

REVISION OF THE JURISDICTION OF
THREE-JUDGE COURTS

JUNE 12, 1973.—Ordered to be printed

Mr. BURDICK, from the Committee on the Judiciary,
submitted the following

REPORT

[To accompany S. 271]

The Committee on the Judiciary, to which was referred the bill (S. 271) to improve judicial machinery by amending the requirement for a three-judge court in certain cases and for other purposes, having considered the same, reports favorably thereon and recommends that the bill do pass.

PURPOSE OF BILL

The purpose of the bill, as amended, is to amend sections 2281, 2282, 2284 and 2403 of title 28, United States Code, by eliminating the requirement for special three-judge courts in cases seeking to enjoin the enforcement of State or Federal laws on the grounds of unconstitutionality. However, three-judge courts would be retained when specifically required by act of Congress or in any case involving congressional reapportionment or the reapportionment of any state-wide legislative body. The bill also clarifies the composition and procedure of three-judge courts in cases where will continue to be required. Finally, it insures the right of States to intervene in cases seeking to enjoin State laws on the ground of unconstitutionality.

STATEMENT

This bill eliminates the requirement for three-judge courts in cases seeking to enjoin the enforcement of State or Federal laws on the grounds that they are unconstitutional, except in reapportionment cases. It does not affect cases where such courts are otherwise required by act of Congress. Three-judge court procedure has recently been termed by one scholar, "the single worst feature in the Federal judicial

system as we have it today." It has imposed a burden on the Federal courts and has provided a constant source of uncertainty and procedural pitfalls for litigants.

Under current law, a Federal district court may not grant an injunction restraining the enforcement of a State or Federal statute on the ground of its unconstitutionality unless the application for injunction has been heard and determined by three judges instead of the usual single district judge. This is required by sections 2281 and 2282 of title 28, United States Code. Decrees of three-judge courts granting or denying an injunction are appealable directly to the Supreme Court under section 1253 of title 28, while the decision of a single district court judge is appealed to the circuit court of appeals with the right of further appeal to the Supreme Court. This extraordinary procedure was originally designed to protect State and Federal legislative programs from hasty, ill-considered invalidation.

HISTORY

The provision for three-judge courts was enacted by Congress as a solution to a specific problem. In 1908, the Supreme Court, in the landmark decision of *Ex parte Young*, 209 U.S. 123 (1908), held that State officials could be enjoined by Federal courts from enforcing unconstitutional State statutes. The *Young* decision came at the turn of the century, at a time of vigorous expansion of big business and the railroads. As the States sought to exert control over these enterprises, they enacted regulatory statutes. Repeatedly, however, their attempts were thwarted by Federal court injunctions preventing enforcement of these statutes. Most controversial was the practice of many Federal judges of granting interlocutory injunctions on the strength of affidavits alone or of granting temporary restraining orders *ex parte*, i.e., without hearing or notice to the opposing side.

As a response, Congress enacted the Three-Judge Court Act (Act of June 18, 1910, ch. 309, § 17, 36 Stat. 577) which prohibited a single Federal district court judge from issuing interlocutory injunctions against allegedly unconstitutional State statutes and required that cases seeking such injunctive relief be heard by a district court made up of three judges. The act also contained a provision for direct appeal to the Supreme Court in the belief that this would provide speedy review of these cases. The rationale of the act was that three judges would be less likely than one to exercise the Federal injunctive power imprudently. It was felt that the act would relieve the fears of the States that they would have important regulatory programs precipitously enjoined. However, as will be explained later in this report, some of the most serious objections to injunction practices of the Federal judges were overcome by statutory and rules changes occurring shortly after the Three-Judge Court Act was passed.

Since its enactment, the Three-Judge Court Act has undergone several significant revisions. The original act dealt only with interlocutory, and not permanent, injunctions. A 1925 amendment to the act required that three judges convene for permanent as well as interlocutory injunctions. In 1937, as one of the few remnants of President Roosevelt's court reform proposals, a similar provision was

made for a three-judge court and direct review in cases seeking injunctions against acts of Congress claimed to be unconstitutional.

The American Law Institute, in proposing a general revision of the jurisdiction of the Federal courts which is now embodied in S. 1876, the Federal Court Jurisdiction Act, proposed a series of amendments to three-judge court proceedings to eliminate a number of jurisdictional questions and to allow these courts to function more smoothly. However, since these proposals for modifying three-judge court procedure were first advanced, it has been suggested that mere refinement of procedure may not be sufficient. The Judicial Conference has strongly recommended the elimination of three-judge courts in suits challenging the constitutionality of State or Federal laws except where expressly required by act of Congress.

