

### 3-JUDGE COURT FOR CERTAIN INJUNCTIONS

JULY 11, 1995.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. MOORHEAD, from the Committee on the Judiciary,  
submitted the following

### REPORT

together with

### DISSENTING VIEWS

[To accompany H.R. 1170]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1170) to provide that cases challenging the constitutionality of measures passed by State referendum be heard by a 3-judge court, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

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The amendments are as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

**SECTION 1. 3-JUDGE COURT FOR CERTAIN INJUNCTIONS.**

Any application for an interlocutory or permanent injunction restraining 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 of the unconstitutionality of such State law unless the application for the injunction is heard and determined by a court of 3 judges in accordance with section 2284 of title 28, United States Code. Any appeal of a determination on such application shall be to the Supreme Court. In any case to which this section applies, the additional judges who will serve on the 3-judge court shall be designated under section 2284(b)(1) of title 28, United States Code, as soon as practicable, and the court shall expedite the consideration of the application for an injunction.

**SEC. 2. DEFINITIONS.**

As used in this Act—

- (1) the term “State” means each of the several States and the District of Columbia;
- (2) the term “State law” means the constitution of a State, or any statute, ordinance, rule, regulation, or other measure of a State that has the force of law, and any amendment thereto; and
- (3) the term “referendum” means the submission to popular vote of a measure passed upon or proposed by a legislative body or by popular initiative.

**SEC. 3. EFFECTIVE DATE.**

This Act applies to any application for an injunction that is filed on or after the date of the enactment of this Act.

Amend the title so as to read:

A bill to provide that an application for an injunction restraining the enforcement, operation, or execution of a State law adopted by referendum may not be granted on the ground of the unconstitutionality of such law unless the application is heard and determined by a 3-judge court.

PURPOSE AND SUMMARY

H.R. 1170 provides that requests for injunctions in cases challenging the constitutionality of measures passed by State referendum must be heard by a 3-judge court. Like other federal legislation containing a provision providing for a hearing by a 3-judge court, H.R. 1170 is designed to protect voters in the exercise of their vote and to further protect the results of that vote. It requires that legislation voted upon and approved directly by the populace of a state (defined in the bill as a referendum) be afforded the protection of a 3-judge court pursuant to 28 U.S.C. §2284 where an application for an injunction is brought in federal court to arrest the enforcement of the referendum on the premise that the referendum is unconstitutional.<sup>1</sup>

In effect, where the entire populace of a state democratically exercises a direct vote on an issue, one federal judge will not be able to issue an injunction preventing the enforcement of the will of the people of that State. Rather, three judges, at the trial level,<sup>2</sup> according to procedures provided by statute, will hear the application for an injunction and determine whether the requested injunction should issue. An appeal is taken directly to the Supreme Court, ex-

<sup>1</sup>An application for an injunction includes both interlocutory and permanent injunction requests under Section 1 of the bill.

<sup>2</sup>The 3-judge court remains technically a district court in terms of its jurisdiction, procedures and place in the judicial hierarchy. *Phillips v. U.S.*, 312 U.S. 246, 248–51 (1941); *Jacobs v. Tawes*, 250 F. 2D 611, 614 (4th Cir. 1957).

pediting the enforcement of the referendum if the final decision is that the referendum is constitutional. Such an expedited procedure is already provided for in other Voting Rights cases.

H.R. 1170 recognizes that referenda reflect, more than any other process, the one-person one-vote system,<sup>3</sup> and seeks to protect a fundamental part of our national foundation. The bill, as reported, will implement a fair and effective policy that preserves a proper balance in federal-state relations.

#### BACKGROUND AND NEED FOR THE LEGISLATION

##### *Historical summary*

Three-judge courts were first established in 1910 in response to the Supreme Court's decision in *Ex Parte Young*, 209 U.S. 123 (1908), which held that federal courts could enjoin state officials from enforcing unconstitutional state statutes. In order to protect states from an imprudent exercise of federal power by one federal judge who, by holding a statute unconstitutional, could halt the implementation of a law passed by a state legislature, Congress created 3-judge courts at the trial level and provided for direct appeal to the Supreme Court in order to expedite the review process. The Three-Judge Court Act of June 18, 1910, cd. 309, § 17, 36 Stat. 577,

prohibited a single Federal court judge from issuing interlocutory injunctions against allegedly unconstitutional State statutes and required that cases seeking such injunctive relief be heard by a district court made up of three judges. The act also contained a provision for direct appeal to the Supreme court in the belief that this would provide speedy review of these cases. The rationale of the act was that three judges would be less likely than one to exercise the Federal injunctive power imprudently. It was felt that the act would relieve the fears of the States that they would have important regulatory programs precipitously enjoined. \* \* \*<sup>4</sup>

Accordingly, through the creation of 3-judge panels, states were afforded due process and balance in state-federal relations vis-a-vis determinations by the federal judiciary of whether their statutes were unconstitutional and review of such decisions was accelerated so that the will of a people of a state could be effected as soon as possible provided the statute was found to be constitutional.

