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Appellate Review Under the Expediting Act (International Business Machines Corp. v. United States)

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APPELLATE REVIEW UNDER THE EXPEDITING ACT

International Business Machines Corp. v. United States

Section 2 of the Expediting Act vests sole appellate jurisdiction in the Supreme Court over final judgments in civil antitrust cases initiated by the government.[1] When the Expediting Act was passed in 1903, it was designed to accelerate antitrust litigation.[2] Unfortunately, as evidenced by *International Business Machines Corp. v. United States*,[3] this goal has not been achieved.

Despite the Government's filing of the original complaint in *IBM* on January 17, 1969, a resolution of the merits has not yet been reached. The lack of progress is partially attributable to IBM's determination to obtain appellate review of a pretrial order and the inability of the Expediting Act to cope with this effort. In a private antitrust suit against IBM, brought by Control Data Corporation (CDC) and others in the federal district court in Minnesota, some 17 million documents had been ordered produced.[4] While their transmission to CDC was in progress, the Government, too, was engaged in discovery with respect to an action against IBM in the District Court for the Southern District of New York. Apparently impressed with the speed of the Minnesota program, the Government chose to abandon its independent discovery program and instead participate in the IBM-CDC exchange.[5]

Due to the unusual volume of material in issue,[6] IBM was concerned that certain privileged documents would fall into the Government's hands. Therefore, it was agreed that IBM would first excise any privileged matter from the microfilms already delivered to CDC and provide the Government with limited information concerning the edited documents.[7] To protect the heretofore unreleased material,

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1 15 U.S.C. § 29 (1970) provides:
In every civil action brought in any district court of the United States under any of said [antitrust] acts, wherein the United States is complainant, an appeal from the final judgment of the district court will lie only to the Supreme Court.

2 *See* Tidewater Oil Co. v. United States, 409 U.S. 151, 154-56 (1972).

3 471 F.2d 507 (2d Cir. 1972) (2-1), *rev'd on rehearing*, 480 F.2d 293 (2d Cir. 1973) (en banc) (4-2).

4 480 F.2d at 295.

5 471 F.2d at 510.

6 Judge Mulligan found it "mind-boggling to contemplate 17 million document pages which in bulk weigh 87 tons and would stretch from coast to coast." 471 F.2d at 523 (dissenting opinion).

7 The Government was supplied with a list showing the author, addresses, nature of the privilege, date, and file source of the documents edited from the microfilm. Most of the documents claimed to be privileged were of an attorney-client nature. 471 F.2d at 509.

IBM placed an "interceptor" at the point of microfilming to insure that no privileged matter was copied. Judge Neville of the District Court of Minnesota, concerned about delay, ordered the "interceptor" removed on condition that he "would thereafter brook no argument that the privilege had been waived [by IBM] merely because the document had been seen by CDC and perhaps copied."[8]

The Government moved in its own civil suit in the Southern District of New York for the production of the documents withheld by IBM claiming that delivery of the matter to CDC constituted a waiver of the attorney-client privilege.[9] Chief Judge Edelstein agreed and ordered IBM to release the documents.[10] Notwithstanding the bar of the Expediting Act, IBM appealed from the order and petitioned for a writ of mandamus before the Second Circuit.

A divided panel of the circuit, per Judge Moore, expressed dissatisfaction with the limitations on appellate review imposed by the Act and asserted jurisdiction over the appeal from the discovery order.[11] In departing from precedent,[12] the panel held that review was available either by appeal or by writ and reversed the district court's order. The panel was persuaded by IBM's contention that release of the documents pursuant to a "no waiver" agreement could not later be used to establish a waiver.[13]

Judge Mulligan dissented, challenging the existence of the alleged "no waiver" agreement.[14] In addition, his reading of the record

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8 Order *re* Claimed Waiver of Privilege, Control Data Corp. v. IBM, 3-68 Civ. 312 at 2-3 (D. Minn. Apr. 18, 1972), *cited in* 471 F.2d at 510 n.6.

9 The substantive problem in the question of the waiver of privilege related to whether inadvertent or accidental disclosure to CDC was a waiver of the privilege for all purposes. The Proposed Federal Rules of Evidence would support IBM's claim of non-waiver. Inadvertence or accident apparently should not constitute "voluntary disclosure."

