

The Hyde Bill:

An Attempt to Resurrect the 1910 Three-Judge Court Act.

by Tamara Hall

*“What has been is what will be:
What has been done is what will be done:...and
There is no remembrance of former things among
those who come after.”*
Ecclesiastics 1:9,11

INTRODUCTON

On the front page of the June 5, 1997, *Recorder* edition, the story entitled, “New Front Opens Judge Wars,” was probably scanned in cursory fashion by most readers.¹ However, the content of the story will have lasting effects if its Republican supporters have their say. The judge front at issue is the current plan to push legislation² that will erode judicial power, notwithstanding strong objections from the nation’s judiciary.³

This essay focuses on the second section of the Judicial Reform Act of 1997, as introduced by Representative Henry Hyde. The “Hyde Bill” purports to erode judicial power by requiring a three-judge court when certain equitable remedies are sought. This exposition begins with a background section that examines the cause and rationale of the 1910 Three-Judge Court Act, its significant revisions, and its 1976 abrogation. The background is followed by a three-part discussion section. Part A summarizes and gives the pro and cons of the bill. Part B provides two nationally known examples that gave the incentive for the proposed legislation. Finally, Part C analyzes the legal and practical ramifications if resurrection of the 1910 Act, via Hyde Bill § 2, occurs.

BACKGROUND

Ex Parte Young

At the beginning of this century, big business and the railroads were in a stage of vigorous expansion.⁴ In response, states enacted regulatory statutes in an attempt to exercise control over these enterprises.⁵ However, these attempts proved futile when federal courts would, in turn, issue injunctions, preventing enforcement of such statutes.⁶ In 1908, the United States Supreme Court held, in *Ex Parte Young*,⁷ that state officials could indeed be enjoined by federal courts from enforcing unconstitutional state statutes. Accordingly, federal judges had unbridled discretion to issue temporary restraining orders *ex parte* and interlocutory injunctions based on affidavits alone.⁸ Moreover, such measures could be continued indefinitely, as there was no statutory restraint on the judges’ power to do so.⁹ As a response to the *Young* decision, Congress enacted the Three-Judge Court Act of 1910.¹⁰

THREE-JUDGE COURT ACT OF 1910

Under the 1910 Act, a federal district court could not grant an injunction restraining the enforcement of a state statute on the ground of unconstitutionality unless the application for the injunction had been heard and determined by three judges.¹¹ Appeal from the three-judge decision could be made directly to the United States Supreme Court for a speedy review of the case.¹² It was hoped that this legislation would curtail the imprudent issuance of injunctions against state statute enforcement.¹³ Furthermore, the 1910 Act was enacted to relieve the fears of the states that important regulatory programs would be precipitously enjoined.¹⁴

FOUR SIGNIFICANT REVISIONS

In its original enactment, the 1910 Act provided for three-judge courts only in suits in which interlocutory injunctions were sought against the enforcement of state statutes by state officers on the ground of unconstitutionality.¹⁵ Moreover, the original Act dealt only with interlocutory, and not permanent, injunctions.¹⁶ The first significant revision occurred in 1913 when the Act was amended to include cases that sought to enjoin enforcement of an administrative order made by an administrative board or commission acting under a state statute.¹⁷ The second significant revision was enacted in 1925 with an amendment to the Act that expanded the convention of three judges to cases of permanent injunction.¹⁸ In 1937, the Act was further amended to require a three-judge court and direct review for injunctions against claimed unconstitutional acts of Congress.¹⁹ Finally, the fourth significant revision occurred in 1975 when the American Law Institute proposed a series of amendments to three-judge court proceedings that would eliminate a number of jurisdictional questions so that these courts could function more smoothly.²⁰

Although these four major revisions made a good faith effort to foster the Act’s purposes of “the saving of state and federal statutes from improvident doom at the hands of a single judge,”²¹ mere tinkering with procedures was insufficient to remedy the unforeseen problems that the Act created. Consequently, the Judicial Conference’s strong recommendation that three-judge courts in suits challenging the constitutionality of state or federal law should be eliminated led to the 1976 abrogation of the Act.²²

1976 ABROGATION

To better understand the pitfalls of the three-judge court, it is useful to look to the reasoning behind Congress’ 1976 decision to repeal the requirement of the three-judge court after over a half-century of its use. Such reasoning is thoroughly dis-

cussed in the legislative history of the 1976 repeal.