Three-judge panels were established for many state statutory and administrative decisions and were coming into greater and greater use. In 1973, 3-judge court cases had risen threefold in 10 years and were perceived as causing too great a burden on the federal judiciary. In response, in 1976, Congress abolished the use of 3-judge courts in cases challenging the constitutionality of general state statutes and regulations by repealing §§ 2281 and 2282 of Title 28, United States Code, but specifically preserved their use

<sup>3</sup> See *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>4</sup> "Revision of the Jurisdiction of Three-Judge Courts," S. Rep. No. 94-204, Report of the Senate Committee on the Judiciary to Accompany S. 537, 94th Cong., 1st Sess. 2-3 (June 18, 1975).

when required by Act of Congress<sup>5</sup> and in cases involving the apportionment of congressional districts or any statewide legislative body. Three-judge courts were preserved in voting apportionment cases “because these issues are of such importance that they ought to be heard by a three-judge court and, in any event, they have never constituted a large number of cases.”<sup>6</sup>

Today, the use of 3-judge courts is provided for in 28 U.S.C. §2284, as amended.<sup>7</sup> The law requires that when a 3-judge panel is required by an Act of Congress or in an apportionment case, the judge to whom the case is assigned must determine for herself whether a 3-judge court is required, and then must contact the Chief Judge of the circuit in which the suit is filed who must in turn appoint a panel consisting of at least one circuit judge and two other judges either from the circuit or district. This provides for constitutional review of the challenged state law or procedure by at least one federal appellate judge. A single judge may conduct all pre-trial proceedings. Direct appeal to the United States Supreme Court is provided for all cases which utilize a 3-judge court pursuant to 28 U.S.C. §1253.

Congress has consistently maintained the use of 3-judge court panels in cases which concern a citizen’s voting rights and in cases of voting procedures. Besides apportionment cases, a 3-judge court is mandatory in suits brought under the Voting Rights Act of 1965, pursuant to 42 U.S.C. §§1971 (action by the U.S. for preventative relief with respect to a pattern or practice of discrimination in voting rights); 1973b(a) (action by state or political subdivision for declaratory judgment regarding tests or devices to determine eligibility to vote); 1973c (action by State or political subdivision for declaratory judgment regarding voting qualifications and procedures); 1973bb (action by U.S. seeking injunction against state denying right under 26th Amendment); and 1973h(c) (actions for relief against enforcement of poll tax requirement).

#### *Current lack of protection*

With the rise in use of popular referenda by states to allow direct democracy to rule on issues where representative systems may be perceived to have failed in legislating the will of the populace, states have experienced an improper restraint by the federal judiciary on their citizen’s right to vote. Applications to estop the enforcement of the direct will of the people of a State may be granted by a single federal judge. Overturning that decision requires a lengthy and expensive appeals process. The imbalance is aggravated by the ability of a plaintiff who wishes to arrest the enforcement of a law passed by state referendum to “judge shop” by bringing suit in a venue in which a judge is likely to be sympathetic to the plaintiff’s cause.

<sup>5</sup>The use of 3-judge courts was specifically preserved by Congress in cases brought under the Voting Rights Act and in certain civil rights suits.

<sup>6</sup>S. Rep. No. 94-204 at 9.

<sup>7</sup>The current version of 28 U.S.C. §2284 dealing with 3-judge courts (when they are required, their composition and procedure) is the result of the general revision of the existing provisions in 1976, referred to in discussion, supra, by P.L. 94-381, §3, 90 Stat. 1119 (Aug. 12, 1976), and a subsequent amendment in 1984, P.L. 98-620, Title IV, §402(29)(E), 98 Stat. 3359 (Nov. 8, 1984).

The Amendment in the Nature of a Substitute to H.R. 1170, as reported by the Subcommittee, would provide for the three-judge court panel consideration and determination, in accordance with 28 U.S.C. § 2284, of any application brought in or removed to federal district court for temporary or permanent injunctive relief from the enforcement, operation or execution of a state law passed by referendum or initiative<sup>8</sup> based on a challenge to the constitutionality of such a referendum. The bill further provides for expedited consideration of such an application under 28 U.S.C. § 2284(b)(1), and any appeal would be made directly to the Supreme Court in line with 28 U.S.C. § 1253.

H.R. 1170, unlike other Acts which provided for 3-judge court consideration for constitutional challenges to state laws prior to the abolishment of many such courts in 1976, is specifically limited to state laws which are voted on directly by the entire populace of the state, lending itself to parallel the apportionment and Voting Rights cases which traditionally have maintained 3-judge court consideration by Congress because of the importance of such cases due to the effect on a voter's exercise of his or her franchise<sup>9</sup> and because such cases are presented so rarely they do not present the same burden on the courts as cases which involve constitutional challenges to general state laws passed by the state legislative process. A Congressional Research Service survey reveals that over the past 10 years, only 10 cases in the nation would have been eligible for review by a 3-judge court under H.R. 1170.<sup>10</sup>

State laws adopted by referendum or initiative, reflecting the direct will of the electorate of a state on a given issue, will be afforded greater reverence than measures passed generally by representative bodies. Such cases are of "such great importance" and occur so rarely such that they will not "overburden the courts", that they precisely fit the category of cases in which 3-judge courts were preserved even after the abolishment of many 3-judge courts in 1976. The use of 3-judge courts is imperative to the proper balance of state-federal relations in cases such as this where one federal judge can otherwise impede the direct will of the people of a state because she disagrees with the constitutionality of the provision passed. Three-judge courts in this case will help to provide fairer, less politically motivated consideration of State referendum cases.

H.R. 1170 will also substantially limit the practice of "shopping around" for a federal judge or a particular venue likely to be sympathetic to a plaintiff's cause. The recognition that individual judicial policy predilections may influence a judge's decision whether to grant an injunction leads attorneys to "shop" for the federal district within a state most likely to have a predisposition in favor of that attorney's argument on behalf of her client. Forum shopping results in imbalanced decision-making and undermines public confidence.

