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Thomas A. Tozer

*Indiana University School of Law*

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The Heileman Power: Well-Honed Tool or Blunt Instrument?†

THOMAS A. TOZER*

INTRODUCTION

Proponents of judicial case management1 justify the reform of pretrial procedures by pointing to a crisis in American courts: backlogged cases, disingenuous lawyers, abuse of pretrial processes to incur delay, impatient litigants and a failing faith in the judicial system.2 Concerns about the

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1. Advocates of judicial management have suggested many methods of judicial intervention to speed the movement of cases through the court system. See generally Constantino, Judges as Case Managers, 17 TRIAL 56 (Mar. 1981) (analyzing the case load and case management of one federal district judge); Lambros, The Summary Jury Trial and Other Alternative Methods of Dispute Resolution, 103 F.R.D. 461 (1984) [hereinafter Lambros, The SJT and Others] (discussing the advantages of summary jury trials (SJT's) as an alternative to full trial for parties who prefer a jury to settlement negotiations); Lambros & Shunk, The Summary Jury Trial, 29 CLEV. ST. L. REV. 43 (1980) (further discussing the pros and cons of SJTs); Peckham, A Judicial Response to the Cost of Litigation: Case Management, Two-Stage Discovery Planning and Alternative Dispute Resolution, 37 RUTGERS L. REV. 253, 253 n.3, 264-80 (1985) (defining case management as two stages: planning pretrial matters and then the trial itself, and summarizing arbitration, mini-trial, summary jury trial and mediation techniques); Peckham, The Federal Judge as a Case Manager: The New Role in Guiding a Case from Filing to Disposition, 69 CALIF. L. REV. 770, 771, 805 (1981) [hereinafter Peckham, The New Role] (applauding the use of pretrial devices such as early intervention to shape discovery, define pretrial matters, define contested issues and calling for diligence in enforcing pretrial orders); Schwarzer, The Federal Rules, the Adversary Process, and Discovery Reform, 50 U. PITT. L. REV. 703, 721-23 (1989) (proposing overhaul of discovery to require disclosure by parties rather than current system of interrogatories and requests).

On the specific topic addressed in this Note, see Richey, Rule 16: A Survey and Some Considerations for the Bench and Bar, 126 F.R.D. 599 (1989); Note, Rule 16 and Pretrial Conferences: Have We Forgotten the Most Important Ingredient?, 63 S. CAL. L. REV. 1449 (1990) [hereinafter Note, Rule 16] (arguing for amendment of Federal Rule of Civil Procedure 16 to allow court orders compelling represented litigants to attend pretrial conferences); Casenote, So It's Settled, Then—Rule 16 and Courts' Power to Order Represented Parties to Attend Pretrial Settlement Conferences: G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648 (7th Cir. 1989), 58 U. CHI. L. REV. 1421 (1990) [hereinafter Casenote, So It's Settled] (arguing that statutory construction rules require disallowing the power under Rule 16 to order represented parties to attend pretrial conferences).

2. See G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 657 (7th Cir. 1989) (en banc) (Posner, J., dissenting) (observing that many magistrates and judges distrust lawyers to recommend settlement to a client in lieu of trial); Lockhart v. Patel, 115 F.R.D. 44, 47 (E.D. Ky. 1987) (citing case load of 400 per judge and the need to settle “at least 350”); see also C. HARRINGTON, SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTER-
efficiency of justice are laudable, and where real problems exist they should be addressed. Yet, the search for good case management methods should not be guided by unsubstantiated claims of a method's efficiency.

Some observers believe that the concerns of the judicial management movement are exaggerated. There also is evidence that some reforms the movement has promoted are ineffective at speeding a litigant's case through the courts. Furthermore, the purported efficiency of a settlement-oriented

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4. See S. Flanders, Case Management and Court Management in United States District Courts (Federal Judicial Center 1977). The Flanders study shows a rough inverse relationship between settlement involvement and terminations. Only a positive relationship would support the idea that routine settlement conferences are effective. This outcome is striking, given the widespread notion that a strong judicial role in settlement is necessary—even if possibly risky or occasionally questionable—to handle a large and growing case load.

Id. at 37 (emphasis added); M. Rosenberg, The Preliminary Conference and Effective Justice 28-29 (1964); Resnik, Failing Faith, supra note 3, at 557-60; Rosenberg, Devising Procedures that are Civil to Promote Justice that is Civilized, 69 Mich. L. Rev. 797, 804-08 (1971); see also Fed. R. Civ. P 16 advisory committee’s notes, introduction (citing Flanders study).

Methods which increase pretrial officials’ power to effect settlement are questionable in terms of both efficiency and propriety. Menkel-Meadow, For and Against Settlement: Uses
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Technique should not blind reformers to the fact that when such techniques succeed they bring about resolutions that are unappealable, regardless of whether the judge has understood the facts or the law involved.\(^5\) Tools that provide only dubious gains in efficiency can produce real losses in the quality of justice.\(^6\) Speedy *injustice* is not an improvement over slow *justice*.\(^7\) One answer to this objection is that when a pretrial official misconstrues facts or law, the party who disagrees with the official should refuse to settle. But this is too simplistic. What a litigant terms “disagreement” a judge may call “delay.” The real issue is how much power pretrial officials should have over a litigant who refuses to settle.

A recent decision in the Seventh Circuit highlights this issue. In *G. Heileman Brewing Co. v. Joseph Oat Corp.*\(^8\) (*Heileman III*), the court, sitting en banc, chose to promote the power of federal pretrial officials\(^9\) to manage their case loads through pretrial settlement conferences over the right of a litigant to demand a trial.\(^10\) *Heileman III* interpreted Federal Rule

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\(^5\) See infra notes 54, 63 and accompanying text.

\(^6\) Menkel-Meadow, supra note 4, at 506-13. Menkel-Meadow argues that use of pretrial conferences as a docket-cleaning device is “problematic in terms of the substantive and process values (i.e., quality of solution) previously discussed.” *Id.* at 508 (emphasis in original); see also Rosenberg, supra note 4 at 804-08 (arguing that pretrial conferences neither save time nor promote the quality of justice).

\(^7\) C. CLARK, *PROCEDURE—THE HANDMAID OF JUSTICE* 166 (C. Wright & H. Rea

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of Civil Procedure 16(a) to allow a pretrial magistrate to compel a represented litigant to attend pretrial conferences with "full authority to settle," even when the litigant is a defendant and has consistently refused to settle.\[^1\]

The decision also upheld monetary sanctions under Rule 16(f)\[^1\] against the

\[^{11}\] Heileman III, 871 F.2d at 655. The underlying assumption of judicial management is that use of the courts is a privilege which imposes obligations. See C. Harrington, supra note 2, at 15-23, 45-81 & 169-73 (discussing an ideologically based shift from the view that access to the courts is a right to the view that access is a privilege imposing duties on users). Even if one adopts this view, it can only apply to a plaintiff. A defendant should not be obliged to the court simply because he has been dragged in by a plaintiff.