In hearings before the Subcommittee on Improvements in Judicial Machinery, the chief judges of the Second, Third, Fourth and Fifth Circuit Courts of Appeal urged the repeal of three-judge court statutes. Judge Skelly Wright from the U.S. Court of Appeals for the District of Columbia, testifying on behalf of the Judicial Conference, also advocated the general abolition of three-judge courts and specifically requested that this legislative proposal be considered separate and apart from the Federal Court Jurisdiction Act in order that it might receive prompt consideration by the Senate.¹ Prof. Charles Alan Wright of the University of Texas Law School strongly urged that legislation to eliminate the requirement for three-judge courts in most cases be given prompt attention because of the great burden that these cases are now placing upon the Federal court system.

In addition, the Chief Justice of the United States, in his annual report on the state of the Judiciary to the American Bar Association, called for the elimination of the requirement for three-judge district courts. He stated:

We should totally eliminate the three-judge district courts that now disrupt district and circuit judges' work. Direct appeal to the Supreme Court, without the benefit of intermediate review by a court of appeals, has seriously eroded the Supreme Court's power to control its workload, since appeals from three-judge district courts now account for one of five cases heard by the Supreme Court. The original reasons for establishing these special courts, whatever their validity at the time, no longer exist. There are adequate means to secure an expedited appeal to the Supreme Court if the circumstances genuinely require it. Remarks of Warren E. Burger, Chief Justice of the United States, before American Bar Association, San Francisco, Calif., August 14, 1972.

There are four major reasons for enacting this legislation which would eliminate the requirement for three-judge courts in all cases except those involving reapportionment or where required by congressional enactment. They are: (1) to relieve the burden of three-judge court cases, which have increased in number from 129 in 1963

¹ Subsequent to the hearings, a special committee report to the Federal Judicial Center also recommended abolition of such three-judge courts. "Report of the Study Group on the Caseload of the Supreme Court" (1972).

to 310 in 1972, causing a considerable strain on the workload of Federal judges; (2) to remove procedural uncertainties that exist under the present ambiguous three-judge court practices; (3) because statutory and rules changes have eliminated the original reasons for the establishment of three-judge courts; and (4) because decisional law has provided its own safeguards against precipitous injunctive action by Federal judges.

THE BURDEN OF THREE-JUDGE COURTS

In the years from 1955 to 1959, the average number of three-judge court cases heard was 48.8 per year. In the years from 1960 to 1964, the average per year was 95.6 such cases. Since fiscal year 1968, the number of three-judge court cases has continued to grow at an explosive rate. The figures for the subsequent years are:

1968	-----	179
1969	-----	215
1970	-----	291
1971	-----	318
1972	-----	310

The burden of these cases can be further seen from the following table.

TABLE 1.—3-JUDGE COURT HEARINGS BY NATURE OF SUIT, FISCAL YEARS 1963-72

Fiscal year	Total	Review of ICC orders	Civil rights	Suits involving State or local laws or regulations	
				Reappor- tionment	Other actions
1963	129	67	19	16	27
1964	119	50	21	18	30
1965	147	60	35	17	35
1966	162	72	40	28	22
1967	171	64	55	10	42
1968	179	51	55	6	67
1969	215	64	81	1	69
1970	291	42	162	8	79
1971	318	41	176	2	99
1972	310	52	166	32	60

Source: Data from the Annual Report of the Director of the Administrative Office of the U.S. Courts, 184 (1972).

Thus, the number of three-judge court cases has increased 73 percent in the 5 years since the American Law Institute made its modest proposals to revise three-judge court procedures.

The three-judge court provisions impose a considerable burden on the Federal courts because whenever such a court is required, a second district judge, as well as a judge of a circuit court of appeals, must be brought in to hear and determine the case along with the district judge in whose court the case was filed. In most parts of the country, the two additional judges must come from another city or State, leaving the work that they would ordinarily be doing in their own courts, to serve on a three-judge court.

In addition to the burden that the three-judge courts place on the district judges and the judges of the courts of appeal, the present procedure allows a direct appeal to the Supreme Court from orders of a three-judge court granting or denying injunctions, 28 U.S.C. section 1253. Although these cases account for only a small portion (less than

3 percent) of all cases docketed in the Supreme Court, they consume a disproportionate amount of the limited time for argument in the Supreme Court. In the period from October 1969, through November 1971, the Court heard argument of 366 cases. Of these, 80, or 22 percent, were from three-judge courts.

JURISDICTIONAL UNCERTAINTIES UNDER THE PRESENT THREE-JUDGE
PRACTICE

(a) *The Question of When a Three-Judge Court is Required*

Due to the burden placed on the Federal judicial system in calling a court of three judges, the statutory requirements of section 2281 of title 28 have been strictly construed. *Phillips v. U.S.* 212 U.S. 246 (1941). The effect of this construction has, in essence, been to narrow the class of section 2281 cases. Thus, the single district court judge must decide the threshold question of whether a case meets the statutory requirements for calling a three-judge court. This has not been easy.

