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THE "TWO-JUDGE FEDERAL COURT": THE CHIEF JUDGE'S DISCRETION IN THREE-JUDGE COURT CONVOCATION

by J. Tom Ezell and E. Russell Nunnally

Three-judge district courts play a large role in today's federal court docket. Through them, three federal judges¹ can nullify acts of state legislatures,² rulings of the Interstate Commerce Commission,³ and acts of Congress.⁴ These courts, however, have put a great strain on the entire federal judiciary.⁵ The use and necessity of three-judge courts have been subjected to numerous commentaries,⁶ and those aspects need not, and will not, be discussed here. This Comment deals specifically with the procedure involved in empaneling a three-judge district court. The statute that sets out this procedure provides in part: "The district judge to whom the application for injunction or other relief is presented . . . shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge."⁷

A problem has been created by United States Supreme Court decisions permitting the single judge to determine initially whether the plaintiff's claim is within the jurisdiction of a three-judge court.⁸ The question then becomes whether the district judge to whom the application is presented is *solely* responsible for making this jurisdictional determination, or whether the chief judge of the circuit can also determine to his satisfaction that the case is proper for a three-judge court. The few cases that have dealt with the problem are not consistent,⁹ and a survey of the chief judges of the courts of appeals indicate that they too are not in agreement.¹⁰ In order to get a better grasp of the problem, a short look at the history of three-judge court acts is necessary.

¹ One must be a circuit judge and one must be the district judge in whose court the application is filed. 28 U.S.C. § 2284(1) (1971).

² *Id.* § 2281.

³ *Id.* § 2325.

⁴ *Id.* § 2282.

⁵ See Comment, *The Three-Judge Federal Court in Constitutional Litigation: A Procedural Anachronism*, 27 U. CHI. L. REV. 555 (1960); Note, *The Three-Judge District Court: Scope and Procedure Under Section 2281*, 77 HARV. L. REV. 299 (1963); Note, *The Three-Judge Court Reassessed: Changing Roles in Federal-State Relationships*, 72 YALE L.J. 1646 (1963).

⁶ See note 5 *supra*. See also Comment, *The Three-Judge Federal Court in Challenges to State Action*, 34 TENN. L. REV. 235 (1967); Comment, *The Three-Judge District Court in Contemporary Federal Jurisdiction*, 41 WASH. L. REV. 877 (1966); Note, *Reviewing the Grant of a Three-Judge Court*, 69 COLUM. L. REV. 146 (1969); Note, *Three-Judge District Courts: Some Problems and a Proposal*, 54 CORNELL L. REV. 928 (1969); Note, *Three-Judge Court Practice Under § 2281*, 53 GEO. L.J. 431 (1964); Note, *A Survey of the Three-Judge Requirements*, 47 GEO. L.J. 161 (1958); Note, *The Three-Judge District Court and Appellate Review*, 49 VA. L. REV. 538 (1963).

⁷ 28 U.S.C. § 2284(1) (1971). Wherever the term "chief judge" is used hereafter, it refers to the chief judge of the court of appeals.

⁸ See, e.g., *Swift & Co. v. Wickham*, 382 U.S. 111 (1965); *Bailey v. Patterson*, 369 U.S. 31 (1962); *California Water Serv. Co. v. City of Redding*, 304 U.S. 252 (1938); *Ex parte Poresky*, 290 U.S. 30 (1933).

⁹ Compare *Miller v. Smith*, 236 F. Supp. 927 (E.D. Pa. 1965), with *Jackson v. Choate*, 404 F.2d 910 (5th Cir. 1968).

¹⁰ Letters from the chief judges of the circuits for the United States Court of Appeals to E. Russell Nunnally, Jr.: *Bailey Aldrich*, 1st Cir., Aug. 31, 1971; *J. Edward Lombard*, 2d Cir., Aug. 25, 1971; *William H. Hastie*, 3d Cir., Aug. 16, 1971; *Harry Phillips*, 6th Cir., Sept. 2, 1961; *Luther M. Swygert*, 7th Cir., Aug. 30, 1971; *M.C. Matthes*, 8th Cir., Aug. 16,

I. THREE-JUDGE COURT—
FROM ANTITRUST TO ACT OF CONGRESS

The initial three-judge court act required that any action regarding the protection of trade and commerce from unlawful restraints and monopolies be heard by three judges.¹¹ Congress then passed a statute requiring that any action to enjoin an order of the Interstate Commerce Commission be heard by a three-judge court.¹² In 1911 Congress enacted what is now section 2281 of the Judicial Code,¹³ which requires that a three-judge court hear any action to enjoin the operation of a state statute on the ground that the statute is unconstitutional.¹⁴ This latter act was passed in order to soothe the intense feelings of the states against suspension of the laws of the state legislature by a single federal district judge.¹⁵ These fears stemmed from *Ex parte Young*,¹⁶ in which a single federal district judge enjoined the attorney general of Minnesota from enforcing a state law that lowered railroad rates.

Although these statutes dealt with different matters, they had some common features. Each statute set out its own procedure for empaneling the court, which was the same in all cases.¹⁷ The district judge to whom the application was made merely appointed two other judges to hear the case with him. In addition, all three statutes provided for direct appeal to the Supreme Court.