See also Heileman I, 107 F.R.D. 275, where the district court, effectively adopting this assumption, stated:

By bringing their dispute to a court for resolution, the parties have invoked the use of an expensive public resource. It is a misuse of those resources for any party to refuse even to meet personally with the opposing party or its counsel to attempt to resolve their disputes prior to trial.

Id. at 277. Harrington’s “shift” may have untold consequences for public perception of, and participation in, the court system. See Alschuler, supra note 2, at 1815 (“In the absence of an effective peaceful means of vindicating private rights, people retain a plausible claim that they are entitled to vindicate these rights through self-help.”). The fact that Alschuler’s topic is criminal cases does not minimize the point.

It should be noted here that Oat Corporation was not a “pure defendant,” but originally was the plaintiff. It became the defendant after dropping its complaint. At that point only the counterclaim of one of the original defendants remained. Heileman III, 871 F.2d at 654 n.9.

\[^{12}\] Heileman III, 871 F.2d at 656. The pertinent sections of the Rule read as follows:

(a) Pretrial Conferences; Objectives. In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purposes as

(1) expediting the disposition of the action;
(2) establishing early and continuing control so that the case will not be protracted because of lack of management;
(3) discouraging wasteful pretrial activities;
(4) improving the quality of the trial through more thorough preparation, and;
(5) facilitating the settlement of the case.

(c) Subjects to be Discussed at Pretrial Conferences. The participants at any conference under this rule may consider and take action with respect to

(7) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;

(11) such other matters as may aid in the disposition of the action.
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.

(f) Sanctions. If a party or party’s attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party’s attorney is substantially unprepared
defendant for failing to comply with such an order. Notably, the Heileman III court did not define what is required of a corporate litigant’s “authorized” representative. In effect for the future, and in fact for the Heileman III defendant, the decision leaves intact a questionable definition of that term from the lower court.¹³

Several issues surround the question of pretrial, settlement-oriented case management and the “new power”¹⁴ approved in Heileman III. This Note explores these issues by examining three levels of the problem presented by this newly approved power. These levels are: (1) what the goals of civil procedure should be and whether the pretrial official’s new power is likely to help courts meet those goals, (2) whether the goals of the judicial management movement, as embodied in the new pretrial power, can be reconciled with the Anglo-American tradition of written law and the practical separation of the judicial from the legislative function and, (3) whether arguments based on the Federal Rules of Civil Procedure (the “Rules”) fall decisively for or against the new power.

The Note concludes that the new power undermines the goals of civil procedure, oversteps traditional boundaries on the judicial role and is not conclusively supported by the Rules. Other means available to pretrial officials are adequate,¹⁵ if courts would make use of them,¹⁶ to handle the problems the judicial management movement correctly seeks to eliminate.

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¹³. Consider the definition implied by the magistrate’s opinion, affirmed and appended to the district court’s ruling: “While Mr. Fitzpatrick claimed authority to speak for Oat, he stated that his authority was to make no offer [of cash]. Thus, no representative of Oat or National [Oat’s insurer] having authority to settle the case was present at the conference as the order directed.” Heileman I, 107 F.R.D. at 279 (emphasis added). The clear implication is that “authority to settle” means the power to write a check.

¹⁴. It may be that the power is not new but merely has not been challenged. See Fox, supra note 2, at 146, 154 (stating in 1971 that “it is often useful and sometimes imperative, to have the parties themselves attend discussions,” and that if a lawyer lacked authority to settle, a judge could compel the client to attend a pretrial conference); In re LaMarre, 494 F.2d at 753, 756 (insurance claims manager who disobeyed order to attend conference was sanctioned). The lack of cases challenging such orders reveals the coercive aspect of judicial orders involving pretrial settlement negotiations.

¹⁵. See infra notes 34, 50-53 and accompanying text.

¹⁶. See generally Note, Restraining the Overly Zealous Advocate: Time for Judicial Intervention, 65 Ind. L.J. 445, 462-69 (1990) (suggesting more active judicial oversight of attorneys to prevent abuse and delay). Courts already have the power to set mandatory schedules to control discovery and set trial dates, to punish abusive practices and to call pretrial conferences. See Fed. R. Civ. P 16(a), (b) & (f).
I. THE PROPER GOALS OF PROCEDURE AND THEIR RELATION TO THE NEW POWER

A. The New Power that Heileman III Approved

G. Heileman Brewing Co. v Joseph Oat Corp.\(^{17}\) arose out of a dispute over Joseph Oat Corporation's ("Oat Corporation") role in the construction of a waste water treatment plant for G. Heileman Brewing Company. Oat Corporation's attorney and an attorney for its insurer attended a pretrial conference on December 14, 1984. However, they were excluded from the conference because they were unwilling to settle.\(^{18}\) At that conference the magistrate entered an order for a continued conference and ordered Oat Corporation's attorney and a representative from the company to appear with authority to settle at a December 19 conference.\(^{19}\) Oat Corporation's attorney later inquired by telephone whether someone from Oat Corporation was required to attend even though the corporation would not settle for money. The clerk told Oat Corporation's attorney that "'[t]he magistrate stands by his order.'"\(^{20}\) Oat Corporation sent two attorneys to the conference. Its lawyers had "'authority to settle,'" provided they were not to pay money.\(^{21}\) The magistrate, "'apparently miffed,'"\(^{22}\) took this as less than "'full authority to settle'" and ordered Oat Corporation to show cause why it should not be sanctioned for failing to comply with the order that initiated the conference.\(^{23}\) The magistrate later ordered Oat Corporation to pay the plaintiff's costs in attending the December 19 conference.\(^{24}\) The magistrate's order and sanctions were affirmed by the district court.\(^{25}\) Oat Corporation appealed this order to a panel in the Seventh Circuit, where it prevailed on the theory that the magistrate has no power to order represented litigants to attend a settlement conference under Rule 16.\(^{26}\) The panel decision was vacated and reversed.\(^{27}\)

\(^{17}\) Heileman III, 871 F.2d 648 (7th Cir. 1989) (en banc). The facts also are discussed in Heileman III, 871 F.2d at 650; Heileman II, 848 F.2d 1415, 1417 (7th Cir. 1988); and Heileman I, 107 F.R.D. 275, 278 (W.D. Wis. 1985).

\(^{18}\) Heileman II Brief, supra note 10, at 7

\(^{19}\) Id. at 4.

\(^{20}\) Heileman II Brief, supra note 10, at 7

\(^{21}\) Id. at 1418.

\(^{22}\) Heileman II, 848 F.2d at 1417.

\(^{23}\) Id. at 1418.

\(^{24}\) Id.


\(^{26}\) Heileman II, 848 F.2d at 1422.

\(^{27}\) Heileman III, 871 F.2d 648.
B. What Civil Procedure Should Do

A system of civil procedure should enable a court to uncover the truth of the parties' claims in an even-handed, efficient and speedy manner, to give all parties what is rightfully theirs as those rights are defined by the law and to leave the parties with a sense that their rights have been fairly addressed. Of course, a prescription for good civil procedure is easier to write than it is to put into practice. Many of the goals listed above conflict with each other. Providing a full-blown trial with appellate review to the highest appropriate level in all cases would assure that every litigant's claim was fully adjudicated and reviewed under the latest and most objective view.

