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FOREWORD: THE THREE-JUDGE COURT
AND DIRECT APPEALS TO THE
SECOND CIRCUIT

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Three-judge courts as an institution are under considerable pressure. Increasing federal court business¹ coupled, perhaps, with less fear that a single judge's enjoining a state statute that is unconstitutional might create a constitutional crisis in a federal system,² have led distinguished bodies,³ commentators,⁴ judges,⁵ and now the United States Senate⁶ alike to call for the partial abolition and modification of the requirements in 28 U.S.C. § 2281 that:

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.

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¹ See H. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 50 (1973) [hereinafter cited as FRIENDLY].

² REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 78 (1970).

³ *Id.* at 78-9; REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT 28-9 (1972) [hereinafter cited as STUDY GROUP].

⁴ Ammerman, *Three-Judge Courts: See How They Run*, 52 F.R.D. 293, 304 (1970); *Hearings on S. 1876 Before the Subcomm. on Improvement in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 773 (1972) (statement of C. Wright).

⁵ Statement of Chief Justice Burger, *State of the Judiciary*, 41 U.S.L.W. 2094 (Aug. 22, 1972); FRIENDLY, *supra* note 1.

⁶ S. 271, 93d Cong., 1st Sess. (1973), passed by the Senate, 119 CONG. REC. 1114 (daily ed. June 14, 1973), and now under consideration by a subcommittee of the House Judiciary Committee.

The same holds true, perhaps to a lesser degree, as to the requirement of a three-judge court in respect to injunctions under unconstitutional federal statutes, 28 U.S.C. § 2282.⁷

As the Report of the Study Group on the Case Load of the Supreme Court pointed out, the concomitant of 28 U.S.C. §§ 2281 and 2282 is direct appeal to the Supreme Court, 28 U.S.C. § 1253, with added burdens on that Court, particularly in light of the fact that such appeals are *not* discretionary. This burden is not made any the lesser by the fact that three-judge courts are particularly ill-suited to the taking of evidence, so that the record in the Supreme Court is often inadequate.⁸ The problem of waste of judicial time has exacerbated with the rapid increase, particularly perhaps in § 1983 actions, of actions calling for the convening of a three-judge court. Omitting reference to the figures for direct review of I.C.C. orders under the perfectly ridiculous set of statutes⁹ calling therefore, three-judge court hearings the country over have increased from 62 in fiscal 1963 to 268 in fiscal 1973.¹⁰ The Second Circuit has at least its share: the judges, circuit and district alike, from Connecticut will not be surprised to learn that the Nutmeg State led the country in fiscal 1973 with 22 of these hydra-headed monsters, surpassing New York State's four-district total of 18 and Vermont's 5.¹¹

As long ago as *Phillips v. United States*,¹² Justice Frankfurter writing for the Court said, in reference to § 2281's predecessor, after calling attention to the "serious drain upon the federal judicial system,"¹³ that the procedure is not "a measure of broad social policy to be construed with great liberality, but . . . an enactment technical in the strict sense of the term and to be applied as such."¹⁴ Baron Parke himself would be proud of the mysterious, highly esoteric flow of decisions in the wake of this astute comment by Mr. Justice Frankfurter, one that has basically gone unheeded in the halls of Congress until 1973. *Gunn v. Committee to End the War in Vietnam*¹⁵ and *Board of*

⁷ Section 2282 reads as follows:

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.

⁸ Cf. *Askew v. Hargrave*, 401 U.S. 476, 478-79 (1971) (per curiam).

⁹ 15 U.S.C. §§ 28, 29; 28 U.S.C. § 2325; 49 U.S.C. §§ 44, 45.

¹⁰ ANNUAL REP. DIR. ADMIN. OFF. U.S. COURTS II-40 (1973).

¹¹ *Id.* at II-41.

¹² 312 U.S. 246 (1941).

¹³ *Id.* at 250.

¹⁴ *Id.* at 251.

¹⁵ 399 U.S. 383 (1970).

*Regents of the University of Texas System v. New Left Education Project*¹⁶ are two cases cited by the Study Group¹⁷ as indicating how arcane the three-judge art really is. There are others.

Well, by no means the least qualification to the three-judge court requirement in §§ 2281 and 2282 is that if injunctive relief is *not* sought, and only a declaration of unconstitutionality obtained, one judge may act alone, with concomitant direct appeal to the court of appeals.¹⁸ This stated as a rule is simple enough. It does not answer such questions as when is there “an order granting or denying . . . an interlocutory or permanent injunction” or when only a declaration of unconstitutionality is made, much less whether a given order granting the declaration but not referring to the injunctive prayer is final, or how a court can declare against some parties (*e.g.*, state’s attorneys) but enjoin no one, with the result that such a declaration could properly be unheeded by others and the declaration unenforceable as such.