In 1937 Congress passed the last of the three-judge court acts. This statute required a three-judge court to hear any action to enjoin the enforcement of an act of Congress.¹⁸ While this statute was similar to its predecessors in that it provided for direct appeal to the Supreme Court, the procedural steps for empaneling the court were quite different. The district judge to whom the application was made was to "request the senior circuit judge . . . to designate two other judges to participate in hearing and determining such application."¹⁹ The statute went on to say that "[i]t shall be the duty of the senior circuit judge . . . to designate immediately two other judges."²⁰ The statute itself gave no explanation of why the chief judge was brought into the proceedings; therefore, any comment on legislative intent is mere speculation. The most plausible reason is that the chief judge is in a better position to know which judges are available, and he is able to take care of the administrative functions more efficiently than a district judge.²¹

1971; Richard H. Chambers, 9th Cir., Aug. 13, 1971; David T. Lewis, 10th Cir., Aug. 24, 1971; Interview with Nathan Paulson, chief clerk to the chief judge for the D.C. Cir., by telephone, Sept. 8, 1971.

¹¹ Act of Feb. 11, 1903, ch. 544, 32 Stat. 823.

¹² Act of June 29, 1906, ch. 3591, 34 Stat. 584.

¹³ 28 U.S.C. § 2281 (1971).

¹⁴ Act of Mar. 3, 1911, ch. 231, § 266, 36 Stat. 1162.

¹⁵ C. WRIGHT, *LAW OF FEDERAL COURTS* 188 (1970); 42 CONG. REC. 4847 (1908) (remarks of Senator Overman).

¹⁶ 209 U.S. 123 (1908).

¹⁷ Act of Mar. 13, 1911, ch. 231, § 266, 36 Stat. 1162; Act of June 29, 1906, ch. 3591, 34 Stat. 584; Act of Feb. 11, 1903, ch. 544, 32 Stat. 823.

¹⁸ Act of Aug. 24, 1937, ch. 754, § 3, 50 Stat. 752.

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Sinatra v. New Jersey State Comm'n of Investigation*, 311 F. Supp. 678, 680 (D.N.J. 1970) (comment by Chief Judge Hastie); ALI, *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 328, 329 (Official Draft 1969) [hereinafter cited as ALI STUDY].

When the Judicial Code was revised in 1948, Congress decided to make the procedure for empaneling three-judge courts uniform.²² This meant that no matter what function the court was to perform—whether a challenge to an Interstate Commerce Commission order or an act of Congress—the procedural aspects would be the same. Since the method for convening a three-judge court to hear challenges to acts of Congress²³ was the most recent, it was considered the best.²⁴ For this reason the procedure that called for the chief judge to appoint the other two judges was made applicable to all actions required to be heard by a three-judge court.²⁵ One significant change was made, however, in the act that unified the procedure. The 1937 act stipulated that the district judge was to “request” the chief judge to designate two other judges.²⁶ The 1948 revision omitted the word “request” and stated that the district judge shall merely notify the chief judge, and that the chief judge “shall” designate the two other judges.²⁷ This change has been overlooked, however, by some of the chief judges who insist that they have the discretion either to appoint or not to appoint the other judges notwithstanding a request to do so from the district judge.

II. USE OF DISCRETION BY THE CHIEF JUDGE

Although the first act requiring the chief judge to appoint the three-judge court was passed in 1937,²⁸ no court had held that the chief judge could refuse to do so until 1965, when Judge Biggs, then chief judge of the Third Circuit, took that position in *Miller v. Smith*.²⁹ In that case the district judge to whom the application was made expressed some doubt about whether the case called for a three-judge court. Nevertheless, he asked the chief judge to appoint two other judges. The chief judge, in refusing to empanel the three-judge court, met the issue squarely³⁰ and determined that “he must, as a judicial act determine that the proceeding or case in which the three-judge court is sought . . . is actually one requiring adjudication by a three-judge tribunal.”³¹ Judge Biggs’ reasoning was somewhat metaphysical: The statute says that the district judge

²² H.R. REP. No. 308, 80th Cong., 1st Sess. A182 (1947).

²³ Act of Aug. 24, 1937, ch. 754, § 3, 50 Stat. 752.

²⁴ H.R. REP. No. 308, 80th Cong., 1st Sess. A182 (1947).

²⁵ Act of June 25, 1948, ch. 646, § 2284(1), 62 Stat. 968.

²⁶ Act of Aug. 24, 1937, ch. 754, § 3, 50 Stat. 752.

²⁷ Act of June 25, 1948, ch. 646, § 2284(1), 62 Stat. 968.

²⁸ Act of Aug. 24, 1937, ch. 754, § 3, 50 Stat. 752.

²⁹ 236 F. Supp. 927 (E.D. Pa. 1965). See also *Kirk v. State Bd. of Educ.*, 236 F. Supp. 1020 (E.D. Pa. 1964), in which Judge Biggs stated in dicta that the jurisdictional issue was one which “also must be determined by the Chief Judge of the Circuit.” *Id.* at 1022.

³⁰ Does a chief judge of a circuit possess the power . . . when notified by a district judge of the circuit that an application has been made to him for an injunction in a case which, in the opinion of the district judge, requires adjudication by a three-judge court pursuant to Sections 2281 and 2284, . . . to refuse to designate such a court if in the opinion of the chief judge the notification of the district judge is erroneous and the designation of the two additional judges therefore should not be made. Or should the chief judge of the circuit, as a ministerial act, without considering the question of whether the case is one adjudicable by a three-judge tribunal, proceed to designate two other judges to make up the three-judge court?

