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can be reviewed directly by the Court. While this approach is not in accord with the original congressional desire to have federal decisions invalidating state statutes reviewed expeditiously by the Court, a restrictive interpretation seems justified in order to keep the Supreme Court's docket within manageable proportions. The long-term solution lies in revision of the statutory provisions governing three-judge courts.

NATURE OF SUBSTANTIAL QUESTION REQUIRED FOR THREE-JUDGE DISTRICT COURT

Nieves v. Oswald

A suit brought in a federal court to enjoin the enforcement of a state statute, administrative order, or regulation which is of state-wide application, must be decided by a district court of three judges.[1] The single district judge who receives such a complaint and motion for a three-judge court must determine whether a substantial federal question exists thereby warranting the convocation of a three-judge district court.[2] The statutory scheme authorizing the three-judge district court, and the accompanying provisions governing appellate review,[3] have been the source of endless jurisdictional headaches for both judges and litigants.[4]

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1 28 U.S.C. § 2281 (1970). Three-judge court legislation stems from a concern expressed in the early part of this century that single-judge district courts had abused their power to issue injunctions against state statutes, especially statutes regulating transportation and industry. Goldstein v. Cox, 396 U.S. 471, 476 (1970); Swift & Co. v. Wickham, 382 U.S. 111, 116 (1965); Note, *Federal Jurisdiction — Three-Judge Courts — The Recent Evolution in Jurisdiction and Appellate Review*, 61 MICH. L. REV. 1528, 1529 (1963); Note, *The Three-Judge Federal Court in Constitutional Litigation: A Procedural Anachronism*, 27 U. CHI. L. REV. 555, 556 (1960). There was a feeling that federal judges had "run wild" in their issuance of injunctions against state legislation. Note, *The Three-Judge Court and Appellate Review*, 49 U. VA. L. REV. 538, 539 (1963).

> The purpose of § 2281 is "to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme . . . by issuance of a broad injunctive order". . . .

Moody v. Flowers, 387 U.S. 97 (1967), *quoting* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 154 (1962).

In providing for three-judge courts, Congress acted to protect and benefit the interests of the states. Indeed, it was thought that parties attacking state enactments were overly protected. Currie, *The Three-Judge Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1, 77 (1964) [hereinafter cited as Currie]; Note, *The Three-Judge District Court: Scope and Procedure under Section 2281*, 77 HARV. L. REV. 299, 300 (1963). *See* Astro Cinema Corp. v. Mackell, 422 F.2d 293 (2d Cir. 1970).

2 Idlewild Bon Voyage Liquor Corp. v. Rohan, 289 F.2d 426, 428 (2d Cir. 1961); Bistrick v. Univ. of S. C., 319 F. Supp. 193, 194 (D.S.C. 1970); Glancy v. Parole Bd. of the Mich. Dep't of Corrections, 287 F. Supp. 34, 37 (W.D. Mich. 1968); Powell v. Workmen's Compensation Bd. of N.Y., 214 F. Supp. 283, 286 (S.D.N.Y.), *aff'd*, 327 F.2d 131 (2d Cir. 1963).

3 Either party can appeal directly to the Supreme Court from an order issued by a three-judge district court granting or denying injunctive relief. 28 U.S.C. § 1253 (1970).

4 One distinguished authority has said that:

In *Nieves v. Oswald*[5] the Second Circuit discussed the standards which must be met in order to invoke the jurisdiction of a three-judge district court and dealt with a novel situation — the attempted withdrawal of a request for an injunction in order to effectuate a review of the merits by the court of appeals. There, the Second Circuit reversed and remanded the decision of a single district court judge that the plaintiffs' claims did not present a constitutional issue of sufficient proportion to warrant the convening of a three-judge court.