In addition to the Judicial Conference, several notable opponents of the Act's abrogation advocated their concerns in hearings before the Subcommittee on Improvements in Judicial Machinery.²³ Those opponents included the chief judges of the Second, Third, Fourth and Fifth Circuit Courts of Appeal, Judge Skelly Wright from the U.S. Court of Appeals for the District of Columbia, and Professor Charles Alan Wright of the University of Texas Law School.²⁴ Presumably, the strongest advocate for the Act's abrogation was the then Chief Justice of the United States Supreme Court, Warren E. Burger. In Chief Justice Burger's annual report on the State of the Judiciary to the American Bar Association in the Summer of 1972, he asserted:

We should totally eliminate the three-judge district courts that now disrupt district and circuit judges' work. Direct appeal to the Supreme Court, without the benefit of intermediate review by a court of appeals, has seriously eroded the Supreme Court's power to control its workload, since appeals from three-judge district courts now account for one of five cases heard by the Supreme Court. The original reasons for establishing these special courts, whatever their validity at the time, no longer exist.²⁵

Four years after Chief Justice Burger's remarks, Congress abrogated the Act requiring three-judge courts in all cases for four major reasons: (1) to relieve the burden of three-judge court cases; (2) to remove procedural uncertainties; (3) because the original reasons for the Act were eliminated by

statutory and rule changes; and (4) because decisional law had provided its own safeguards against precipitous injunctive action by federal judges.²⁶

The Burden of Three-judge Courts

Three-judge courts burdened all three levels of the federal courts. For example, from 1955 to 1959, the average number of three-judge courts convened in the district courts were 48.8 per year.²⁷ Further, this number almost doubled to 95.6 per year between the years of 1960 to 1964.²⁸

In addition to the increase in the number of three-judge court cases, the convening of three-judges meant disruption of other court calendars. Whenever a three-judge court was required, a second district judge and a judge on the Circuit Court of Appeals were summoned to hear and determine the case along with the district judge in whose court the case was filed.²⁹ This quasi re-location caused the court calendar of these other judges to become subordinated to this special court's calendar.³⁰

Finally, the Act's provision of direct appeal to the Supreme Court from the decrees of a three-judge court granting or denying injunctions burdened the Supreme Court's docket.³¹ Although the three-judge cases were a small portion of all cases docketed in the Supreme Court, they consumed a disproportional

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Footnotes

1. Naftali Bendavid, *New Front Opens in Judge Wars*, THE RECORDER (California), June 5, 1997, at 1.
2. H.R. 1252, 105th Cong. (1997).
3. Bendavid, *supra* note 1, at 1.
4. See S. REP. NO. 94-204, reprinted in 1976 U.S.C.C.A.N 1988, 1989 [hereinafter Senate Report].
5. *Id.*
6. *Id.*
7. Ex Parte Young, 209 U.S. 123 (1908).
8. Comment, *The Three-Judge Federal Court in Constitutional Litigation: A Procedural Anachronism*, 27 U. CHI. L. REV. 555, 558 (1960) [hereinafter Three-Judge Constitutional Litigation].
9. *Id.*
10. *Id.*
11. Act of June 18, 1910, ch. 309, § 17, 36 Stat. 577 (codified at 28 U.S.C. §2281 (1948)).
12. Comment, *The Three-judge Court Act of 1910: Purpose, Procedure and Alternatives*, 62 J. CRIM. L. & CRIMINOLOGY 205 (1971).
13. At the congressional debate on the proposed Three-judge Act, Senator Overman of North Carolina stated: "Whenever one judge stands up in a State and enjoins the Governor and the Attorney General, the people resent it, and public sentiment is stirred, as it was in my state, when there was almost a rebellion, whereas if three-judges declare that a state statute is unconstitutional the people would rest easy under it..... The whole purpose of the proposed statute is for peace and good order among the people of the States." Three-Judge Constitutional Litigation, *supra* note 8, at 558 n. 11.
14. In response to the *Young* decision, Senator Bacon of Georgia stated: "[T]he decision trampled on the rights of the State of

