Recent Development

Federal Jurisdiction—THREE-JUDGE COURTS—Disposition of case by three-judge court on grounds which would have justified dissolution of three-judge court or refusal to convene court at outset must be appealed to court of appeals rather than Supreme Court.—*Gonzalez v. Automatic Employees Credit Union*, 95 S. Ct. 289 (1974).

An attack upon the constitutionality of the repossession and resale provisions of the Illinois Commercial Code[1] has afforded the United States Supreme Court an opportunity to limit further the effect of the three-judge court statutes[2] and their companion statute allowing direct appeal from such courts to the Supreme Court.[3] The Court availed itself of this opportunity in *Gonzalez v. Automatic Employees Credit Union*.[4]

Alfredo Gonzalez had purchased an automobile in Illinois under a retail installment contract. This contract was assigned to the Mercantile Bank of Chicago, which subsequently repossessed the automobile and resold it to a third party. Gonzalez brought a class action on behalf of himself and all other Illinois debtor-purchasers for declaratory and injunctive relief from the statute under which the bank had purported to act. The district judge convened a three-judge court pursuant to the three-judge court statutes.[5]

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[1] ILL. REV. STAT., ch. 26, §§ 9-503, -504 (1973); *id.*, ch. 95½, §§ 3-114(b), -116(b), -612.

[2] 28 U.S.C. §§ 2281, 2282, 2284 (1970).

[3] *Id.* § 1253.

[4] 95 S. Ct. 289 (1974).

[5] 28 U.S.C. § 2284 (1970) provides in part:

> In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:
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> (1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he 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. Such judges shall serve as members of the court to hear and determine the action or proceeding.

Because Gonzalez was seeking to enjoin the enforcement and operation of state statutes on constitutional grounds, this was an "action . . . required by [*id.* § 2281] to be heard and determined by a district court of three judges . . . ."

This three-judge court did not reach the merits of the plaintiffs' claims of unconstitutionality; instead, it dismissed the complaint, holding that the named representatives of the class, including Gonzalez, lacked standing to maintain a suit.[6]

Section 1253 establishes a right of direct appeal to the United States Supreme Court from an order of a properly convened three-judge court granting or denying injunctive relief.[7] Exercising the right he believed was his under section 1253, Gonzalez appealed the action of the three-judge court to the Supreme Court. Like the district court, the Supreme Court refused to reach the merits of the constitutional claim. The Court further refused, however, to pass upon the validity of the determination by the three-judge district court that the plaintiff lacked standing. Instead, the Court declared itself to be without appellate jurisdiction over the case under section 1253 and remanded the case to the district court.[8] In so holding, the unanimous Court frankly acknowledged that it was establishing a new rule regarding appeals to the Supreme Court under section 1253. The Court further acknowledged that in order to establish this new rule, the principle of stare decisis had to be shunted aside.[9] The Court announced that henceforth, when a three-judge court denies injunctive relief on grounds which would have justified dissolution of that court, or would have justified a refusal to convene a three-judge court at the outset, the plaintiff's sole recourse is to the court of appeals.[10]

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[6]Gonzalez claimed he was not in default under the installment contract. He further alleged that the bank had acted maliciously but did not allege that the bank had acted pursuant to the challenged statute. Because of this, the district court found that the named representatives had suffered no injury by the bank's having acted pursuant to the statutes. Therefore, the court held, the plaintiffs had no standing to challenge the statutes. Mojica v. Automatic Employees Credit Union, 363 F. Supp. 143 (N.D. Ill. 1973) (three-judge court).

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> Except as otherwise provided by law, any party may appeal to the Supreme Court from an order granting or denying, after notice and hearing, an interlocutory or permanent injunction in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges.

28 U.S.C. § 1253 (1970).

[8]The Court vacated the order of the three-judge court and remanded the case to the district court so that a fresh order could be entered by that court and a timely appeal made to the court of appeals. It should be noted, however, that the Court intimated that Gonzalez and Mercantile had settled the claim while the appeal to the Court was pending. 95 S. Ct. at 296 n.21. Gonzalez might not, therefore, prosecute his appeal to the Seventh Circuit Court of Appeals.