The plaintiffs in *Nieves*, inmates of the Attica Correctional Facility, brought an action under section 1983 of the Civil Rights Act[6] against the prison officials[7] of Attica alleging infringement of their federal constitutional rights and seeking to enjoin the holding of disciplinary hearings unless certain procedural safeguards were implemented. The complaint alleged that the procedures followed in prison disciplinary proceedings were unconstitutional in that: (1) the plaintiffs "are denied the opportunity to present witnesses in their defense and to confront adverse witnesses;" (2) "the rules governing prisoner conduct are so vague as to be void;" (3) "the testimony is unsworn;" (4) "inmates are not given *Miranda*-type warnings even though statements made in disciplinary proceedings may be used in subsequent criminal prosecutions;" (5) "inmates are denied assistance of counsel;" (6) there is "inadequate notice of the rule allegedly violated . . . and of the precise facts underlying the charges;" (7) they "are denied a decision by an unbiased decision-maker and are not accorded a written opinion by the deciding tribunal based upon substantial evidence."[8] Since the complaint in essence sought an injunction against the enforcement of state regulations which controlled disciplinary proceedings in all state correctional facilities,[9] the plaintiffs requested the convocation of a three-judge district court.

The existing three-judge statutes are in a mess. No one really knows when three judges are required.

Currie, *supra* note 1, at 78.

See Note, *Federal Jurisdiction — Three-Judge Courts — The Recent Evolution in Jurisdiction and Appellate Review*, 61 MICH. L. REV. 1528, 1530 (1963); Note, *The Three-Judge Federal Court in Constitutional Litigation: A Procedural Anachronism*, 27 U. CHI. L. REV. 555, 571 (1960).

5 477 F.2d 1109 (1973). Judge Feinberg authored the majority opinion, with Judges Mulligan and Timbers comprising the rest of the unanimous panel. In his opinion, Judge Feinberg expressed his frustration with the three-judge court legislation and felt that *Nieves* was further proof of the need to revise or repeal these provisions. *Id.* at 1110-11.

6 42 U.S.C. § 1983 (1972).

7 Named as defendants were Russell Oswald, then Commissioner of Correctional Services and Vincent Mancusi, Superintendent of Attica.

8 477 F.2d at 1112.

9 *Id.* at 1111. By statute, the Commissioner of Correctional Services is responsible for

Judge Henderson, before whom the petition for a three-judge court was presented, denied plaintiffs' motion. In a decision handed down in June of 1972 he explained that plaintiffs' claims are based upon two distinct theories.[10] Primarily, "plaintiffs challenge the application of the regulations, which do not require the above-claimed procedural safeguards, to any serious disciplinary proceeding in state prisons."[11] Secondly, the plaintiffs challenged "the absence of these safeguards when inmates are threatened, as are plaintiffs here, with prison-disciplinary and subsequent criminal proceedings" since self-incrimination may be involved.[12] Judge Henderson concluded that neither theory necessitated the calling of a three-judge court. He explained that plaintiffs' constitutional claims under the first theory were insubstantial in light of the Second Circuit's decision in *Sostre v. McGinnis*[13] and that the plaintiffs' claims under the second theory were only of local and not statewide concern.[14]

Consequently, Judge Henderson, acting alone, heard the merits of the case and ruled against the plaintiffs on all issues except as to plaintiffs' right to counsel.[15] The plaintiffs appealed from both the

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all matters relating to the government, discipline and policing of state correctional institutions and the inmates confined therein. He has the power to make rules and regulations for the government and discipline of those facilities. N.Y. CORREC. LAW § 112 (McKinney Supp. 1973). The commissioner is authorized to ". . . provide for such measures as he may deem necessary for the safety, security and control of correctional facilities and the maintenance of order therein." N.Y. CORREC. LAW § 137 (McKinney Supp. 1973).