> A person upon whom these rules confer a privilege against disclosure of the confidential matter or communication waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter or communication. This rule does not apply if the disclosure is itself a privileged communication.

Proposed Federal Rules of Evidence, rule 511, 56 F.R.D. 183, 258 (Nov. 20, 1972). The Advisory Committee's notes explain that "[b]y traditional doctrine, waiver is the *intentional* relinquishment of a known right." *Id.* at 259 (emphasis added).

10 Pretrial Order No. 5 (Sept. 26, 1972), *as cited in* 480 F.2d at 294. Chief Judge Edelstein did not write an opinion in granting the Government's motion.

11 471 F.2d 507 (2d Cir. 1972).

12 Tidewater Oil Co. v. United States, 409 U.S. 151 (1972); United States v. California Cooperative Canneries, 279 U.S. 553 (1929). The *Tidewater* opinion was handed down on December 6, 1972, thirteen days prior to the panel's decision. *See* notes 31-36 and accompanying text *infra*.

13 471 F.2d at 511. *But see id.* at 521 (Mulligan, J., dissenting).

14 471 F.2d at 523 (Mulligan, J., dissenting):

> The agreement is claimed to be based on telephone calls between respective counsel in December 1970, which culminated in a letter from IBM counsel to counsel for the United States Department of Justice on December 28, 1970 to the

convinced him that Judge Neville's assurance that he would "brook no argument" concerning waiver, was given *after* the "documents had already been made available to CDC."[15]

In view of the effect the panel's ruling would have on future antitrust litigation the Second Circuit agreed to a rehearing en banc.[16] The en banc court reversed the panel's decision. In so doing it reaffirmed the more traditional approach and held that the Expediting Act deprived the court of jurisdiction to consider the interlocutory order either by mandamus or appeal. Judge Mulligan's dissent in the panel decision became the basis for the en banc majority's opinion which he authored. A subsequent attempt to obtain Supreme Court consideration was unsuccessful.[17]

Despite its inability to establish appellate jurisdiction, IBM remained determined to oppose the discovery order. Accordingly, rather than produce the documents in accordance with the en banc opinion, IBM respectfully refused to obey the district court's order. The refusal resulted in a civil contempt citation and a $150,000 a day fine which

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effect that the sense of their undertaking was that IBM would only deliver a copy of the microfilm taken by CDC with the excision of any inadvertently produced privileged documents. Since this letter was not answered, it is obvious that the Government elected this option and refused an alternative suggestion that the entire and unedited microfilm be supplied with the Government stipulating that IBM had not waived its privilege. The parties now draw conflicting inferences from the alternative selection made by the Government.

15 *Id.* at 522:

The record does not warrant the assumption that IBM withdrew its interceptor only because of Judge Neville's assurance that he would "brook no argument" thereafter that the privilege had been waived merely because the document had been seen by CDC and perhaps copied. That assurance was only forthcoming in his order of April 18, 1972 on the motion of IBM which order was made some 11 days after the motion of the United States in the Southern District of New York to compel disclosure of the 1200 questioned documents. It would seem reasonable to assume that all of these documents had already been made available to CDC prior to this determination.

16 480 F.2d 293 (2d Cir. 1973) (en banc). Judge Timbers in his dissent expressed his continuing concern over the method in which current en banc procedures are permitted to operate. In the present case only five members of the nine-man court were eligible to vote for the rehearing; three had disqualified themselves from voting on all phases of the case and there has been a vacancy on the bench for over a year and a half. Without Judge Timbers' vote, the five votes required by 28 U.S.C. § 46(c) (1970) would not have been obtainable. According to Judge Timbers:

[I]t is of less importance that the vote of a single active judge could have blocked en banc reconsideration than that *each* active judge was willing to vote in favor of en banc, thus assuring that the will of the other four . . . was not thwarted.