236 F. Supp. at 931.

³¹ *Id.* at 933. It is important to note, however, that Judge Biggs permitted the parties to appear and argue the point.

"shall immediately notify the chief judge of the circuit, who shall"³² appoint two other judges. Since the Supreme Court has given the district judge discretion on whether to notify the chief judge,³³ by using "shall" in the same context, Judge Biggs reasoned that he also had discretion to appoint or not to appoint the other judges.³⁴

Judge Biggs' interpretation of the statute failed to recognize that prior to the time the district judge determined that the case was within the jurisdiction of a three-judge court, the case was not necessarily required to be heard by a three-judge court;³⁵ however, once the district judge determined that the case was within three-judge court jurisdiction, the district judge was required to notify the chief judge to appoint two other judges.³⁶ The only time the district judge does not have to request a three-judge court is when the case is not within three-judge court jurisdiction. To allow the chief judge to refuse the request once the jurisdictional determination has already been made permits the chief judge to circumvent the specifications of the statute. One writer has criticized this approach as giving "a single appellate judge . . . the power to review a case on the merits and enter what is in effect a final judgment."³⁷ He suggested that the mere repetition of the word "shall" should not be used to grant the chief judge such awesome power.³⁸

In answer to the argument that the chief judge might have been included in the empaneling procedure merely because he knew the availability of the other judges, Judge Biggs stated that the "terms of the statute" led him to the conclusion that his role was judicial rather than ministerial.³⁹ He did not state the "terms" to which he referred, but it must have been his interpretation of the word "shall." It seems strange that "shall" had suddenly become a term of discretion. This fact would certainly surprise most, if not all, legislative bodies. Judge Biggs did not attempt to justify his position on any practical basis, but he seemed to say that since he was not forbidden from refusing to appoint the other judges, he was free to do so.

One year after *Miller* Judge Bazelon, Chief Judge of the District of Columbia Circuit, aligned himself with Judge Biggs on this issue. In dicta in *Hobsen v. Hansen* Judge Bazelon stated that he had authority to refuse to allow certain issues to be determined by the three-judge court if those issues did not present substantial constitutional attacks.⁴⁰ Referring to three-judge courts, Judge Bazelon stated that "the determination of the court's jurisdiction should be made *exclusively* by the Chief Judge of the Circuit or should be left to the three-

³² 28 U.S.C. § 2284(1) (1971) (emphasis added).

³³ See cases cited note 8 *supra*.

³⁴ 236 F. Supp. at 933.

³⁵ See H.R. REP. NO. 1677, 77th Cong., 2d Sess. 5 (1942), which states that Congress desired that even the district judge was to have no discretion and that *Ex parte Poresky*, which gave him that power, was to be overruled. The Supreme Court has chosen to ignore that intent, however. See, e.g., *Rosado v. Wyman*, 397 U.S. 397 (1970); *Bailey v. Patterson*, 369 U.S. 31 (1962).

³⁶ 28 U.S.C. § 2284(1) (1971).

³⁷ Note, *Reviewing the Grant of a Three-Judge Court*, 69 COLUM. L. REV. 146, 148 (1969).

³⁸ *Id.* at 149.

³⁹ *Miller v. Smith*, 236 F. Supp. 927, 934 n.11 (E.D. Pa. 1965).

⁴⁰ 256 F. Supp. 18, 19 (D.C. Cir. 1966).

judge court."⁴¹ This position that the district judge should make no jurisdictional determination was indeed unique and had never been followed in any circuit, including Judge Bazelon's.⁴² He has since changed his position and now feels that the jurisdictional determination should be left to either the district judge or the three-judge court.⁴³

A position directly contrary to that of Judge Biggs was originally taken by Judge Brown, Chief Judge of the Fifth Circuit, in *Jackson v. Choate*, in which he stated that "whether the question presented is properly a three-judge matter is initially for the determination of the 3-Judge Court."⁴⁴ Judge Brown's reasoning was purely practical in that it would require less administrative problems if the three-judge court were convened in every case and appeal would be much less complicated by the automatic convening of the three-judge court.⁴⁵ In *Hurgrave v. McKinney*⁴⁶ Judge Brown reaffirmed this position and explained that the automatic convening of the three-judge court would save time in the long run. Apparently, however, Judge Brown has recently changed his position.⁴⁷ The present policy within the Fifth Circuit is that whenever a three-judge court is requested, the district judge forwards the request to the chief judge who then makes the jurisdictional determination himself.⁴⁸ However, even this procedure is not always followed because of the difficulty of ascertaining if the question presented in a particular case involves a substantial constitutional attack. The problem is most apparent when the district judge believes, for whatever reason, that the case is not one for a three-judge court. In that instance must the chief judge be consulted? Judge Brown has stated that he must.⁴⁹ In some instances, however, these communications⁵⁰ have not

⁴¹ *Id.* at 21 n.10 (emphasis added).

⁴² However, Chief Judge Brown subsequently adopted that position. See text accompanying note 47 *infra*.

⁴³ Interview with Nathan Paulson, *supra* note 10.