<sup>8</sup>Section 2(c) of the bill defines "referendum" to cover what is commonly known as both referenda and initiatives, i.e. legislation first passed by a state legislature and then presented to the general populace of a state for a vote and initiatives presented directly to the populace.

<sup>9</sup>In *Baker v. Carr*, 369 U.S. at 259 (Clark J., concurring), Justice Clark explicitly recognized the similarity between state referenda and the protection provided to the people by the constitutional prohibition of unfair apportionment of voters among legislative districts.

<sup>10</sup>Survey conducted by Congressional Research Service of The Library of Congress on March 9, 1995 as to the number of cases that would have been affected by H.R. 1170 for years 1986 through 1994. Thirty-six states have some sort of referendum system.

It subjects the directly expressed will of the people to the vagaries of a single judge's policy predispositions, which may have been chosen in advance by the conscious forum selection of a competent lawyer. Like other cases in which Congress has maintained 3-judge courts, H.R. 1170 recognizes the obvious truth that no matter how objective a judge may attempt to be, her predilections will necessarily influence her decisions, especially when addressing matters of constitutional policy.

The constitutional issues raised in cases such as those passed by State referendum are often complicated and difficult, and are a direct result of the one-person, one-vote system. These cases are therefore more appropriately addressed by a proceeding in the nature of an appellate hearing than by a single trial judge.<sup>11</sup>

#### HEARINGS

The Committee's Subcommittee on Courts and Intellectual Property held 1 day of hearings on H.R. 1170 on April 5, 1995. Testimony was received from 3 witnesses, Mr. Harold G. Maier, Professor of Law, David Daniels Allen Distinguished Chair in Law, Vanderbilt University School of Law; Mr. Burt Neuborne, Professor of Law, New York University School of Law; and The Honorable Harry T. Edwards, Chief Judge, United States Court of Appeals for the District of Columbia Circuit. Additional material was submitted by the Honorable Daniel E. Lungren, Attorney General, State of California; William P. Barr, former Attorney General of the United States; and Edwin Meese III, former Attorney General of the United States.

#### COMMITTEE CONSIDERATION

On May 16, 1995, the Subcommittee on Courts and Intellectual Property met in open session and ordered reported the bill H.R. 1170, as amended by an amendment in the nature of a substitute, by a vote of 8 to 4, a quorum being present. On June 7, 1995, the Committee met in open session and ordered reported the bill H.R. 1170 with the amendment in the nature of a substitute by a voice vote, a quorum being present.

#### VOTE OF THE COMMITTEE

##### Rollcall No. 1.

Subject: H.R. 1170, to provide that injunction cases challenging the constitutionality of measures passed by State referendum be heard by a 3-judge court—Subcommittee amendment in the nature of a substitute. Adopted 17–13.

	Ayes	Nays	Present
MR. MOORHEAD .....	X	.....	.....
MR. SENSENBRENNER .....	X	.....	.....
MR. McCOLLUM .....	X	.....	.....
MR. GEKAS .....	.....	.....	.....
MR. COBLE .....	X	.....	.....
MR. SMITH (TX) .....	X	.....	.....

<sup>11</sup> While three judges must make final decisions regarding the issuance of an injunction, a single judge may make all preliminary determinations in a case and issue a temporary restraining order. 28 U.S.C. § 2284(b)(3). The burden on 3-judge panels is thereby lessened.

	Ayes	Nays	Present
MR. SCHIFF .....	X		
MR. GALLEGLY .....	X		
MR. CANADY .....	X		
MR. INGLIS .....	X		
MR. GOODLATTE .....	X		
MR. BUYER .....			
MR. HOKE .....			
MR. BONO .....	X		
MR. HEINEMAN .....	X		
MR. BRYANT (TN) .....	X		
MR. CHABOT .....	X		
MR. FLANAGAN .....	X		
MR. BARR .....	X		
MR. CONYERS .....		X	
MRS. SCHROEDER .....		X	
MR. FRANK .....		X	
MR. SCHUMER .....			
MR. BERMAN .....		X	
MR. BOUCHER .....		X	
MR. BRYANT (TX) .....		X	
MR. REED .....		X	
MR. NADLER .....		X	
MR. SCOTT .....		X	
MR. WATT .....		X	
MR. BECERRA .....		X	
MR. SERRANO .....		X	
MS. LOFGREN .....			
MS. JACKSON-LEE .....		X	
MR. HYDE, Chairman .....	X		
TOTAL .....	17	13	

#### COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 2(l)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

#### COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT FINDINGS

No findings or recommendations of the Committee on Government Reform and Oversight were received as referred to in clause 2(l)(3)(D) of rule XI of the Rules of the House of Representatives.

#### NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 2(l)(3)(B) of House Rule XI is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

#### CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 2(l)(3)(C) of rule XI of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 1170, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, June 12, 1995.*

Hon. HENRY J. HYDE,  
*Chairman, Committee on the Judiciary,  
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has reviewed H.R. 1170, a bill to provide that an application for an injunction restraining the enforcement, operation, or execution of a state law adopted by referendum may not be granted on the ground of unconstitutionality of such law unless the application is heard and determined by a three-judge court, as ordered reported by the House Committee on the Judiciary on June 7, 1995.

CBO estimates that enacting H.R. 1170 would not result in any significant cost to the federal government. Because enactment of H.R. 1170 would not affect direct spending or receipts, pay-as-you-go procedures would not apply to the bill.