Id. at 305 (dissenting opinion). Judge Timbers had previously expressed concern over the operation of the procedure in Zahn v. International Paper Co., 469 F.2d 1033 (2d Cir. 1972) (en banc denied where 4 in favor of en banc, 3 against), *aff'd*, 42 U.S.L.W. 4087 (U.S., Dec. 17, 1973). For what Judge Timbers described as "an unusually perceptive criticism of the en banc procedure in Zahn," 480 F.2d at 304 n.3, see *Second Circuit Note, En Banc Petition-Decisive Presence of a Disqualified Judge*, 47 ST. JOHN'S L. REV. 345 (1972). For a summary of thirty cases in which the Second Circuit has granted en banc hearings see Walters v. Moore-McCormack Lines, Inc., 312 F.2d 893 (2d Cir. 1963).

17 412 U.S. 945 (1973) (application for stay denied).

has been stayed by Judge Timbers pending yet another appeal to the Second Circuit.[18]

While the language of the Expediting Act deprives the courts of appeals of jurisdiction to review final judgments in civil antitrust suits brought by the Government, the Act is silent as to interlocutory appeals. Since the opinion of Mr. Justice Brandeis in *United States v. California Cooperative Canneries*[19] in 1929, the Act has been held to "preclud[e] the possibility of an appeal to either court from an interlocutory decree."[20] Thus the only appeal that would lie is to the Supreme Court and then only from a final judgment.[20a] The panel majority attempted to circumvent the holding of *California Canneries* by interpreting the discovery order as a "final order."[21] The foundation for this approach was laid in the Supreme Court's decision in *Cohen v. Beneficial Industrial Loan Corp.*[22] The *Cohen* exception expands the concept of "final judgments" to include a

> small class [of interlocutory orders] which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.[23]

Thus, the panel held that the discovery order satisfied the *Cohen* test and was a final judgment for the purposes of appeal.[24]

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18 170 N.Y.L.J. Aug. 2, 1973, at 1, col. 1 (district court contempt order). 170 N.Y.L.J., Aug. 9, 1973, at 1, col. 4 (stay continued pending decision by court of appeals). As this issue went to press, the Second Circuit affirmed the district court's contempt order. Nos. 73-2126-7, 73-2145-6 (2d Cir., Dec. 17, 1973).

19 279 U.S. 553 (1929). In this case the district court had refused a petition for intervention in an attempt to set aside a consent decree. The court of appeals, without considering the question of its own jurisdiction, reversed the district court and directed intervention. 299 F. 908 (1924). In reversing, the Supreme Court noted that the court of appeals lacked jurisdiction and that its assumption of the matter was a departure "from the limits of admissible discretion." 279 U.S. at 560.

20 279 U.S. at 558.

20a 15 U.S.C. § 29 (1970). *See* note 1 *supra*.

21 471 F.2d at 512-16.

22 337 U.S. 541 (1949). This was a stockholders derivative suit in federal court on the ground of diversity of citizenship. The defendant corporation unsuccessfully moved in the district court to have the plaintiff post $125,000 security for expenses and attorney's fees pursuant to New Jersey law. 7 F.R.D. 352 (D.N.J. 1947). The court of appeals reversed and ordered the security posted. 170 F.2d 44 (3d Cir. 1948). In affirming, the Supreme Court relied on a "practical rather than a technical construction" of the statute to avoid the "irreparable injury" which would result if the question of posting security could not be decided until it would be moot. 337 U.S. at 546.

23 337 U.S. at 546.

24 471 F.2d at 514. One fallacy in the logic of this argument is that if the order can be considered a "final judgment" then it should be appealable under the Expediting Act. In that case it would fall into the exception of these cases "where direct review may be had in the Supreme Court."

While the *Cohen* exception may be a proper justification for an interlocutory appeal in the ordinary case, it in no way aids appellate jurisdiction in actions specifically governed by the Expediting Act.[25] To overcome this remaining obstacle, the panel argued that the rule which permits intermediate appeals in certain private party litigation had been expanded by the Supreme Court in *Shenandoah Valley Broadcasting, Inc. v. ASCAP*.[26] *Shenandoah* permits appeals to the circuit courts where the issue "is entirely between private parties and is outside the mainstream of the litigation in which the Government is directly concerned."[27] The panel sought to have this exception encompass appeals of ancillary matters even where the Government remained a party to the action.[28]

The case which was claimed to mark the shift was a dismissal of an appeal to the Supreme Court which simply cited the earlier rule as authority.[29] The en banc majority correctly noted that while the Government remained a party to that action, it no longer considered itself aggrieved and thus, unlike the present case, the dispute was actually between private parties.[30]