[9]*Id.* at 293.

[10]*Id.* at 296.

To those who have followed the attitudes of the members of the Supreme Court toward three-judge courts, the *Gonzalez* decision should come as no surprise. For nearly a quarter of a century, these acts have been subjected to narrowing construction and severe criticism, the latter reaching somewhat of a crescendo in this decade. A cursory review of these attitudes, constructions, and criticisms indicates that *Gonzalez* is merely the freshest step in a succession of predictable measures taken by the Court to shelter its appellate docket and, to a lesser extent, to relieve the burden placed upon the lower levels of the federal judiciary by the three-judge court statutes.

The three-judge court statutes were first enacted in 1910,[11] evidently intended to serve a dual purpose: first, to encumber the attempts of a conservative federal judiciary to strike down on constitutional grounds progressive state economic legislation, and second, to assuage the feelings of the states whose legislation was laid low, by requiring the judicial act to be done by a court with prestige greater than that of a single judge.[12] As amended in 1925,[13] the act required a three-judge court to be impaneled to enjoin on constitutional grounds the enforcement of any state statute or regulation. In 1937, Congress reacted to the judiciary's recalcitrant attitude toward New Deal legislation by extending the requirement of three-judge courts to cases involving the constitutionality of federal legislation.[14] Subsequent congressional action has produced the requirement that three-judge courts be convoked for certain actions under the Civil Rights Act of 1964,[15] and to hear appeals from the Interstate Commerce Commission.[16] Thus, there are currently several statutory provisions regarding the three-judge court. For the purposes of this discussion, the most

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[11]Act of June 18, 1910, ch. 309, § 17, 36 Stat. 557. The statute has been amended on a number of occasions. *See, e.g.*, Act of March 4, 1911, ch. 231, § 236, 36 Stat. 1162. It is currently codified at 28 U.S.C. § 2281 (1970).

[12]*See generally* Swift & Co. v. Wickham, 382 U.S. 111, 119 (1965); Bailey v. Patterson, 369 U.S. 31, 33 (1962); Phillips v. United States, 312 U.S. 246, 250 (1941); C. WRIGHT, FEDERAL COURTS § 50 (1970); Ammerman, *Three-Judge Courts: See How They Run*, 52 F.R.D. 293, 296 (1971); Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964); Hutcheson, *A Case for Three Judges*, 47 HARV. L. REV. 795, 807-10 (1934); Comment, *The Applicability of Three-Judge Courts in Contemporary Law: A Viable Legal Procedure or a Legal Horsecart in a Jet Age?*, 21 AM. U.L. REV. 417, 418-21 (1972).

[13]Act of Feb. 13, 1925, ch. 229, § 1, 43 Stat. 938.

[14]Act of Aug. 24, 1937, ch. 754, § 3, 50 Stat. 752 (now codified at 28 U.S.C. § 2282 (1970)).

[15]42 U.S.C. §§ 1971g, 2000a-5(b), 2000e-6(b) (1970). Similar provisions are found in the Voting Rights Act of 1965. *Id.* §§ 1973b(a), 1973c, 1973h(c).

[16]15 U.S.C. §§ 28, 29 (1970).

important is section 2281, which requires that a three-judge court hear constitutional attacks on state legislation or regulations.[17]

Congress also included in the 1910 Act the provision for direct appeal of three-judge decisions to the Supreme Court.[18] Congress believed it essential that a means for swift final decision be afforded the parties so that the states might suffer a minimum of judicial interference with the administration of their laws.[19]

The so-called "Judges' Bill" of 1925[20] is also important to an understanding of the judicial decimation of the three-judge court statutes. In an action ostensibly unrelated to the expansion or constriction of the three-judge court acts, Congress greatly expanded the control of the Supreme Court over its docket through the use of the discretionary writ of certiorari.[21] Although the Judges' Bill nearly eliminated the right of appeal to the Supreme Court,[22] section 1253 was among the few provisions creating rights of direct appeal which were not abolished.