Basically, for section 2281 of title 28 to be applicable, a State statute or administrative order must be challenged, a State officer must be a party defendant, injunctive relief must be sought, and it must be claimed that the statute or order is contrary to the Constitution of the United States. The same rules are, in general, applicable to challenges to Federal statutes under section 2282.

The application of the apparently simple criteria listed above has been, in fact, the nemesis of three-judge courts; for, if a threshold determination on any of the criteria is incorrectly made, a three-judge court is unnecessary, and complex appellate review problems arise.

State Statutes.—There has been considerable conflict as to the meaning of the term "State statute." In the leading case of *Ex Parte Collins*, 277 U.S. 565 (1928), the Supreme Court held that the Three-Judge Court Act would not apply to the suspension of acts of the State legislature of only local application. For a recent case involving difficulties with the "local application" doctrine, see *Board of Regents of University of Texas System v. New Left Education Project*, 404 U.S. 981 (1972).

State Officers.—The officer sought to be enjoined must be a State officer. The statute does not apply to suits against a State officer performing acts of purely local concern, but it does apply to local officers performing a State function that embodies a policy of statewide concern. *Spielmon Motor Sales Co. v. Dodge*, 295 U.S. 89 (1935).

Injunctive Relief.—The Supreme Court has held that in particular cases, a three-judge court was inappropriate in an action for declaratory judgment. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963). Yet, in many cases, declaratory relief is essentially equivalent to an injunction. The uncertainty of this point is unfortunate. A three-judge court is to be invoked only where the complaint seeks injunctive relief. It is not necessary if the constitutionality of a statute is drawn into question without any prayer for restraint of its enforcement. *Fleming v. Nestor*, 362 U.S. 603 (1960). Thus, many cases raising constitutional questions are now heard and decided by a single judge since no injunctive relief is requested.

Unconstitutionality of the Statute.—A three-judge court is required only if the injunction is sought on Federal constitutional grounds. Like many other things about “this deceptively simple statute,” this limitation abounds with slippery distinctions. Thus, three judges are needed if it is claimed that the statute, as applied, is unconstitutional, even though it may be conceded that the statute, in general, is valid. *Department of Employment v. U.S.*, 385 U.S. 355 (1966). But a different result is reached, and three judges are not required, if it is possible to enjoin State officials without holding a State statute or administrative order unconstitutional, such as where it is claimed that officials are administering a constitutional statute in an unconstitutional manner *Phillips v. U.S.*, 312 U.S. 246 (1941). Nor are three judges required if the claim is that a State statute conflicts with a Federal statute which, by virtue of the supremacy clause, is controlling. *Swift & Co. v. Wickham*, 382 U.S. 111 (1965).

(b) *Complexities of Appellate Review*

The rules on appellate review of whether a three-judge court is needed “are so complex as to be virtually beyond belief.” ALI Study, 332 (1969). The proper channels for appealing jurisdictional issues are wasteful and confusing. To quote Prof. Charles Wright, a leading scholar on Federal courts:

The court of appeals may review if the single judge regards the Federal claim as so insubstantial as to require dismissal for want of jurisdiction or if the single judge correctly concludes that three judges are not required and decides the merits of the case. If the single judge incorrectly believes that three judges are not required and proceeds to the merits, the remedy once was mandamus from the Supreme Court, but now appears to be an appeal to the court of appeals. If the court of appeals should fail to see that the case was one for three judges, and reviews on the merits, its decision is void. If a three-judge court is convened, but it determines that three judges were not necessary, appeal is to the court of appeals. If the special court is correctly convened and gives judgment on the merits, appeal lies directly to the Supreme Court. If judgment is given on the merits by a three-judge court but such a court was not required, appeal should be to the court of appeals rather than to the Supreme Court (citations omitted). C. Wright, “Federal Courts,” section 50, page 193 (2d. ed., 1970).

Judge Henry Friendly, chief judge of the Second Circuit Court of Appeals, in his testimony before the Judicial Improvements Subcommittee, characterizes the problems of appellate review in this way:

We get appeals where the district judge has refused to seek the convocation of the three-judge court because he doesn't regard the constitutional attack on the State statute as substantial and all three circuit judges agree that the statute is constitutional, yet they feel bound to reverse because the attack was not insubstantial. On the other side,

we have had a case where the district judge refused to ask for a three-judge court because he thought the attack on a State regulation was not substantial, but the three circuit judges consider not only that the attack was substantial but that the regulation is unconstitutional. We are still pondering over the serious question of whether we can reverse on the merits or must order a three-judge court. I suppose I could designate myself and one of my colleagues so that there wouldn't be very much doubt of the result. Hearings on S. 1876 before the Subcommittee on Improvements in Judicial Machinery of Senate Committee on the Judiciary, 93d Congress, second session, part 2, at pages 748-749 (1972).