Thirteen days prior to the panel's ruling, the Supreme Court gave detailed examination to the problem of interlocutory appeals in cases under the Expediting Act. In *Tidewater Oil Co. v. United States*,[31] the district court had certified that the order involved a controlling question of law,[32] an ordinary procedure permitting an inter-

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See Weight Watchers, Inc. v. Weight Watchers Int'l, Inc., 455 F.2d 770 (2d Cir. 1972), wherein a district court order permitted defendant franchisor conditional communication with members of the class for which plaintiff was maintaining a class action. Plaintiff sought to appeal this order, and defendant moved to dismiss for lack of appellate jurisdiction. The court dismissed the appeal, finding that: (1) the order would not have the drastic consequences of depriving the plaintiff of his "day in court"; (2) the appeal would not settle the issue, but only raise further questions; and (3) the order was granted only temporarily and in contemplation of further action. Chief Judge Friendly, speaking for the court, indicated "that *Cohen* must be kept within narrow bounds, lest this exception swallow the salutory 'final judgment' rule." *Id.* at 773.

25 *See* note 1 *supra*; 28 U.S.C. § 1291 (1970) which provides that: "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

26 375 U.S. 39, *modified*, 375 U.S. 994 (1963). *Shenandoah* involved a suit under the Sherman Act. The case was directly appealed to the Supreme Court which dismissed for want of jurisdiction. The court of appeals subsequently found the Expediting Act applicable and dismissed the appeal that had been brought to it. Holding that the order had been final, yet not directly concerning the United States Government, the Supreme Court on petition for writ of certiorari remanded the case to the court of appeals.

27 375 U.S. at 40-41.

28 471 F.2d at 514.

29 Garrett Freightlines, Inc. v. United States, 405 U.S. 1035 (1972).

30 480 F.2d at 297.

31 409 U.S. 151 (1972).

32 409 U.S. at 152. 28 U.S.C. § 1292(b) (1970) provides in pertinent part:

locutory appeal. While expressing great dissatisfaction with the Act[33] itself, the Court felt that

> personal views as to the wisdom of § 2 are, of course, no basis for disregarding what we are bound to recognize as the plain and unaltered intent of Congress to require that appeals in Government civil antitrust cases be taken only from final judgments and only to this Court.[34]

The panel attempted to distinguish *Tidewater* on the grounds that it was an appeal from the denial of a motion to dismiss a party, which is an issue of antitrust significance and part of the main action, whereas the discovery order in *IBM* was an ancillary matter and subsidiary to the central controversy.[35] The en banc majority did not view *Tidewater* so narrowly. The Second Circuit reasoned that if jurisdiction would not lie where the question had certified, a fortiori it would not lie where the district court had refused a request to certify.[36]

As its second avenue of approach to jurisdiction, the panel relied on the All Writs Act.[37] A discovery order may be reviewable by writ

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When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order. . . .

See Hawaii v. Standard Oil Co., 405 U.S. 351 (1971); Ross Trustees v. Bernhard, 396 U.S. 531 (1970). In *Standard Oil* the state was attempting to bring a *parens patriae* claim and a class action under the Clayton Act. The district court dismissed the *parens patriae* count, but denied the motion to dismiss the class action. Because the law was unsettled on this point, the court granted a section 1292(b) certification. 405 U.S. at 256. In *Ross*, the district court held that a shareholder had a right to a jury trial in any suit in which the corporation would have had the same right had it been suing. Interlocutory appeal was granted because the Court found "substantial grounds for difference of opinion as to this question . . . an immediate appeal would materially advance the ultimate termination of this litigation." 396 U.S. at 532.

[33] The Court noted in this regard:

> [W]e remain convinced that under present circumstances the Expediting Act fails to hasten substantially the final disposition of important antitrust actions while it unjustifiably burdens this Court with inadequately sifted records and with cases that could be disposed of by review in the courts of appeals. Uniformity in the interpretation and administration of the antitrust laws continues to be an important consideration. But such uniformity could be adequately ensured by the availability of review in this Court on certiorari of cases involving issues of general importance — together with the '[l]imited expediting of such cases, under the discretion of this Court,' . . . where time is a factor. The simple fact is that '[t]he legal issues in most [Government] civil antitrust cases are no longer so novel or unsettled as to make them especially appropriate for initial appellate consideration by this Court, as compared with those in a variety of other areas of federal law.'