Under the regulations issued pursuant to statutory authority, if there is reasonable cause to believe that an inmate's actions have constituted a danger to life, health, security or property the superintendent of the institution may conduct a disciplinary proceeding. *Procedures for Implementing Standards of Inmate Behavior and for Granting Good Behavior Time Allowance* 7 N.Y.C.R.R. ch. V., § 253.1. This proceeding is instituted by the preparation of a formal charge by a prison employee. *Id.*, § 253.2. The employee designated to conduct the proceeding then must give a copy of the charge to the inmate and must investigate any factual claim that the inmate might make. *Id.*, § 253.3. At the commencement of the proceeding, the inmate must be advised of his right to be silent and must be warned that any statements he makes might be used against him in a criminal proceeding. The inmate is then interviewed and asked to either admit or deny the charge. If the inmate denies the charge or is silent, the presiding employee then must interview witnesses or other persons who can contribute relevant information. Written reports are deemed part of the record and may be considered without having them formally read into the record. Before ruling on the charge, the presiding officer must reinterview the inmate, advise him of the facts that tend to support the charge and give him the opportunity to comment or make any statement with regard to the charge against him. *Id.*, § 253.4.

[10] The Second Circuit agreed with Judge Henderson that the plaintiffs' constitutional claims were based upon two theories. 477 F.2d at 1112.

[11] *Id.*

[12] *Id.*

[13] 442 F.2d 178 (2d Cir. 1971).

[14] 477 F.2d at 1114. Judge Henderson viewed the matter as stemming from a specialized controversy, to wit, the Attica uprisings.

[15] *Id.* at 1111. Judge Henderson granted the plaintiffs limited injunctive relief. He required that plaintiffs be given the right to counsel at any part of the disciplinary pro-

denial of their request for a three-judge court and from the grant of only limited relief.[16]

The Second Circuit reversed the decision of the court below and held that a three-judge district court was required.

Citing *Idlewild Bon Voyage Liquor Corp. v. Epstein*[17] the court explained that in considering whether a given case should be heard and determined by a three-judge court, a federal judge must decide if a substantial constitutional issue is presented, if the complaint "at least formally" states grounds for equitable relief, and if the case otherwise fits within the three-judge court legislation.[18] In determining

ceedings which the inmates were allowed to attend and to be afforded an opportunity to meet with counsel prior to any proceeding.

[16] *Id.*

[17] 370 U.S. 713 (1962) (per curiam). The two main tests laid down in *Idlewild* were whether the constitutional issue is substantial and whether there would be a proper basis for the issuance of injunctive relief. *Id.* at 715. A denial of the application for a three-judge court based on the impropriety of equitable relief might rest on several grounds, *viz.*, that there was an adequate legal remedy, that administrative remedies provided by the state had not been exhausted, or that, the abstention doctrine should be applied. Note, *The Three-Judge District Court: Scope and Procedure under Section 2281*, 77 HARV. L. REV. 299, 309 (1963). Professor Currie believes that it is an open question whether a single-judge district court could consider such factors. Currie, *supra* note 1, at 25-26. The Second Circuit has ruled that only a three-judge court, not a single district judge, can consider whether the federal courts should abstain from the case under the equitable and comity principles enunciated in Younger v. Harris, 401 U.S. 37 (1971) and Samuels v. Mackell, 401 U.S. 66 (1971). Abele v. Markle, 452 F.2d 1121, 1125 (2d Cir. 1971), *vacated on other grounds*, 410 U.S. 951 (1973).

[18] 477 F.2d at 1111-12. *See* Abele v. Markle, 452 F.2d 1121, 1125-26 (2d Cir. 1971), *vacated on other grounds*, 410 U.S. 951 (1973); Green v. Board of Elections, 380 F.2d 445 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968). The statute governing the operation of the three-judge court requires that the district court judge who receives the application for an injunction against enforcement of a state statute "immediately notify" the chief judge of the circuit so that he might appoint two more members to the court. 28 U.S.C. § 2284 (1970).

Originally the Supreme Court held that district courts had no discretion and must convene a three-judge court if the application on its face involved a constitutional question. *Ex parte* Metropolitan Water Co., 220 U.S. 539, 545 (1911) (dictum). The Court stated:

> We find no expression of or implication that there was an intention on the part of Congress that the single justice or judge . . . need not call to his assistance two other judges. . . .