Some years after the enactment of the Judges' Bill, the Court began to view that legislation as an authorization to construe sections 2281 and 1253 very narrowly in order to give effect to the purposes of Congress. In 1941, Mr. Justice Frankfurter determined that the purpose behind the Judges' Bill was to keep the appellate docket of the Supreme Court within narrow confines;[23] he also attributed to the 1925 Congress an awareness of the seri-

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> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title.

28 U.S.C. § 2281 (1970).

[18]Act of June 18, 1910, ch. 309, § 17, 36 Stat. 557 (now codified at 28 U.S.C. § 1253 (1970). *See also* Act of March 4, 1911, ch. 231, § 236, 36 Stat. 1162.

[19]See authorities cited in note 12 *supra*.

[20]Act of Feb. 13, 1925, ch. 229, 43 Stat. 936. This Act was called the "Judges' Bill" because it was drafted by a committee of Supreme Court justices. C. WRIGHT, FEDERAL COURTS § 1 (1970).

[21]The discretionary writ of certiorari had originated with the Evarts Act, Act of March 3, 1891, ch. 517, § 6, 26 Stat. 828. The writ was greatly expanded by the Judges' Bill, Act of Feb. 13, 1925, ch. 229, § 237, 43 Stat. 937-38.

[22]Act of Feb. 13, 1925, ch. 229, § 238, 43 Stat. 938; C. WRIGHT, FEDERAL COURTS § 1 (1970).

[23]Phillips v. United States, 312 U.S. 246, 250 (1941). *See also* Taft, *The Jurisdiction of the Supreme Court Under the Act of Feb. 13, 1925*, 35 YALE L.J. 1 (1925).

ous drain upon the federal judiciary caused by the three-judge court statutes. This analysis of congressional intent, Frankfurter decided, reveals the three-judge court provision "not as a measure of broad social policy to be construed with great liberality, but as an enactment technical in the strict sense of the term and to be applied as such."[24]

The Supreme Court has consistently observed this canon of narrow construction;[25] constriction of the three-judge court statutes has been the rule and expansion the virtually nonexistent exception. Accordingly, the Court has held that a specific prayer for an injunction is required to trigger the three-judge court procedure under section 2281; a prayer solely for declaratory relief, while equitable in nature and injunctive in effect, is insufficient.[26] The Court has held that ultra vires executive action is not a state statute or regulation for purposes of section 2281 and, thus, cannot form the basis for relief from a panel of three judges.[27] The Court has construed the term "statute" in section 2281 to require legislation of state-wide application.[28] The constitutional claim must be substantial: the claim may not be frivolous,[29] nor may the statute be patently unconstitutional.[30] If it is either, section 2281 does not require a three-judge court. The Court has even applied a narrowing construction to the statutory term "unconstitutionality." While the contention that a state statute violates the supremacy clause of the Constitution is certainly constitutional in nature, such an argument does not compel the convoking of a three-judge court.[31]

Each of the above limitations upon section 2281 may be indirectly reflected in the appellate docket of the Supreme Court. Section 1253 gives a party the right to appeal from an order granting or denying injunctive relief in an action "required by any Act of Congress to be heard and determined by a district court of three judges." Thus, each time the Supreme Court establishes a new exception to the requirements for a three-judge court, it effectively establishes, albeit indirectly, a new exception to the right of direct appeal. Even procedural exceptions can have such an effect.

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[24]Phillips v United States, 312 U.S. 246, 251 (1941).

[25]The *Gonzalez* Court cited Justice Frankfurter's language from Phillips v. United States, 312 U.S. 246 (1941), with approval. 95 S. Ct. at 294-95 n.16.

[26]Perez v. Ledesma, 401 U.S. 82, 86 (1971); Mitchell v. Donovan, 398 U.S. 427 (1970); Rockefeller v. Catholic Medical Center, 397 U.S. 820 (1970).

[27]Phillips v. United States, 312 U.S. 246 (1941).

[28]Moody v. Flowers, 387 U.S. 97 (1967); Phillips v. United States, 312 U.S. 246 (1941).