409 U.S. at 170 (citations omitted).

[34] *Id.*

[35] 471 F.2d at 514-15.

[36] 480 F.2d at 296.

[37] 471 F.2d at 516-17. 28 U.S.C. § 1651(a) (1970) provides: "The Supreme Court and

of mandamus under the criteria set forth in *American Express Warehousing Ltd. v. Transamerica Insurance Co.*,[38] where there is a "usurpation of power," clear abuse of discretion, and the presence of an issue of first impression.[39] The issuance of the *IBM* discovery order, it was argued, met this tripart test thus permitting the court to exercise jurisdiction notwithstanding the Expediting Act.[40] While the issue has never been squarely decided, Supreme Court dicta indicates that such a route may not be taken. The Court has noted that, where "the statutory scheme permits appellate review of interlocutory orders only on appeal from the final judgment, review by certiorari or other extraordinary writ is not permissible. . . ."[41]

Consistent with its earlier dicta, the Supreme Court denied an application for a stay of the district court's order following the en banc decision.[42] Undaunted by its lack of success, IBM considered the issue of the privileged documents far from settled. IBM attempted to follow much of the battle plan set forth in Judge Moore's en banc dissent:

> The custodian of the 1,200 allegedly privileged papers in the instant case disregards (with or without advice of counsel) the court order to produce. A contempt order of commitment then ensues. The jail door closes. The Supreme Court has said that it will review only the final judgment so that it can pass upon important questions of antitrust law. But the order of incarceration has nothing to do with antitrust law. It is entirely ancillary or collateral to the "mainstream" of the antitrust litigations. The victim has no particular interest in the refinements of that field of the law. All that he desires is some court to which he can appeal the unlawfulness of

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all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

38 380 F.2d 277 (2d Cir. 1967).

39 *Id.* at 283. The test is based on Schlagenhauf v. Holder, 379 U.S. 104 (1964). It is interesting to note that in *American Express*, a non-Expediting Act case, the petitioner was appealing an order directing him to turn over matter claimed to fall within the attorney's work product privilege. The court set down the test for a writ of mandamus permitting interlocutory review but held that it was not met under the facts of the case. It also expressed the view that *Cohen v. Beneficial Indus. Corp.* could not be used to appeal discovery orders. 380 F.2d at 280.

40 The panel found the "clear abuse of discretion"

> [i]nsofar as (1) the Edelstein order is in direct conflict with the provisions of the Neville order, (2) the Edelstein order is based on the erroneous assumption that waiver occurred by IBM delivery to CDC, and (3) the Edelstein order has ignored the intent of the IBM-Government agreement. . . .

471 F.2d at 517.

41 United States Alkali Export Ass'n v. United States, 325 U.S. 196, 203 (1945). It should be noted that the Court did grant a writ of certiorari in that case because of a conflict between the district court's jurisdiction and that of a federal agency. However, the *Alkali Export* dicta was cited with approval in *Tidewater*. 409 U.S. at 161 n.25.

42 412 U.S. 945 (1973). The application was made to Mr. Justice Marshall and was submitted by him to the Court. Mr. Justice Douglas would have granted the stay.

> his confinement. I seriously doubt that the Supreme Court would interpret its recent decisions in *Tidewater Oil Co. v. United States* . . . requiring the contemnor to languish in jail for five or more years with the dubiously cheerful knowledge that due process of law eventually would be accorded him when the antitrust appeal would be finally decided.[43]

However, the district court was not so accommodating. Rather than holding IBM in criminal contempt which would have established a basis for appellate review of the discovery order, it found the contemptuous conduct to be of a civil nature.[44] The distinction between the two is in the nature and purpose of the remedy — whether it be to punish and vindicate the authority of the court and hence, criminal; or to secure compliance with the order of the court and thus, civil.[45] Furthermore, the district court rejected IBM's request to have its attorneys cited for contempt, thereby eliminating the possibility of a non-party obtaining review of the validity of the contempt citation.[46]

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43 480 F.2d at 301, 302 (Moore, J., dissenting). Judge Timbers also dissented in a separate opinion. *Id.* at 303.