- Minnesota, and I may add that if it trampled on the rights of Minnesota, it necessarily trampled upon the rights of every other State.... If these subordinate courts can exercise such power, then, indeed, the States are but provinces and dependencies." *Id.*
15. CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4234 at 596-97 (1988).
16. Senate Report, *supra* note 4, at 1989.
17. Wright, *supra* note 15, § 4234 at 598.
18. Senate Report., *supra* note 4, at 1989.
19. *Id.*
20. *Id.* at 1990.
21. Wright, *supra* note 15, § 4234 at 600.
22. *Id.* at 600-01.
23. Senate Report, *supra* note 4, at 1990.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 1991.
28. *Id.* Since the 1968 fiscal year, the number of three-judge court cases continued to grow at alarming rates as illustrated below.
1968.....179
1969.....215
1970.....291
1971.....318
1972.....310
1973.....320
Id.
29. *Id.*
30. *Id.*
31. *Id.*

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tionate amount of the limited time for argument.³² For instance, from October 1969 through November 1971, the Court heard arguments from 366 cases. Of these, 22 percent were from three-judge courts.³³

Jurisdictional Uncertainties

In large part, the Act's abrogation occurred because of two jurisdictional uncertainties created by its vague drafting. First, the threshold question of whether a three-judge court was required was an onerous inquiry

for a single district court to decide.³⁴ Before deciding this threshold question, four statutory elements were required.³⁵ In practice, these elements proved difficult to ascertain.³⁶

Because a three-judge court was warranted only when a complaint sought injunctive relief, in those cases in which declaratory relief was essentially equivalent to an injunction, a three-judge court was deemed inappropriate.³⁷ Moreover, a three-judge court was warranted only if the injunction was sought on federal constitutional grounds.³⁸ Yet embedded in this vague limitation were slippery distinctions. On the one hand, three judges were warranted if it was asserted that a statute's application was unconstitutional, notwithstanding concessions that the statute, in general, was valid.³⁹ On the other hand, three judges were not required if it was possible to enjoin state officials without holding a state statute unconstitutional.⁴⁰ This occurred when a claim asserted that officials were administering a constitutional statute in an unconstitutional manner.⁴¹

If any one of the statutory elements was incorrectly decided, a second jurisdictional uncertainty arose: the complexities of appellate review.⁴² According to Professor Wright, a leading scholar on federal courts, the proper channels for appealing jurisdictional issues were wasteful and confusing.⁴³ To illustrate:

The court of appeal may review if the single judge regards the Federal claim as so insubstantial as to require dismissal for want of jurisdiction or if the sin-

gle judge correctly concludes that three-judges are not required and decides the merits of the case. If the single judge incorrectly believes that three-judges are not required and proceeds to the merits, the remedy once was mandamus from the Supreme Court, but now appears to be an appeal to the court of appeals. If the court of appeals should fail to see that the case was one for three-judges, and reviews on the merits, its decision is void. If a three-judge court is convened, but it determines that three judges were not necessary, appeal is to the court of appeals. If the special court is correctly convened and gives judgment on the merits, appeal lies directly to the Supreme Court. If judgment is given on the merits by a three-judge court but such court was not required, appeal should be to the court of appeals rather than to the Supreme Court.⁴⁴

Original Reasons for Act Eliminated by Statutory and Rule Changes

The Act was intended to end the arbitrary exercise of authority illustrated in the situation created by *Ex Parte Young* discussed above.⁴⁵ However, these original problems became obsolete when the Federal Equity Rules were revised.⁴⁶ The revision extended to all injunctive cases the same protective procedures that the 1910 Act provided via three-judge courts.⁴⁷ The Equity Rules were changed to prohibit federal courts from granting ex parte temporary restraining orders for extended periods of time and to make federal judges accept some evidence before preliminary injunctions were granted to block enforcing state statutes.⁴⁸