[29]*Ex Parte* Poresky, 290 U.S. 30 (1933).

[30]Bailey v. Patterson, 369 U.S. 31 (1962).

[31]Swift & Co. v. Wickham, 382 U.S. 111 (1965).

Although the statute setting forth the procedure to be followed when a three-judge court is required specifically prohibits a single judge from dismissing a case for any reason other than failure to meet the requirements of section 2281,[32] the Court has effectively read this provision out of the statute books.[33] Nor has section 1253 itself been spared the narrowing construction applied to section 2281: the Court has long since determined that section 1253[34] does not create a right of appeal in cases which were actually decided by a single judge although they should have been decided by a three-judge court under section 2281.[35] Even more astonishingly, the Court has explicitly disclaimed jurisdiction over interlocutory orders denying permanent injunctions despite clear language in section 1253 establishing the right to appeal any three-judge court order granting or denying an "interlocutory or permanent injunction."[36]

In addition to this virtually unbroken string of cases narrowing the application of the three-judge court acts and the right to direct appeal, recent years have witnessed an unprecedented series of attacks from all sides upon the three-judge court procedure. The basis of the majority of these attacks has been the strain placed upon the federal judiciary by the three-judge court requirements.[37]

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[32]28 U.S.C. § 2284 (1970) provides in part:

> (5) Any one of the three judges of the court may perform all functions, conduct all proceedings except the trial, and enter all orders required or permitted by the rules of civil procedure. A single judge shall not appoint a master or order a reference, or hear and determine any application for an interlocutory injunction or motion to vacate the same, or dismiss the action, or enter a summary or final judgment.

[33]Gonzalez v. Automatic Employees Credit Union, 95 S. Ct. 289, 293-94 n.14 (1974); Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715 (1962); Bailey v. Patterson, 369 U.S. 31 (1962); *Ex Parte* Poresky, 290 U.S. 30 (1933).

[34]28 U.S.C. § 1253 (1970) is reprinted at note 7 *supra*.

[35]"We have glossed over the provision so as to restrict our jurisdiction to orders actually entered by three-judge courts." Gonzalez v. Automatic Employees Credit Union, 95 S. Ct. 289, 293-94 n.14 (1974). *See* Schackman v. Arnebergh, 387 U.S. 427 (1967); Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713 (1962); Stratton v. St. Louis S.W. Ry., 282 U.S. 10 (1930); *Ex Parte* Metropolitan Water Co., 220 U.S 539 (1911).

[36]Rockefeller v. Catholic Medical Center, 397 U.S. 820 (1970); Goldstein v. Cox, 396 U.S. 471 (1970).

[37]The administrative drain upon the district and circuit courts has increased dramatically in the past decade. The average number of cases heard by three-judge courts from 1955 to 1959 was 48.8 per year; from 1960 to 1964, the average per year was 95.6. AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1374, at 317 (1969) (hereinafter cited as ALI STUDY). From 1969 to 1973, the average per year was 290.8. There were 320 such cases in 1973 compared to 119 in

Although the American Law Institute concluded in 1969 that "the burden on the federal judicial system that a three-judge court creates is outweighed by the beneficial effect it has on federal-state relations,"[38] the Institute nonetheless recommended a number of amendments to limit the three-judge court requirement.[39] Subsequent recommendations have not exhibited the tolerance shown by the ALI of this burden on the judiciary. In 1970 the Judicial Conference of the United States called for the abolition of three-judge courts except when expressly required by an Act of Congress.[40] The primary focus of these studies was upon the district and circuit court levels of the federal judiciary and the disruptive effect of three-judge courts upon the dockets of those courts.

Other criticisms have found their justification in the effect of section 1253 on the docket of the Supreme Court. Chief Justice Burger has been quite blunt in his objections to the three-judge court procedure,[41] and at least two Associate Justices have advocated the elimination of the three-judge court.[42] The Report of the Study Group on the Caseload of the Supreme Court, now commonly called the "Freund Report," recommended that section 2281 be repealed.[43] This recommendation, however, has gone somewhat

1964. ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1973 ANNUAL REPORT pt. II, at 40.