Thus, under present law, it appears that where a district judge has refused to seek the convocation of a three-judge court because he does not regard the constitutional attack on a State statute as substantial, appeal lies in the circuit court. Yet, even if three circuit judges agree that the statute is constitutional, they will feel bound to reverse if the attack was not insubstantial. On the other hand, cases may arise where the district judge refuses to ask for a three-judge court because he thinks the attack on a State regulation is not substantial but the three circuit judges consider not only that the attack is substantial but that the regulation is unconstitutional. Yet, the circuit court cannot reverse on the merits. The circuit court, even though it must examine the merits to decide if a three-judge court is required, will only order the appointment of such a court. See, *Gold v. Lomenzo*, 425 F. 2d 959 (2d Cir., 1970).

Furthermore, even though there have been numerous cases in recent years seeking to clarify the right of direct appeal to the Supreme Court, it was necessary for that Court in a recent case to explain that an order granting or denying a declaratory judgment is not directly appealable in spite of the fact that an injunction was originally sought and the case was decided by three judges. *Mitchell v. Donovan*, 398 U.S. 427 (1970). A system that forces a duplicative and uncertain process of filing several appeals is not sound. A procedure that has caused a helpless litigant to travel to eight separate forums in search of relief necessarily defeats a manifest purpose of speedy appeal. See *Goldstein v. Cox*, 396 U.S. 471 (1970).

In summary, the three-judge court generates, rather than lessens, litigation, and the elimination of the requirement of three-judge courts, as proposed in this bill, would increase the efficiency of our judicial system to the benefit of litigants, lawyers, and judges alike.

STATUTORY AND RULES CHANGES HAVE ELIMINATED THE ORIGINAL REASONS FOR THE ESTABLISHMENT OF THREE-JUDGE COURTS

The original rationale for the three-judge court has long been obsolete and, as one commentator pointed out, began to disappear soon after the original legislation was enacted in 1910. Ammerman, "Three-Judge Courts: See How They Run," 52 F.R.D. 293, 297 (1971). This legislation, as previously explained, was responsive to the situation created by *Ex parte Young*, 209 U.S. 123 (1908), in the

wake of which many railroads and utilities attacked State rate fixing and tax laws. This created a deluge of applications for injunctive relief, ex parte or on the basis of affidavits alone, with no limits on the judge's discretion to continue interlocutory injunctions and temporary restraining orders indefinitely. The Three-Judge Court Act was intended to end this arbitrary exercise of authority. However, the original problems were largely obviated 2 years after the passage of the Three-Judge Court Act when the Federal Equity Rules were revised, extending to all injunctive cases much of the same protective procedures which the 1910 act had provided for by three-judge court proceedings. The Equity Rules were changed to prohibit Federal courts from granting ex parte temporary restraining orders for extended periods of time and to make Federal judges take some evidence before even preliminary injunctions were issued against the enforcement of State statutes. So, to a considerable extent, the reason for the original legislation was obviated, very soon after it was passed.

Later two other important statutes further restraining the power of the Federal courts to enjoin State action were enacted. In the Johnson Act of 1934, now 28 U.S.C. section 1342, Congress took away certain injunctive power with respect to State public utility rate orders. In the Tax Injunction Act of 1937, now 28 U.S.C. section 1341, Congress restricted Federal injunctions with respect to State taxes. The effect of these statutes was to limit the ability of a Federal court to interfere precipitously with the operation of State tax and public utility programs whenever there was a "plain, speedy, and efficient remedy" available in a State court.²

DECISIONAL LAW HAS PROVIDED ITS OWN SAFEGUARDS AGAINST
PRECIPITOUS INJUNCTIVE ACTION BY FEDERAL JUDGES

In its recent opinions, the Supreme Court has provided restrictions on Federal injunctions that further obviate the need for three-judge courts. In *Younger v. Harris*, 401 U.S. 37 (1971), the Supreme Court held that injunctive relief against a pending State criminal prosecution is not available except in exceptional circumstances, as when the prosecution is in the nature of a bad faith harassment of the defendant in the exercise of his Federal rights. Furthermore, the Supreme Court has recently clarified the application of the abstention doctrine. Under the abstention doctrine, a Federal court will stay the exercise of its jurisdiction where a case involves an unsettled issue of State law which, if decided, could avoid the necessity of deciding any constitutional claims asserted. *Askew v. Hargrave*, 401 U.S. 476 (1971) (this case involved a situation where there was a pending State case on an unsettled issue of State law); *Reetz v. Bozanich*, 397 U.S. 82 (1970) (abstention ordered in a case involving fishing rights where the Alaska Constitution contained a unique, uninterpreted provision specifically related to conservation of the State's marine resources). This pattern of decisions clearly precludes the sort of precipitous intrusion in the

² As previously noted, in 26 out of 29 cases reported, since 1961, in which it was sought to enjoin a State tax law, the Federal district court found the State remedy adequate. Of the three cases where jurisdiction existed, one involved the United States as a plaintiff, one was a complex interpleader case, and only one involved an inadequate remedy under State law.