Moreover, two other statutes were enacted to further restrain the power of federal courts to enjoin state action.⁴⁹ In the Johnson Act of 1934,⁵⁰ Congress restrained the federal courts' injunctive power with respect to state public utility rate orders.⁵¹ In the Tax Injunction Act of 1937,⁵² Congress restrained the federal courts' injunctive power with respect to state taxes.⁵³ The purposes of these statutes were to limit the ability of a federal court to interfere precipitously with the operation of state tax and public utility programs whenever there was a "plain, speedy, and efficient remedy" available in a state court.⁵⁴

32. *Id.* at 1991-92.

33. *Id.* at 1992.

34. *Id.*

35. *Id.* The four statutory elements were 1) state statute, 2) state officers, 3) request for injunctive relief, and 4) alleged unconstitutionality of the statute. *Id.*

36. *Id.* at 1992-93.

37. *Id.* (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963)).

38. Senate Report, *supra* note 4, at 1993

39. *Id.* at 1993 (citing *Department of Employment v. U.S.*, 385 U.S. 355 (1966)).

40. Senate Report, *supra* note 4, at 1993.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* (quoting C. WRIGHT, *FEDERAL COURTS*, § 50, at 193 (2d ed. 1970)). The complexity of the appellate review is analyzed in greater length in part three of the discussion section.

45. Senate Report, *supra* note 4, at 1995.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. codified in 28 U.S.C. § 1342 (1993).

51. Senate Report, *supra* note 4, at 1995.

52. This act is codified in 28 U.S.C. § 1341 (1993).

53. Senate Report, *supra* note 4, at 1995.

54. *Id.*

Decisional Law Provided Safeguards against Federal Judges

Case law also precluded the sort of precipitous intrusion in the state legal process by a single federal judge, that the 1910 Act purported to control. In *Younger v. Harris*,⁵⁵ the Supreme Court had held that injunctive relief against a pending state criminal prosecution was only available in exceptional circumstances, as when the prosecution is in the nature of a bad faith harassment of the defendant in the exercise of his or her federal rights.⁵⁶ Furthermore, in *Askew v. Hargrave*,⁵⁷ the Court had clarified the application of the abstention doctrine.⁵⁸ The Court held that under the abstention doctrine, a federal court will stay the exercise of state law that, if decided, could avoid the necessity of deciding any constitutional claims asserted.⁵⁹

For the above four reasons, on August 2, 1976, Congress abrogated the requirement for special three-judge courts in cases that sought to enjoin the enforcement of state or federal laws on the ground of unconstitutionality.⁶⁰ The trade off for that abrogation was an increase in the efficiency of the United States judicial system which benefits litigants, lawyers, and judges alike.⁶¹ Presently, to the extent that this trade off has been successful, the Hyde Bill § 2 is a return to the status quo ante.

DISCUSSION

Hyde Bill §2 and its Pros and Cons

Hyde Bill § 2 provides that “[a]ny application for an anticipatory relief against the enforcement, operation, or execution of a State law adopted by referendum shall not be granted by a United States district court or judge thereof upon the ground that the State law is repugnant to the Constitution, treaties, or laws of the United States unless the application for anticipatory relief is heard and determined by a court of three judges...”⁶² According to Representative Hyde, it was originally developed by Congressman Sonny Bono of California.⁶³ However, Hyde Bill § 2 reads and is vaguely drafted very similar to the original Act.

Moreover, according to Representative Hyde, Hyde Bill § 2 “is not intended to interfere with the Federal court’s ability to carry out its duty to review the constitutionality of United States laws.”⁶⁴ Nevertheless, as history has indicated, interference will occur. Furthermore, according to Representative Charles Canady, “it is appropriate to have more than one person looking at a challenge to the constitutionality of an act that has been adopted by the people of a state.”⁶⁵ Yet Representative

Canady fails to address the jurisdictional uncertainties a single district judge will face before the three judges reach, if they ever do, the constitutional challenge.