The burden upon these judges cannot be fully appreciated through mere reference to statistics, however. A great deal of travel is involved in the typical three-judge court case. For example, for the hearing of Communist Party v. Sendak, No. 72-H-224 (N.D. Ind., Sept. 28, 1972), *rev'd sub nom.*, Communist Party v. Whitcomb, 414 U.S. 441 (1974), district judges from Indianapolis and Fort Wayne and a circuit judge from Chicago met and heard the case in Hammond, Indiana.

[38]ALI STUDY § 137, at 320.

[39]*Id.* §§ 1374-76.

[40]REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 78-79 (1970).

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

Burger, *The State of the Federal Judiciary—1972*, 58 A.B.A.J. 1049, 1053 (1972).

[42]Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 474 (1973); Rehnquist, *Whither the Courts?*, 60 A.B.A.J. 787, 790 (1974).

[43]REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT 30 (1972).

unnoticed amidst the furor generated by the Freund Report's call for the establishment of a National Court of Appeals to limit the annual caseload of the Supreme Court to four hundred cases.[44]

In light of the history of narrow construction of the three-judge court statutes and the accompanying right to appeal and of the recent vehement criticisms of the three-judge court concept and procedure, the *Gonzalez* decision cannot be said to have been unforeseeable. The only surprise to be found in the case is a mild one. The respondent argued that the Supreme Court should not exercise jurisdiction under section 1253 in cases in which the three-judge district court failed to reach the merits of the plaintiff's claim.[45] The Court rejected this formulation of section 1253 and instead adopted a rule which arguably goes beyond that proferred by the respondent. In holding section 1253 inapplicable when a three-judge court denies relief on grounds which would have justified refusal to convoke the panel ab initio, the Court has disclaimed jurisdiction in cases in which the three-judge court reaches the merits but finds that the claim was not substantial. In other words, if the panel finds that the plaintiff's claim is frivolous or that the statute or regulation at issue is patently unconstitutional, the Court is without jurisdiction to entertain a direct appeal under section 1253.[46]

An examination of the *Gonzalez* decision calls forth several reflections, both upon the narrow holding of the case itself and upon the milieu in which judgment was rendered. *Gonzalez* is a decision which bears tangible fruits for bar, bench, and litigant and at the same time gives rise to certain disappointments.

Among the benefits to be perceived in the *Gonzalez* holding is the resolution of the quandary heretofore faced by an unsuccessful party as to where he should file an appeal. Prior to *Gonzalez,* the party was required to appeal to the Supreme Court pursuant to section 1253 if a three-judge court dismissed his complaint for want of subject-matter jurisdiction[47] but was required to appeal to the court of appeals if the dismissal of his complaint was based upon lack of statutory jurisdiction.[48] Thus, unless the party was able to determine the basis of the dismissal by the three-judge court, his most prudent course of conduct was to file an appeal

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[44]*Id.* 10-24.

[45]95 S. Ct. at 295.

[46]*See* Bailey v. Patterson, 369 U.S. 31 (1962); *Ex Parte* Poresky, 290 U.S. 30 (1933).

[47]Flast v. Cohen, 392 U.S. 83 (1968); Baker v. Carr, 369 U.S. 186 (1962); Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 U.S. 73 (1960); California Water Co. v. City of Redding, 304 U.S. 252 (1938).

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

in the Supreme Court in an attempt to invoke its jurisdiction under section 1253 and, simultaneously, to file a protective appeal with the appropriate court of appeals. The failure to file a protective appeal might result in total denial of appellate review if the Supreme Court were to decide, after the expiration of the time for filing an appeal in the court of appeals, that it was without appellate jurisdiction under section 1253.[49] Because a single judge is permitted to determine the absence of subject-matter jurisdiction, and on that basis refuse to convoke a three-judge court,[50] it seems clear that *Gonzalez* requires the party whose relief is denied for want of either statutory or subject-matter jurisdiction to appeal to the court of appeals.