220 U.S. at 545.

Later the Court recognized that the statute only applied when a substantial constitutional question was raised. Stratton v. St. Louis S.W. Ry., 282 U.S. 10, 15 (1930). If the district court erred and failed to call a three-judge court when he should have, the Supreme Court could issue a writ of mandamus directing the lower court to call the special court. *Id.* at 16. However, the courts of appeals had no jurisdiction to review on the merits a decision by a single district judge on a matter that would have warranted the convening of a three-judge court and had no power to remand the case to the district judge with a direction to convene the three-judge court. *Id.*

In recent years the Court has moved so far as to allow the courts of appeals to review the determination of a single judge not to call the three-judge court. "*Stratton* does not stand for the broad proposition that a court of appeals is powerless even to give any guidance when a single judge has erroneously invaded the province of a three-judge court."

these questions, the single judge may only look to the allegations contained in the complaint.[19] Addressing itself to a consideration of the first criterion, whether a substantial constitutional issue was present, the Second Circuit stated that the issue presented may be clearly insubstantial because it is "obviously without merit" or because prior decisions so "foreclose the subject" as to prevent the question from being a matter of controversy.[20] However, prior decisions, although in point, do not necessarily preclude a substantial question.[21] A claim is insubstantial only if a prior decision renders the claim frivolous. A doubtful or questionable claim may be substantial enough to warrant the convening of a three-judge court.[22]

Thus, the initial question considered by the Second Circuit was whether plaintiffs' claim was "foreclosed" by the court's earlier holding in *Sostre v. McGinnis.* While Judge Henderson had found that the

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Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715-16 (1962) (per curiam). Therefore, the Court refused to issue a requested writ of mandamus. *Id.*

Just this year, the Court impliedly recognized that the court of appeals has jurisdiction to determine if the single judge erred in refusing to call a three-judge court, but, citing *Stratton,* ruled that a court of appeals could not reach the merits of the plaintiff's contentions. Goosby v. Osser, 409 U.S. 512, 522 n.8 (1973). The court in *Nieves* apparently contradicted *Goosby* when it stated that the Second Circuit could affirm a single-judge district court's decision "when we unhesitatingly agreed with the resolution of the merits of a case by the court below, and where convening a statutory district court seemed therefore patently wasteful." 477 F.2d at 1115. It is submitted that in light of *Goosby* a court of appeals so acting would be doing so without subject matter jurisdiction. The proper procedure in such a case would be to remand to a three-judge district court wherein a motion for summary judgment might be entertained. *Cf.* Abele v. Markle, 452 F.2d 1121 (2d Cir. 1971).

19 Goosby v. Osser, 409 U.S. 512, 521 n.7 (1933); *Ex parte* Poresky, 290 U.S. 30, 32 (1933) (per curiam).

20 477 F.2d at 1112. *See Ex parte* Poresky, 290 U.S. 30, 32 (1933) (per curiam); Levering & Garrigues Co. v. Morrin, 289 U.S. 103, 105-06 (1933).

21 Green v. Board of Elections, 380 F.2d 445, 448 (2d Cir. 1967), *cert. denied,* 389 U.S. 1048 (1968).

22 Goosby v. Osser, 409 U.S. 512, 518 (1973); *see* Bailey v. Patterson, 369 U.S. 31, 33 (1962) (per curiam). In *Bailey,* the plaintiffs sought to enforce their right to nonsegregated transportation, which was allegedly denied them under color of a state statute. The Court ruled that prior decisions had rendered any claim by the state that the statute was constitutional frivolous. *Id.*

Cases such as *Bailey* may serve to eliminate the need for three-judge courts to hear cases that are clearly noncontroversial. Currie, *supra* note 1 at 65-66. It is critical that some weeding out be done because, ordinarily, the only review of a three-judge court decision is in the Supreme Court, under 28 U.S.C. § 1253 (1970). Members of the Court already are complaining of the heavy burden put upon them by the three-judge court legislation. *See* 41 U.S.L.W. 2094-95 (August 22, 1972) (Chief Justice Burger reported as favoring total elimination of three-judge courts).