Some of these questions were met in two recent Second Circuit cases, with varying results, *Thoms v. Heffernan*¹⁹ and *Nieves v. Oswald*.²⁰ In *Thoms*, a three-judge court had declared a Connecticut flag misuse statute unconstitutional.²¹ In doing so, however, the district court neither expressly granted nor denied the injunctive relief sought by the prevailing plaintiff. Chief Judge Blumenfeld, writing for the 2-1 majority, said, “We have no reason to believe defendants will continue to enforce [the Connecticut statute] upon notice of this decision; accordingly, we forbear to enter an injunction restraining them from enforcing it.”²² The court of appeals majority construed this determination of the district court “as merely a forbearance” rather than the granting or denial of injunctive relief; it therefore took jurisdiction of the appeal, rather than construing it as a denial (which would have required appeal to the Supreme Court directly). As the majority pointed out, however, if any of the defendants below (or indeed any other police chief or state’s attorney unnamed as a party) had sought to enforce the statute, the three-judge court would have had to grant injunctive relief under its declaration of unconstitutionality and the appeal to the court of appeals would thereby have been mooted. But,

¹⁶ 404 U.S. 541 (1972).

¹⁷ STUDY GROUP, *supra* note 3, at 29.

¹⁸ *Mitchell v. Donovan*, 398 U.S. 427, 430 (1970) (per curiam); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

¹⁹ 473 F.2d 478 (2d Cir.), *petition for cert. filed*, 41 U.S.L.W. 3555 (U.S. Apr. 19, 1973) (No. 72-1359).

²⁰ 477 F.2d 1109 (1973).

²¹ *Thoms v. Smith*, 334 F. Supp. 1203 (D. Conn. 1971).

²² *Id.* at 1211.

with the Second Circuit's previous ruling that, on the pledge of the prosecutor to respect the three-judge district court's ruling pending appeal, the omission to grant injunctive relief by the district court permitted appeal to the court of appeals, *Long Island Vietnam Moratorium Committee v. Cahn*,²³ and in the light of the admonitions of *Phillips, Gunn and Goldstein v. Cox*,²⁴ the majority held that appeal lay directly to the court of appeals. The majority distinguished *Abele v. Markle*,²⁵ where the court of appeals remanded²⁶ for reconsideration of the injunctive relief question, on the basis that the two judge majority in the district court there had disagreed upon the question of the issuance of injunctive relief.

Circuit Judge Timbers wrote one of his typically strong dissents, calling for a halt to "the charade by which a three-judge district court, under the gloss of forbear[ing] to enter an injunction, can determine the court to which it sends its appellate business."²⁷ He pointed out that the only basis for three-judge jurisdiction in the first instance was the request for injunctive relief.²⁸ And he considered that the "forbearance" was the equivalent of a denial. He likened the case to his own *Lynch v. Household Finance Corp.*,²⁹ where the Supreme Court considered it had jurisdiction on a direct appeal when "all relief sought by plaintiffs" was denied. He felt the case of *Abele v. Markle* on all fours, and that the proper course was to remand for a determination on the issue of injunctive relief.³⁰ While anyone's guesses in the three-judge court field, as any other, are subject to correction by a higher authority, with all due respect to Brother Timbers, one fails to see how *Lynch* has any bearing on the problem, since there *all* relief sought had been denied, while here the declaration of unconstitutionality sought was granted. On the other hand, it is obvious that *Long Island Moratorium Committee* and *Abele v. Markle* present two different alternatives for action by a court of appeals in a *Thoms* situation. Which option is chosen is basically a matter of policy: is it better to construe the three-judge court statute technically and narrowly or is it preferable to require the three-judge district court to take a stand on the option of injunctive relief? The choice of the *Thoms* majority is open to the criticism that action

²³ 437 F.2d 344 (2d Cir.), *cert. denied*, 400 U.S. 956 (1970).

²⁴ 396 U.S. 471, 478 (1970) (the Supreme Court's jurisdiction on appeals from three-judge courts is to be "narrowly construed").

²⁵ 342 F. Supp. 800 (D. Conn. 1972).

²⁶ Docket No. MR-5241 (2d Cir., May 9, 1972) (*per curiam*).

²⁷ 473 F.2d at 487.

²⁸ *Id.*

²⁹ 405 U.S. 538, 541 n.5 (1972), *reversing* 318 F. Supp. 1111 (D. Conn. 1970) (Timbers, J.).

³⁰ 473 F.2d at 488.

by parties beyond the control of the court of appeals may moot its jurisdiction, as the majority recognized, as well as the complaint of Judge Timbers that too much leeway was being given to the three-judge court to determine the route of appeal from its own decision. On the other hand, Judge Timbers' dissent makes it that much harder on the Supreme Court, fails to give credence to the assumption on the part of a local three-judge court that its edict will be followed by state officials without the necessity of a formal injunction (a belief apparently justified in *Thoms*), and hence fails to allow any play for a little "mutual" comity in the federal system, whereby each side recognizes the defects in the anachronistic procedure which have been outlined above. An argument could be made that by Judge Timbers' rigid enforcement of the rules, the evils of the procedure could be more directly pointed out; the argument the other way is that as long as we have the procedural evil we might as well make the best of it. Since the author of this comment wrote the majority opinion in *Thoms* it is probably not too difficult to tell which option he believed preferable. He would be the first to concede, however, that the decision could just as easily have gone the other, or Judge Timbers', way on this point.