A further benefit which will accrue from the *Gonzalez* opinion is the inevitable easing of the docket pressures upon the Supreme Court. It is impossible to predict how slight or great this easing will be, for one cannot say how many judgments of three-judge courts will be rendered on grounds which now require appeal to the court of appeals. It would seem, however, that any reduction in the appellate docket of the Court will be significant, since twenty-two per cent of the cases argued orally before the Court from 1969 to 1971 were appeals from three-judge courts.[51]

Still another benefit which might be produced by *Gonzalez* is the sudden availability to a party of a realistic forum for review of an adverse decision by a three-judge court. Mr. Justice Rehnquist has noted that during the 1971 term approximately fifty appeals from three-judge courts were summarily affirmed,[52] and that figure may be an underestimate.[53] Justice Rehnquist has also conceded: "No one seriously contends that these summary

[49]This possibility may be more theoretical than practical. Upon finding itself without jurisdiction under section 1253, the Supreme Court has made a practice of remanding the case to the district court for the entry of a fresh order from which the party could file a timely appeal in the court of appeals. *See, e.g.*, Gonzalez v. Automatic Employees Credit Union, 95 S. Ct. 289 (1974); Mengelkock v. Industrial Welfare Comm'n, 393 U.S. 83 (1968); Wilson v. City of Port Lavaca, 391 U.S. 352 (1968).

[50]*See* notes 32 and 33 *supra* & accompanying text.

[51]REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT 29 (1972).

[52]Rehnquist, *supra* note 40, at 790.

[53]In the 1971 term referred to by Justice Rehnquist, 120 appeals from three-judge courts were filed with the Supreme Court. REPORT OF THE STUDY GROUP OF THE CASELOAD OF THE SUPREME COURT A11 (1972). According to Justice Stewart's opinion in *Gonzalez*, the "Court typically disposes summarily of between ⅔ and ¾ of the three-judge court appeals filed each term." 95 S. Ct. at 295 n.17, *citing* Douglas, *The Supreme Court and Its Case Load*, 45 CORNELL L.Q. 401, 410 (1960). Applying this estimate to the 1971 term, between eighty and ninety such appeals would have been dealt with summarily.

affirmances receive the full consideration that is given to a case argued on the merit and disposed of by written opinion . . . ."[54] The docket of the Court, however, is such that summary disposition of many cases is required.[55] The practical effect of this type of near nonreview is that an appellant is afforded no forum in which he may fully argue his position.[56] Again, one cannot predict the number of parties, whose cases would have been summarily decided by the Supreme Court, who will now be enabled to assert their positions before a court of appeals. It must be assumed that these courts will have at least slightly more time than the Supreme Court to devote to such cases. For each such appellant, *Gonzalez* may prove to be a boon.[57]

Despite these beneficial effects of *Gonzalez*, one cannot help but be somewhat discouraged by the opinion. The extremes which the Court felt were necessary for a disavowal of the doctrine of stare decisis in the area of three-judge court law are at best discomforting. Writing for the Court, Mr. Justice Stewart candidly stated:

> [I]t is also a fact that in the area of statutory three-judge court law the doctrine of *stare decisis* has historically been accorded less than its usual weight. These procedural statutes are very awkwardly drafted, and in struggling to make workable sense of them, the Court has not infrequently been induced to retrace its steps.[58]

In a footnote to this passage, Justice Stewart graphically set forth a number of cases in which the Court has "been induced to retrace its steps."[59] Regardless of the validity of Justice Stewart's state-

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[54]Rehnquist, *supra* note 40, at 790.

[55]Appeals from three-judge courts constituted twenty-two percent of *all arguments* heard by the Court during the 1971 term despite disposition without argument of eight-two percent of *all appeals* filed. REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT 29, A10 (1972).

[56]Justice Brennan has indicated that the Court is aware of this effect and thus is more likely to attempt to hear the appeal. Brennan, *The National Court of Appeals: Another Dissent*, 40 U. CHI. L. REV. 473, 474 (1973). It is unfortunate that so laudable a concern does not ease the pressures of the Court's appellate docket.

