



UNC  
SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

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Volume 42 | Number 1

Article 28

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12-4-1963

# Federal Jurisdiction -- Three Judge Courts -- Abstention -- Appellate Jurisdiction

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## Recommended Citation

Charles M. Whedbee, *Federal Jurisdiction -- Three Judge Courts -- Abstention -- Appellate Jurisdiction*, 42 N.C. L. REV. 236 (1963).  
Available at: <http://scholarship.law.unc.edu/nclr/vol42/iss1/28>

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transfer of realty without providing any substantial benefits to either spouse. The remedy for this situation calls for an amendment to the present constitution, which, with respect to this requirement, seems both illogical and outmoded.

ANN H. PHILLIPS

### Federal Jurisdiction—Three Judge Courts—Abstention— Appellate Jurisdiction

*Idlewild Bon Voyage Liquor Corp. v. Epstein*<sup>1</sup> makes two significant decisions dealing with the jurisdiction of three judge courts and appeal from a district court's denial to convene such a court. The result is to simplify and clarify this area of federal jurisdiction.

A novel feature of our judicial system, the three judge federal court is an important buffer in the conflict of state and federal law. A three judge court is properly convened when petitioner seeks to enjoin the enforcement of a state or federal statute as being unconstitutional.<sup>2</sup> If the case is proper the district judge certifies the case to the chief judge of the circuit, who convenes the special court. The full court includes in its three members one circuit judge and the district judge before whom the case is pending.<sup>3</sup> Appeal lies directly to the Supreme Court.<sup>4</sup>

The three judge court was created by Congress in response to public demand. *Ex Parte Young*<sup>5</sup> held that a single federal district judge could enjoin a state official from enforcing an unconstitutional

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<sup>1</sup> 370 U.S. 713 (1962) (per curiam).

<sup>2</sup> "An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title." 28 U.S.C. § 2281 (1958). 28 U.S.C. § 2282 (1958) applies the same rule to federal statutes. 28 U.S.C. § 2284 (1958) outlines the composition and procedure of the three judge court. Other actions requiring a three judge court are cases seeking to set aside an order of the Interstate Commerce Commission, 28 U.S.C. § 2325 (1950) and to enjoin a violation of the Sherman Antitrust Act in which an expediting certificate has been filed by the U.S. Attorney General, 63 Stat. 107 (1949), 15 U.S.C. § 28 (1958).

<sup>3</sup> 28 U.S.C. § 2284(1) (1958).

<sup>4</sup> 28 U.S.C. § 1253 (1958). Direct appeal is allowed because of the dignity of the special court and the cases are generally of extreme importance. See 47 Geo. L.J. 161, 169 (1958).

<sup>5</sup> 209 U.S. 123 (1908).

state statute. That a single federal district judge could overturn state legislation was a great affront to state pride and dignity.<sup>6</sup> Further, "legislative history . . . indicates that the three judge court sections . . . were enacted to prevent a single federal judge from being able to paralyze totally the operation of an entire regulatory scheme, either state or federal, by issuance of a broad injunctive order."<sup>7</sup>

Judicial interpretation has limited the jurisdiction of these courts. The statutes creating them are not a statement of broad social policy but are to be strictly construed.<sup>8</sup> There must be a substantial federal question—if the statute is clearly constitutional<sup>9</sup> or unconstitutional<sup>10</sup> the district judge is not required to call a three judge court. Petitioner must attack the constitutionality of the statute itself; an allegation of unconstitutional application is insufficient.<sup>11</sup> However a three judge court may assume jurisdiction of collateral issues if properly joined with an allegation that the statute is unconstitutional.<sup>12</sup> An injunction must be sought,<sup>13</sup> and a statewide statute must be attacked, not a local ordinance.<sup>14</sup> Nor do three judges hear counterclaims<sup>15</sup> or contempt actions,<sup>16</sup> or cases involving only private litigants.<sup>17</sup>

The single district judge before whom the case is first presented has limited power. He can only determine whether the case presented comes within the statutory requirements for a three judge court, whether the complaint alleges a basis for equitable relief,

<sup>6</sup> *Hutcheson, A Case for Three Judges*, 47 HARV. L. REV. 795 (1934).