In *Nieves v. Oswald*, Judge Timbers had another go at the same problem, this time with Judge Feinberg writing for the unanimous panel, also including Judge Mulligan. That suit was one by inmates of Attica subject to criminal charges in connection with the Attica riot to declare the New York state administrative regulations governing prison disciplinary hearings unconstitutional. It also sought injunctive relief. Chief Judge Henderson, acting as a single judge below, denied all of the plaintiffs' claims except for granting the plaintiff class limited rights to counsel (to protect their fifth amendment rights) as to which he ordered injunctive relief. Following submission of briefs in the court of appeals (in which plaintiffs urged and defendants opposed the invocation of the three-judge court procedure), plaintiffs moved in the court of appeals for leave to withdraw their prayer for injunctive relief. Judge Feinberg pointed out that if such a motion had been made and granted in the district court, there would have been no problem, citing *Rosario v. Rockefeller*.³¹ He went on, however, to say that resolution of district court jurisdiction could not "be so easily manipulated after submission of an appeal," citing in a footnote Judge Timbers' dissent in *Thoms*.³² Adding that the limited injunctive relief granted by the district judge

³¹ 458 F.2d 649, 651-52 n.2 (2d Cir. 1972), *aff'd*, 410 U.S. 752 (1973).

³² 477 F.2d at 1115-16 & n.16, *citing* *Thoms v. Heffernan*, 473 F.2d at 487-88 (Timbers, J., dissenting).

would, if plaintiffs' prayer were granted, "also fall away,"⁸³ the court said that a remand to the district court was "the sensible course" in any event. It denied the plaintiffs' motion, without prejudice, however, to renewal before the district judge upon remand. What happened, of course, was that the motion was renewed after remand, an order was entered granting it, the State cooperated by stipulating to a stay of its disciplinary hearings pending appeal, and the case has now been reargued before the court of appeals on the merits and is *sub judice*. The state authorities, as in *Thoms*, apparently thought it wiser to have the matter heard in the court of appeals than to take the Supreme Court route.

One is tempted to think that the panel in *Nieves* was entirely correct in doing what it did, that is, remanding without prejudice to the renewal of the plaintiffs' motion to amend that it denied; to permit *the initial determination* whether a three-judge court is to be invoked to be made by the parties after briefing of an appeal from a single judge's decision is going quite far, further surely than the *Thoms* majority had to go. On the other hand, in *Nieves* a waste of quite a little time occurred, despite the appeal being expedited, since the original appeal was heard on February 21 and decided on April 20 and after remand the case was not heard in the court of appeals until July 19. And not a little effort was spent by the original panel on appeal discussing the "substantiality" of the question for three-judge court consideration; I purposely do not say time "wasted" since the panel's discussion of this question and particularly the applicability of *Sostre v. McGinnis*⁸⁴ is a very enlightening one.⁸⁵ In sum, however, one must agree with the panel that in the *Nieves* situation the even greater loss of time that might have occurred had the letter of § 2281 not been adhered to in the first instance, and the case gone to the Supreme Court only to result in a hearing anew by a three-judge district court,⁸⁶ justified a remand there. On remand, the State's accession to a stay, coupled with the plaintiffs' dropping of the prayer for injunctive relief, in effect enabled the parties in a one-judge district court milieu to accomplish what the parties in a three-judge district court situation did in *Thoms*. Thus in both cases, the morass and mystery, if not miasma, that the three-judge court procedure has become, was avoided by enlightened

⁸³ 477 F.2d at 1116.

⁸⁴ 442 F.2d 178 (2d Cir. 1971), *cert. denied*, 404 U.S. 1049 (1972).

⁸⁵ *Nieves v. Oswald*, 477 F.2d at 1113-14.

⁸⁶ *See, e.g.*, *Goosby v. Osser*, 409 U.S. 512 (1973); *Schneider v. Rusk*, 372 U.S. 224 (1963) (*per curiam*). Both of these cases were cited by Judge Feinberg in *Nieves*, 477 F.2d at 1115.

parties and judges attempting, at an appropriate level, to work their way around it. Abolition of the procedure as called for in the Senate Bill³⁷ is, however, a consummation devoutly to be wished. While the fine ratiocination and enlightening discussions of procedural niceties involved in a *Thoms v. Heffernan* or a *Nieves v. Oswald* may be missed by some, those of us in the federal courts who would rather get down to the substantive business at hand, of which we have enough, will shed no tears at the demise of three-judge courts. I suspect that lawyers bent on obtaining prompt and proper rulings on constitutional issues with adequate factual records will not either.

³⁷ S. 271, 93d Cong., 1st Sess. (1973), would repeal §§ 2281 & 2282, but would permit the procedure to be invoked "when otherwise required by Act of Congress" or in an apportionment case. Direct appeal to the Supreme Court is retained, however.