28. Federal Rule 1 states all of the "first-tier" purposes of procedure: speed, accuracy, and procedural and substantive fairness. "Second-tier" concerns are also important. Such concerns include party perception of fairness, limiting the number of tactical maneuvers available to lawyers and reducing the queue at the bar of justice. The "tiers" are not meant to connote any greater or lesser importance of the separate concerns. See Shreve, Questioning Intervention of Right—Toward a New Methodology of Decisionmaking, 74 NW. U.L. REV. 894, 907 (1980) (footnote omitted) ("A good procedure should be designed to be equally accessible to all litigants, expeditious, and capable of presenting a sufficiently unobstructed view of the rights of the parties so that the court can decide fairly the merits of the case."); P CARRINGTON & B. BABCOCK, CIVIL PROCEDURE 1-2 (2d ed. 1977):

Contemporary civil procedure in the United States seeks moral acceptance in two principal ways. One is to provide citizens with the opportunity to participate on even terms in decisions which may negatively affect them: the adversary tradition. The second is to assure citizens that [such] decisions are not made by the whim of officials, but by application of generally accepted principles applied impersonally: heralded as the Rule of Law.

Ibid. at 1.

The linkage between the ideas derives thus: the application of law depends on our knowing the truth about the circumstances to which the law is to be applied.

If we are to be effective in the enforcement of substantive law, we cannot be too fastidious about costly adversary procedures.

Ibid. at 2; F JAMES & G. HAZARD, CIVIL PROCEDURE 2-3 (2d ed. 1977):

[T]he law of procedure is a model [involving among other elements] resolution according to principles applicable regardless of the identity of the specific disputants (rules of law). These elements express social and political values concurrent with the policies expressed in substantive legal rules and deemed worth fulfilling independently of what the substantive law may be.

Procedure should give all the parties to a dispute the feeling that they are being fairly [sic] dealt with, that each is given a reasonable chance to present his side before a reasonably convenient tribunal.

Ibid. at 2 (footnote omitted).

Not infrequently, however, the courts seek to accomplish substantial justice by adhering to established substantive law but manipulating procedural rules in favor of the "right" party. This causes some of the worst procedural rulings, which may bring some kind of substantive justice in the case at hand but which produce language and reasoning to vex other cases where an application of them may thwart both procedural efficiency and also substantive justice, as measured by any test.

Ibid. at 3 (emphasis added).
of the substantive law. Yet, few litigants would want to take part in such an elaborate and long-winded system, and even fewer would want to pay for it. Furthermore, such a system would back up so quickly that it could only be salvaged by a massive influx of judges at every level or by a massive "outflux" of litigants. Perfect law, frictionless efficiency and lightning speed may be impossible to put into practice, and given the costs of creating such a system, perhaps undesirable. Still, under a "government of laws" ideology, cases where facts are in dispute should always be exposed at trial to the substantive law. If the facts are not disputed, a judge should rule on the applicable law. At a minimum, then, the ideal resolution of a dispute entails a written opinion explaining the legal result, except in cases of truly voluntary settlements, or a bench or jury trial resolving a factual dispute in a well-settled area of the law.  

C. Relation to the New Power

The new power ratified by the Heileman III court sacrifices concern for the litigants' subjective view of the justice they receive to obtain a questionable increase in efficiency. It is an unnecessary and potentially destructive addition to the judge's pretrial tool chest. It is not demonstrably more efficient than other pretrial techniques. It is not even-handed and therefore probably harms the integrity of the justice system in the mind of the litigants and the public. It does nothing to aid the court in getting to the truth of the parties' claims. And it circumvents application of the law to the parties' claims. The power to order a represented litigant to attend settlement conferences, and to sanction her for failing to attend or to send an agent who is "authorized to settle," is troublesome; it also may not be as efficient as its proponents suggest nor as conducive to "judicial integrity" as they would like. Because the main concern of settlement-minded judges appears to be efficiency, the threshold question is whether the new power is in fact efficient.

29. See infra notes 47-54, 60-62 and accompanying text.

30. Oddly, the Seventh Circuit has forbidden judges from ordering litigants to take part in summary jury trials. Strandell v. Jackson County, 838 F.2d 884 (7th Cir. 1988). This is cognitively dissonant with Heileman III: The Seventh Circuit has given pretrial officials the power to compel litigants to take part in a settlement-oriented method (conferences) that circumvents trial by an objective outsider, yet has denied them power to compel participation in a settlement-oriented method that may aid parties in reaching a consensus on disputed facts. Summary jury findings are not binding and do not affect a party's right to a full trial, but may help litigants assess how they would fare with a jury. See Lambros, The SJT and Others, supra note 1, at 469.

31. See infra note 45 and text accompanying notes 77-81.

32. Heileman III, 871 F.2d at 651; see also P Lacey, supra note 2, at 25-26; Fox, supra note 2, at 130; Lambros, The SJT and Others, supra note 1, at 476.
A Federal Judicial Center study from the late 1970s found that settlement-oriented techniques are not strongly conducive to docket efficiency.33 Furthermore, the judges interviewed and the data collected suggested that the most efficient methods are those that focus on readying a case for trial, such as stringent dates for discovery and firm trial dates.34 Such methods also were viewed as the most effective in obtaining settlement.35

On one hand, even if one believes that judicial efficiency is of primary importance, the practical benefits of a power to compel represented litigants to attend pretrial settlement conferences may be relatively small in those terms. On the other hand, the lack of such a power may have little effect on a pretrial official’s ability to bring in a litigant by request. Apparently, many represented litigants regularly comply with requests to attend settlement conferences.36 An order to compel attendance is unnecessary in many cases because most litigants will attend a conference if requested to do so. But when an order must be used, it is unlikely to yield a settlement (short of judicial arm-twisting, which the Seventh Circuit assures us is out-of-bounds)37 because litigants who would resist a request are likely to be the most resistant to settlement as well. The new power, therefore, offers no demonstrable added efficiency.