State legal processes by a single Federal judge that the original Three-Judge Court Act sought to control.

Thus, the rationale that gave life to the three-judge court in 1910, has all but disappeared.

ELIMINATING THE REQUIREMENT FOR THREE-JUDGE COURTS: S. 271

Concluding that as a general proposition the original reasons for the three-judge court have been largely dissipated by limiting statutes and decisions controlling the jurisdiction of the Federal courts collaterally to review State laws, that the existing procedure compounds and confuses rather than simplifies orderly constitutional decision, and that the burden placed on the panels of judges to handle these cases on an expedited bases is onerous in view of the mounting backlog of cases of no lesser priority, this bill deletes the requirement for three-judge courts in all cases except those expressly required by act of Congress or in cases involving the apportionment of congressional districts or the apportionment of any statewide legislative body. This is accomplished by the repeal of sections 2281 and 2282 of title 28, United States Code, which required three-judge courts in cases challenging the constitutionality of State and Federal laws respectively. Three-judge courts would continue to be required in the review of certain ICC cases, 28 U.S.C. section 2325; in cases under the Expediting Act, 15 U.S.C. section 29, 49 U.S.C. section 45,³ in certain cases under the Civil Rights Act of 1964, 42 U.S.C. sections 2000a-5(b), 2000e-6(b); and in cases under the Voting Rights Act of 1965, 42 U.S.C. section 1971g. The bill preserves three-judge courts for cases involving congressional reapportionment or the reapportionment of a statewide legislative body because it is the judgment of the committee that these issues are of such importance that they ought to be heard by a three-judge court and, in any event, they have never constituted a large number of cases.

The use of the term "any statewide legislative body" is intended merely to reflect the application of the constitutional principles of representation announced in *Reynolds v. Sims*, 377 U.S. 533 (1964), to elected bodies which exercise "general governmental powers over the entire area served by the body." *Avery v. Midland County*, 390 U.S. 474, 485 (1968) (county commissioners); *Hadley v. Junior College District*, 397 U.S. 50 (1970) (board of trustees of school district).⁴ Where such a body exercises its powers over the entire State, this section requires that three judges hear cases challenging apportionment of its membership. Apportionment of a body that deals only with matters of local concern and representative of a county, district, or city, would not require three judges, even though the body derives its power from a State statute. Thus, under this section, three judges would not be required in a *Hadley*-type case.

³ It should be noted that another bill, S. 782, would remove the requirement for three-judge courts and direct appeal in cases under the Expediting Act.

⁴ For further discussion of when a body exercises "governmental powers" requiring application of the one-man, one-vote principle, see *Salzer Land Co. v. Tulare Lake Water Dist.*, 410 U.S. — (Mar. 20, 1973); *Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist.*, 410 U.S. — (Mar. 20, 1973).

Section 5 of the bill adds a new subsection (b) to section 2403 of title 28, United States Code. The present section 2403 gives the United States the right to intervene in any action challenging the constitutionality of a Federal statute when the United States is not a party. The new subsection (b) provides for a similar right of intervention on the part of a State. In any instance where a State is not a party in a case challenging the constitutionality of any statute of that State affecting the public interest, notice must be given to the attorney general of the State and the State is permitted to intervene.

COMMENTS FROM STATE ATTORNEYS GENERAL

Since the proposals in this bill would be of concern to the States, the committee deemed it advisable to ascertain to what extent the chief legal officers of the States were interested in the revision of jurisdiction of three-judge courts contained in this bill. Accordingly, copies of a virtually identical bill, S. 3653 (92d Cong.), together with a brief explanation were sent to all 50 State attorneys general in July of 1972. Only 12 State attorneys general replied: ⁵ three generally accepted the bill (Alaska, Minn. and N.J.); one indicated concern if the bill expanded the jurisdiction of the Federal courts, but was reassured that the bill was procedural only and would not affect jurisdiction in any way (Iowa); three suggested that this bill was of no value because it would not get at the problem which they viewed as central—overly broad Federal jurisdiction (Ariz., Ga., and Ind.); one suggested that action should be taken on habeas corpus actions (Wyo.); two others suggested that three-judge courts should be retained because a court of three judges signifies the seriousness of the case and lessens the strain between the States and the Federal Government (Miss. and R.I.); and five attorneys general were particularly concerned about the method of appeal in such cases and problems relating to the granting or denial of a stay of an injunction (Minn., N.J., N.Y., R.I., and Tex.). The other 38 attorneys general did not reply to the committee's inquiry.