Further, according to California State Senator Richard Mountjoy, Hyde Bill § 2 “will restore confidence in our judiciary...because there is a loss of public confidence in those [federal] courts.”⁶⁶ This contention was most compelling when it was asserted by Senator Overman in the 42nd Congress held in 1908.⁶⁷ Then, the Act’s major problems as discussed above were unforeseeable. Over a period of 65 years, these problems became apparent. Once such problems manifested, the Act was abrogated. Yet, the problems were not resolved. Hence, this contention, reasserted 89 years later in the 105th Congress, loses its forcefulness. To enact Hyde Bill § 2, which does not resolve these problems but, rather, requires the judiciary to repeat the process in which these problems arose, will destroy, not restore, public confidence in the judiciary.

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Two National Examples That Influenced Hyde Bill § 2

Proposition 209

On November 5, 1996, California voters approved Proposition 209, which prohibited the state, local governments, districts, public universities, colleges, and schools, and other government instrumentalities from discriminating against or giving preferential treatment to any individual or group in public employment, public education, or public contracting on the basis of race, sex, color, ethnicity, or national origin.⁶⁸ However, before the enactment of Proposition 209, litigation commenced challenging its constitutionality.⁶⁹ The district court judge promptly blocked the enactment of Proposition 209 by granting a temporary restraining order.⁷⁰ The Ninth Circuit reversed and declared that “[a] system which permits one judge to block with the stroke of a pen what 4,736,180 state residents voted to enact as law tests the integrity of our constitutional democracy.”⁷¹

Proposition 187

On November 8, 1994, California voters approved Proposition 187, which prohibited illegal aliens from receiving

55. 401 U.S. 37 (1971).

56. Senate Report, *supra* note 4, at 1995.

57. 401 U.S. 476 (1971).

58. Senate Report, *supra* note 4, at 1995.

59. *Id.*

60. Wright, *supra* note 15, § 4234 at 603.

61. Senate Report, *supra* note 4, at 1994.

62. H.R. 1252, 105th Cong. §2(a) (1998).

63. *The Judicial Reform Act of 1997: Hearings on behalf of the judicial conference of the United States Before the Capitol Hill Hearing*, 105th Cong., 1st Sess. (1997)(statement of Henry H. Hyde, Congressman).

64. *Id.*

65. Bendavid, *supra* note 1, at 12.

66. *Judicial Overhaul 1997:Hearings on the Judicial Subcommittee on courts and intellectual property Before the House Committee chaired by Rep. Howard Coble*, 105th Cong., 1st Sess. (1997)(statement of Senator Richard Mountjoy, California State Senator).

67. See *supra* note 13.

68. *Coalition for Econ. Equity v. Wilson*, 946 F.Supp. 1480,1488 (N.D. Calif. 1996).

69. *Id.*

70. *Id.* at 1520-21.

71. *Coalition for Econ. Equity v. Wilson*, 122 F3d 692, 699 (9th Cir. 1997).

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public social services such as social security income and welfare subsidies.⁷² Moreover, Proposition 187 prohibited illegal aliens from receiving health care services from publicly funded health care facilities.⁷³ Further, Proposition 187 prohibited the admission or attendance of illegal aliens in public elementary or secondary school.⁷⁴ A federal

district court judge blocked the enactment of Proposition 187 when its constitutionality was challenged.⁷⁵ [Ed. note: On March 13, 1998, the District Court for the Central District of California found sections 1,4,5,6,7 and 8 of Proposition 187 unconstitutional and permanently enjoined its implementation and enforcement.⁷⁶]

Outraged by “the unjust effects the preliminary decision of a single federal district court judge may have on the voting rights of the entire population of a particular state,”⁷⁷ as illustrated by these national examples, the Republican position is that Hyde Bill § 2 will control “unelected judges from twisting the Constitution beyond any reasonable meaning in order to abrogate to themselves the ability to decide any significant issue in a way they prefer.”⁷⁸ In an attempt to control “an imperious judiciary,”⁷⁹ on its face, Hyde Bill § 2 does not take into consideration the legal and practical ramifications that will result if resurrection of the Act occurs.

