matter, a private party) to send a representative to a pretrial  
305 conference with full authority to settle, a district court should  
306 take a practical approach. The court must be permitted to conduct  
307 its business in a reasonably efficient manner; it need not allow  
308 the parties or counsel to waste valuable judicial resources  
309 unnecessarily. On the other hand, the court should recognize that  
310 parties have a host of problems beyond the immediate case that is  
311 set for pretrial conference. This is particularly true of the  
312 government. We have outlined above, in some detail, the peculiar  
313 position of the Attorney General and the special problems the  
314 Department of Justice faces in handling the government's ever-  
315 increasing volume of litigation.

316 We conclude that the district court abused its discretion in  
317 routinely requiring a representative of the government with  
318 ultimate settlement authority to be present at all pretrial or  
319 settlement conferences. We do not suggest that the district court  
320 can never issue such an order, but it should consider less drastic  
321 steps before doing so.

322 For example, the court could require the government to declare  
323 whether the case can be settled within the authority of the local  
324 United States Attorney. If so, the court could issue an order  
325 requiring the United States Attorney to either attend the

326 conference personally or be available by telephone to discuss  
327 settlement at the time of the conference.

328         According to the government at argument, most of its routine  
329 litigation can be settled within the United States Attorney's  
330 authority. Where that is not so, and failure of the government to  
331 extend settlement authority is a serious, persistent problem,  
332 substantially hampering the operations of the docket, the court  
333 could take additional action, such as requiring the government to  
334 advise it of the identity of the person or persons who hold such  
335 authority and directing those persons to consider settlement in  
336 advance of the conference and be fully prepared and available by  
337 telephone to discuss settlement at the time of the conference.  
338 Finally, if the district court's reasonable efforts to conduct an  
339 informed settlement discussion in a particular case are thwarted  
340 because the government official with settlement authority will not  
341 communicate with government counsel or the court in a timely  
342 manner, the court, as a last resort, can require the appropriate  
343 officials with full settlement authority to attend a pretrial  
344 conference.

345         The measures we outline above are intended to be exemplary,  
346 and we express no ultimate view as to such hypothetical situations  
347 except to point out that there are many steps that reasonably can  
348 be taken, far short of the standing order at issue here. We  
349 include these scenarios to demonstrate that the district court,  
350 before issuing an order such as the directive under review here,  
351 must give individualized attention to the hardship that order will

352 create. The court must then exercise its discretion in light of  
353 the circumstances of that case. We believe that such practical  
354 measures will enable the courts to administer their dockets  
355 efficiently while allowing the Department of Justice to handle  
356 effectively the burdensome volume of litigation thrust upon it.

357 IV.

358 In summary, we conclude that the district court abused its  
359 discretion in these cases. We find it unnecessary to issue writs  
360 of mandamus, however. The able district judge has indicated that  
361 he welcomes this court's exposition of this issue, and we are  
362 confident that he will abide by our decision and adjust his  
363 directives accordingly. Thus, the petitions for writs of mandamus  
364 are DENIED without prejudice.