This bill would require that an application for an injunction challenging any state law passed by state referendum, on the grounds of unconstitutionality, could be granted only if such application was heard by a panel of three judges. Under current law, these challenges to state law are referred to a single federal judge. According to information from the Administrative Office of the United States Courts, federal courts have heard fewer than 100 such appeals over the last 10 years and the number of future appeals is not expected to increase significantly. Thus, CBO estimates that while enacting H.R. 1170 would require additional court resources, the amount of such additional court expenses would be minimal.

CBO estimates that H.R. 1170 would have no impact on state courts.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Susanne S. Mehlman.

Sincerely,

JUNE E. O'NEILL, *Director.*

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(l)(4) of rule XI of the Rules of the House of Representatives, the Committee estimates that H.R. 1170 will have no significant inflationary impact on prices and costs in the national economy.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Section 1. This section provides for the use of a 3-judge court in accordance with 28 U.S.C. § 2284 in any case brought in federal district court where an application for an injunction is made to restrain the enforcement of a state law adopted by referendum on the ground that such law is unconstitutional. This section further provides that a decision as to who shall serve on the applicable 3-judge panel shall be designated in accordance with 28 U.S.C. § 2284(b)(1) as soon as practicable and that the 3-judge court hearing the application for an injunction shall expedite its consideration.

Section 2. This section defines the term "state" to mean each of the several states in which there sits a federal district court, in-

cluding the District of Columbia. This section defines "state law" as any measure of a state that has the force of law including state constitutions, ordinances, rules and regulations. This section defines the term "referendum" to mean the reflection of the majority of a voting populace of a state on either an original initiative or on a piece of legislation previously passed by the state legislature.

Section 3. This section establishes a prospective effective date and applies the provisions of the Act to applications for injunctions filed on or after the date of enactment.

AGENCY VIEWS

U.S. DEPARTMENT OF JUSTICE,  
OFFICE OF LEGISLATIVE AFFAIRS,  
*Washington, DC, May 16, 1995.*

Hon. CARLOS MOORHEAD,  
*Chairman, Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: This letter sets forth the views of the Department of Justice regarding H.R. 1170, a bill to provide that federal-court cases challenging the constitutionality of measures passed by state referendum be heard by a three-judge district court, whose decision would be appealable directly to the Supreme Court. We understand that this bill will be marked up by your Subcommittee in early May.

Provisions similar to those found in H.R. 1170 once were commonly found in federal law, but Congress gradually has eliminated such provisions because of a consensus view that such three-judge-court requirements are cumbersome, confusing, and inefficient. Indeed, in 1976, Congress rescinded a provision of federal law that was almost identical to the requirement proposed in section 1(b) of H.R. 1170. Former 28 U.S.C. §2281 provided, in pertinent part, that

[a]n interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute \* \* \* 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.

The only material difference between this former statute and proposed section 1(b) of H.R. 1170 is that the latter is limited to "State law adopted by referendum."

Before its revocation in 1976, both the bar and the bench expressed sustained and virtually unanimous opposition to §2281. Vocal proponents of rescinding that statute included the United States Judicial Conference, the Chief Justice of the Supreme Court, the Chief Judges of the Second, Third, Fourth and Fifth Circuit Courts of Appeals, the Department of Justice, the American Bar Association, and Professor Charles Alan Wright, the foremost expert in the area of federal civil procedure. See S. Rep. No. 204, 94th Cong., 1st Sess. 3 (1975) ["Senate Report"]; H.R. Rep. No. 1379, 94th Cong., 2d Sess. 4 (1976) ["House Report"]. Repeal of the three-

judge-court requirement also was recommended by the Federal Judicial Center Study Group on the Caseload of the Supreme Court, popularly known as the Freund Committee. See Report of the Study Group on the Caseload of the Supreme Court, 57 F.R.D. 573, 595–605 (1972) [“Freund Committee Report”].

The strong criticism of the three-judge procedure in former § 2281 was animated by the widely-held view that that procedure was “the single worst feature in the Federal judicial system as we have it today.” Senate Report at 2. Accordingly, Congress repealed former § 2281 in 1976. Pub. L. No. 94–381, § 1, 90 Stat. 1119. The specific reasons Congress invoked to explain the repeal were three-fold.

First, “the original reasons for the three-judge court ha[d] been largely dissipated by limiting statutes and decisions controlling the jurisdiction of the federal courts collaterally to review State laws.” Senate Report at 8. As then-Chief Justice Burger noted, “[t]he original reasons for establishing these special courts, whatever their validity at the time, no longer exist.” *Id.* at 3. Because later legal developments obviated the concerns that originally had given rise to the three-judge-court requirement, the House concluded the “states no longer require this kind of protection from the arbitrary actions of a single judge.” House Report at 4. See also Senate Report at 7 (original rationale for § 2281 “has long been obsolete”).

Second, the procedure “compounds and confuses rather than simplifies orderly constitutional decision.” Senate Report at 8–9. Whether and to what extent a three-judge court must be convened under particular circumstances, and at certain stages of litigation, were questions that engendered hopelessly complex and arcane litigation and decisional law under § 2281. See generally 12 Moore’s Federal Practice ¶ 421.03[2], at 5–63 to 5–96 (2d ed. 1995) (canvassing and discussing hundreds of pertinent decisions and distinctions). Examples of frequent areas of procedural litigation included whether a three-judge court was required when it was unclear that the court had jurisdiction (for example, because the plaintiff lacked standing or the suit was barred by the statute of limitations or *res judicata*), and whether a three-judge court was required when plaintiff’s claim was frivolous.