LEGAL & PRACTICAL RAMIFICATIONS

Legal Ramifications

Provided that Hyde Bill § 2 is enacted, the legal ramifications federal courts will encounter are twofold. First, a district judge will have to decide whether to convene a three-judge court.⁸⁰ This inquiry is based on applying the substantial question test set forth in *Ex Parte Poresky*.⁸¹ Under *Poresky*, an insubstantial question is one that is either “obviously without merit” or because “its unsoundness so clearly results from previous Supreme Court decision as to foreclose the subject and leave no room for the inference that the question raised can be

the subject of controversy.”⁸² The *Poresky* substantiality test is vague and ambiguous. Classifying a claim as “obviously without merit” falls short of a helpful construction of the meaning of “insubstantial question.”⁸³ Further, the phrase, “foreclosed by previous decisions” of the Supreme Court, has often resulted in conflicting Supreme Court rulings since these decisions are based on different factual situations and new constitutional theories.⁸⁴ Thus, a district judge is not provided with a clear standard by which to convene a three-judge court.⁸⁵

If Hyde Bill § 2 is enacted, a district judge deciding a state referendum similar to Proposition 209 must first ascertain whether the constitutional claim is a substantial one before deciding that a three-judge court has jurisdiction to hear the case.⁸⁶ Yet, because these standards lack clarity, what constitutes a substantial question will depend heavily on the predilections of individual judges.⁸⁷ Two historical cases illustrating the variation that could occur between federal courts are *National Mobilization Committee to End the War in Vietnam v. Foran*⁸⁸ and *Hargrave v. McKinney*.⁸⁹

In *Foran*, a district judge denied a three-judge court hearing on the ground that the celebrated Anti-Riot Act raised no substantial constitutional question.⁹⁰ Based on a Supreme Court decision upholding an Arkansas disorderly conduct statute, which foreclosed any constitutional question with respect to the Anti-Riot Act, the Seventh Circuit found the two statutes sufficiently similar to preclude a three-judge hearing even though the statutes were, arguably, different.⁹¹ To reach such a conclusion, the Seventh Circuit implicitly gave the *Poresky* holding a narrow construction and, in so doing, sanctioned the right of district judges to construe challenged statutes in order to obviate their raising substantial constitutional questions.⁹²

In contrast, when the *Hargrave* district judge found no substantial question in a constitutional attack on a Florida educational tax requirement,⁹³ the Fifth Circuit, taking a more liberal approach than the Seventh Circuit, overruled the district court’s decision.⁹⁴ Based on its construction of *Poresky*, the Fifth Circuit held that a claim need only be arguable to merit the invocation of a three-judge court.⁹⁵ It reasoned:

Regardless of our personal reactions to the merits of plaintiffs’ position and regardless of the novelty of the

72. *League of United Latin American Citizens v. Wilson*, 131 F3d 1297, 1300 (9th Cir. 1997).

73. *Id.*

74. *Id.*

75. *League of United Latin American Citizens v. Wilson*, 908 F.Supp. 755, 764 (C.D.Cal. 1995).

76. *League of United Latin American Citizens v. Wilson*, No. 94-7569 MRP, 1998 WL 141325, at *1 (C.D.Cal. March 13, 1998).

77. Statement of Representative Hyde, *supra* note 63.

78. Senator Orrin Hatch, quoted in Bendavid, *supra* note 1, at 12.

79. Representative Hyde, quoted in Bendavid, *supra* note 1, at 12.

80. The Three-Judge Court Act of 1910, *supra* note 12 at 208.

81. 290 U.S. 30 (1933). In *Poresky*, the Supreme Court held that a three-judge court is warranted if there is a substantial constitutional challenge to a state statute. *Id.* at 32.

82. *Id.*

83. The Three-Judge Court Act of 1910, *supra* note 12 at 208-09.

84. The Three-Judge Court Act of 1910, *supra* note 12 at 209.

85. *Id.* at 209.

86. *Poresky*, 290 U.S. at 32. Absent a case or controversy, federal question jurisdiction cannot be invoked. However, the Court reasoned that if federal jurisdiction existed independently of federal question jurisdiction, then the substantiality test is inapplicable. *Id.*

87. Three-Judge Court Act of 1910, *supra* note 12 at 209.

88. 411 F2d 934 (7th Cir. 1969).