<sup>7</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963).

<sup>8</sup> *Phillips v. United States*, 312 U.S. 246 (1941).

<sup>9</sup> *E.g.*, *California Water Serv. Co. v. City of Redding*, 304 U.S. 252 (1938); *Ex Parte Poresky*, 290 U.S. 30 (1933) (per curiam).

<sup>10</sup> *Turner v. City of Memphis*, 369 U.S. 350 (1962) (per curiam); *Baily v. Patterson*, 369 U.S. 31 (1962) (per curiam). See 50 CALIF. L. REV. 728 (1962).

<sup>11</sup> *Phillips v. United States*, 312 U.S. 246 (1941).

<sup>12</sup> *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73 (1960); *cf. Hurn v. Oursler*, 289 U.S. 238 (1933).

<sup>13</sup> *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963); *Harlan v. Pennsylvania R.R.*, 180 F. Supp. 725 (W.D. Penn. 1960).

<sup>14</sup> *Rorich v. Board of Comm'rs of Everglades Drainage Dist.*, 307 U.S. 208 (1939); *Ex Parte Collins*, 277 U.S. 565 (1928).

<sup>15</sup> *Public Service Comm'n of Missouri v. Brasher Freight Lines*, 306 U.S. 204 (1939).

<sup>16</sup> *Pendergast v. United States*, 314 U.S. 574 (1941), *rev'd on other grounds*, 317 U.S. 412 (1943).

<sup>17</sup> *International Ladies Garment Workers v. Donnelly Garment Co.*, 304 U.S. 243 (1938).

and whether the constitutional question is substantial.<sup>18</sup> If these criteria are met he must certify the case to the chief judge who will convene the three judge court. To prevent irreparable damage though, the single judge can issue a temporary restraining order to remain in force only until the full hearing,<sup>19</sup> but he cannot determine the case on the merits.<sup>20</sup> If the district judge refuses to order a three judge court, then mandamus will lie to the Supreme Court.<sup>21</sup> If there is no substantial federal question<sup>22</sup> or the case is otherwise improper,<sup>23</sup> the single judge may dismiss. His determination of the existence of a substantial federal question may be appealed to the court of appeals.<sup>24</sup>

*Idlewild Bon Voyage Liquor Corp. v. Epstein*<sup>25</sup> makes two additional inroads into the field of three judge courts. *Idlewild* first holds that the single district judge cannot decide to abstain.<sup>26</sup> Petitioner sold liquor to overseas passengers at an international air terminal, delivery being made upon the buyer's arrival at his foreign destination. Being advised by New York state authorities that his business was illegal under state statutes, petitioner sought to enjoin enforcement of the statute as being unconstitutional under the com-

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<sup>18</sup> *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962) (per curiam).

<sup>19</sup> 28 U.S.C. § 2284(3) (1958).

<sup>20</sup> *Stratton v. St. Louis S.W. Ry.*, 282 U.S. 10 (1930).

<sup>21</sup> *E.g.*, *Ex Parte Bransford*, 310 U.S. 354 (1940); *Stratton v. St. Louis S.W. Ry.*, *supra* note 20.

<sup>22</sup> *E.g.*, *Ex Parte Poresky*, 290 U.S. 30 (1933); *German v. South Carolina Ports Authority*, 295 F.2d 491 (4th Cir. 1961). This includes the determination that the statute is clearly constitutional or unconstitutional. See cases cited notes 8-10 *supra*.

<sup>23</sup> *Jacobs v. Tawes*, 250 F.2d 611 (4th Cir. 1957) (lack of jurisdictional amount); *Harlan v. Pennsylvania R.R.*, 180 F. Supp. 725 (W.D. Penn. 1960) (no injunction sought).

<sup>24</sup> *Bell v. Waterfront Comm'n of New York Harbor*, 279 F.2d 853 (2d Cir. 1960); *White v. Gates*, 253 F.2d 868 (D.C. Cir.), *cert. denied*, 356 U.S. 973 (1958).