⁴⁴ 404 F.2d 910, 912 (5th Cir. 1968). See also *Smith v. Ladner*, 260 F. Supp. 918 (S.D. Miss. 1966), written by Judge Brown then acting as chief judge and stating that the jurisdictional issue is "best determined by the three-judge court." *Id.* at 919. This approach was lauded as the proper procedure in Note, *Three-Judge District Courts: Some Problems and a Proposal*, 54 CORNELL L. REV. 928, 940 (1969).

⁴⁵ 404 F.2d at 913.

⁴⁶ 302 F. Supp. 1381 (M.D. Fla. 1969).

⁴⁷ See Brief for Respondent at 2, *Wiley v. Brown*, 400 U.S. 915 (1970), in which a writ of mandamus was sought to compel Judge Brown to convene a three-judge court. See also *Giordano v. Stubb*, 335 F. Supp. 107 (N.D. Ga. 1971).

⁴⁸ Letter from Judge Brown to all district judges of the Fifth Circuit, Apr. 30, 1970. See also letter from Judge Brown to William M. Taylor, Jr., district judge, Jan. 26, 1971, set out in note 50 *infra*.

⁴⁹ See notes 47, 48 *supra*.

⁵⁰ An example of the communications from the chief judge to the district judges is the following letter from Judge Brown to Judge William Taylor of the Northern District of Texas:

January 26, 1971

C.A. No. 3-4254-C—Lewis, et al,
v. Texas Power & Light Co., et al.

My dear Judge Taylor:

I have received your letter of January 22 with its enclosures.

It would be in order for you to enter an order reciting in effect that you had submitted the matter of constituting a three-Judge Court to the Chief Judge of the Circuit, and for one or more or all of the reasons set forth in your letter of January 22 which would now be filed, he declines to constitute a three-Judge Court. I would comment, in addition (and it would be appropriate for this to be included in the order), that the problems posed are inexorably bound up with intricate Texas statutes, the construction of which

been disclosed to the parties or to their attorneys.⁵¹ In such a situation the litigants have no way of ascertaining which of the two judges really made the decision not to convene a three-judge court, and they may not know the reasons for the decision. Thus, the litigants are somewhat like players in a judicial shell game: they never know whose shell hides the pea—the district judge's or the chief judge's.⁵²

Some light is shed on Judge Brown's change of position in his brief to the Supreme Court in *Wiley v. Brown*.⁵³ Judge Brown argued that the *Jackson v. Choate* rule⁵⁴ was formulated because the Fifth Circuit was reversing single judges "several times each year . . . on the ground . . . that the District Judge should have certified the case to the Chief Judge . . ."⁵⁵ However, Judge Brown now feels this approach "must be carefully applied lest it (i) needlessly overburden the two added Judges and (ii) results often in an order which the Supreme Court holds is reviewable only by the Court of Appeals so that the order before the Supreme Court must be vacated to permit a new order to be entered upon which timely appeal can be taken to the Court of Appeals."⁵⁶ Judge Brown also noted the great burden that three-judge courts place upon the circuit and district judges.⁵⁷

Although judicial economy may be a valid reason for a district judge to give requests for three-judge courts close scrutiny, it is not a valid reason for the chief judge to exercise independent discretion.

While Judge Brown encourages the district judges to research the matter thoroughly and to make their recommendation whether or not jurisdiction is proper,⁵⁸ he reserves to himself the power to make the final decision. This procedure, while suggested by Judge Bazelon in *Hobsen v. Hansen*,⁵⁹ defies all pre-

ought to be exhausted in the State Courts before reaching any of the constitutional issues sought to be asserted.

Sincerely yours,
/s/ John R. Brown

This letter is taken from Petitioner's Supplemental Brief in *Lewis v. Brown*, 404 U.S. 819 (1971).

⁵¹ See, e.g., *Joiner v. City of Dallas*, 329 F. Supp. 943 (N.D. Tex.), *aff'd*, 447 F.2d 1403 (5th Cir. 1971), in which the parties were informed by notice of a pretrial hearing that the chief judge had declined to convene a three-judge court. There was obviously communication between the district judge and the chief judge, but the parties were informed only of the result.

⁵² It might appear at first glance that this discussion of the two-judge court is merely procedural nitpicking, but the effects are much more than procedural. When the two-judge court dismisses the attack as insubstantial without a thorough examination—a step which often precludes even further examination by the district judge—the result may be that the underlying constitutional claim is simply swept out of the federal system. It is indeed ironic that such a substantive result is reached because of a "procedural" attitude on the part of some judges; *i.e.*, a hostility toward three-judge courts grounded in a desire for judicial economy. (This attitude is amply illustrated by Chief Justice Burger's dissent in *Wisconsin v. Constantineau*, 400 U.S. 433, 443 (1971), in which he characterizes the statutes as "unwise.")

The letter from Judge Brown quoted in note 50 *supra* is an example of the operation of the two-judge court to close the doors of the federal courts to the litigant's constitutional claim.

⁵³ Brief for Respondent, *Wiley v. Brown*, 400 U.S. 915 (1970).

⁵⁴ See note 44 *supra*, and accompanying text.

⁵⁵ Brief for Respondent at 5, *Wiley v. Brown*, 400 U.S. 915 (1970).

⁵⁶ *Id.*

⁵⁷ *Id.* at 6-10.

⁵⁸ Letter from Judge Brown to all district judges of the Fifth Circuit, Aug. 21, 1970.