89. 413 F2d 320 (5th Cir. 1969).

90. *Foran*, 411 F2d at 395.

91. *Id.* at 938.

92. Three-Judge Court Act of 1910, *supra* note 12 at 209.

93. *Hargrave*, 413 F2d at 322.

94. *Id.* at 328.

95. *Id.* at 328-29.

theories which support their position, we cannot say that their view of the taxing scheme is beyond challenge.... All we decide is that the claim is such an arguably one as to be “substantial” within the *Poresky* definition.⁹⁶

The second legal ramification federal courts will encounter is the appellate review to appeal three-judge court decrees. Because the Act itself failed to provide a review of questions relating to three-judge courts, the Supreme Court is credited for creating an orderly appeal system.⁹⁷ For instance, where a district judge refused to convene a three-judge court for any reason, the Supreme Court strongly implied in *Idlewild Bon Voyage Liquor Corp. v. Epstein*⁹⁸ that all questions of three-judge court decrees are reviewable in the court of appeals.⁹⁹ This implication was turned into fact in *Schackman v. Arnebergh*.¹⁰⁰ In *Schackman*, *Idlewild* was cited as authority for the proposition that review of three-judge court decrees are in the court of appeals.¹⁰¹

Practical Ramifications

Provided that Hyde Bill § 2 is enacted, its procedure is identical to the procedure the original Act followed.¹⁰² This procedure has proven to be an intolerable burden on the courts and a dangerous source of pitfalls for litigants.¹⁰³ Hence, it must follow that under Hyde Bill § 2, federal courts will confront the same intolerable burdens the Act presented in the past; litigants will confront the same procedural pitfalls the Act presented in the past.

Similar to the Act, Hyde Bill § 2 will cause disruption at the trial level.¹⁰⁴ Under Hyde Bill § 2, if a state referendum like Proposition 187 is filed in a district court, a second district judge and a judge of the court of appeals will have to leave their own benches. While the argument that district judges are too few and far between to travel is not as compelling in 1997 as it was in 1908,¹⁰⁵ the argument that very serious inconvenience can result in a court that has a crowded docket is more compelling in 1997 than in 1908.¹⁰⁶ Moreover, because it, like the original Act, imposes a direct appeal to the Supreme Court, Hyde Bill § 2 carves out a large class of cases in which the Court is prohibited from exercising its judicial discretion of granting or denying certiorari.¹⁰⁷

Finally, similar to the Act, litigants will confront procedural pitfalls under Hyde Bill §2. For instance, if a single district judge decides that a state referendum like Proposition 187 lacks a substantial constitutional claim, that judge will not convene a three-judge court.¹⁰⁸ Like the original Act, Hyde Bill § 2 is silent on review of such orders.¹⁰⁹ Alternatively, if that district judge decides that there is a substantial question and convenes a three-judge court, the three judges could decide that a three-judge court is not warranted.¹¹⁰ Again, like the original Act, Hyde Bill § 2 is silent on review of such orders. Consequently, confusion prevails as to how such review may properly be obtained.¹¹¹

In the first instance, the Supreme Court has held that the exclusive remedy is a writ of mandamus from the Supreme Court.¹¹² Despite this rule, some court of appeals may review the order denying a three-judge court on appeal from the final decree of the district judge.¹¹³ At this point, to be safe, litigants will have to pursue both of these procedures simultaneously weighing the advantages and disadvantages of each remedy.¹¹⁴

With respect to a writ of mandamus, the major advantage and disadvantage are as follow. The mandamus remedy allows for interlocutory review of the order denying a three-judge court.¹¹⁵ However, the court can consider only the question of whether the three-judge court was required.¹¹⁶ In either event, the parties will be sent back for a new trial or for an appeal on the merits to the court of appeals.¹¹⁷

With respect to an appeal to the court of appeals, the major advantage and disadvantage are as follow. If the court of appeals decides that a three-judge court was nor required below, it will proceed to review the merits of the decree which was entered, disposing of the entire case at once.¹¹⁸ However, some courts of appeal will dismiss an appeal because of the “rule” that mandamus from the Supreme Court is the exclusive remedy.¹¹⁹ Despite the advantages and disadvantages of both remedies, a litigant who decides to pursue one remedy risks having the other remedy barred by limitations.¹²⁰

This procedure has proven to be ... a dangerous source of pitfalls for litigants.