[57]The Court indicated its awareness of this effect. 95 S. Ct. at 295 n.17.

[58]*Id.* at 293.

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> Cases in which the District Court had denied injunctive relief for want of standing, or of justiciability generally: *Florida Lime & Avocado Growers v. Jacobsen*, 362 U.S. 73; *Baker v. Carr*, 369 U.S. 186; *Flast v. Cohen*, 392 U.S. 83; *Richardson v. Kennedy*, 401 U.S. 901; *Granite State Falls Bank v. Schneider*, 402 U.S. 1006. Cases where denial was for want of subject-matter jurisdiction: *Lynch v. Household Finance Corp.*, 405 U.S. 538; *Carter v. Stanton*, 405 U.S. 669. Cases where denial was on grounds of abstention or for want of

ment or the justness of the *Gonzalez* decision, the divorce of an entire area of law from the doctrine of stare decisis is somewhat disconcerting. One cannot help but entertain the rather naive hope that at its next opportunity the Court will retract this caveat toward prior case law. Otherwise *Gonzalez* will serve to encourage litigants to argue the "unworkability" of current law to the Court, and further anomolies may well arise in this already unsettled area of the law. One must hope that the Court will hereafter attempt to establish lasting rules for the guidance of litigants and attorneys. As an alternative, one might entertain the hope that intervening legislation will make further litigation of three-judge court law unnecessary.

Another disappointment one might experience upon reflecting on *Gonzalez* is that while the decision will certainly serve to ease the strain on the docket of the Supreme Court, it does nothing to relieve the burden of the three-judge court statutes on the lower levels of the federal judiciary.[60] In one sense, the decision has even increased the burden: each case which fits the *Gonzalez* mold will now require the time of four judges of circuit courts of appeals in addition to the time of two district judges.[61]

Perhaps the most profound disappointment regarding *Gonzalez,* however, is the fact that it was necessary at all. Despite the fervent pleas that have arisen from within the legal profession for the abolition, or at least the curtailment, of the three-judge court laws, Congress has failed to respond. Regardless of the conceded validity of the system in 1910, the three-judge court acts have outlived their usefulness and have become anachronistic. Yet this musty procedure continues to require circuit judges to abandon their schedules to appear at the nisi prius level of litigation. District judges, already swamped by their own dockets, are forced by these statutory relics to "double up" on cases which could just as easily be determined by a single judge. The Supreme Court continues to be required by section 1253 to rule in direct appeals, losing a large degree of control over its docket, the management of which is so burdensome that Chief Justice Burger

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equitable jurisdiction: *Doud v. Hodge,* 350 U.S. 485; *Zwickler v. Koota,* 389 U.S. 241; *Mitchum v. Foster,* 407 U.S. 225; *American Trial Lawyers Assn. v. New Jersey Supreme Court,* 409 U.S. 467. 95 S. Ct. at 293 n.11. Under the *Gonzalez* holding, none of these cases, of course, would have reached the Court without prior review by a court of appeals.

[60]See note 36 *supra.*

[61]28 U.S.C. § 2284 (1970) requires that at least one circuit judge sit on a three-judge court. See note 5 *supra.* When an appeal is taken to a court of appeals from a three-judge court, three more circuit judges will be drawn into the case.

today calls for the creation of a special court to manage that docket.[62] The benefits of the three-judge court laws no longer outweigh the unworkable situation which the laws create. *Gonzalez* demonstrates the twin problems facing the courts in this area: the need for change, and the constitutional inability to satisfactorily effect the change. Congress must act to strip the statute books of the three-judge court laws. Until it does, the Supreme Court is powerless to strike down those laws as unconstitutional. As in *Gonzalez*, the Court can only effectively strike them down as inconvenient.

ROBERT L. MILLER, JR.

[62] *See* Burger & Warren, *Retired Chief Justice Warren Attacks, Chief Justice Burger Defends Freund Study Group's Composition and Proposal*, 59 A.B.A.J. 721 (1973); Burger, *Report on the Federal Judicial Branch—1973*, 59 A.B.A.J. 1125 (1973).