<sup>25</sup> 370 U.S. 713 (1962) (per curiam).

<sup>26</sup> Equitable abstention is the principle that the "federal courts should not adjudicate the constitutionality of state enactments fairly open to interpretation until the state courts have been afforded reasonable opportunity to pass on them." *Harrison v. NAACP*, 360 U.S. 167, 176 (1959); *accord*, *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) (complicated state regulatory system); *Great Lakes Dredge & Drydock Co. v. Huffman*, 319 U.S. 293 (1943) (state taxation); *Railroad Comm'n of Texas v. Pullman*, 312 U.S. 496 (1941) (constitutional question with unsettled state law). See *Wright, The Abstention Doctrine Reconsidered*, 37 *Tex. L. Rev.* 815 (1959); *Note*, 59 *Colum. L. Rev.* 749 (1959). But see, *e.g.*, *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25 (1959), where abstention is exercised in other than constitutional questions.

merce clause and the supremacy clause. Petitioner's request for a three judge court was denied by the district judge on the grounds that the federal court should retain jurisdiction but abstain until the question was initially decided by the state courts, even though no state action was pending at the time.<sup>27</sup>

The Supreme Court, in a per curiam opinion,<sup>28</sup> held that the decision to abstain is to be made by three judges because it is a decision on the merits and thus improper for a single judge.<sup>29</sup>

It can be argued that abstention is a threshold jurisdictional decision, similar to the substantial question determination.<sup>30</sup> There is no determination of rights or duties. Abstention is simply a decision that the federal court should not hear the case. Further, the cases<sup>31</sup> allowing the single judge to decide the substantial question issue are indicative of a Supreme Court policy to restrict rather than broaden the use of three judge courts. The convening of a three judge court is a time consuming and costly process<sup>32</sup> and since the purpose of the statute is to avoid improvident invalidation of state statutes, policy reasons favor a single judge deciding the matter of abstention.<sup>33</sup> Also abstention is an area marked by delay and frustration<sup>34</sup> and the convening of three judges adds to the delay.

<sup>27</sup> *Idlewild Bon Voyage Liquor Corp. v. Rohan*, 188 F. Supp. 434 (S.D.N.Y. 1960).

<sup>28</sup> *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1963) (per curiam).

<sup>29</sup> *Snyder's Drug Stores, Inc. v. Taylor*, 227 F.2d 162 (8th Cir. 1955) holds that a single judge can abstain, but does not give supporting rationale. A three judge court can abstain. *E.g.*, *Harrison v. NAACP*, 360 U.S. 167 (1959).

<sup>30</sup> 47 IOWA L. REV. 534, 537 (1962).

<sup>31</sup> *E.g.*, *Ex Parte Poresky*, 290 U.S. 30 (1933); *Baily v. Patterson*, 369 U.S. 31 (1962); notes 9 & 10 *supra* and accompanying text.

<sup>32</sup> "[T]he requirement of three judges, of whom one must be a Justice of this Court or a circuit judge, entails a serious drain upon the federal judicial system particularly in regions where, despite modern facilities, distance still plays an important part in the administration of justice. And all but a few of the great metropolitan areas are such regions. Moreover, inasmuch as this procedure also brings direct review of a district court to this court, any loose construction of the requirements of § 266 [§ 2281] would defeat the purposes of Congress, as expressed in the Jurisdictional Act of February 1925, to keep within narrow confines our appellate docket." *Phillips v. United States*, 312 U.S. 246, 250 (1941).

<sup>33</sup> See 47 IOWA L. REV. 534, 538 (1962).

<sup>34</sup> The three judge court called pursuant to the decision in the principal case refused to abstain because of the delay and expense already incurred by the petitioner. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 212 F. Supp. 376 (S.D.N.Y. 1962). But see *Government & Civic Employees Organizing Comm., CIO v. Windsor*, 353 U.S. 364 (1957); where appellant twice reached the Supreme Court without ever having his case heard on the merits.

Under close examination, however, it becomes apparent that the substantial question determination and the decision to abstain are different. The former is to determine if jurisdiction exists, because a substantial question is a jurisdictional requirement for the convening of a three judge court.<sup>35</sup> Also the single judge has no discretion. If the outcome of the case is clear, he must dismiss.