⁵⁹ 259 F. Supp. 18 (D.C. Cir. 1966).

cedent and the very wording of the statute itself. The procedure is also a departure from Judge Biggs' policy, since Judge Biggs refused to make any decision on the matter unless the district judge had specifically found that three-judge court jurisdiction was proper.⁶⁰

In an informal poll of the chief judges some of those answering stated that they felt that the chief judge, in extraordinary circumstances, could refuse to empanel a three-judge court when notified to do so by the district judge.⁶¹ None, however, even suggested the procedure now followed by Judge Brown. The remaining judges stated that they would strictly comply with the district judge's determination.⁶² The reasoning of the chief judges who do not automatically empanel the court is that it would be a waste of time in cases in which a lack of jurisdiction is obvious.⁶³ However, if the lack of jurisdiction is so obvious, it seems that the district judge should be able to determine the issue correctly. Because of the inconveniences caused by three-judge courts⁶⁴ and the extremely crowded dockets, there may be a few cases in which the chief judge is warranted in refusing to empanel the court—*e.g.*, if an intervening Supreme Court or state court decision moots the question. For the sake of procedure, however, rather than rest the power in the chief judge, it would appear to be preferable for the district judge to withdraw his request.⁶⁵

The Supreme Court has never met this issue,⁶⁶ nor does dictum in any related case provide a basis for prediction. The Court and commentators assume that the district judge will determine the question of jurisdiction.⁶⁷ In *Ex parte Poresky*, the Court stated that "the District Judge clearly has the authority to dismiss for the want of jurisdiction when the question lacks the necessary substance"⁶⁸

Since neither the Supreme Court nor the Congress has conferred this discretionary power on the chief judge, the source of the power is somewhat mysterious. The only official explanation to date has been Judge Biggs' interpretation of the word "shall."⁶⁹ That this nebulous interpretation is correct seems highly unlikely. One possible source of such power is the Federal Rules of Civil Procedure, which allow any federal court to dismiss a cause of action whenever it is brought to the attention of the court that subject matter jurisdiction is lacking.⁷⁰ The rule does not list, nor limit, the persons who are allowed to point out this lack of jurisdiction. The chief judge of the circuit

⁶⁰ *Fiumara v. Texaco, Inc.*, 240 F. Supp. 325 (E.D. Pa. 1965).

⁶¹ Letters from the chief judges of the Second, Seventh, Eighth, Ninth, and Tenth Circuits, *supra* note 10. See *Merced Rosa v. Herrero*, 423 F.2d 591 (1st Cir. 1970).

⁶² Letters from the chief judges of the First, Third, and Sixth Circuits, *supra* note 10; interview with Nathan Paulson, *supra* note 10.

⁶³ See note 61 *supra*.

⁶⁴ *Phillips v. United States*, 312 U.S. 246 (1941).

⁶⁵ If the chief judge and district judge disagree as to the interpretation of the intervening decision, the district judge's decision should prevail since he has jurisdiction over the application for the three-judge court.

⁶⁶ Some of the applicants who have been denied a three-judge court by the chief judge have applied to the Supreme Court for a writ of mandamus, but the Court has summarily denied mandamus in each case. See, *e.g.*, *Lewis v. Brown*, 404 U.S. 819 (1971); *Miller v. Biggs*, 382 U.S. 805 (1965).

⁶⁷ Note, *supra* note 37, at 156.

⁶⁸ 290 U.S. 30, 32 (1933).

⁶⁹ See text accompanying notes 30-34 *supra*.

⁷⁰ FED. R. CIV. P. 12(h) (3).

can certainly direct the court's attention to alleged jurisdictional deficiencies. However, the final judgment is generally left to the judge in whose court the action is filed or to an appellate court.

The duties of the chief judge are not explicitly delineated in any statute. Congress has merely set out the qualifications.⁷¹ It appears that his function in that capacity was intended to be purely administrative as opposed to judicial.⁷² If the chief judges add judicial functions on their own initiative, however, it may become necessary for Congress to set out guidelines so that the chief judges' jurisdiction can become a matter of common knowledge and be uniformly exercised. Otherwise, serious problems could arise, as they have in the three-judge court area.

III. PROBLEMS OF CONVENING A THREE-JUDGE COURT

Examining the present system in operation illustrates the manifold difficulties that it causes.

A. *Where To Appeal*

The most apparent problem with the chief judge's independent denial of the three-judge court is the problem of where to appeal.⁷³ Two of the chief judges who have taken this action stated that the proper review would be an application for a writ of mandamus to the Supreme Court.⁷⁴ The effect is to place the chief judge's decision on a parallel with a decision by the court of appeals, since the proper review of a dismissal for lack of jurisdiction by the district judge is an appeal to the circuit.⁷⁵ The result is an indication of the impropriety of such action by the chief judge, since a hearing in the court of appeals must be held before three judges.⁷⁶ Clearly the district judge to whom application for the three-judge court is made has the power to dismiss for lack of jurisdiction.⁷⁷ It is also clear that proper review of the district judge's dismissal is an appeal to the court of appeals,⁷⁸ and not to the chief judge.⁷⁹ Why then must the applicant be forced to undergo an appeal to the chief judge if the district judge is inclined to rule in his favor? Conversely, if the defendant satisfies the district judge that the case is not proper for a three-judge court, why must he suffer an appeal? While no one has yet called this review by the chief judge an appeal, it is in effect just that.⁸⁰

⁷¹ 28 U.S.C. § 45 (1971).