What is more, a second tier of complex litigation was generated by the “wasteful and confusing” channels for appealing jurisdictional issues relating to three-judge courts under § 2281. According to the Senate, the rules on appellate review of whether a three-judge court was needed were “so complex as to be virtually beyond belief.” Senate Report at 6. See also Freund Committee Report, 57 F.R.D. at 598 (“When, where, and how to obtain appellate review of an order by or relating to a three-judge court is a hopelessly complicated and confused subject that in itself has produced much unnecessary litigation,” and “review of these matters has become so mysterious that even specialists in this area may be led astray”). Examples of this kind of litigation included questions as to which court had appellate jurisdiction when a three-judge court decided a case that should have been decided by a single-judge district court, or when a three-judge district court decided the case, not on the issue for which a three-judge court was required, but on some other issue, e.g., lack of standing, lack of personal or subject-matter

jurisdiction, a statute of limitations bar, res judicata, or lack of merit on an unconstitutional ground.

Third, in addition to the extra, complex litigation engendered by the three-judge-court requirement of §2281, the three-judge procedure in and of itself was, in Justice Frankfurter's words, a "serious drain upon the federal judicial system." *Phillips v. United States*, 312 U.S. 246, 250 (1941). As the Senate concluded, "the burden placed on the panels of judges to handle these cases on an expedited basis is onerous in view of the mounting backlog of cases of no lesser priority." Senate Report at 9. See also *id.* at 4–5; House Report at 4 ("The scarce judicial manpower of the nation is inefficiently used by requiring three judges to convene for work that could be performed by one."); Freund Committee Report, 57 F.R.D. at 598.

Three-judge district courts are administratively complicated to convene and conduct, especially when, as frequently occurs, the judges do not reside in the city where the proceedings take place. Such a court "is not well adapted for the trial of factual issues," Freund Committee Report, 57 F.R.D. at 599, and accordingly, such courts often resort to procedural devices to induce stipulated facts or otherwise pretermitt development of the facts at an evidentiary hearing, *id.*

Moreover, eliminating court of appeals review and providing direct appeal to the Supreme Court unnecessarily burdens the Supreme Court by requiring the Court to resolve cases that could and should be resolved at the court of appeals level. On direct appeal from a three-judge court, the Supreme Court often must decide between reaching decision on an inadequate factual record or protracting the litigation by remanding for development of a more helpful record. *Id.* And, even where the record is adequate, direct appeal means that the Supreme Court "does not have the benefit of the preliminary screening and sharpening of issues that the courts of appeals ordinarily provide." *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 937, 938 (separate opinion of Burton and Frankfurter, JJ.) (1952)).

In sum, the three-judge requirement of §2281 "generate[d], rather than lessen[ed], litigation," and Congress accordingly eliminated that requirement in order to "increase the efficiency of our judicial system to the benefit of litigants, lawyers, and judges alike." Senate Report at 7. H.R. 1170 would simply reinstate the problems and stresses that were alleviated by repeal of §2281. Admittedly, H.R. 1170 might not apply to as many lawsuits as did former §2281, because it is limited to state laws "adopted by referendum." Nonetheless, the problems associated with such cases will be just as pronounced as they were with respect to cases under §2281.

Moreover, in one important respect, H.R. 1170 is broader in scope than was §2281. Section 2281 required a three-judge court only for the issuance of an injunction restraining the enforcement of a state statute. Section 1(a) of H.R. 1170 would, by contrast, require a three-judge court without respect to whether injunctive relief is sought. Under that section, a three-judge court would be required to "hear [] and determine []" "[a]ny action" in federal court that "challenges the constitutionality of a State law adopted by referendum." Thus, for example, a three-judge court arguably would

have to be convened if the unconstitutionality of a State referendum-passed statute were simply interposed as a defense to a private civil action or to a criminal charge. Indeed, H.R. 1170 seems to contemplate that any action being heard by a single district judge would have to be transferred to a three-judge court whenever a question is raised in the litigation as to the constitutionality of an applicable State statute. Thus, the problems and complexities that led to the elimination of §2281 might even be exacerbated under H.R. 1170.

The standard judicial procedure provides for expedited appellate review in the courts of appeals in appropriate cases. A decision of a single-judge district court holding unconstitutional a state law adopted by referendum would be such a case. H.R. 1170 would provide that only the Supreme Court, not a court of appeals, could overturn such a decision. The result in most cases will be to delay, rather than to expedite, appellate review. For these reasons, H.R. 1170 is likely to have the opposite result than the one its sponsors intend.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this report from the standpoint of the Administration's program.

Sincerely,

ROBERT BRISH

(For Kent Markus, Acting Assistant Attorney General).

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U.S. DEPARTMENT OF JUSTICE,  
OFFICE OF LEGISLATIVE AFFAIRS,  
*Washington, DC, June 5, 1995.*

Hon. HENRY J. HYDE,  
*Chairman, Committee on the Judiciary,  
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: This letter sets forth the views of the Department of Justice regarding H.R. 1170, a bill "to provide that any application for an injunction restraining the enforcement, operation, or execution of a State law adopted by referendum may not be granted on the ground of the unconstitutionality of such law unless the application is heard and determined by a 3-judge court." We understand that this legislation was cleared for full committee action by the Subcommittee on Courts and Intellectual Property on May 16, 1995.

