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# IMPROVING JUDICIAL ADMINISTRATION BY REPEALING THE REQUIREMENTS FOR THREE-JUDGE DISTRICT COURTS

MICHAEL J. MULLEN\*

The measure that I will be discussing is Senate Bill 271;<sup>1</sup> it passed the Senate in the last session of Congress on June 14, 1973, and is now pending in the House Judiciary Committee. This bill would repeal the requirement for special three-judge district courts in most cases where they are now required, that is, in actions that seek to enjoin the enforcement of a state law on the ground that it is unconstitutional.

Before discussing the specific provisions of this legislation, I would like to briefly go over the history and the development of these three-judge courts. As I was looking into this matter yesterday and contemplating this little talk, I went back over briefly some of the developments of our federal court system. Prior to 1801, there were no permanently established circuit courts of appeals as we know them today. There was only one judge assigned to each of the circuit courts, and he sat together on the cases that came before the circuit with a Justice of the Supreme Court, whenever he was riding the circuit, and one of the district judges from that circuit. In fact, it was not even until 1869 that Congress appointed full-time circuit judges. Prior to that time, the Justices of the Supreme Court would go out to the circuits and sit on with the district court judges in the cases that came before the circuit courts.

In 1891, however, significant reform came about under the Evarts Act<sup>2</sup> which created the circuit courts of appeals and called for the appointment of an additional circuit judge for each circuit. Even under this Act, however, district courts, as distinguished from the circuit courts of appeals,

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<sup>1</sup> S. 271, 93d Cong., 1st Sess. (1973).

<sup>2</sup> Ch. 517, 26 Stat. 826 (1891).

remained as trial courts for some important cases.

These judicial changes which took place in 1869 and 1891, really resulted from the tremendous population and economic explosion that followed the Civil War. The business of the Supreme Court became so great, and the number of cases that arose in the "old circuit courts" were so great that it was considered necessary to establish permanent intermediate courts of appeals to review the decisions of the district courts. This was done under the Evarts Act.

At the same time that this increasing number of cases arose in the federal courts, the great westward expansion of the country opened up the West and there was a great development of railroads as well as grain terminals in Minneapolis and Chicago. I think we all know that the rates charged by the railroads gave rise to furious political debate in the Midwestern state legislatures, and they, either directly through statutes or through establishing new railroad commissions, sought to control the rates that the railroads were able to charge. Interestingly enough, the most famous case probably in this area arose in Minnesota. The Minnesota Legislature tried to deal with the exorbitant rates charged by the railroad, but the day before the Minnesota law went into effect requiring a reduction of railroad rates, the shareholders of nine railroads brought suit in the federal courts to enjoin the state from enforcing its new law. One of the defendants was Edward T. Young, the Attorney General of Minnesota. This gave rise to the famous case of *Ex parte Young*.<sup>3</sup> The federal district court issued a temporary restraining order, and later a preliminary injunction granting the relief requested by the railroads to stop the enforcement of the Minnesota law.

The Supreme Court held that an injunction could be enforced against a state official since the injunction did not run against the sovereign, but rather it simply restricted an illegal act on the part of a state official. And it was held that if the state official was acting in an unconstitutional manner, he was no longer acting within his sovereign capacity, and therefore, the federal court was authorized to declare the particular action that he was taking unconstitutional and to hold him without power to take that action.

Following the decision in *Ex parte Young*, there were a number of cases that arose in the federal courts where new state laws, attempting to regulate railroads, were struck down. These decisions gave rise to considerable discussion in the Congress because of public agitation against them. In 1910, Congress chose a remedy, and that was to declare that cases seeking to enjoin the enforcement of a state law on the ground that it was unconstitutional, had to be heard before special three-judge district courts. Congress patterned these courts after three-judge courts which had been

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<sup>3</sup> 209 U.S. 123 (1907).

previously created to hear cases attempting to set aside orders of the Interstate Commerce Commission. It is interesting to observe just how these three-judge district courts came about. They were first authorized to hear certain antitrust cases of special importance under the Sherman Act.<sup>4</sup>

Remember that the Sherman Act was passed in 1890, and the Evarts Act, which created the circuit courts of appeals, was passed in 1891, and from the research that I have done, it appears that Congress was reluctant to assign a review of ICC cases to the newly created circuit courts of appeals, and therefore, they assigned review of the ICC cases to these special three-judge district courts. So, after the problem that arose when *Ex parte Young* came along, what were they going to do about cases seeking to enjoin state acts on the grounds that they are unconstitutional? Congress took an already established judicial mechanism, *viz.*, the three-judge district courts. That is how the situation evolved that cases seeking to enjoin state laws on the grounds they are unconstitutional are heard and tried before the three-judge district courts. That occurred in 1910, and basically, the three-judge court provisions continued without any great change, and without any great problems for the judiciary, until about 1963.

During that period, the Warren court, as you know, recognized many constitutional rights in ways that I think most of us recognize and accept as necessary and appropriate, but one of the side effects of these new constitutional rulings was the fact that the number of cases brought before the three-judge district courts rose significantly from a total of 36 cases in 1963 (excluding reapportionment cases, which are not affected by the bill presently before Congress) until in 1972 the number of these three-judge court cases had risen to 226. Now, everytime a three-judge court is requested by a party bringing an action, the district court judge has to ask the chief judge of the circuit court to authorize the empanelling of a three-judge district court. In addition to these constitutional cases, the ICC cases are still under three-judge courts (although another bill now before Congress would repeal the three-judge courts in these cases as well). The total number of three-judge court cases in 1972 was 310. It is a great problem for the chief judge of the circuit courts to be able to find enough judges, given the fact the circuit judges are assigned regularly to sit on the regular circuit panels, reviewing the decisions of the district courts; it is also difficult to find district court judges who don't have a trial set on their calendar. In other words, it is difficult to designate judges to hear three-judge court cases. In addition, of course, since these are injunctive actions, and some of them involve free speech questions concerning meetings that are going to arise on a date certain, it is very important to get a timely decision from the three-judge district court.