Nor is it so obvious whose interests are served by the Heileman III power. It has been touted as serving the interests of litigants whose lawyers deal with them less than honestly.38 Judges and rulemakers may be justifiably wary of lawyers’ motives and the tactics they can use to delay an opponent

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33. S. Flanders, supra note 4, at 37. While “a nudge early in the case may break the ice,” id. at 39, time spent pushing parties toward settlement has little impact on case disposition and “data suggest that a large expenditure of judicial time is fruitless.” Id. at 37.
34. Id. at 17, 25, 33. Data showed that docket efficiency increased most dramatically through judicial control over pretrial process timing and rapid progress toward trial. Id.
35. Id. at 37.
36. Heileman III, 871 F.2d at 657 (Posner, J., dissenting) (“[I]t is a rare attorney who will invite a district judge’s displeasure by defying a request to produce the client for a pretrial conference.”); see also Fox, supra note 2, at 146 (stating the usefulness of getting the actual parties into the conference).
37. Heileman III, 871 F.2d at 653; see also Kothe v. Smith, 771 F.2d 667 (2d Cir. 1985) (holding that a judge may not order a litigant either to make or accept a settlement offer); Del Rio v. Northern Blower Co., 574 F.2d 23, 26 (1st Cir. 1978) (Reversing a district court’s order that a party who refused to reduce his claim in order to facilitate settlement pay the entire cost of the suit because “[t]here is no duty to settle cases. Unless his claim is frivolous, a party is entitled to assert it, and to whatever judicial time is required to try it.”).
38. Richey, supra note 1, at 604 (arguing that the Heileman III decision was “wholly proper” because “courts cannot always rely on attorneys to fairly relay to their clients the merits of a particular settlement”); Note, Rule 16, supra note 1, at 1468, 1453 (arguing that Rule 16 should be amended to allow the Heileman III power to comport with “the thematic backdrop of the 1983 amendments” to the Federal Rules to avoid codifying “a dated conception of the attorney-client relationship that is difficult to square with the growing control of managerial judges over pretrial proceedings”).
and forestall trial or settlement. And sometimes the careful application of available pretrial powers may be needed to undermine techniques of delay.

But judges and rulemakers also should be wary of the powers they provide pretrial officials, and the motives those officials may have for pushing settlement on resolute litigants; motives such as political and peer pressure, and even simple human exhaustion, which have no relationship to the merits of a party's case. In other words, while it may be "a fact of life that settlements which may be in the client's best interest are not always in the best interest of the client's lawyer in terms of fees," it also is a fact that pretrial officials have their own interests to serve. Those interests also can conflict with the interests of a litigant who is determined to go to trial. If there is reason to be wary of lawyers, then there is no reason to trust one just because she is wearing a robe.

If the Heileman III power does encourage litigants to settle, it may do so only by undermining their confidence in the impartiality of the judicial system. A party who is open to settling a case will show up for a settlement conference if requested to do so, or simply allow her lawyer the authority required. But a represented party who has refused to settle may feel she is being harassed by an order to attend and doubt the court's ability to give her a fair trial. Producing this doubt in a litigant's mind may increase her desire to settle; she may believe that she can exert some control over


40. See generally Note, supra note 16 (calling for use of district courts' inherent powers to prevent attorneys from delaying trial).

41. Alschuler, The Trial Judge's Role in Plea Bargaining (Part I), 76 Colum. L. Rev. 1059, 1099-1102 (1976) (describing the politics, gamesmanship and egotism involved in "disposition rate rivalry" and "the motives of bargaining trial judges"). Though it deals with criminal courts, Alschuler's underlying assumption that "the primary reason for the activism of most judges is the need to process large caseloads with seriously inadequate resources" is as true for civil cases. Id. at 1099; see also Note, Limits of Judicial Authority in Pretrial Settlement Under Rule 16 of the Federal Rules of Civil Procedure, 2 Ohio J. on Dispute Resolution 311, 321 (1987) (discussing the "deleterious effect" participation in such conferences may have on a judge); Bills Aim to Curb Litigation Delay: Package in State Senate Looks to Cure Motion Practice Abuse, Delay by Judges, N.Y.L.J., June 13, 1988, at 1, col. 3; Colorado Judge Sanctioned for Delay: 2 Years to Rule on "Common" Case, Nat'l L.J., Dec. 22, 1986, at 3, col. 1; High Court Censures Judge for Delaying Cases, L.A. Daily J., Oct. 6, 1986, at 2, col. 2.

42. Richey, supra note 1, at 604.

43. Although "a basic and necessary assumption of our system [is] that judges can be trusted," Note, Rule 16, supra note 1, at 1449, they need not be trusted unconditionally. Lawyers also must be trusted for the system to work—especially when we remember that litigants choose their lawyers, but not their judges. Most observers grow wary of a lawyer at the point where her interests conflict with her client's. Id. at 1480-81. So, too, at that point the system should be wary of pretrial officials. See also S. Flanders, supra note 4, at 40 (citing some lawyers' belief that judges may use pretrial devices to force "busy work" on lawyers and expense on their clients to coerce settlement and avoid the merits).

44. Heileman III, 871 F.2d at 657 (Posner, J., dissenting); see also Casenote, So It's Settled, supra note 1, at 1443-44.
settlement but that she is powerless to control the judge's whims. If this is how the new power works to produce settlements, then it must severely undercut the "integrity of the court" as measured by public confidence in the system. 45

The power to compel represented litigants to appear at settlement conferences also conflicts with civil procedure's truth-finding function. Settlement conferences take time and money, resources that could be spent on discovery. Through discovery the parties and their lawyers learn about each others' case. Discovery may also enable the parties to reach a consensus about the truth, and about their respective rights. 46 Relying on judicial pressure toward settlement to terminate cases shortchanges the discovery process.

Cases settle for several reasons besides judicial intervention. Nonetheless, whatever a party's reasons for settling, fear of judicial harassment and sanction for failure to settle should not be among them. Pretrial officials already have extensive powers they may use to make settlement attractive to otherwise reluctant parties. Rule 16 should not be read nor amended to expand these powers.

II. THE TRADITION

The new power sidesteps traditional notions about the role of the judiciary in a democratic legal system. The empowering conception of courts as an instrument of the sovereign, and the limiting conception of courts as a part

45. When courts discuss "judicial integrity," they commonly include concern for public perception of the system and the appearance of impropriety. See, e.g., Webster v. Reproductive Health Servs., 109 S. Ct. 3040, 3067 (1989) (Blackmun, J., dissenting) (fearing the majority holding would undermine "the integrity of, and public esteem for, this Court"). In Mapp v. Ohio, 367 U.S. 643 (1961), the Court, observing the importance of judicial integrity, en route to extending the fourth amendment exclusionary rule to the states, said:

"Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in Olmstead v. United States: "Our government is the potent, the omnipresent teacher. For good or for ill it teaches the whole people by its example."

Mapp, 367 U.S. at 659 (citation omitted) (quoting Elkins v. United States, 364 U.S. 206, 222 (1960)); see also Hazel-Atlas Co. v. Hartford Co., 322 U.S. 238, 246 (1944) ("fraudulently begotten judgments" tamper with the "administration of justice"), overruled in Standard Oil Co. of Cal. v. United States, 429 U.S. 17 (1976); Alexander v. Robertson, 882 F.2d 421, 425 (9th Cir. 1989) (setting aside a judgment obtained by a co-defendant's counsel who was not a licensed attorney would not "protect [the] integrity of the judicial system" from this type of misconduct in the future); United States v. Stout, 723 F Supp. 297 (E.D. Pa. 1989) (citing a concern for public perception and judicial integrity in holding to remove an attorney from defending in a criminal case for conflict of interest); In re Mattera, 34 N.J. 259, 168 A.2d 38 (1961) (citing the need for the public to be protected from the professional misconduct of attorneys).