In our letter of May 16, 1995, to the Chairman of the Subcommittee on Courts and Intellectual Property (copy enclosed), we raised a number of serious concerns about H.R. 1170 and noted that "three-judge-court requirements [of the kind envisioned by H.R. 1170] are cumbersome, confusing, and inefficient." The amendments adopted during subcommittee markup of this legislation have not alleviated our concerns, and we therefore continue to recommend against enactment of H.R. 1170.

Please let us know if we may be of additional assistance in connection with this or any other matter. The Office of Management and Budget has advised this Department that there is no objection

to the submission of this report from the standpoint of the Administration's program.

Sincerely,

KENT MARKUS,  
*Acting Assistant Attorney General.*

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JUDICIAL CONFERENCE OF  
THE UNITED STATES,  
*Washington, DC, April 4, 1995.*

Hon. CARLOS J. MOORHEAD,  
*Chairman, Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, House of Representatives, Rayburn House Office Building, Washington, DC.*

DEAR MR. CHAIRMAN: Thank you for your letter of March 24, 1995, requesting comments on H.R. 1170, a bill to provide that cases challenging the constitutionality of measures passed by state referendum, as well as interlocutory or permanent injunctions sought to restrain the enforcement, operation, or execution of such laws, be heard by a three-judge court, in accordance with the procedures in section 2284 of title 28, United States Code. The bill also requires expedited consideration of the case by the three-judge court and provides for direct appeal of these cases to the Supreme Court.

The Judicial Conference has not taken a position on H.R. 1170. In the past, the Conference has commented upon the appropriateness of retaining three-judge courts for certain classes of cases. Ultimately, it remains for Congress to determine what types of cases should be determined by how many judges. Below, however, is a summary of positions the Conference has taken on this issue.

In October 1970 the Judicial Conference endorsed the repeal of sections 2281 and 2282 of title 28, United States Code, which required a three-judge district court in cases seeking to restrain the enforcement, operation, or execution of all state or federal statutes for repugnance to the Constitution and to provide for direct appeal to the Supreme court in certain cases.<sup>1</sup> The Conference explained that much of the concern by state officials had lessened regarding the granting of injunctions against enforcement of state statutes by a single federal judge, which was why such courts were first created in 1910. Also, the requirement for a three-judge court in such injunction cases, it was noted, created a judicial burden for district and appellate judges because of the volume of cases necessitating a three-judge panel and the resulting limitations on the judges' availability to handle other cases.

The Conference further explained in 1970 that the mechanism allowing for direct appeal to the Supreme Court avoided the screening process of appellate review at the court of appeals level, which better serves the interests of justice. The repealing legislation which the Conference was then endorsing would have instead created a new section title 28 providing for the direct review of any preliminary or permanent injunction granted against enforcement of a state or federal statute for repugnance to the Constitution by

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<sup>1</sup> Sections 2281 and 2282 of title 28, United States Code, were both repealed in 1976.

the appropriate court of appeals or by the Supreme Court at the election of the attorney general of a state or the Attorney General of the United States, depending on the statute involved in the suit—in essence, the cases subject to sections 2281 and 2282.

I note that the 1970 position addressed a statute applying to constitutional challenges to all state laws, whereas the amendment in H.R. 1170 appears to apply only to state laws adopted by referendum. Subsequently, the Conference endorsed the retention of three-judge courts for reapportionment cases involving congressional redistricting or statewide reapportionment.

At its October 1971 session, the Judicial Conference commented upon a bill implementing recommendations of the American Law Institute to curtail the use of three-judge courts. The Conference reaffirmed its support for the elimination of three-judge district courts in those cases seeking to restrain the enforcement of state or federal statutes that have been challenged on constitutional grounds and to provide for direct appeal to the Supreme Court in certain cases, as proposed in 1970. One year later, the Conference approved a bill to amend the requirement for a three-judge court, although the bill was different from the 1970 recommendation in that it did not give the attorney general of a state or the Attorney General of the United States the option of appealing to the appropriate court of appeals or directly to the Supreme Court.

In March 1983 the Judicial Conference considered the Judicial Reform Act of 1982 and a provision therein to require that an injunction directed against a state or any officer, commission, political subdivision, or other agency of a state be heard by a three-judge district court. The Conference repeated its support for the elimination of three-judge district courts, as articulated by it in 1970.

Concerning expedited review, the Judicial Conference in September 1990 reiterated its strong opposition to statutory provisions imposing litigation priority, expediting, or time limitation rules on specified classes of civil cases brought in federal courts beyond those specified in 28 U.S.C. § 1657. This position was taken in response to legislative efforts to impose litigation priorities and time limits in certain classes of cases.

I hope that this information is helpful and, as you know, we stand ready to assist you in any way we can. Please let me know if you have any questions, or you may wish to call Mike Blommer, Assistant Director for the Office of Congressional, External and Public Affairs, at 273-1120.

Sincerely,

L. RALPH MECHAM, *Secretary*.

## DISSENTING VIEWS

### INTRODUCTION

The three-judge district court procedure in cases challenging the constitutionality of state laws, with a direct appeal to the Supreme Court, is one that has failed the test of time. It was resoundingly rejected by the judiciary and by the Congress in 1976, based on long experience. Revival of the procedure in the form mandated by H.R. 1170 would impose significant burdens on an already overburdened federal judiciary. H.R. 1170 arrogantly tells States that one method of enacting state laws is preferred over others, a determination that States are best suited to make for themselves. Moreover, H.R. 1170 fails to provide any real benefit to the voters of a State who approved a state law by referendum. By championing the Prop. 187 experience in California for their own political gain. We suggest that their duty lies, instead, in the direction of furthering public understanding of the process of constitutional law.