44 170 N.Y.L.J., Aug. 2, 1973, at 1, col. 4. A citation for criminal contempt is considered final and thus immediately appealable whether a party or non-party is cited. Union Tool Co. v. Wilson, 259 U.S. 107 (1922); Hanley v. James McHugh Constr. Co., 419 F.2d 955 (7th Cir. 1969); Southern Ry. v. Lanham, 403 F.2d 119 (5th Cir. 1968); Duell v. Duell, 178 F.2d 683, 687-88 (D.D.C. 1949). However, a civil contempt order is considered interlocutory and is appealable only from the final judgment. Fox v. Capital Co., 299 U.S. 105 (1936); Dickinson v. Rinke, 132 F.2d 884 (2d Cir. 1943).

See Vincent v. Teamsters Local 294, 424 F.2d 124 (2d Cir. 1970), wherein the Second Circuit recognized the general rule of non-review of civil contempt orders until final judgment, but noted that where a contempt order is issued after the principal action has concluded, it is immediately reviewable. The court went on to hold that since the contempt order was made pursuant to an injunction which had since expired, the appeal was moot.

45 *See* Gompers v. Buck Stove & Range Co., 221 U.S. 418, 442-43 (1911). In McCrone v. United States, 307 U.S. 61 (1938), the Court observed:

> While particular acts do not always lend themselves to classification as civil or criminal contempts, a contempt is considered civil when the punishment is wholly remedial, serves only the purpose of the complainant and is not intended as a deterrent to offenses against the public.

Id. at 64 (footnote omitted). United States v. Ross, 243 F. Supp. 496, 499 (S.D.N.Y. 1965). The intended effect of a civil contempt order is to insure compliance. McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949). Criminal contempt is punitive in nature and seeks to vindicate the authority of the court. United States v. United Mine Workers, 330 U.S. 258, 303-04 (1947).

46 Good faith reliance upon the advice of counsel may be a defense to a criminal contempt but not to a civil citation. *In re* Eskay, 123 F.2d 819 n.17 (3d Cir. 1941). *See* United States v. Goldfarb, 167 F.2d 735 (2d Cir. 1948). A judgment of civil contempt would have provided a basis for an appeal even though the main action was still pending. McCrone v. United States, 307 U.S. 61 (1939); Bessette v. W.B. Conkey Co., 194 U.S. 324 (1904); Southern Ry. Co. v. Lanham, 403 F.2d 119 (5th Cir. 1968).

IBM in its attempt to have its attorneys cited for contempt relied upon Appeal of the SEC, 236 F.2d 501 (6th Cir. 1955). There, SEC general counsel, now Judge William H. Timbers, was ordered held in custody for failure of the SEC to turn over subpoenaed documents. As Chief Judge Edelstein properly noted, there was no other meaningful way to insure compliance with that order; furthermore, attorney Timbers had been

The remaining vehicle for reconsideration of the discovery order was through a hearing pursuant to local civil rule 14(b) which permits the contemnor to place both the alleged misconduct and the resulting damages in issue.[47] The district court distinguished between a fine necessary to insure compliance and the damages to be awarded to the plaintiff Government for the delay; it postponed the issue of damages but held that based on IBM's annual report, a $150,000 a day fine would be appropriate. Most critical of all, the court refused to grant a hearing on issue of the alleged misconduct on the ground that the facts necessary for a determination of contempt had been admitted and, therefore, a hearing would only serve "the purposes of delay and obfuscation."[48]

Underlying the contempt question were the competing policy considerations of the virtues of speedy determinations in Expediting Act cases versus the potential waste of judicial resources in permitting a complex antitrust matter to reach a final conclusion only to be reversed on the basis of a pretrial order erroneously given. The philosophy expressed by Chief Judge Edelstein seemed to reject consideration of either:

> [I]t is not proper for the district court to enter an order which is designed to either thwart or promote an interlocutory appeal. . . . The district court can, and should, do no more than frame an order which it believes to be proper in the circumstances of the case before it.[49]

While such a viewpoint may at times be more easily expressed than followed, it does reflect an unwillingness to set aside the mandate of the Expediting Act whenever a party determines that reversal of an interlocutory order is critical to its case. Presumably, the Act contemplated postponement until final judgment not merely of frivolous appeals but also those of substance and merit.