However, if a decision not to call a three-judge court is reversed on appeal, as in *Nieves,* the litigants must commence proceedings all over again. Such a procedure could result in considerable delay in resolving the case and considerable frustration of a state policy or program. Currie, *supra* note 1, at 65-66.

present allegations were "a mirror image" of those presented in *Sostre*, the Second Circuit disagreed.[23] In *Sostre*, the plaintiff argued that he should not be punished by having to forfeit earned "good time" credit or by losing the chance to earn such credit unless procedural safeguards substantially the same as those alleged in *Nieves* were provided.[24] The *Sostre* court rejected those claims, reversed a lower court's grant of injunctive relief, and stated that:

> All of the elements of due process recited by the district court are not necessary to the constitutionality of *every* disciplinary action taken against a prisoner.[25]

In *Nieves*, the Second Circuit correctly noted that, unlike *Sostre*, the plaintiff faced both disciplinary and criminal proceedings.[26] These plaintiffs would be unable to speak in their own defense in the disciplinary proceeding for fear they might incriminate themselves. Any incriminatory statement thus made could be used against them in the subsequent criminal prosecution. Moreover, since the hearing denied them the opportunity to call favorable witnesses and to cross-examine unfavorable ones, the plaintiffs would be unable to present any defense or explanation.[27]

Secondly, Judge Feinberg noted that a reading of the *Sostre* opinion also indicated that the court did not intend to settle the question of prisoners' rights once and for all. The *Sostre* court noted that in most cases where substantial punishments were to be placed upon the prisoner, due process would probably require that the prisoner be able to confront his accusers, be informed of the evidence against him, and be given a reasonable chance to explain his behavior.[28] Thus, the plaintiffs in *Nieves* might be entitled to greater procedural protection be-

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23 477 F.2d at 1112.

24 The district court ordered (and Sostre attempted to preserve the order on appeal) that Sostre could not lose his "good time" credit unless he had: written notice of the charges against him, a chance to confront adverse witnesses and present favorable ones, the right to the assistance of counsel, and a recorded hearing before a disinterested official who would issue a written decision. 442 F.2d at 195. These rights are similar to the ones asserted by Nieves, set out in the text accompanying note 6 *supra*.

25 442 F.2d at 203 (emphasis added).

26 447 F.2d at 1113-14.

27 *Id.* at 1114. It is conceivable that a *Nieves* plaintiff could be acquitted in the criminal proceedings, but suffer disciplinary punishment because of his fear of speaking out in his own defense.

28 442 F.2d at 198. The court further noted that:

> We do not thereby imply that discipline in New York prisons may be administered arbitrarily or capriciously. We would not lightly condone the absence of such basic safeguards against arbitrariness as adequate notice, an opportunity for the prisoner to reply to charges lodged against him, and a reasonable investigation into the relevant facts at least in cases of substantial discipline.

442 F.2d at 203.

cause they faced losing more than their "good time" credit. Relying on these contentions[29] the court concluded that the *Nieves* cause of action was not inescapably foreclosed.[30]

The next consideration for the court was whether the challenged statute was of "general and statewide application."[31] The Second Circuit ruled that the regulations did have sufficient statewide application.[32] The regulations were based on a grant of authority by the state legislature. Although the regulations would not affect every citizen of the state nor every prisoner in state institutions, they were deemed applicable to all state prisons.[33] The Second Circuit's reversal of the district court on this point was vital to the protection of prisoners' rights. Under the lower court's ruling, prisoners in state institutions could not obtain federal injunctions against even the most arbitrary actions of prison officials.[34]

The most interesting aspect of the *Nieves* decision stemmed from the plaintiffs' attempted withdrawal, on appeal, of their request for injunctive relief.[35] This tactic was intended to induce the court of

29 477 F.2d at 1113. The plaintiffs also claimed that their rights to cross-examination and confrontation were more essential than Sostre's because the plaintiffs in *Nieves* would be judged on the basis of testimony of adverse witnesses. The court expressed no opinion as to the validity of this contention. *Id.*

30 *Id.*

31 Moody v. Flowers, 387 U.S. 97, 101 (1967); Phillips v. United States, 312 U.S. 246, 251 (1941); Rorick v. Board of Comm'rs, 307 U.S. 208, 212 (1939); *Ex parte* Collins, 277 U.S. 565, 568 (1928).