46. See F. Lacey, supra note 2, at 14 (also noting that the lawyers' experience plays a crucial role); Fox, supra note 2, at 136.
of a system of written laws are both endangered when judges can “make law” surreptitiously. The initiation and progress of settlement discussions should be treated delicately, not with the blunt instrument provided by the *Heileman III* court. A good settlement saves resources for the parties and for society. But a settlement involving even a whiff of coercion threatens fundamental principles of the traditional justice system.

A. The Historical Foundations of Judicial Power

1. The Role of the Courts

The American judicial system developed within a tradition that views courts as an instrument of the sovereign lawmaking power. Judicial intervention that disposes of a case without examining the facts and issues under substantive law, and without requiring the judge to report reasons for her decision, threatens the practical separation of powers in this system. A tool that increases a court’s power to coerce a pretrial settlement from an unwilling party increases to an unacceptable level the likelihood of judicial lawmaking beyond its legitimate scope.

47. When parties take a dispute to the courts for adjudication under substantive law, its resolution is law for them: it governs the outcome and dictates their rights. Therefore, whether a dispute takes parties to trial or is resolved before trial by settlement, effectively the result is law. A pretrial official who coerces such an outcome surreptitiously “makes law” for those parties and leaves nothing written to guide later courts and litigants or to appeal to higher courts.

48. Before 1066, English courts were decentralized both in form and in the substance of the law. Local courts made local law, and the system was a freewheeling one, where courts sold their services and offered varying remedies for a price. After 1066, the Norman kings sought to consolidate the courts to maximize control over the lawmaking power. See, e.g., P Carrington & B. Babcock, *supra* note 28, at 4-16 (stating that the English common law was a product of the Norman Conquest of 1066); M. Hale, *The History of Common Law England 16-27* (C. Gray ed. 1971); F Maitland, *A Sketch of English Legal History 26-73, 131-59* (1915). Centralization of courts and the system of writs began as a means of strengthening the crown’s control. Resistance occurred (for instance, in the events leading to the Magna Carta), but by the end of the thirteenth century the royal power, subject to the growing influence of Parliament, prevailed and the control of justice centralized. The American colonies established legal institutions which largely replicated those to be found in England in the seventeenth and eighteenth centuries. F James & G. Hazard, *supra* note 28, at 8-9.

As one influential drafter of the original Federal Rules of Civil Procedure noted, the American court system evolved based on this model: control over the lawmaking power by the sovereign. C. Clark, *supra* note 7, at 160. By the time the American system took root, in England and in the colonies the sovereign lawmaking power rested in the legislature, and through that vehicle, in the people.

To an American understanding the people are sovereign. See U.S. CONST. preamble (“We the people ordain and establish this Constitution”). Therefore, the conception of the courts as a tool for application of sovereign-made law is a democratic one under such a system.

49. The question of constitutional separation of powers is beyond the scope of this Note.
Unlike summary judgment,\textsuperscript{50} declaratory judgment,\textsuperscript{51} judgment on the pleadings,\textsuperscript{52} Rule 12(b) dismissal and other pretrial, party or judge-initiated methods of moving cases toward a final disposition,\textsuperscript{53} an off-record settlement conference generates no records or written opinions on the facts or the law involved, and the means used to bring the conference about are unappealable,\textsuperscript{54} emphatically so if it results in a strong-armed settlement. Such a result conflicts with the American conception of the judicial system as a fact-finding mechanism that submits disputes to written, substantive law.

2. The Role of the Process

The modern judicial management movement is motivated by a concern for the integrity of the legal system as well as for its efficiency. It is a reaction to problems generated by the current system of pleading, and is related to prior movements to revamp the processes of justice. For instance, the common law pleading system presented numerous problems of fairness for both the litigants and the court.\textsuperscript{55} The complexity of the system led to the dismissal of worthy actions for failure to make the proper tactical move. Pure lawyering skills often carried more weight than did the merits of a plaintiff's action. And the system’s insistence on narrowing issues to a lone “crucial” controversy often left important questions unconsidered and produced artificial results.\textsuperscript{56}

\begin{itemize}
\item \textsuperscript{50} See \textit{Fed. R. Civ. P} 56.
\item \textsuperscript{51} See \textit{Fed. R. Civ. P} 57.
\item \textsuperscript{52} See \textit{Fed. R. Civ. P} 12(c).
\item \textsuperscript{53} See \textit{Fed. R. Civ. P} 26, 36, 37 (discovery, requests for admission and sanctions for failure to make or cooperate in discovery, respectively).
\item \textsuperscript{54} See infra note 63. Because the coerced party indicates “consent” to the settlement, whatever her practical reason, she cannot complain later that it was reached without her consent. The pressure used to gain this “consent” is not subject to review, unless it amounts to direct coercion. Kothe v. Smith, 771 F.2d 667 (2d Cir. 1985) (a judge may not coerce a litigant either to make or to accept a settlement offer). In \textit{Kothe} the court found coercion where the trial judge recommended a settlement amount and warned of sanctions if the parties settled after trial began for a comparable figure. \textit{Id.} at 669.
\item This scenario makes negative assumptions about some pretrial officials. But at least some wariness is justified. Advocates of judicial management repeatedly criticize lawyers for dubious tactics. \textit{See, e.g., Note, supra} note 16. The system should not assume that pretrial officials are always above similar behavior. In fact, somewhat disturbing is the admission of one management advocate that judges do in fact coerce settlements. \textit{See F. LACEY, supra} note 2, at 19. Speaking to newly appointed judges, Lacey cautioned that, “[i]n the long term, coerced settlements will add to neither your stature as a judge nor your success at settling cases.” \textit{Id.}
\item If coercion were not a problem, he would not have had to address it. \textit{See also} Elliott, \textit{supra} note 39, at 309 (emphasis in original) (“Managerial judges believe that the system does not work; that something must be done to make it work; and that the only plausible solution to the problem is \textit{ad hoc} procedural activism by \textit{judges}.”).
\item \textsuperscript{55} See \textit{C. CLARK, supra} note 7, at 78-82.
\item \textsuperscript{56} \textit{Id.} at 76-79. The Field Code was an initial attempt to remedy some of these problems. However, for several reasons it failed. For an explanation of the Field Code's attempts and failures, see \textit{id.} at 79.
\end{itemize}
Today's system under the Federal Rules presents new problems of its own. For instance, the Rules require only that a plaintiff give "notice" of her claim to the defendant. The emphasis on mere notice may leave a court with the burdensome task of decoding an incoherent set of pleadings. This should not be the court's task, at least not one it should have to handle alone; and to be fair to a defendant the system ought eventually to require something more of a plaintiff than "he done me wrong." The Federal Rules, as they were originally written and as they have developed since, attempt to meet this problem with post-filing, pretrial procedures to clarify factual disputes and narrow legal issues. This creates a post-filing "backwash." The judicial management movement is a response to such problems and to that extent it is beneficial. Pretrial conferences aimed at preparing a case for actual litigation and the use of several pretrial devices, such as the power to set firm discovery deadlines and trial dates, have a real impact on moving cases quickly through the process, in improving trial quality and in bringing about settlement. These contributions should not be overlooked.