APPEAL TO THE SUPREME COURT

One consideration of the committee in proposing the elimination of three-judge courts was assurance that both individual litigants and the States would have adequate means of appeal. Under the proposals of this bill, cases no longer requiring a three-judge court would be appealed to the circuit court of appeals and subsequently, to the Supreme Court. A 1970 Judicial Conference proposal ⁶ on three-judge courts, in contrast, would have provided for direct appeal to the Supreme Court from these decisions if the attorney general of the government involved files a statement that immediate consideration of the appeal by the Supreme Court is of general public importance. If such a certificate was filed, the Supreme Court would have discretion either to hear and decide the case or to refer it for decision to the appropriate court of appeals.

⁵ Additionally, the Solicitor General for the Commonwealth of Puerto Rico reported his opposition to the bill.

⁶ They have since endorsed legislation identical to this bill, S. 3653 (92d Cong.). See the communication in this report.

However, the Judicial Conference proposal would have added to the burden of the Supreme Court the additional task of giving immediate attention to these cases, not to decide them on the merits, but merely to decide whether to grant an expedited review. Analysis of the disposition of three-judge court cases on appeal by the Supreme Court under the present system shows that this would be an unnecessary and unwise proposal. The majority of such cases never receive full argument before the Supreme Court. In the 1971 term of the Court, there were 109 three-judge court cases appealed, but in only 29 cases was oral argument heard, and only 24 opinions rendered. (Cases involving the same or very similar issues may be decided in the same opinion.) There were per curiam opinions in nine cases and all of the remainder of the 109 cases were either affirmed or reversed without opinion, or dismissed.⁷

It is clear that only the most significant cases are given full oral argument and opinion by the Court. Since a substantial number of three-judge court cases are not of such significance as to be given full consideration by the Court, it would seem fair to assume that most of those cases would not be of such a nature so as to warrant bypassing the court of appeals.

In light of this analysis of Supreme Court practice, the direct-appeal-by-certification device seems to be an unnecessary complication. Swift judicial review can be had in cases where the public interest requires it. For example, in an important steel strike case, the judgment of the district court was entered October 21, the case was decided by the court of appeals October 27, and the decision from the Supreme Court came on November 7. *United Steelworkers of America v. U.S.* 361 U.S. 39 (1959). Even greater expedition is possible, when this is necessary, because of the power of the Supreme Court under 28 U.S.C. 1254(1) to grant certiorari before judgment in the court of appeals and thus, in effect, allow direct review. Although it has been suggested that the Supreme Court rarely uses its power under section 1254, the fact is that many cases are brought today under three-judge court statutes where there is a direct right of appeal to the Supreme Court, thus limiting the number of cases where the Supreme Court might be requested to grant such an expedited hearing. The Committee expects that the Supreme Court will give early consideration to those cases which, on the basis of equitable principles, warrant immediate consideration, and has, thus, concluded that direct appeal by certification is not needed.

One other concern of the committee was the review of the granting, or the denial, of a stay of an injunction by a district court. The committee believes that with appeals of these cases clearly vested in the 11 Circuit Courts of Appeal, they will be more able than the Supreme Court to carefully consider and evaluate requests for a stay in these cases and that ample procedures exist to act effectively in these cases. See, *3 Barron and Holtzoff* (Wright ed.) §§ 1371-78.

⁷ The statistics on the disposition of three-judge court cases were furnished to the Subcommittee on Improvements in Judicial Machinery by the Clerk of the Supreme Court.

COST

It is not anticipated that this legislation will effect any increase in the expenditures for the Federal judiciary.

COMMITTEE ACTION

The committee met on May 22, 1973, to consider S. 271 and voted to favorably report the bill, without amendment.

COMMUNICATIONS

ADMINISTRATIVE OFFICE OF THE U.S. COURTS,
Washington, D.C., October 30, 1972.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This refers further to your letter of June 21, 1972, transmitting for study and report S. 3653, a bill "To improve judicial machinery by amending the requirement for a three-judge court in certain cases and for other purposes."

The Judicial Conference of the United States, at its session on October 26-27, 1972, considered the provisions of S. 3653 and voted its approval thereof.

Sincerely,

WILLIAM E. FOLEY,
Deputy Director.