⁷² See, e.g., 28 U.S.C. §§ 291-95 (1971) (assigns judges to cases); *id.* §§ 331-33 (pertaining to his role in judicial conferences).

⁷³ See *Jackson v. Choate*, 404 F.2d 910 (5th Cir. 1968); *Fiumara v. Texaco, Inc.*, 240 F. Supp. 325 (E.D. Pa. 1965). See also ALI STUDY 317, 318; Note, *supra* note 44.

⁷⁴ *Jackson v. Choate*, 404 F.2d 910 (5th Cir. 1968) (Judge Brown); *Fiumara v. Texaco, Inc.*, 240 F. Supp. 325 (E.D. Pa. 1965) (Judge Biggs).

⁷⁵ *Schackman v. Arnebergh*, 387 U.S. 427 (1967); *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962). But see *Ex parte Collins*, 277 U.S. 565 (1928), stating that mandamus is the proper remedy whenever a three-judge court is sought. *Id.* at 566.

⁷⁶ 28 U.S.C. § 46(b) (1971).

⁷⁷ See cases cited note 8 *supra*.

⁷⁸ See text accompanying note 68 *supra*.

⁷⁹ *Schneider v. Herter*, 283 F.2d 368 (D.C. Cir. 1960); *Eastern States Petroleum Corp. v. Rogers*, 265 F.2d 593 (D.C. Cir. 1959); *Sinatra v. New Jersey State Comm'n of Investigation*, 311 F. Supp. 678 (D.N.J. 1970).

⁸⁰ Not only is appellate review by one judge improper, this is also effectively an interlocutory appeal, which defies the finality requirement designed to prevent piecemeal appeal. 28 U.S.C. § 1291 (1971). See also *Cobbledick v. United States*, 309 U.S. 323 (1940).

In a recent decision the Fifth Circuit further confused the already bewildering procedural morass of three-judge appeals. In *Rowan v. Pinnell*⁸¹ the court held that it does not have jurisdiction to review an order of the district court refusing convocation of a three-judge court when the chief judge has participated in the decision, and that the only remedy is by mandamus from the Supreme Court.⁸² In announcing this result, however, the court did not articulate its reasoning. Perhaps the court concluded that since the chief judge and the other circuit judges are on the same level in the judicial power structure, any order from other circuit judges to the chief judge would be inappropriate and possibly an exercise in futility.⁸³

Whatever the rationale of *Rowan*, the decision appears to be in conflict with previous interpretations of the role of courts of appeals in three-judge court cases. Although not completely settled, the rule regarding appeals appeared to be that a decision by a three-judge court on the merits is directly appealable to the Supreme Court;⁸⁴ but, if the three-judge court is not convened, or dismisses for lack of jurisdiction, review is in the court of appeals.⁸⁵ However, in *Rowan* the Fifth Circuit stated that it was without jurisdiction when the chief judge exercised discretion not to convene. The result in *Rowan* would indicate that the court of appeals is without jurisdiction to review an order by a three-judge court dissolving itself and remanding to a single judge. The reasoning would be that because one member of the three-judge court was a circuit judge and, therefore, of equal rank to those who would review such dissolution, the proper remedy would be an appeal to the Supreme Court.⁸⁶ The recent trend has been to review such orders in the courts of appeals⁸⁷ (as with orders denying three-judge courts). However, in the Fifth Circuit, that review would now appear to be unavailable. Hence, the only review remaining is by writ of mandamus to the Supreme Court.⁸⁸

While review by mandamus is technically possible, it is highly impractical for two reasons. First, the applicant may spend much time just having the

⁸¹ No. 71-1480 (5th Cir., Nov. 23, 1971). On Feb. 3, 1972, the Fifth Circuit, on its own motion, filed an amended opinion in *Rowan* which omitted the paragraph stating that there was a lack of jurisdiction. In the amended opinion the court of appeals said that the appellant failed to raise a substantial constitutional question and state a basis for equitable relief. It is submitted, however, that these opinions implicitly indicate that the Fifth Circuit will not be inclined to overrule a decision of the chief judge.

⁸² Even if the result in *Rowan* is defensible, the court apparently overlooked rule 27(c) of the Federal Rules of Appellate Procedure, which provides in pertinent part: "The action of a single judge may be reviewed by the court." While this review is discretionary, there can be little doubt that the court has jurisdiction. Nevertheless, the decision stands, and its effects must be considered.

⁸³ Once the chief judge determines that his role in convocation of three-judge courts is judicial rather than ministerial, there is a real question to what extent the other circuit judges can exercise control over the chief judge. For example, if the chief judge remands the case to the district judge so that the order of dismissal is entered as the district judge's order, this change in form does not solve the problem. If, on appeal from the district court, the court of appeals rules that jurisdiction existed, but the chief judge on remand still refuses to convene a three-judge court, what would the court of appeals then do?

⁸⁴ 28 U.S.C. § 1253 (1971).

⁸⁵ *Wilson v. City of Port Lavaca*, 391 U.S. 352 (1968).

⁸⁶ 28 U.S.C. § 1253 (1971).

⁸⁷ See *Mengelkoch v. Industrial Welfare Comm'n*, 393 U.S. 83 (1968); *Wilson v. City of Port Lavaca*, 391 U.S. 352 (1968).