A three-judge court may not decide requests for injunctive relief against the enforcement of local ordinances because the Supreme Court has interpreted section 2281 as providing ". . . procedural protection against an improvident state-wide doom by a federal court of a state's legislative policy." Kennedy v. Mendoza-Martinez, 372 U.S. 144, 154 (1963), *quoting* Phillips v. United States, 312 U.S. 246, 251 (1941).

But see 28 U.S.C. § 1254(2), which provides for appeal as of right by a party relying on a state statute held by a federal court of appeals to be unconstitutional. Although the wording of section 1254(2) is similar to that of section 2281, the term "state statute" under the former provision has been interpreted to include local ordinances. *See, e.g.*, United Gas Pipe Line Co. v. Ideal Cement Co., 369 U.S. 134 (1962) (case involved a city license code).

32 477 F.2d at 1114. *But see* Board of Regents v. New Left Educ. Project, 404 U.S. 541, 544 (1972), where it was held that regulations applicable to only a few colleges and universities in Texas' system of higher education were not regulations of statewide concern.

33 477 F.2d at 1114. The court's decision is bolstered by viewing the regulations as manifesting a state policy relating to the treatment of individuals confined in state penal institutions.

Nevertheless, it is interesting to note that the state in *Nieves* was willing to have a single federal judge rule on the merits of the case. *Id.* at 1115. In view of the fact that the state was the intended beneficiary of the three-judge court provisions, *see* note 1 *supra*, the court considered it paradoxical to order the convening of the three-judge court for the benefit of the plaintiffs. However, since *Nieves* satisfied the statutory requirements, the court ordered the convening of the special court to avoid further litigation in the Supreme Court because that would substantially delay a final resolution of the issue. *Id.* at 1115.

34 *Id.* The plaintiffs could of course attempt to obtain a federal declaratory judgment or decide to vindicate their rights through the state court system.

35 *Id.*

appeals to rule on the merits rather than remand to a three-judge district court. By withdrawing the prayer for injunction, the jurisdictional basis for the three-judge court would dissolve and the jurisdiction of the court of appeals would revive.[36] The court denied the motion, ruling that it did not want the question of jurisdiction to be so easy to manipulate.[37] It was also necessary to remand the case because a limited injunction had been granted, which the plaintiffs presumably did not want to lose.[38]

In *Jeannette Rankin Brigade v. Chief of the Capitol Police*,[39] the District of Columbia Circuit was faced with a similar problem. That court also refused to give effect to the attempted withdrawal, though on somewhat different grounds. The court in *Jeannette* reasoned that the case retained the same character it started with, since the issuance of a declaratory judgment by the court of appeals against the constitutionality of the statute involved would have a restraining effect similar to an injunction.[40]

Taken alone, *Nieves* presents a good discussion of the esoterica involved in the complex area of three-judge district court litigation. However, it is worthwhile to compare *Nieves* with another Second Circuit case, *Thoms v. Heffernan*.[41] The common thread running through these two cases is that both recognize the Supreme Court's legitimate concern with its growing caseload. Accordingly, both *Thoms* and *Nieves* express dissatisfaction with the current statutory scheme.[42] In *Thoms* the Second Circuit adopted the Supreme Court's willingness

36 A three-judge district court is necessary only when an injunction is sought against a state statute or administrative order. 28 U.S.C. § 2281 (1970). Appeals from single-judge district court decisions are to the courts of appeals. 28 U.S.C. § 1291 (1970). Judge Henderson had made a determination on the merits. By withdrawing their request for injunction, the plaintiffs decided to try to waive the error of the lower court in refusing to call a three-judge court and to appeal the decision on the merits directly.