96. *Id.* at 328.

97. Three-Judge Court Act of 1910, *supra* note 12, at 210.

98. 370 U.S. 713 (1962).

99. *Id.* at 716.

100. 387 U.S. 427 (1967).

101. *Id.*

102. H.R. 1252, 105th Cong. §2 (1997).

103. *Three-Judge Constitutional Litigation*, *supra* note 8, at 563.

104. *Id.*

105. *See id.* at 563-64.

106. *See id.*

107. *See id.* at 564.

108. *See id.* at 566.

109. *See id.* at 566 n. 56.

110. *See id.* at 566 n. 55 (*citing* *Ex Parte Gray*, 342 U.S. 517 (1952), and *Ex Parte Public National Bank*, 278 U.S. 101 (1928)).

111. *See* *Three-Judge Constitutional Litigation*, *supra* note 8, at 566-67.

112. *Id.* at 567 (*citing* *Ex Parte Metropolitan Water Co.*, 220 U.S. 539 (1911)).

113. *Three-Judge Constitutional Litigation*, *supra* note 8, at 567 (*citing* *Carrigan v. Sunland-Tujung Telephone Co.*, 263 F.2d 568 (9th Cir. 1959)).

114. *Three-Judge Constitutional Litigation*, *supra* note 8, at 567.

115. *Id.* at 569.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 567 (*citing* *Waddell v. Chicago Land Clearance Comm'n.*, 206 F.2d 748, 750 (7th Cir. 1953)).

120. *Three-Judge Court Constitutional Litigation*, *supra* note 8, at 568.

In the second instance, where there is a decree of an erroneously convened three-judge court, the decree is not void for want of jurisdiction.¹²¹ However, the Supreme Court will dismiss an appeal from such a court once the defect is discovered.¹²² This creates the delay and expense of a second appeal to the court of appeals.¹²³ Yet, this second appeal may not be feasible.¹²⁴ By the time the Supreme Court dismisses the first appeal, the time for appealing to the court of appeals will probably expire.¹²⁵ To remedy this problem, a litigant will have to secure an order from the Supreme Court directing the district court to enter a new decree from which a timely appeal can be taken.¹²⁶ But, the Court could deny the secured order, thereby leaving the appellant remediless.¹²⁷

CONCLUSION

Representative Hyde testified that Hyde Bill § 2 “reforms the procedures of the federal courts to ensure fairness in the hearing of cases, without stripping jurisdiction or reclaiming any powers granted by Congress to the district court.”¹²⁸ Based on the judicial history created by the original Act, it is highly likely that the converse of Representative Hyde’s statement is true. You be the judge!

121. *Id.* at 570-71.

122. *Id.* at 571.

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. Bendavid, *supra* note 1, at 12.



Tamara Hall won second place in the American Judges Association writing competition for law students with this article. She received her J.D. in December 1997 from the Golden Gate University School of Law. She received a B.S. in business administration in 1993 from the University of Southern California. Ms. Hall’s career goal is to prosecute white collar crime.

Editor’s Note: After final submission of Ms. Hall’s article as part of the law student writing competition, there has been significant activity in Congress involving H.R. 1252, now known as the Judicial Reform Act of 1998. It was favorably reported by the House Judiciary Committee, chaired by Representative Hyde, on April 1, 1998, and was passed by the House on April 23, 1998. In the Senate, the bill has been assigned to the Judiciary Committee, but has not yet been reported out by the committee. As passed by the House, H.R. 1252 contains several provisions beyond the three-judge court section discussed in this article. Other sections include revised procedures for processing complaints against federal judges; random assignment of habeas corpus applications in each district; rules governing media coverage of federal court proceedings; and limits on the powers of federal courts over suits concerning prison conditions.

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