However, to recognize the contributions and laudable motives of the judicial management movement does not require ignoring traditional notions about the justice system and procedure's role in it. Judicial efficiency conflicts with the court's proper role as an instrument of the democratic lawmaking process when it requires granting overly coercive powers to a pretrial official.

B. Boundaries of the Judicial Role: Why the Limit Exists and How the Seventh Circuit's New Power Oversteps that Line

Our judicial system is based on an admittedly idealized conception of the legal system as one of written laws, rather than one based on the whims...
of rulers. As a part of this traditional ideal, judges who interpret the law should at least report the reasons for their decisions in written opinions.

According to the traditional ideal, a judge should render a written decision, one that lets the parties know where they stand and one which they can appeal. The tradition of "a government of written laws" places a judge within certain boundaries: The logic of her written decision can be followed and analyzed and its reasoning made plain to the losing party; and if her decision conflicts with clear precedent or ignores a statute, that result may be appealed.

A settlement achieved through harassment or intimidation of a party has neither of these virtues. The reasoning of the decision makers is not preserved in writing as a part of the public record, and the result cannot be appealed. Even if a coerced settlement results in the most just, economical and speedy disposition ever achieved in the history of jurisprudence, it would still be lacking. Such an impressive feat should be preserved in writing to aid future courts. However, if judicial harassment results in a less-than-optimal disposition, the coerced party is left with no recourse to protest her treatment and may feel cheated by the system she had looked to for justice.

60. The original draft of the Massachusetts Constitution (1779), drafted by John Adams, promised "[a] government of laws, and not of men." J. BARTLETT, FAMILIAR QUOTATIONS 368 (13th ed. 1955). This language was echoed in Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803) ("[T]he government of the United States has been emphatically termed a government of laws, and not of men."). See also E. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW 8 (1955).

61. See, e.g., F. MAITLAND, supra note 48, at 2, 110 n.1. Maitland describes a 700 year history of written decisions in English courts. Reporters, though limited in number, began circulating around 1292. Id. at 110 n.1. While the number of reporters grew in England, prior to 1776 the colonial courts and the lawyers practicing in them did not keep reporters of American decisions. Id. at 132 n.1; M. HALE, supra note 48, at 16. One reason for the sparsity of reporters in the early colonies may be that, "[i]n some colonies, lawyers were distinctly unwelcome," L. FRIEDMAN, A HISTORY OF AMERICAN LAW 96 (2d ed. 1985), and hence, their law books were also unwelcome.

62. In her idealized role, a judge applies law made by the legislature and fills gaps it has not addressed. Yet, statutes by nature must be broadly drawn, and judges must deal with specific actors in specific situations facing specific consequences. In this role, judges always have made, and in fact must make, law.

Yet, even the traditional, idealized model does not require judicial deference to every legislative pronouncement. When the legislature makes laws that tread upon fundamental rights the judiciary ought to step in. See Marbury, 5 U.S. (1 Cranch) at 177 (When a law conflicts with an individual right, "[i]t is emphatically the province and duty of the judicial department to say what the law is."); THE FEDERALIST No. 78 (A. Hamilton) (H. Lodge ed. 1904). But it must do so in written opinions, both for the sake of the parties involved and for the benefit of the minority which such a decision must protect:

[A] voluminous code of laws is one of the inconveniences necessarily connected with the advantages of a free government. To 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.

Id. at 490.

63. Pretrial tactics that result in settlement appear to be unappealable, except for direct
The Seventh Circuit majority opinion mouthed the oft-repeated warning that a federal court may not coerce a settlement. But coercion is in the eye of the beholder. There are tools available to the court to make settlement attractive to a party or her lawyer without the magistrate or judge having actually to order acceptance of a settlement offer. The new power unnecessarily strengthens the court's hand in this regard. Under \textit{Heileman III}, a pretrial official may repeatedly force a represented party to travel long distances and spend additional time and money to attend meetings which she is already paying her lawyer to attend.

The power to order a represented litigant to attend pretrial conferences may have some utility and may already be widely used. However, its coercion to settle. \textit{In re Ashcroft}, 888 F.2d 546, 547 (8th Cir. 1989) (“If the case were settled, obviously the issue of the propriety of this action [the district court’s alleged efforts to force settlement], as well as the other issues in the case, would disappear.”). Because a represented party must obey an order, or even several orders, to attend settlement conferences, those orders may subtly coerce a litigant into settling a case. \textit{Malone v. United States Postal Serv.}, 833 F.2d 128, 133 (9th Cir. 1987) (quoting \textit{Chapman v. Pacific Tele.}, 613 F.2d 193, 197 (9th Cir. 1979)) (holding that counsel who “believes a pretrial order is erroneous is not relieved of the duty to obey it”), \textit{cert. denied}, 488 U.S. 819 (1988); see also \textit{United States v. United Mine Workers of Am.}, 330 U.S. 258, 293 (1947) (noting that “an order issued by a court with jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings”).

\textit{Heileman III}, 871 F.2d 648, 653 (7th Cir. 1989) (en banc); see also \textit{Del Rio v. Northern Blower Co.}, 574 F.2d 23 (1st Cir. 1978) (a party has no duty to settle a case, but has the right to assert a claim unless it is frivolous).

“Our trial judges must never fall prey to becoming part of a process that even subliminally suggests a pressure to forego the essential right of trial.” \textit{Heileman III}, 871 F.2d at 661 (Coffey, J., dissenting); see also \textit{Public Utilities Comm’n v. Pollack}, 343 U.S. 451, 466-67 (1952) (“[T]he administration of justice should reasonably appear to be disinterested as well as be so in fact.”).

\textit{Heileman III}, 871 F.2d at 654. Joseph Oat Corp., for instance, is located in Camden, New Jersey. The conferences were held in the federal district court in Madison, Wisconsin. \textit{Heileman III}, 871 F.2d at 654.