Abstention presupposes jurisdiction.<sup>36</sup> In abstaining a court declines, for policy reasons, to hear a case of which it has jurisdiction. The decision to abstain is not automatic but is based on a weighing of factors.<sup>37</sup> This seems a proper function for three judges, since the statute indicates that the single judge's functions be almost ministerial in nature.<sup>38</sup>

Furthermore, if a substantial question exists, the single judge should not deny relief to either party. Withholding relief is the same as granting it. The single judge cannot grant an injunction. Conversely he should not be able to deny petitioner's request.<sup>39</sup> Also there is no temptation for the single judge to use abstention as an excuse to avoid convening a three judge court because the procedure would disrupt his docket as well as that of the court of appeals.

The second significant holding of *Idlewild* deals with appellate review and restricts the interpretation to be given *Stratton v. St. Louis S.W. Ry.*<sup>40</sup> In *Stratton* a district judge granted a temporary restraining order but later dismissed the bill for want of equity.<sup>41</sup> The court of appeals reversed on the merits, not on the question of the propriety of three judges.<sup>42</sup> On its own motion the Supreme Court held that the single judge had no jurisdiction to hear the case on the merits, a three judge court being proper, and that, therefore, the court of appeals was without jurisdiction.<sup>43</sup>

In *Idlewild* the court of appeals also decided that abstention was a decision on the merits proper only for a three judge court. How-

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<sup>35</sup> *Ex Parte Poresky*, 290 U.S. 30 (1933).

<sup>36</sup> *Idlewild Bon Voyage Liquor Corp. v. Rohan*, 289 F.2d 426, 429 (1961).

<sup>37</sup> *NAACP v. Bennett*, 360 U.S. 471 (1959).

<sup>38</sup> See Bowen, *Where are Three Federal Judges Required?*, 16 MINN. L. REV. 1, 17 (1931).

<sup>39</sup> *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962) (per curiam).

<sup>40</sup> 282 U.S. 10 (1930).

<sup>41</sup> *St. Louis S.W. Ry. v. Emmerson*, 27 F.2d 1005 (S.D. Ill. 1928).

<sup>42</sup> *St. Louis S.W. Ry. v. Emmerson*, 30 F.2d 322 (7th Cir. 1929).

<sup>43</sup> *Stratton v. St. Louis S.W. Ry.*, 282 U.S. 10 (1930).

ever, it thought itself unable to give petitioner relief,<sup>44</sup> holding that under *Stratton* it had no jurisdiction, and dismissed.<sup>45</sup> In doing so it gave *Stratton* a broad interpretation and held that it was precluded from hearing the question of jurisdiction as well as deciding the merits<sup>46</sup>—though admitting it was in the anomalous position of finding the district court in error and being unable to give relief.

The Supreme Court limited the interpretation to be given *Stratton*. Though the per curiam opinion is not explicit, it apparently holds that *Stratton* is authority only for the point that the court of appeals cannot decide the merits of an issue within the jurisdiction of a three judge court. Thus, if the court of appeals finds that the district court had jurisdiction, it can review the merits of the case; and if it finds that the district judge did not have jurisdiction, it can remand the case with instructions to convene a three judge court.

Before *Idlewild* petitioner's only safe course, upon being denied a three judge court, was to file both a petition for mandamus with the Supreme Court and an appeal with the court of appeals.<sup>47</sup> Mandamus was thought necessary to compel the convening of a three judge court. Appeal was provident, since if mandamus were denied petitioner might find that his time for appeal on the merits had lapsed.<sup>48</sup> Since one or the other would consequently prove unnecessary, petitioner bore an expensive burden. Also such a procedural route resulted in piecemeal determination of the case.<sup>49</sup>

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<sup>44</sup> *Idlewild Bon Voyage Liquor Corp. v. Rohan*, 289 F.2d 426 (2d Cir. 1961).