#### I. THREE-JUDGE COURTS IMPOSE A SIGNIFICANT BURDEN ON THE FEDERAL JUDICIARY

At every step of the process, the three-judge court requirement is burdensome on the federal judiciary, and the burden is substantial even if the number of cases falling within the ambit of the requirement is small.

We do not have to surmise that this is so; when a substantially similar statute<sup>1</sup> was repealed in 1976, the repeal received universal support, and the repealed provision was described as “the single worst feature in the Federal judicial system as we have it today.”<sup>2</sup>

H.R. 1170 would require three judges, including one circuit judge, to perform the work now performed by one judge. In most areas of the country, judges are widely dispersed throughout the circuit, and will have to travel to convene the three-judge panel, to the substantial detriment of their existing caseloads. This committee knows all too well that the federal judiciary has limited resources and an overburdened docket; we should not blithely require the judiciary to triple the time it must devote to a single case with-

<sup>1</sup> Former 28 U.S.C. § 2281, repealed by Pub. L. No. 94-381, § 1, 90 Stat. 1119. The primary difference between H.R. 1170 and § 2281 is that the former applies only to State law adopted by referendum.

<sup>2</sup> S. Rep. No. 204, 94th Cong., 1st Sess. 2 (1975). Although the Judiciary Committee rushed through the hearing and markup of H.R. 1170 before the Judicial Conference of the United States had an opportunity to consider the bill and provide the Committee with the benefit of its views, consistently since 1970, the Conference has opposed three-judge courts except for reapportionment cases involving congressional redistricting or statewide reapportionment. The undersigned note our concern that, not for the first time this year, the Judiciary Committee majority has ridden roughshod over the federal judiciary, taking action on measures with a significant impact on the workload of the federal judiciary without waiting the short period of time it would take to permit the Judicial Conference to consider those measures and give the Committee the benefit of its views.

out evidence that an improvement worthy of that added investment would be forthcoming.

Proponents of H.R. 1170 argue that very few cases would be implicated by its provisions, and therefore, the burden would be minimal. This argument is wrong for several reasons. First, no reliable evidence was introduced into the record to demonstrate that the number of cases would be small.<sup>3</sup> Even if the number is small, the burden is high. As Chief Judge Harry T. Edwards of the D.C. Circuit Court of Appeals testified, even “a relatively insignificant number” of cases constitutes “a terribly burdensome process when we’re asked to engage in it.”<sup>4</sup> Finally, because the referendum process does not exist in fourteen states, and its use is more heavily concentrated in others (for example, California), the burden imposed by H.R. 1170 would not be evenly distributed among the circuits. Some circuits would find themselves bearing a disproportionate share of the burden of H.R. 1170 without any additional resources.

Furthermore, the burden imposed by a three-judge court requirement is not merely one of time and logistics. There are also procedural difficulties for the three-judge court, and appellate burdens for the Supreme Court.

Judge J. Skelly Wright, testifying in 1975, emphasized “the problem of ruling on evidence as the swift-moving events of the trial take place. Three judges cannot act with the same incisiveness as the single judge in making trial rulings as necessary. \* \* \*”<sup>5</sup> Chief Judge Edwards underscored this concern:

[C]onducting a trial or any procedure other than a strict appellate-style argument with more than one judge is, quite frankly, a nightmare. Bench-attorney interactions, which are crucial to trial and hearing processes, are extremely hard to orchestrate in a three-judge setting.<sup>6</sup>

Fact-finding is a trial court function particularly difficult for a three-judge panel, and it is clear that many proceedings under H.R. 1170 will involve substantial fact-finding. As Judge Edwards noted, “determining the likelihood of irreparable harm in the weighing of probable evidence in support of parties’ arguments on the merits” are fact-finding matters “ill-suited for initial decision by multi-judge panels.”<sup>7</sup> A burden is also imposed on the Supreme Court. Judge Wright noted that a three-judge court procedure requires the Supreme Court to “dispose of a case, often involving delicate issues of federal-state relationships, on the skeletal record developed in an injunctive suit in the district court, without intermediate consideration by a court of appeals.” Wright Testimony at 7.

<sup>3</sup>Proponents of H.R. 1170 argued that only ten cases in the last decade would have come within the ambit of H.R. 1170. The source of this information, apparently, was a quick keyword computer search performed by a Library of Congress employee and reported by telephone. No truly reliable research was conducted.

<sup>4</sup>Testimony of Hon. Harry T. Edwards before the House Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, April 6, 1995.

<sup>5</sup>Testimony of Hon. J. Skelly Wright, Hearings before the Subcommittee on Courts, Civil Liberties, and the Administration of Justice (June 20 and July 19, 1975) [hereinafter “Wright Testimony”].

<sup>6</sup>Testimony of Hon. Harry T. Edwards before the House Subcommittee on Courts and Intellectual Property, Committee on the Judiciary, April 6, 1995.

<sup>7</sup>Id.

## II. FORUM SHOPPING IS ALREADY PROHIBITED IN FEDERAL COURTS

A primary argument advanced by the proponents of this bill is that it will prevent forum-shopping by plaintiffs who, it is said, can now file their cases in the court most likely to favor their position. This argument ignores the fact that all federal districts have rules that require the random assignment of cases, so that forum shopping is absolutely impossible in federal court. Indeed, in the California Prop. 187 case that motivated H.R. 1170, the case was filed in the Central District of California, which has 25 district judges (and an additional seven senior district judges), where it was randomly assigned to one of those 25 judges. Forum shopping is a highly overrated technique if it means that the plaintiff gets one chance in 25 of drawing the preferred judge.