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sworn as a witness and was, therefore, under the technical jurisdiction of the court. 170 N.Y.L.J., Aug. 2, 1973, at 5, col. 4. The order upon which the contempt was based was later reversed. 403 F.2d 119.

47 So. & E. DIST. R. 14(b) (McKinney's N.Y. Court Rules 1973), provides:

> If the alleged contemnor puts in issue his alleged misconduct or the damages thereby occasioned, he shall upon demand therefor, be entitled to have oral evidence taken thereon, either before the court or before a master appointed by the court. When by law such . . . contemnor is entitled to a trial by jury, he shall make a written demand therefor . . . otherwise he will be deemed to have waived a trial by jury.

The Supreme Court has ruled that in fixing a fine for civil contempt the court must "consider the character and magnitude of the harm threatened by the continued contumacy and the probable effectiveness of any suggested sanction in bringing about the result desired." United States v. United Mine Workers, 330 U.S. 258, 303-04 (1947).

48 170 N.Y.L.J., Aug. 2, 1973, at 5, col. 3.

49 *Id.* at col. 4.

While IBM's tripart attempt to circumvent the Expediting Act by appeal, writ, and contempt ultimately proved unsuccessful, it raises serious questions concerning our entire structure of appellate jurisdiction. Criticism of the Act has come from all quarters.[50] Overload of the Supreme Court's calendar,[51] lack of benefit of the intermediate court's opinion,[52] and possible prejudice to a party in waiting until final judgment is rendered[53] have all been cited as resulting evils. The unspoken issue presented in the *IBM* cases is whether judicial construction is the proper mode for correcting the defects of the Expediting Act.

A piecemeal approach to expanding the jurisdiction of the courts of appeals would provide little or no relief for the Supreme Court's calendar. If intermediate review of interlocutory matters were permitted, as the panel has suggested, the number of cases reviewable on direct appeal to the Supreme Court would remain the same as would the number of issues open for review; furthermore, there would be a corresponding increase in petitions for certiorari following the courts of appeals decisions.[54] Since expedition of these cases is a legitimate and proper interest, provisions would have to be made to keep the additional time required for intermediate review down to a minimum.[55]

Seventy years ago, Congress passed the Expediting Act as a procedural measure to insure the speedy determination of important controversies of public interest in what was then a new area of the law. Today, Congress, together with the judiciary, should reexamine the entire structure of jurisdiction in light of the changing needs and priorities of our judicial system. While the Expediting Act is a prime candidate for reform, a careful look with an eye toward overall planning is more likely to bring about more satisfactory results than judicial construction to meet the needs of a particular controversy.

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50 *See, e.g.*, United States v. Singer Mfg. Co., 374 U.S. 174, 175 n.1 (1963) (Clark, J.); Brown Shoe Co. v. United States, 370 U.S. 294, 364-65 (1962) (Harlan, J., concurring). *See also* Gissell, *A Much Needed Reform in the Expediting Act for Antitrust Cases*, 1961 N.Y. ANTITRUST L. SYM. 98 (Expediting Act is outdated; there are no questions of law to decide in antitrust litigation). *But see* Celler, *Case in Support of Application of the Expediting Act to Antitrust Suit*, 14 DEPAUL L. REV. 29 (1964) (new issues arising in antitrust law, and uniform interpretation, policies, and enforcement is to be preferred); Solomon, *Repeal of the Expediting Act—A Negative View*, 1961 N.Y. ANTITRUST L. SYM. 94 (avoidance of delay and appeal as of right are valuable features of the Expediting Act).

51 Tidewater Oil Co. v. United States, 409 U.S. 151, 169 (1972). For a strong case that the Supreme Court's calendar is not as overloaded as one might be led to believe see the dissent of Mr. Justice Douglas at *id.* at 174.

52 409 U.S. 169.

53 480 F.2d at 302.

54 409 U.S. at 171.

55 United States v. Cities Serv. Co., 410 F.2d 662, 670 (1st Cir. 1969).