<sup>45</sup> Petitioner started anew and again sought a three judge court but the second district judge refused to overrule the prior denial of another district court. *Idlewild Bon Voyage Liquor Corp. v. Rohan*, 194 F. Supp. 3 (S.D.N.Y. 1961).

<sup>46</sup> There was a split of authority on this question. Some circuits dismissed, citing *Stratton*. *Waddell v. Chicago Land Clearing Comm'n*, 206 F.2d 748 (7th Cir. 1953) (dictum); *Riss & Co. v. Hoch*, 99 F.2d 553 (10th Cir. 1938). Other courts vacated the order of the single judge, but apparently the present question was not squarely faced. *Two Guys from Harrison-Allentown, Inc. v. McGinley*, 266 F.2d 427 (3rd Cir. 1959); *Board of Supervisors v. Tureaud*, 207 F.2d 807 (5th Cir. 1953), *vacated on other grounds*, 347 U.S. 971 (1959) (per curiam). In *Two Guys from Harrison-Allentown, Inc. v. McGinley*, *supra*, the first district judge held a three judge court proper. A second judge dismissed the complaint. The court of appeals held the second judge was without jurisdiction and vacated his order.

<sup>47</sup> In *Idlewild* petitioner sought both certiorari and mandamus. 368 U.S. 812 (1961).

<sup>48</sup> 61 COLUM. L. REV. 1358, 1362 (1961); 47 IOWA L. REV. 534, 541 (1962).

<sup>49</sup> *Ibid.*

As a result of *Idlewild*, appeal to the court of appeals now provides a complete remedy when a district judge improperly refuses to convene a three judge court. If the court of appeals finds that the single judge did not have jurisdiction, it can proceed with the merits. If a three judge court is proper, it can be so ordered. There is no need to delay proceeding by seeking mandamus from the Supreme Court,<sup>50</sup> for mandamus does not consider the merits; it merely orders the convening of a three judge court.

The procedural result of *Idlewild* is a much needed simplification of review procedure. Procedural pitfalls and piecemeal determination have been eliminated and an uncertain area made uniform and clear.

CHARLES MONROE WHEDBEE

### Pleadings—Alternative Joinder of Defendants

The Supreme Court of North Carolina has again considered the application of the alternative joinder of defendants statute<sup>1</sup> in *Conger v. Travelers Ins. Co.*<sup>2</sup> Prior to the decision, the status of the statute was very questionable.<sup>3</sup> The instant case has done much to sweep aside the confusion.

In *Conger*, the plaintiff alleged alternatively two causes of action. In the first clause, plaintiff alleged that she was the named beneficiary of a group life insurance policy issued by the defendant, Travelers, which policy insured the life of deceased; that the deceased died while the policy was fully effective; that payment to the plaintiff under the terms of the policy had been refused by Travelers; and that the plaintiff was entitled to full payment from Travelers in the amount of \$8000. In the second cause of action,

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<sup>50</sup> Apparently mandamus is still available to petitioner. See cases cited note 21 *supra*. However, mandamus will usually not issue where appellate review is available, even though the Court can, in its discretion, issue the writ in exceptional and appropriate cases. *Ex Parte Republic of Peru*, 318 U.S. 578 (1943); *Ex Parte United States*, 287 U.S. 241 (1932). In *Idlewild* the Court granted both certiorari and heard the petition for mandamus. 368 U.S. 812 (1961).

<sup>1</sup> N.C. GEN. STAT. § 1-69 (1953).

<sup>2</sup> 260 N.C. 112, 131 S.E.2d 889 (1963).

<sup>3</sup> *State ex rel Cain v. Corbett*, 235 N.C. 33, 69 S.E.2d 20 (1952); *Foot v. C. W. Davis & Co.*, 230 N.C. 422, 53 S.E.2d 311 (1949) (Although the court did not construe the statute, it was a case for the application of the statute.); *Peitzman v. Town of Zebulon*, 219 N.C. 473, 14 S.E.2d 416 (1941); *Smith v. Greensboro Joint Stock Land Bank*, 213 N.C. 343, 196 S.E. 481 (1938); *Grady v. Warren*, 201 N.C. 693, 161 S.E. 319 (1931).