⁸⁸ See, e.g., *Lewis v. Brown*, 404 U.S. 819 (1971); *Wiley v. Brown*, 400 U.S. 915 (1970).

jurisdictional issue decided. For example, a request for a three-judge court is forwarded from the district judge to the chief judge, and the chief judge refuses to empanel the court. Then the Supreme Court orders the chief judge to empanel the three-judge court as an administrative function; *i.e.*, the Supreme Court merely decides that the chief judge must comply with the district judge's request, but does not itself determine the jurisdictional issue. If the three-judge court then dismisses for lack of jurisdiction,⁸⁹ review of that decision should go to the circuit⁹⁰ and could go again to the Supreme Court.⁹¹ Thus, there would be five reviews of the original decision—and all of these just on the one issue of jurisdiction. The second problem is the additional strain placed on an already overloaded Supreme Court docket. The burden that the direct appeal of three-judge court decisions places on the Court is one of the primary arguments for doing away with three-judge courts.⁹² Any additional strain should be avoided—especially when it is created by the unnecessary actions of the chief judges. If the chief judges would simply perform the ministerial task⁹³ of appointing the two additional judges when requested by the single judge, and leave to the sole discretion of the single judge the propriety of a three-judge court, the problems of appeal would be greatly simplified. The rule could be very simple: If the three-judge court decided the merits, appeal would be to the Supreme Court;⁹⁴ in any other instances appeal would be to the court of appeals.⁹⁵ Thus, while the chief judge may think that he is practicing judicial economy by placing the empaneling of three-judge courts under his additional scrutiny, in the long run he may be placing more of a strain on the entire judiciary.

B. Chief Judge Economy

In the same vein of judicial economy, if the chief judge decides to take it upon himself to be the sole determiner of jurisdiction in all cases, this will severely restrict the time he can devote to other duties. Many three-judge court applications clearly lack jurisdiction and should be dismissed by the district judge.⁹⁶ To force the district judge to forward all three-judge court applications to the chief judge, even though jurisdiction is obviously lacking, adds a needless step in the proceeding and can only act to tie up the chief judge when his time could be better spent elsewhere.

⁸⁹ Jackson v. Choate, 404 F.2d 910 (5th Cir. 1968).

⁹⁰ Wilson v. City of Port Lavaca, 391 U.S. 352 (1968). *But cf.* Rowan v. Pinnell, No. 71-1480 (5th Cir., Nov. 23, 1971).

⁹¹ 28 U.S.C. § 1254 (1971).

⁹² See, e.g., Comment, *supra* note 5; Wisconsin v. Constantineau, 400 U.S. 433, 443 (1971) (Burger, C.J., dissenting).

⁹³ There is support for the contention that the proper role of the chief judge is purely ministerial. In Merced Rosa v. Herrero, 423 F.2d 591, 593 n.2 (1st Cir. 1970), Chief Judge Aldrich, in rejecting the views of the Third and Fifth Circuits, characterized the chief judge's role as "solely ministerial," and said that "unless the chief judge designates himself, his contact with the case is purely ephemeral." See also Johnson v. New York State Educ. Dep't, 449 F.2d 871 (2d Cir. 1971); California Teachers Ass'n v. Newport Mesa Unified School Dist., 333 F. Supp. 436, 441-42 (C.D. Cal. 1971). Judge Aldrich's view would also avoid the problems of appeal raised by the Rowan case.

⁹⁴ 28 U.S.C. § 1253 (1971).

⁹⁵ 28 U.S.C. §§ 1291, 1292 (1971); Wilson v. City of Port Lavaca, 391 U.S. 352 (1968); Schackman v. Arnebergh, 387 U.S. 427 (1967).

⁹⁶ See cases cited note 8 *supra*.

Judge Brown has admitted that the chief judge is not adequately equipped to decide the issue alone. In one letter to all district judges in the Fifth Circuit Judge Brown stated: "Please bear in mind that I do not have the state statutes available, and in most cases they relate to materials found in supplements and the like. Nor do I have the facilities to make this sort of investigation or study."⁹⁷ In another letter Judge Brown again chided the district judges: "I find it completely inadequate for you merely to have the Clerk send to me copies of the complaint. First, I do not have the statutes readily available. Second, I ought not to have to take the time to figure out what the real case is as pleaded. Third, *you are in the best position to do this* in a brief but informative way."⁹⁸ If the chief judge does not have the facilities, and the district judges are in the best position to determine the issue, it is apparent that the district judge should make the ultimate decision. If he decides that the court is to be convened, the chief judge should oblige. If the district judge decides that a three-judge court is not required, he should enter an order to that effect.

Granting that three-judge courts are themselves cumbersome and administratively time-consuming,⁹⁹ the time-saving methods sought should do more than merely redistribute the burden.

C. Undermining of District Judge

Another aspect of the chief judge's independent determination of the jurisdictional issue (whether exclusively or in review of the district judge) is that it seems to undermine the integrity and authority of the district judge. The Supreme Court has clearly and explicitly vested the power to determine jurisdiction in the district judge.¹⁰⁰ The action of the chief judge in directing that decision, or in taking that power away, shows a lack of confidence in the decision of the district judges.¹⁰¹ The district judge has heard the arguments of the parties and should be in a much better position to render a judgment. At any rate, if the chief judge insists on reviewing the district judge's decision, the chief judge should at least follow appellate procedures by calling in two other circuit judges to hear the appeal.¹⁰²

D. No Hearing

If the chief judge must exercise independent discretion, the parties should be given the opportunity to argue their positions.¹⁰³ Denial of a forum without

⁹⁷ Letter from Judge Brown to all district judges of the Fifth Circuit, Apr. 30, 1970.