If anything, H.R. 1170 itself provides an opportunity for forum shopping that does not now exist. If H.R. 1170 is enacted, plaintiffs seeking to challenge the constitutionality of a state law can elect to file a case seeking a declaratory judgment; if they like the judge randomly assigned to the case, they can seek the declaratory judgment alone, and when that judgment is final, it will be *res judicata* and an injunction will have to issue. An end run, in effect, can occur around the three-judge rule. If, on the other hand, the plaintiffs perceive the randomly assigned judge to be unfavorable, they can then file an application for an injunction, which will automatically give them two or more judges, in the hope that the original judge will be out-voted by the two additional judges. In short, plaintiffs would have two bites at the apple in terms of getting the "best" court possible.

## III. ALTHOUGH MOTIVATED BY ANGER OVER THE INJUNCTION IN THE PROP. 187 CASE IN CALIFORNIA, THIS BILL WOULD HAVE MADE NO DIFFERENCE IN THAT CASE

The impetus for this measure comes, in large part, from the frustration that many Californians reportedly feel with the federal court injunction that has been issued with respect to California Proposition 187.<sup>8</sup> As one Prop. 187 proponent, former INS official Harold Ezell, put it, "The people are ticked, and there needs to be some way to stop the kind of things this woman judge is trying to do."<sup>9</sup> It is worth noting, however that a state court judge also issued an injunction with respect to parts of Prop. 187, so that to the extent that the public perceives that its will is being frustrated by judges, the state judicial system is equally implicated. But the situation bears closer scrutiny to determine whether there is judicial "fault," and whether H.R. 1170 would have made a difference. The clear answer to both questions is no.

The education component of Prop. 187 was specifically designed to spur a lawsuit to seek to overturn the 1982 Supreme Court decision in *Plyler v. Doe*.<sup>10</sup> Therefore, it should not be particularly sur-

<sup>8</sup>The bill's primary sponsor noted at the April 5, 1995 hearing on H.R. 1170 that the bill was introduced "because 5 million people voted for a measure and one hand-picked Federal judge \* \* \* can use legal maneuvers to sit and sort of bury that proposition. \* \* \*"

<sup>9</sup>"Uncertain Fate of Prop. 187 Tests Patience," Los Angeles Times (Mar. 28, 1995).

<sup>10</sup>UCLA law professor Evan H. Caminker \* \* \* said [Governor Wilson's complaints] are 'particularly ironic' since the governor stressed during last year's campaign that the education com-

prising to anyone that an injunction has issued pending further court review of the matter. If there is public unhappiness with that process, the fault is not with a judicial process that results in an injunction when there is clear Supreme Court law on point, but rather with those who would politically exploit that public frustration, instead of furthering greater public understanding of the process of constitutional law.

Prop. 187 proponents decried the fact that federal courts would not defer to state court consideration of the challenges to Prop. 187.<sup>11</sup> While we believe the federal courts are an appropriate forum for review of the constitutionality of state laws, those who prefer state court review should consider H.R. 1170 will have the unintended consequence of increasing the likelihood of federal court review of cases within H.R. 1170's ambit.

Many cases challenging the constitutionality of state laws are brought today in state court. By requiring expedited review by a three-judge federal court, and a direct appeal to the Supreme Court, bypassing the Court of Appeals, H.R. 1170 will almost certainly have the consequence of making federal court a much more appealing forum than state courts in these cases, because of the faster and more direct track to the Supreme Court. The expedited federal track will also make it more likely that the federal court process will eclipse any opportunity for state court review.

#### IV. CONGRESS SHOULD NOT TELL STATES THAT ONE METHOD OF ENACTING STATE LAW IS PREFERRED OVER OTHERS

The premise of H.R. 1170 is that a state law enacted by a ballot measure is somehow more worthy than a state law enacted by a state legislature; therefore, the federal judiciary is mandated to give preferential treatment to state laws adopted by referendum. What does that say to the significant number of states that do not have referendum and initiative? By what right (or superior wisdom) does Congress tell certain States that their form of democracy is of lesser value than that of other States? Congress has no business making that kind of judgment.

Indeed, a strong argument can be made that the give and take of the legislative process, with hearings, markup, and debate, is likely to produce a better product than an initiative process in which voters can vote "yes" or "no," but have no method to refine the proposal.

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ponent of Proposition 187 was designed to spur a lawsuit seeking to overturn a 1982 U.S. Supreme Court decision. \* \* \* 'If your real motivation is to get the courts to revisit a constitutional issue, said Caminker, 'it's ironic you now complain the statute is not going into effect before the court decision.'" Id.

<sup>11</sup> Id.

Ultimately, however, the bottom line was best stated by UCLA law professor Evan Caminker, who said, "It ought to make no difference that it is a ballot measure, because the people have no greater authority to transgress the Constitution than does the state Legislature."

For these reasons, we dissent.

JOHN CONYERS, Jr.  
PAT SCHROEDER.  
BARNEY FRANK.  
HOWARD L. BERMAN.  
RICK BOUCHER.  
JOHN BRYANT.  
JERROLD NADLER.  
BOBBY SCOTT.  
MELVIN L. WATT.  
XAVIER BECCERA.  
JOSÉ E. SERRANO.  
ZOE LOFGREN.