Writing in the early 1970s, Fox suggested that judges were already requiring party attendance at pretrial conferences and that a judge could, and often should, compel the client to attend a pretrial conference. \textit{See also In re LaMarre}, 494 F.2d 753, 756 (6th Cir. 1974) (holding that a judge may compel a party’s presence at a pretrial conference); \textit{In re Crash Disaster at Stapleton Int’l Airport}, 720 F Supp. 1433 (D. Colo. 1988) (holding that courts have authority to order officers of a represented corporation to attend pretrial conferences); \textit{Curto v. International Longshoremen’s & Warehousemen’s Union}, 107 F Supp. 805, 808 (D. Or. 1952) (explaining a District of Oregon court rule that litigants were required to attend pretrial conferences unless excused by the court where those conferences were conducted in open court on a full record and were aimed at simplifying issues for trial and convincing litigants of the fairness of the process), \textit{aff’d}, 226 F.2d 875 (9th Cir. 1955), \textit{cert. dened}, 351 U.S. 963 (1956). On related issues, see Federal Reserve Bank of Minneapolis v. Carey-Canada, Inc., 123 F.R.D. 603 (D. Minn. 1988) (affirming an order of a pretrial official compelling litigants to attend and take part in a non-binding summary jury trial); McKay v. Ashland Oil, Inc., 120 F.R.D. 43 (E.D. Ky. 1988) (upholding an order to compel participation in a non-binding summary jury trial); Arabian Am. Oil Co.
potential for harassing a represented litigant is too great. Judges are not immune to ambition and ego, and many have found themselves under great pressure to move their cases. A judge's anger at a party who is unwilling to bend to what seems a reasonable settlement offer is natural. The temptation to order a recalcitrant party to appear for a tongue lashing, with the threat of more such orders in the future, may seem like a reasonable way to get the right thing done. However, the potential efficiency of the *Heileman III* power masks the fact that it allows judges to "get the right thing done" in a way that deprives litigants of the opportunity to review or to appeal a written decision.

The coercive power created by *Heileman III* conflicts with the conception of courts as a part of the democratic tradition of written laws. In this instance, this Note suggests that courts and rulemakers defer to tradition.

III. THE RULE 16 ISSUE

An examination of Rule 16 and the general policies underlying the Federal Rules does not provide any conclusive argument either for or against the new power. Although advocates and opponents of the new power both rely on rules of statutory construction, these rules merely cancel each other out. An argument that the Rules demand efficiency (which they do) ignores the fact that they also require procedural fairness. Finally, the semantic wizardry of a claim that "orders compelling attendance with authority to settle do not compel settlement" rings hollow without a clear definition of the authority required. Because the power does not clearly aid efficiency and fairness and because rules of statutory construction fail to provide a clear answer, the other concerns raised in this Note should tip the scales toward withdrawing this power from the pretrial official.

A. THE FORMAL ARGUMENTS

The primary arguments used by both the *Heileman III* majority and the panel opinion it reversed were based on formalistic rules of construction. The view that prevailed in the vacated panel decision was that if Rule 16

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69. See Alschuler, *supra* note 41, at 1099-1102, and *supra* note 41 (citing news articles).
does not mention the power, then the Rule does not allow it. Such a construction, however, is no more persuasive than its opposite: that if Rule 16 does not mention the new power, then it does not forbid it. The latter construction seems to be the crux of the en banc majority's holding, insofar as it relies upon the view that "the Federal Rules of Civil Procedure do not completely describe and limit the power of the federal courts." These arguments from methods of construction are useless for evaluating the legitimacy of the Heileman III power because the methods simply cancel each other out.

Yet, the Heileman III majority's approach to statutory construction may pose an additional problem. In a dissenting opinion to Heileman III, Judge Ripple questioned the right of the court—vis-à-vis Congress—to create powers for itself based on the mere absence of a prohibition in the promulgated Rules. Ripple pointed to the dangerous impact of the majority's opinion "on the relationship between the Judiciary and the Congress in establishing practice and procedure for the federal courts. The Rules Enabling Act hardly contemplates the broad, amorphous, definition of the ‘inherent power of a district judge’." In other words, Ripple claimed that the statutory construction adopted by the vacated panel decision is demanded by the constitutional relationship between Congress and the courts which Congress is empowered to create. If this is the case, then the majority's construction of Rule 16 is not merely unhelpful but also unconstitutional.

B. Arguments from the Policy of Efficiency

The Heileman III majority also relied on the general policy of the Federal Rules "to secure the just, speedy, and inexpensive determination of every

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70. Heileman III, 871 F.2d 648, 667 (7th Cir. 1989) (en banc) (Manion, J., dissenting) (Manion stated that litigants have a right to conduct a case through counsel, relying on 28 U.S.C. § 1654); see also Heileman III, 871 F.2d at 658-60 (Coffey, J., dissenting) (arguing that Rule 16's terms are unambiguous: only an unrepresented party and attorneys may be ordered to appear and amendments have not added or implied anything to this power). Contra Heileman III, 871 F.2d at 651 (majority suggesting Rule 16 requires that settlement "should be pursued and discussed vigorously"). However, Rule 16 contains no language to the effect that settlement "should be pursued and discussed vigorously," nor does it contain any discussion of settlement at all. See supra note 12 (containing the pertinent text of Rule 16 and the Committee comments).

71. Heileman III, 871 F.2d at 651 (citing HMG Property Investors, Inc. v. Parque Indus. Rio Canas, Inc., 847 F.2d 908, 915 (1st Cir. 1988)).

72. But see Casenote, So It's Settled, supra note 1, at 1437-41 (arguing that the Heileman III majority's decision conflicts with a proper application of the rules of statutory construction).

73. Heileman III, 871 F.2d at 665 (Ripple, J., dissenting).

74. But see Frazier v. Heebe, 482 U.S. 641, 645 (1987) (commenting that district courts have power to enact local rules necessary to manage their dockets); Link v. Wabash R.R. Co., 370 U.S. 626, 629-30 (1962) (holding that district courts have inherent discretion to sanction abusive litigation strategies by dismissing sua sponte a plaintiff's complaint for failure to prosecute). While Link may cut against Ripple's constitutional argument, its result adds weight to the argument that the Heileman III power is unnecessary. However, resolution of the issue Ripple raised is beyond the scope of this Note.
The power to compel represented litigants to attend pretrial settlement conferences complies with this command, the majority wrote, because it is "efficient . . . [and] preserve[s] the integrity of the judicial process . . ." and therefore complies with the command of Rule 1. But the majority’s argument fails on two grounds. First, there is at least a valid question whether this power is efficient at all. Second, even assuming it is efficient, whether it also promotes judicial “integrity” is still questionable. The answer depends on what meaning is given the word “integrity.”

By “integrity,” the Heileman III majority may have meant merely that the new power promotes the “sound, unimpaired, or perfect condition” of the judicial system. But if one measures the system’s “condition” only by the speed of case resolution, and not by the quality of justice it produces (including the parties’ assessment of its fairness), then conceivably any efficient alternative would be acceptable. To read the Federal Rules this way would remove all boundaries on the power of the court over litigants.

Giving the Heileman III majority the benefit of the doubt, it is fair to assume that it had in mind more than turnover rates when it invoked the term “integrity,” and was equally concerned about quality of justice and fairness to litigants. In that case, it is worth asking whose evaluation of the system’s “integrity” is more important: the view of judges, or that of the parties and the public? The goals of civil procedure put a premium on the parties’ views of judicial integrity. Likewise, cases which discuss “judicial integrity” consider foremost the perception of the parties and the general public.

The Heileman III majority did not address how the new power will affect the views of a represented party who has been ordered to attend a pretrial settlement conference. Instead, the majority’s principle concern was ensuring the power of the pretrial official to obtain obedience from the parties: the decision lacked any concern for how the parties and the public perceive the system’s integrity. The Heileman III power places a premium on the pretrial official’s view of the case because it increases her ability to coerce settlement from a resolute litigant with a contrary view of the matter, ensures that a coerced settlement will not be appealed and ignores the litigant’s subjective belief that consent was unfairly coerced. This result is immical to the goals of civil procedure.