37 477 F.2d at 1115.

38 *Id.* at 1115-16. Judge Henderson was able to issue an injunction because his ruling that no statewide policy was involved took the case out of section 2281.

If the motion to withdraw the request for injunctive relief had been granted, the plaintiffs would have lost what limited relief they did receive. The denial of the motion was without prejudice so that the plaintiffs could renew their motion to withdraw their prayer for injunctive relief on remand and then bring another appeal. If they decided not to renew their motion, Judge Henderson would then be required to convene a three-judge court.

39 421 F.2d 1090 (D.C. Cir. 1969), *on remand*, 342 F. Supp. 575 (D.D.C.), *aff'd mem.*, 409 U.S. 972 (1972).

40 *Id.* at 1094.

41 473 F.2d 478 (2d Cir. 1973). *See* p. 377, for in-depth treatment of *Thoms*.

42 In *Thoms* Judge Oakes stated "the anomalous situation we have here points up the illogic of the present three-judge court statutes." 473 F.2d at 480. Judge Feinberg, who wrote the opinion in *Nieves* commented "this litigation offers further proof, if such is needed, of the need for modification or repeal of the three-judge court statutory scheme." 477 F.2d at 1111.

to circumvent the three-judge court statutes by accepting a district court decision which precluded direct review. In contrast, the *Nieves* court followed the statute closely and ordered the special district court convened even though an appeal from the three-judge court would lie directly, as of right, to the Supreme Court.[43] The distinction lies in the inviolability of jurisdiction; in *Thoms*, the *district court* was permitted to influence the path of the litigation by the manner in which relief was fashioned, while in *Nieves*, a *party* was not permitted to do so. The lesson is clear: jurisdiction is a prerogative of courts, not litigants.

DISCLOSURE OF GRAND JURY TESTIMONY

In re Biaggi

The role of the grand jury in Anglo-American jurisprudence has been the subject of recent controversy.[1] The secrecy of grand jury testimony has presented the courts with the complex choice of disclosing the minutes or adhering to the long established policy of keeping grand jury testimony secret.[2] Disclosure of grand jury minutes

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[43] 477 F.2d 1109. Judge Feinberg stated:

> Nevertheless, though adherence to the letter of section 2281 (and judicial gloss thereon) may appear unduly formalized, and though it regrettably adds to the growing Supreme Court caseload, it may also forestall further delay that results from ultimately meaningless efforts, following disposition by a court of appeals, to obtain Supreme Court review. . . .

Id. at 1115.

[1] Bursey v. United States, 466 F.2d 1059 (9th Cir. 1972); Arrington v. United States, 350 F. Supp. 710 (E.D. Pa. 1972); People v. Talham, 41 App. Div. 2d 354, 342 N.Y.S.2d 921 (3d Dep't 1973).

[2] The custom of grand jury secrecy became fixed as a legal principle in England in 1681 in the Earl of Shaftesbury's Trial, 8 How. St. Tr. (33 Chars. 2) 759 (1681), when jurors refused to indict the Earl for "High Treason" although the charges had been asserted by the King's Counsel. The jurors demanded, and obtained, the right to interview witnesses in private, and, when they failed to indict, cited only their consciences as their reason for declining to do so. For a historical perspective of grand jury secrecy see Calkins, *The Fading Myth of Grand Jury Secrecy*, 1 JOHN MAR. J. PRAC. & PROC. 18 (1967); Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455 (1965); Sherry, *Grand Jury Minutes: The Unreasonable Rule of Secrecy*, 48 VA. L. REV. 668 (1962).

Even the Supreme Court has stated that the rule of secrecy is "indispensable." United States v. Johnson, 319 U.S. 503, 513 (1943). Courts consistently have stated the reasons for which, in their opinion, secrecy exists. Although the attitudes and reasons behind the cloak of secrecy are numerous and diverse, *see Comment, The Discovery and Production of Grand Jury Proceedings*, 19 MD. L. REV. 326 (1959), the following reasons most often have been quoted:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect the innocent accused