⁹⁸ Letter from Judge Brown to all district judges of the Fifth Circuit, Aug. 21, 1970 (emphasis added).

⁹⁹ *Phillips v. United States*, 312 U.S. 246 (1941).

¹⁰⁰ See cases cited note 8 *supra*.

¹⁰¹ The Second Circuit, in rejecting the Fifth Circuit's procedure for convocation, spoke to the effect on the district judge: "A district judge should not feel that he is merely a rubber stamp or that he exercises his judgment at his peril." *Johnson v. New York State Educ. Dep't*, 449 F.2d 871, 875 (2d Cir. 1971).

¹⁰² 28 U.S.C. § 46(b) (1971). Perhaps this could be characterized as a denial of an injunction and thus appealable under *id.* § 1292(a) (1). The court of appeals could, by local rule, provide for an expedited determination of such appeal. See, e.g., 5TH CIR. LOCAL R. 11(b); 6TH CIR. LOCAL R. 7(b); 8TH CIR. LOCAL R. 5(b); D.C. CIR. LOCAL R. 11(b).

¹⁰³ Judge Biggs permitted argument in *Miller v. Smith*, 236 F. Supp. 927 (E.D. Pa. 1965). See note 31 *supra*, and accompanying text.

an adequate hearing shortchanges both the parties and the judicial system. Yet this determination by the chief judge is made solely on the district court record and the district judge's recommendation.¹⁰⁴ Since the cause is still technically at the trial level, due process requires that the parties be given a fair and adequate hearing.¹⁰⁵

IV. CONCLUSION

The exercise of discretion by the chief judge in passing upon applications for three-judge courts is a practice that is totally unauthorized by either Congress or the Supreme Court. It should not be allowed to continue solely because it has not been specifically prohibited. Since the three-judge court was born in the legislative branch, any action to stop the chief judge's use of discretion should come from Congress. The American Law Institute has proposed a redrafting of the statute involved that would specify that the district judge has the power to determine jurisdiction, but leaves the description of the chief judge's role unchanged.¹⁰⁶ While this would counter Judge Biggs' questionable interpretation of the word "shall,"¹⁰⁷ the change should be more explicit and definitely state that the chief judge's role is purely ministerial, and that he is to have no discretion whatsoever. Anything less might be subject to some of the metaphysical reasoning that assisted in causing the problem in the first place.

Considering the deliberate slowness with which Congress generally moves, it may be necessary for the Supreme Court to take interim action. Since Judge Brown's published opinions in this area (that only the three-judge court should determine the jurisdictional issue)¹⁰⁸ directly conflict with Judge Biggs' opinion (that the chief judge may determine the issue)¹⁰⁹ the problem could be certified to the Supreme Court by a court of appeals as a conflicting question of law.¹¹⁰ If this were done, the Supreme Court would be required to decide the issue; whereas, if an application for writ of mandamus were made, the Court could, and did with respect to this issue,¹¹¹ summarily deny the writ.

The pressures that gave rise to the variety of procedures in the Third, Dis-

¹⁰⁴ Letter from Judge Brown to all district judges of the Fifth Circuit, Apr. 30, 1970.

¹⁰⁵ *Wong Yong Sun v. McGrath*, 339 U.S. 33 (1950). It may be argued that the opportunity to be heard is satisfied by the submission of briefs and possible oral argument to the district judge. This argument is valid only in cases in which the district judge makes the final decision. The problem is what type of proceeding, if any, is the chief judge's exercise of discretion in convening a three-judge court. If it is characterized as an appeal, there are obvious defects. For example, what is the jurisdictional basis? What of the requirement that the appeal be heard by three judges? Perhaps the procedure could be characterized as a motion in the court of appeals. Rule 27(c) of the Federal Rules of Appellate Procedure provides that a single judge "may entertain and may grant or deny any request for relief which under these rules may properly be sought by motion" In addition, 5TH CIR. LOCAL R. 10(c) provides no oral argument on motions unless ordered by the court. The most serious defect is the submission of the "motion" by the district court rather than by a party. Thus, the procedure cannot be squared with any rule or statute.

¹⁰⁶ ALI STUDY 538.

¹⁰⁷ See text accompanying note 34 *supra*.

¹⁰⁸ See, e.g., *Jackson v. Choate*, 404 F.2d 910 (5th Cir. 1968).

¹⁰⁹ *Miller v. Smith*, 236 F. Supp. 927 (E.D. Pa. 1965).

¹¹⁰ 28 U.S.C. § 1254(3) (1971).

¹¹¹ See, e.g., *Miller v. Biggs*, 382 U.S. 805 (1965).

trict of Columbia, and Fifth Circuits may be unique to those circuits. While the objectives of these procedures are laudable, *i.e.*, to preserve judicial economy and to avoid summary denial of three-judge court applications, nevertheless, these procedures are totally unauthorized, and do not accomplish the original objectives for which they were enacted. The simple solution would be for the chief judges to refrain from exercising any discretion in the convocation of three-judge courts. The "two-judge court" must be eliminated. Procedural certainty and due process require nothing less.