SECTION-BY-SECTION ANALYSIS

Section 1.—Section 1 repeals section 2281 of title 28, which requires the convening of a three-judge court in any case seeking an interlocutory or permanent injunction restraining enforcement of any State statute on the ground of unconstitutionality. Since the purpose of this bill is to eliminate the requirement for a three-judge court in such case, section 2281 is repealed.

Section 2.—Section 2 repeals section 2282 of title 28, United States Code. This section requires a convening of a special three-judge court in any case seeking an interlocutory or permanent injunction restraining the enforcement of any act of Congress for repugnance to the Constitution of the United States. This section is repealed since it is the purpose of this bill to provide that such cases shall initially be heard and decided by a single district court judge.

Section 3.—Section 3 amends section 2284 of title 28 by stating expressly the cases requiring a three-judge court and by clarifying the method in which such courts are composed and the procedure used by such courts.

Subsection (a). Subsection (a) provides that a three-judge court shall be convened when required by act of Congress. Several congressional acts either require or permit a three-judge court. A three-judge court is required in cases reviewing certain orders of the Interstate Commerce Commission, 28 U.S.C. section 2325, and the review of cases

under section 2 of the Expediting Act, 15 U.S.C. section 29, 49 U.S.C. section 45.⁸ It should be noted that legislation to eliminate review by three-judge courts of ICC orders has been considered in previous sessions of Congress. See S. 3597, 91st Congress, second session. A three-judge court is also mandatory without request by anyone in suits under sections 4(a), 5(a), and 10 of the Voting Rights Act of 1965, 42 U.S.C. sections 1973b(a), 1973c, and 1973h(c). The Attorney General alone may request a three-judge court in actions under the public accommodations and equal employment provisions of the Civil Rights Act of 1964, 42 U.S.C. sections 2000a-5(b), 2000e-6(b). Either the Attorney General or the defendant may request a three-judge court in actions under the voting provisions of the 1964 Civil Rights Act, 42 U.S.C. section 1971g.

Subsection (a) would also continue the requirement for a three-judge court in cases challenging the constitutionality of any statute apportioning congressional districts or apportioning any statewide legislative body. The use of the term "any statewide legislative body" is intended merely to reflect the application of the constitutional principles of representation announced in *Reynolds v. Sims*, 377 U.S. 533 (1964), to elected bodies which exercise "general governmental powers over the entire area served by the body." *Avery v. Midland County*, 390 U.S. 474, 485 (1968) (county commissioners); *Hadley v. Junior College District*, 397 U.S. 50 (1970) (board of trustees of school district). Where such a body exercises its powers over the entire State, this section requires that three judges hear cases challenging apportionment of its membership. Apportionment of a body which deals only with matters of local concern and representative of a county, district, or city, would not require three judges, even though the body derives its power from a State statute. Thus, under this section, three judges would not be required in a *Hadley* type case.

Subsection (b). Subsection (b) recodifies § 2284 of title 28, United States Code, and clarifies some problems which have arisen under the present section.

Clause (b) (1). This clause is similar to 28 U.S.C. § 2284(1) in providing for the organization and composition of three-judge courts. It recognizes that the judge to whom the request is made must determine for himself whether a three-judge court is required before notifying the chief judge of the circuit. Thus he must decide whether the case is one for three judges within the scope of subsection (a) of this section. Under present law there is some confusion as to whether this judgment is to be made by the district court or the chief judge of the Circuit Court of Appeals. See *ALI Study*, 327-329 (1969).

Under these proposals, therefore, the role of the chief judge is entirely ministerial. He has immediately at hand information as to which circuit judge or judges of his circuit would be available for three-judge court duty. It is therefore desirable that he designate the judges to serve on the court, rather than leaving this to the district judge, as was originally done under the 1911 and 1913 statutes. It is not desirable that he pass judgment on whether three judges are

⁸ As previously pointed out, a separate bill, S. 782, would eliminate the requirement for three-judge courts in these cases.

required. This can be more authoritatively done by the three-judge court itself after it has been constituted.

Thus, in clause (1) of this subsection, unlike the present statute, 28 U.S.C. § 2284(1), there is a deliberate lack of parallelism. Clause (1) of this bill says that the district judge "shall unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges * * *." Since the district judge is expressly given power of decision, and since the chief judge is not, there should be no possibility of misconstruction of this clause.

It is contemplated under this proposal that the court of appeals rather than the Supreme Court should review the decision of the district judge denying the appointment of a three-judge court. See *ALI Study*, 331-334 (1969). The Committee believes the language contained in the proposed clause will eliminate ambiguity and make the procedure clear. However, it also notes that since the category of cases requiring a hearing by a three-judge court is restricted by the proposals of this bill, such issues should seldom arise in the future.