76. Heileman III, 871 F.2d at 651.
77. See supra notes 4, 33-37 and accompanying text.
79. To bring about a more efficient turnover rate, a court might order a wheel of fortune installed inside the courtroom door for plaintiffs to spin, or decide to rule for defendants on Mondays, Wednesdays and Fridays.
80. See supra notes 28 & 45 and accompanying text.
81. See supra note 45.
C. The Semantic Wizardry

The third argument the majority mustered was that an order compelling a represented litigant to appear with full authority to settle is not the same as an order to settle. To a litigant, this is a merely semantic distinction if the required authority is not clearly defined.

According to the Heileman III majority, Oat Corporation’s representative was only ordered to appear “to consider the possibility of settlement” should acceptable terms be proposed. This interpretation makes no sense in light of the facts: Oat Corporation had already indicated that it was not willing to pay any money at that time. From Oat Corporation’s standpoint, then, its attorneys did appear with “full authority” to approve any “acceptable” terms. Oat Corporation was sanctioned solely because the magistrate did not agree with its view of what was “acceptable.”

The court may have meant that Oat Corporation failed to comply with the December 18 order because it failed to present a properly representative corporate agent at the conference. However, “the proposition that a magistrate may require a firm to send an employee rather than a representative is rather puzzling.” In the case of an individual litigant the distinction is fairly simple to make: the client is a person who either is at the conference or is not. But a corporation itself cannot attend a settlement conference. Someone employed by it—the president, the chairman of the board of directors, maybe the entire board—must appear as its representative. But corporations also often employ outside attorneys, and more to the point, employ them specifically to represent the corporation in court proceedings.

If the majority meant that Oat Corporation violated the court order because it failed to provide an agent with “full authority to settle” (the precise term that Oat Corporation claimed not to understand), then it is odd that the majority failed to define the term. Although two Oat Corporation lawyers attended the December 19 meeting, this, the court reasoned, was not enough because the corporation “was well aware of what the court expected.” But even if the company did understand “what the court expected,” the fact that its executives had decided not to settle meant the

82. Heileman III, 871 F.2d at 653.
83. Id. (citing Heileman I, 107 F.R.D. 275, 276-77 (W.D. Wis. 1985)).
84. Heileman II, 848 F.2d 1415, 1417-18 (7th Cir. 1988).
85. Heileman III, 871 F.2d at 656-57.
86. Id. at 663 (Easterbrook, J., dissenting).
87 See Heileman II Brief, supra note 10. “Both Attorney Possi and Attorney Fitzpatrick had full authority to settle the case on behalf of Oat, but not to pay any money. The Magistrate, by inference, took the position that his order that the parties have ‘authority to settle’ meant that they have authority to pay money.” Id. at 5; see also Fed. R. Civ P 16 advisory committee's note, 1983 amendment, subdivision (c) (reference in the Rule “is not intended to insist upon the ability to settle the litigation”).
88. Heileman III, 871 F.2d at 655.
magistrate would have had to compel at least a quorum of the board to attend to get someone into the conference who could agree to pay money. 89 The court's failure to define "authority to settle" creates a dissonance between its insistence that Oat Corporation was not compelled to settle and the pretrial magistrate's definition of the phrase. 90 This brings to mind two hypothetical problems. First, Oat Corporation's lawyers were excluded from the December 14 conference because they refused to pay money. 91 They were then sanctioned for failing to have authority to settle when they appeared at the December 19 conference. 92 Supposing that Oat Corporation had supplied its company president on December 19—but with an order from the board not to pay cash—the circuit court's decision suggests that Oat Corporation would have satisfied the magistrate's pretrial order. However, this may well not have satisfied the magistrate. 93 Second, suppose Oat Corporation's president had appeared with authority to settle the case for $1.35, 94 and that was not "full authority," would $10 have been enough? If neither offer satisfied the magistrate, it must be because the magistrate had already decided what the case was worth—a decision that implies that he had already decided the facts. Yet, if he had decided the facts, the proper course was to recommend summary judgment 95 rather than push the parties toward a settlement.

This is why the court's parroting of the caveat that "courts should not coerce settlements" is meaningless. A pretrial official need not "coerce" a settlement through court order when the Heileman III Rule 16 power clearly illustrates for the litigant the link between her checkbook and the threat of punishment. 96

CONCLUSION

The power ratified by Heileman III threatens the traditional role of American courts as an instrument of sovereign lawmaking power. It does

89. Id. at 664 (Easterbrook, J., dissenting).
90. See supra note 13 (containing the relevant part of the magistrate's opinion).
91. Heileman II, 848 F.2d at 1417.
92. Id. at 1418.
93. See supra note 13. The magistrate may have ordered the company's board of directors to attend a third conference, an action now permitted under Heileman III.
94. Presumably this would have satisfied the magistrate's demand that authority to settle include the power to make a cash offer. See supra note 13.
95. Under Rule 72(b), the magistrate would send proposed findings of fact to the district court judge with a recommendation for summary judgment. The judge may accept, reject or modify the recommended decision, recommit the findings for further hearings before the magistrate, or receive further evidence herself. Fed. R. Civ. P 72.
96. Judge Easterbrook also noted the potential for harassment latent in the new power. This potential is exacerbated by the majority's failure to define "authority to settle," which by default left the magistrate's definition intact: "The order we affirm today compels persons who have committed no wrong, who pass every requirement of Rules 11 and 68, who want only the opportunity to receive a decision on the merits, to come to court with open checkbooks on pain of being held in contempt." Heileman III, 871 F.2d at 664 (Easterbrook, J., dissenting).
so by handing pretrial officials the power to circumvent the system of written law while making law-in-fact, and by giving short shrift to concerns about the public perception of judicial fairness. While these arguments favor denying the power to pretrial officials, the arguments from statutory construction do not cut clearly either way. The *Heileman III* majority's construction of the Rule, if not constitutionally problematic, is at least no more persuasive than the equally formalistic argument relied on in the decision it reversed.

The Seventh Circuit offers platitudes in response to important concerns about coercing settlements, and leaves key terms undefined—terms that go to the heart of a litigant's potential confusion about the scope of authority she or her agent must bring to a settlement conference to avoid sanctions. With other techniques available to move cases and encourage settlement, the usefulness of the *Heileman III* power is small. What utility it has is outweighed by its dangers. Prior to *Heileman III*, pretrial officials had at their fingertips several tools to aid docket management. Those tools are still available. Therefore, the power to order represented litigants to attend pretrial conferences does little to further docket management. Its potential efficiency does not warrant creating a potential source for judicial harassment of represented litigants. *Heileman III* hands pretrial officials a blunt instrument to hold over the heads of resolute litigants, rather than the kind of well-honed tool that is needed to aid both of the parties in reaching a voluntary settlement.