The result, of course, is that there is a tremendous burden on the chief

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<sup>4</sup> Ch. 647, 26 Stat. 209 (1890).

judge of the circuit to try and arrange to have three-judge cases heard and determined in a prompt and effective fashion. In addition, it means that a circuit judge who is assigned to one of these cases during the time that he should be sitting on a regular panel may have to travel to some town away from the place where the circuit hears its cases, and miss his turn to hear four or five cases regularly argued on appeal. Many three-judge court cases, a few years ago, only lasted one day. The constitutional litigation today, I think, has become much more sophisticated, and as a result, it is not unusual for three-judge court hearings, at least in some cases, to continue for a considerably longer time. It is not uncommon now to try and get the parties to stipulate to as much evidence as they can agree upon in order to shorten the hearing in these three-judge court cases, so that the judges can return to their regular duties.

There are other problems with the three-judge district courts. The statute that requires a three-judge district court is a jurisdictional requirement, and if either the district judge who requests the convening of a three-judge district court makes a mistake, or the chief judge of the circuit makes a mistake about whether a three-judge court is required, the whole case is or may be thrown out. In a case that arose in Texas, *Board of Regents v. The New Left Education Project*,<sup>5</sup> the state sought to place certain requirements on the editors of certain student publications. The state hired as its counsel Charles Wright, who is a well-known author on practice and procedure in the federal courts. After looking over the facts in the case, he decided a three-judge court was required and made a request to the district judge. The Chief Judge of the Fifth Circuit appointed a three-judge panel, which heard the case. Then the opinion was appealed to the Supreme Court, which vacated the judgment, holding that a three-judge court was not required. So all that effort really was somewhat futile; and as I mentioned, the state had as its counsel one of the most distinguished practitioners of federal practice and procedure, and yet he could not ascertain whether a three-judge court was required. The Supreme Court has held that all state statutes of general statewide application require a three-judge district court. In this particular case, the statute and its amplifying regulations applied to the University of Texas, but did not apply to every university in Texas; therefore, the Supreme Court held that a three-judge court was not required.

As you look through the reports of the three-judge court cases, there are numerous situations like this, where either a three-judge court has been required and it's later determined that it was not needed, or a case has not gone originally before a single judge and later the judgment has been vacated and the case remanded to be heard by a three-judge panel. There are other difficulties in interpreting the three-judge court statute. One is

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<sup>5</sup> 404 U.S. 541 (1972).

that the courts make a distinction between cases involving the constitutionality of a statute on its face and those in which the court determines that the statute is constitutional, but is being interpreted in an unconstitutional manner. The case law on that question, I would say, is somewhat gray.

Because of these difficulties, *viz.*, interpreting when a three-judge court is needed or not needed and the administrative burdens of assembling the judges to hear these three-judge court cases, the Judicial Conference of the United States, which is composed of the Chief Justice and the chief judges of the circuit courts, plus a district court representative, representative of each of the circuits, recommended to the Congress that the three-judge courts be generally abolished. Senator Burdick, Chairman of the Judicial Improvements Subcommittee, introduced legislation along the lines recommended by the Judicial Conference, Senate Bill S. 271. It passed the Senate Judiciary Committee unanimously and passed the Senate, and is now pending in the House.

It will eliminate the requirement for three-judge courts except where they are specifically required by an act of Congress, or in reapportionment cases. The judgment was that there is a great deal of leeway given to a court in a reapportionment case, and an appearance of fairness and fairness in fact must be assured. A decision by a single judge—a Republican judge or a Democratic judge—that might be questioned as politically motivated should be avoided. But otherwise, three-judge courts would be generally abolished. What benefits might flow from such a judicial reform? Since the cases would be tried before a single judge, there would not be the pressures that there are now which in essence force the parties into stipulating to perhaps more facts than they might otherwise be willing to if they thought they would have the opportunity for a fairly extensive representation before a single judge. As I mentioned, judges, because of the pressures of their other duties, try to get the parties to stipulate to a lot of the facts in three-judge cases. So, perhaps trying a case in the regular fashion before the district court judge may provide a greater opportunity to fully present all the evidentiary material that the party seeks to rely on.

Second, the circuit judges will no longer have to miss their regular turn sitting in panels where they already have lined up for argument four cases a day; they will not have to lose a day or two in travel and thus should be able to utilize their time more effectively.

The third effect of this reform would be to alternate the role of the Supreme Court. Under the present law, decisions of the three-judge courts are directly appealable to the Supreme Court. Many cases, not of general significance, may come to the Supreme Court on appeal at the present time. If the cases are heard before a single district judge and go to the court of appeals, perhaps some cases would filter out before they reach the Supreme Court. I think, in 1972, there were about 109 three-judge court cases on appeal to the Supreme Court. The Court heard argument in only 29 of

those cases, so the Supreme Court, at least, did not feel that all of them merited full consideration.

I think the sponsors of this legislation, and those on the Judicial Conference, who played a role in its development, still feel that the important cases will reach the Supreme Court, and will receive for review all arguments and opinions, but some of the cases may be filtered out along the way. I recall reading about one three-judge court case involving an injunction to enjoin a Minnesota statute that required all those riding motorcycles to wear helmets. I would think that one district court judge could probably handle such a case on short order.

So I think those are the reasons that have led the Congress to propose this legislation, and the reasons which I just mentioned are some of the beneficial consequences that the Congress thinks might flow from eliminating the general requirement for three-judge district courts.