Clause (b) (2). The provision for notice to the Governor and attorney general of the State is taken from 28 U.S.C. § 2284(2). The portion of that subsection dealing with notice to the Attorney General of the United States where an act of Congress or a Federal order is involved is omitted as unnecessary, since the United States is a party in almost all of the cases in which acts of Congress call for a three-judge court, and since 28 U.S.C. § 2403 makes adequate provisions for notice to the Attorney General when the constitutionality of Federal legislation is drawn into question in private litigation.

The second sentence of this clause is taken from 28 U.S.C. § 2284(4). This clause is obviously desirable "to allocate as many functions as possible to a single district judge, consistent with the statutory purpose." Note, 77 *Harvard Law Review* 299, 306 (1963); Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 *University Chicago Law Review* 1, 20-29 (1964); 28 U.S.C. § 2284(3). The other powers here given the single judge, or expressly denied him, are similar to those stated in § 2284(5).

Section 4.—This section merely changes the analysis of chapter 155 of title 28, United States Code, to conform with this bill.

Section 5.—This section amends § 2403 of title 28, United States Code, by making the present section a separate subsection "(a)." and by adding a new subsection (b). Subsection (b) is parallel to subsection (a) in that it provides that in any action in a court of the United States in which a State is not a party when the constitutionality of any statute of that State affecting the public interest is drawn into question, the court shall give notice of such fact to the attorney general of the State and shall permit the State to intervene in the case. This merely gives the State the same option to intervene in such cases. This presently given to the United States in cases involving Federal statutes.

Section 6.—This section amends item 2403 of the analysis of chapter 161 of title 28, United States Code, to conform to this bill.

Section 7.—This section provides that the act shall not apply to any action commenced on or before the date of enactment. It is merely

added to make clear that cases filed prior to the enactment of this bill shall proceed to final disposition under the law existing on the date they were commenced.

CHANGES IN EXISTING LAW

In compliance with subsection 4 of rule XXIX of the Standing Rules of the Senate, changes in existing law made by the bill as reported are shown as follows (existing law is shown in roman, matter repealed enclosed in black brackets, and new matter is printed in italic):

CHAPTER 155—INJUNCTIONS; THREE-JUDGE COURTS

Sec.

2281. **[Injunction against enforcement of State statute; three-judge court required.]** *Repealed.*

2282. **[Injunction against enforcement of Federal statute; three-judge court required.]** *Repealed.*

2284. Three-judge court; *when required*; composition; procedure.

§ 2281. **[Injunction against enforcement of State statute; three-judge court required**

[An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.]
Repealed.

§ 2282. **[Injunction against enforcement of Federal statute; three-judge court required**

[An interlocutory or permanent injunction restraining the enforcement, operation, or execution of any act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.]
Repealed.

§ 2284. **Three-judge district court; when required; composition; procedure**

[In any action or proceeding required by act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

[(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

[(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least 5 days notice of the hearing shall be given to the Governor and attorney general of the State.

[If the action involves the enforcement, operation or execution of an act of Congress or an order of any department or agency of the United States, at least 5 days notice of the hearing shall be given to the Attorney General of the United States, to the U.S. attorney for the district, and to such other persons as may be defendants.

[Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

[(3) In any such case in which an application for an interlocutory injunction is made, the district judge to whom the application is made may at any time, grant a temporary restraining order to prevent irreparable damage. The order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the full court. It shall contain a specific finding, based upon evidence submitted to such judge and identified by reference thereto, that specified irreparable damage will result if the order is not granted.

[(4) In any such case the application shall be given precedence and assigned for a hearing at the earliest practicable day. Two judges must concur in granting the application.

[(5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment. The action of a single judge shall be reviewable by the full court at any time before final hearing.

[A district court of three judges shall, before final hearing, stay any action pending therein to enjoin, suspend, or restrain the enforcement or execution of a State statute or order thereunder, whenever it appears that a State court of competent jurisdiction has stayed proceedings under such statute or order pending the determination in such State court of an action to enforce the same. If the action in the State court is not prosecuted diligently and in good faith, the district court of three judges may vacate its stay after hearing upon 10 days notice served upon the attorney general of the State.]

(a) *A district court of three judges shall be convened when otherwise required by act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.*

(b) *In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:*

(1) *Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and*

the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action is against a State, or officer or agency thereof, at least 5 days notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State. The hearing shall be given precedence and held at the earliest practicable day.

(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.

CHAPTER 161—UNITED STATES AS A PARTY GENERALLY

* * * * *

See

2403. Intervention by United States or a State; constitutional question.

* * * * *

§ 2403. Intervention by United States or a State; constitutional question

(a) * * *

(b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality.