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Case Notes

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CASE NOTES

Criminal Law—Entrapment in the Federal Courts—Subjective Test Re-affirmed Against Lower Court Departures.—In December 1969, an undercover agent for the Federal Bureau of Narcotics and Dangerous Drugs, who sought to locate a methamphetamine (“speed”) factory, represented himself to respondent and his two co-defendants as the agent of a criminal syndicate. In return for his offer to supply the defendants with phenyl-2-propanone (P-2-P), an essential, but scarce, ingredient of speed, defendants were to supply the agent with one-half their future production. Two days later, the agent returned with 100 grams of P-2-P, which defendants at once used to manufacture two batches of speed. The agent, who observed the process without participation, was given one batch and purchased part of the other for \$60. A month later the agent asked one of the co-defendants if he was still interested in the arrangement. This defendant responded affirmatively but added that it would take a few days to finish with two bottles of P-2-P which he had acquired elsewhere. No evidence was adduced linking respondent with this or any phase of his co-defendants’ operation other than the original transaction. Three days later the agent returned with a search warrant and halted the illegal operation. Respondent’s conviction was reversed by the court of appeals which held that he had been entrapped.¹ Upon certiorari, the Supreme Court reversed, holding as a matter of law that respondent had not been entrapped. *United States v. Russell*, 411 U.S. 423 (1973).

It is demonstrable that the doctrine of entrapment is an indirect result of society’s desire to regulate the habits of its members, to which end it creates sumptuary² offenses. These offenses are difficult of detection since generally they are committed in private, and are normally consensual in the sense that there is rarely a complaining victim to present the matter to the police. Indeed, the police often operate without the sympathy of the public in detecting these “victimless” crimes. The police thus are forced to develop less conventional detection techniques,³ often in situations where pressures of time and place⁴ require instant decisions by individuals with differing attitudes towards both methodology and suspect.⁵ These detection tactics, however factually disparate, are elementally similar. One analysis of the typical situation involves

1. *United States v. Russell*, 459 F.2d 671 (9th Cir. 1972), rev’d, 411 U.S. 423 (1973).

2. The term’s modern usage encompasses regulation or proscription of narcotics, alcoholic beverages, prostitution, and other such habits offensive to the general welfare. See, e.g., Bancroft, *Administration of the Affirmative Trap and the Doctrine of Entrapment: Device and Defense*, 31 U. Chi. L. Rev. 137, 137-38 & n.2 (1963) [hereinafter cited as Bancroft].

3. *Id.* at 138-40; Donnelly, *Judicial Control of Informants, Spies, Stool Pigeons, and Agent Provocateurs*, 60 Yale L.J. 1091, 1093-94 (1951) [hereinafter cited as Donnelly].

4. Rotenberg, *The Police Detection Practice of Encouragement*, 49 Va. L. Rev. 871, 875-77 (1963) [hereinafter cited as Rotenberg].

5. Bancroft 149-58.

the police agent "(1) acting in the capacity of a victim, (2) intending by his actions to suggest his willingness to be a victim, (3) actually communicating this feigned willingness to the suspect, and (4) thereby having some influence upon his commission of the crime."⁶ This elemental pattern may be termed "encouragement,"⁷ whereby the police by artifice deploy to observe a course of secret, consensual, otherwise undetectable crime, and to obtain evidence sufficient to arrest and convict the suspect. In view of the many variables involved, it is not surprising that, in their desire to trigger an observable offense (by one supposedly ready, willing, and able to commit such an offense), the police occasionally have resorted to overzealous methods. Often, this can result in a patently different situation, involving "the conception and planning of an offense by an officer, and his procurement of its commission by one *who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer*."⁸ At this point the judicial limitation on police methods known as the doctrine of entrapment interposes itself.

The doctrine is indigenous to the United States,⁹ and first appears in the state courts in the late 1870s.¹⁰ Although the doctrine was not recognized in the federal courts until 1915,¹¹ the following two decades saw a wave of federal entrapment claims.¹² To the extent an analysis was attempted, justification of the doctrine generally was based on one of two grounds. One rationale was that public policy could not condone the punishment of a man for a crime incited by the government.¹³ Other courts reasoned that the government was estopped from prosecuting by its agents' conduct.¹⁴ Similar disagreement

6. Rotenberg 874 (footnotes omitted). There is not a victim in the true sense, for the sumptuary victim participates voluntarily. Rather, he is the medium through which the crime impacts on society, the ultimate victim. *Id.* n.10.

7. *Id.* at 874.

8. Sorrells v. United States, 287 U.S. 435, 454 (1932) (Roberts, J., concurring) (emphasis added). Justice Roberts's definition has achieved wide acceptance as the classic definition of entrapment. See, e.g., 22 C.J.S. Criminal Law § 45(2) (1961).

9. English courts have refused to recognize entrapment as a defense. DeFeo, Entrapment as a Defense to Criminal Responsibility: Its History, Theory and Application, 1 U. San. Fran. L. Rev. 243, 245-47 (1967) [hereinafter cited as DeFeo]. But cf. Brannan v. Peek, [1947] 2 All E.R. 572, 573-74 (K.B.) (dictum).

10. The earliest cases are collected in Annot., 25 L.R.A. 341 (1894).

11. Woo Wai v. United States, 223 F. 412 (9th Cir. 1915).

12. See cases collected in Annot., 86 A.L.R. 263 (1933); Annot., 66 A.L.R. 478 (1930); Annot., 18 A.L.R. 146 (1922).

13. E.g., Butts v. United States, 273 F. 35, 38 (8th Cir. 1921); Sam Yick v. United States, 240 F. 60, 67 (9th Cir. 1917); United States v. Echols, 253 F. 862, 863 (S.D. Tex. 1918).

14. E.g., United States v. Kaiser, 138 F.2d 219 (7th Cir. 1943), cert. denied, 320 U.S. 801 (1944); Voves v. United States, 249 F. 191 (7th Cir. 1918); United States v. Lynch, 256 F. 983 (S.D.N.Y. 1918). These decisions proceeded despite the common law rule that the sovereign cannot be estopped. At least one commentator, however, has concluded that the no-estoppel rule is weakening dramatically. Comment, Applying Estoppel Principles in Criminal Cases, 78 Yale L.J. 1046 (1969).

existed as to what police conduct would constitute entrapment.¹⁵ In retrospect, it is apparent that the Supreme Court made a significant contribution to the confusion by refusing to analyze the doctrine until 1932.¹⁶

At that point, however, in the landmark case of *Sorrells v. United States*,¹⁷ the Court resolved these matters in an opinion which, as supplemented by the decision in *Sherman v. United States*,¹⁸ had expressed the fundamental law of entrapment in the federal courts until the instant case. The facts of these two cases are examples both of the normal context in which encouragement techniques are used, and of the evils to which such methods descend and against which the entrapment doctrine sets its face. In *Sorrells*, an undercover prohibition agent, posing as a visitor in town, engaged petitioner in warm conversation, centered around their shared wartime experiences. During this conversation, the agent repeatedly asked Sorrells to "get him some liquor." After twice refusing, Sorrells finally stepped out and returned with liquor, which he then sold to the agent. For this offense, Sorrells was convicted.¹⁹

The facts of *Sherman* were even less savory. There, the acquaintance between petitioner and a paid government informer grew through several chance meetings at a doctor's office, where both were being treated for narcotics addiction. On several such occasions the informer asked Sherman if he knew a source of narcotics, since the informer was not responding to treatment and was suffering greatly. At last petitioner acquiesced and purchased a quantity

15. Some cases turned on the "genesis of intent": the question was whether the defendant had entertained the "intent" to commit the crime before the agent approached him, or whether the agent had implanted the intent. E.g., *Butts v. United States*, 273 F. 35 (8th Cir. 1921); *Peterson v. United States*, 255 F. 433 (9th Cir. 1921); *Sam Yick v. United States*, 240 F. 60 (9th Cir. 1917). Other courts concluded that "[i]f the officers of the government act in good faith and in the honest belief that the defendant is engaged in an unlawful business . . . the defense of entrapment is without merit." E.g., *United States v. Reisenweber*, 288 F. 520, 526 (2d Cir. 1923); see *Billingsley v. United States*, 274 F. 86 (6th Cir.), cert. denied, 257 U.S. 656 (1921); *United States v. Certain Quantities of Intoxicating Liquors*, 290 F. 824 (D.N.H. 1921). One case, involving the use of a Caucasian-appearing Indian as an undercover agent to induce sales of liquor from defendants, in violation of laws prohibiting the sale of liquor to Indians, simply held that this deception constituted entrapment per se. *United States v. Healy*, 202 F. 349 (D. Mont. 1913).

16. In the federal courts recognition of the entrapment doctrine had been pressed in the late 19th century, but had become confused in a series of cases involving non-mailable matter posted in response to imaginative decoy letters sent by government agents. Uniformly, these cases were decided on an ad hoc basis without explicit mention of an entrapment doctrine. E.g., *United States v. Adams*, 59 F. 674, 676-77 (D. Ore. 1894); *United States v. Grimm*, 50 F. 528 (E.D. Mo. 1892), aff'd, 156 U.S. 604 (1895); *United States v. Whittier*, 28 F. Cas. 591, 594 (No. 16,688) (E.D. Mo. 1878) (Treat, J., concurring). Some of the decoy letter cases reached the Supreme Court, which held merely that the use of decoy letters by the police was permissible as a matter of law. What constituted impermissible inducement, and why, was not discussed. *Goode v. United States*, 159 U.S. 663 (1895); *Grimm v. United States*, 156 U.S. 604 (1895).

17. 287 U.S. 435 (1932).

18. 356 U.S. 369 (1958).

19. 287 U.S. at 438-40.

of narcotics, part of which he sold to the informer; the remainder facilitated his own relapse into addiction. After several such transactions, the informer tipped off government agents.²⁰

In reversing Sorrells's conviction, the Supreme Court expressed grave misgivings about the power of the judiciary to prevent, on the basis of public policy or estoppel, the punishment of acts denominated as criminal by Congress. This would be tantamount, said the Court, to clemency, which is a function of the executive branch and, hence, beyond the power of a court.²¹ Rather, continued the Court, entrapment deals with an individual who has *not* violated the penal statute, for Congress could not have intended its statute to be enforced by methods which lure into commission of the proscribed acts one who, but for those methods, would not so have acted.²² Statutory construction, then, was the proper theoretical wellspring of the doctrine, and the assumed "innocence-but-for" of its beneficiary was the key to all cases. A defendant is otherwise innocent, said the Court, when the criminal design is conceived by the government's agents, who then induce the defendant to commit criminal acts not of his conception.²³ The controlling question, then, is what is styled the "genesis of intent."²⁴ Thus, continued the Court, to the claim of inducement the government may respond with "an appropriate and searching inquiry"²⁵ into defendant's predisposition, by evidence of the defendant's past criminal designs, which tends to show that he is not, after all, otherwise innocent.²⁶ Applying this test, the Court had little difficulty in concluding that Sorrells was, indeed, otherwise innocent.²⁷

That Sherman was equally innocent was the conclusion of a unanimous Court in *Sherman v. United States*,²⁸ but in strict adherence to *Sorrells*, the majority opinion spoke for only five justices.²⁹ The Court declined to reconsider the *Sorrells* rationale without benefit of briefs or oral argument.³⁰ In view of

20. 356 U.S. at 371. Resort to paid informers, instead of police undercover agents, is perhaps the least wholesome aspect of these detection practices. It has been estimated that 90 percent of narcotics sales come to light through informers. Rotenberg 875 n.15. Judicial attempts to provide protection against unscrupulous informers, while preserving the government's interest in the secrecy of its informers' identity and methods, have had curious effects on defendants' right to confront their accusers, i.e., the informers. Donnelly 1094-96. Egregious abuses of the use of informers have occasioned wrathful denunciations from the bench. E.g., *Williamson v. United States*, 311 F.2d 441 (5th Cir. 1962), cert. denied, 381 U.S. 950 (1965) (informer paid, on contingency basis, so much for each suspect produced).

21. 287 U.S. at 449-50. For a fuller discussion of the entrapment doctrine as beyond the power of the judiciary see notes 53 & 54 *infra* and accompanying text.

22. 287 U.S. at 446-48.

23. *Id.* at 445.

24. Donnelly 1104; see 287 U.S. at 442; note 15 *supra*.

25. 287 U.S. at 451.

26. *Id.* at 451-52.

27. *Id.* at 452.

28. 356 U.S. 369 (1958).

29. Justices Frankfurter, Brennan, Douglas and Harlan concurred in the result only.

30. 356 U.S. at 376.

the "handicaps" that would be placed on the police, were evidence of defendant's criminal history excluded,³¹ the Court did not wish to be "brushing aside the possibility that we would be creating more problems than we would supposedly be solving."³²

The problems which *Sherman* refrained from "supposedly solving" are real enough, as revealed in the concurring opinions of Justice Roberts in *Sorrells*,³³ and Justice Frankfurter in *Sherman*,³⁴ which have served as the spearheads for a continual attack upon the *Sorrells-Sherman* thesis. The resort to statutory construction as the legal theory behind the entrapment doctrine presents grave difficulties, for there is no evidence that Congress intended what the Court says it intended. Indeed, the fair meaning of the statutes involved is the exact opposite of the Court's interpretation.³⁵ What the Court effectively has done is to amend the statute so as to exempt from its sanction not only those who have not committed the proscribed acts, but also some of those who have done so.³⁶ Moreover, since the Court has refused to construe sumptuary offenses as requiring proof of scienter,³⁷ it is inconsistent to exculpate some of those who *do* act with scienter. But assuming *arguendo* the correctness of this interpretation put on the legislation involved in *Sorrells*, nothing inherent in the Court's logic commands an identical construction of other sumptuary laws.³⁸ Ostensibly this is an issue raised for decision in every case. Yet no case found since *Sorrells* has attempted such an analysis,³⁹ and there are strong hints in *Sherman* that the issue is closed, irrespective of the nature of the statute.⁴⁰

Moreover, the genesis of intent test is fraught with inconsistencies. The

31. *Id.* at 377.

32. *Id.* at 377-78. It appears that *Sherman* made no alteration in the rule of *Sorrells*, which generally has been read for the proposition that if defendant can show that he was "otherwise innocent," and induced in fact by the police conduct, no further inquiry into the nature of that conduct is required to establish entrapment. At least one commentator, however, has pointed out the possibility of reading *Sherman* to say that defendant must show not only that he is "otherwise innocent," but also that the police methods employed against him fell below a certain objective norm. There is allegedly nothing in *Sorrells* itself to contravene this interpretation. Rotenberg 895-96 & nn.86-87. In view of the unitary focus of the subjective theory of entrapment upon defendant's predisposition, this interpretation seems debatable. The instant case may have settled the point by emphasizing anew the sole focus upon predisposition. *United States v. Russell*, 411 U.S. 423, 433-36 (1973).

33. 287 U.S. at 453-59 (Roberts, J., concurring).

34. 356 U.S. at 378-85 (Frankfurter, J., concurring).

35. *Id.* at 379-80 (Frankfurter, J., concurring).

36. 287 U.S. at 456 (Roberts, J., concurring).

37. See *United States v. Balint*, 258 U.S. 250 (1922).

38. 287 U.S. at 450-51; see Mikell, *The Doctrine of Entrapment in the Federal Courts*, 90 U. Pa. L. Rev. 245, 255-56 (1942) [hereinafter cited as Mikell].

39. DeFeo 256-57; Donnelly 1110; Mikell 259.

40. "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations." 356 U.S. at 372; cf. *United States v. Russell*, 411 U.S. 423, 433-35 (1973).

entrapment doctrine by definition concerns itself with the impermissibility of some police detection practices. If the question is *which* practices, it is plainly unresponsive to answer with an inquiry into the state of mind of the victim of the police conduct in issue. The result of that inquiry would be the same if the entrapper were a private citizen, yet it is settled that in such a case there is no defense.⁴¹ And when the courts speak of genesis of intent, they cannot mean pure intent to the specific crime charged, for even an entrapped defendant intends the acts for which he is indicted. The courts can be referring only to a general, pre-existent disposition to violate the law; attempts to defend the test as a psychiatrically valid distinction between "chronic" and "situational" offenders certainly have assumed as much.⁴² This suggests a more fundamental problem: in finding that the defendant harbored a general criminal predisposition, on the basis of evidence of his prior criminal behavior, the courts are convicting the defendant for offenses for which he is not being tried. For these offenses, the chronic offender apparently could not be convicted directly, for if the police had possessed sufficient evidence thereof, there would have been no need to induce defendant into another offense.⁴³

These conceptual difficulties with genesis of intent create inequitable practical consequences. The government's evidence rebutting a claim of entrapment consists largely of hearsay evidence concerning defendant's prior crimes and convictions which is admissible for the sole purpose of proving defendant's predisposition. It is dubious whether this highly prejudicial evidence will not affect the jury's determination of the separate issue of defendant's commission of the crime charged.⁴⁴ The problems do not vanish if the jury succeeds in accomplishing this feat. Consider two defendants, *A* and *B*. They have committed the identical crime in circumstances of an identical level of police inducement. The only difference in their cases, in fact, is that *A* has a history of similar criminal activity and *B* has none. *A*, whose entrapment defense is rebutted, will be convicted; *B* will go free. The practical effect is that the level of permissible police inducement is directly proportional to the length of the suspect's record and to the number of his enemies.⁴⁵ It would seem that the genesis of intent doctrine allows the police to induce former convicts back into crime more freely than they may lure a law-abiding citizen. Thus, once convicted, a man is charged with the legal duty, under pain of another conviction, to resist greater police inducement than must the law-abiding man.

No doubt largely due to these shortcomings in the "subjective" theory of

41. *United States v. Romano*, 278 F.2d 202 (2d Cir. 1960); *Polski v. United States*, 33 F.2d 686 (8th Cir.), cert. denied, 280 U.S. 591 (1929); see Note, *Entrapment: An Analysis of Disagreement*, 45 B.U.L. Rev. 542, 560-65 (1965).

42. *Donnelly* 1107-08, 1113-14; *Mikell* 250-52; *Rotenberg* 897-99.

43. 287 U.S. at 458-59 (Roberts, J., concurring); *Donnelly* 1107-08; see *Mikell* 251.

44. 287 U.S. at 458 (Roberts, J., concurring); *Bancroft* 177-78; *Donnelly* 1108. Good discussions of the particulars of the admissibility rule are found in *DeFeo* 263-67; Note, *Entrapment: An Analysis of Disagreement*, 45 B.U.L. Rev. 542, 555-56 (1965).

45. 356 U.S. at 383 (Frankfurter, J., concurring); *Bancroft* 170.

the entrapment doctrine, a vastly different "objective" theory has emerged, showing remarkable resiliency in the face of two rejections by the Supreme Court. Its main tenets have been delineated in a dissent by Justice Brandeis in *Casey v. United States*,⁴⁶ in Justice Roberts's concurring opinion in *Sorrells*,⁴⁷ and in Justice Frankfurter's concurring opinion in *Sherman*.⁴⁸

Casey involved a conviction for an illegal purchase of narcotics under a statute making evidence of an illegal sale prima facie evidence of an illegal purchase. The facts surrounding the sale itself clearly warranted discussion of possible entrapment, but the Court limited itself to considering and upholding the validity of the evidentiary presumption.⁴⁹ Justice Brandeis, however, dissented on the basis of entrapment. He conceded that the conduct of the government did not operate to exculpate a defendant guilty of the crime charged, but he argued nonetheless that defendant's unexculpated guilt was irrelevant:

This prosecution should be stopped, not because some right of Casey's has been denied, but in order to protect the Government. To protect it from illegal conduct of its officers. To preserve the purity of its courts.⁵⁰

In the same vein was Justice Roberts's opinion in *Sorrells*. A fundamental rule of public policy, he declared, made it "the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law."⁵¹ The emphasis, according to this analysis, upon the nature of governmental activity rendered irrelevant defendant's state of mind. Pre-disposition, Justice Roberts declared, was a "false issue," for to say that impermissible governmental conduct was "rendered innocuous" by defendant's criminal reputation is to disregard the policy reasons why the courts refuse their processes to the government in entrapment situations.⁵²

Whatever the merits of Justice Roberts's objective theory in laundering the entrapment doctrine of the practical difficulties and inequities attending the subjective approach, it nonetheless suffers from a fundamental problem with its public policy underpinnings. A strong case can be made for the proposition that, in releasing concededly guilty defendants on public policy grounds, the courts usurp powers reserved to the other two coordinate branches. In *Sorrells*, the Court proceeded on the premise that the law of the criminal case, unlike civil actions, is contained solely in the apposite statute, and that if that statute labels defendant guilty, his only plea is the statute's unconstitutionality. To release a defendant guilty under a constitutional statute is to grant clemency, a function of the executive.⁵³ By similar reasoning, Professor

46. 276 U.S. 413, 421-25 (1928) (Brandeis, J., dissenting).

47. 287 U.S. at 453-59 (Roberts, J., concurring).

48. 356 U.S. at 378-85 (Frankfurter, J., concurring).

49. 276 U.S. at 418-20.

50. *Id.* at 425 (Brandeis, J., dissenting).

51. 287 U.S. at 457 (Roberts, J., concurring).

52. *Id.* at 459 (Roberts, J., concurring).

53. 287 U.S. at 449-50. The Court relied on *Ex parte United States*, 242 U.S. 27 (1916), which held that there is no power in the courts to suspend indefinitely a congressionally

Mikell has perceived in the objective theory an intrusion upon congressional powers as well. Congress, argues Mikell, has *already* determined public policy by choosing to outlaw defendant's very acts. In refusing to punish upon policy grounds, the courts are operating on the theory that Congress is either ignorant of, or in violation of, "true" public policy. This, the argument concludes, constitutes an appropriation of congressional powers, since judicial power in this area is limited to disposing of what is unconstitutional.⁵⁴

It is perhaps for these reasons that Justice Frankfurter in *Sherman* chose to rework the objective theory's doctrinal basis, by grounding the entrapment doctrine not on public policy, but on the supervisory powers of the federal courts to formulate and apply standards for the enforcement of the federal criminal law.⁵⁵ It is not enough, Justice Frankfurter contended, to say that a criminal may not be set free for reasons extraneous to a constitutional statute, for statutes are enacted under certain presuppositions concerning the legal order, one of which is the established supervisory role of the federal courts.⁵⁶ What the federal courts already possess, they cannot usurp.

In addition to shifting the theoretical basis of entrapment, Justice Frankfurter also set forth a test for determining what police conduct was impermissible:

[I]n holding out inducements they [the police] should act in such a manner as is likely to induce to the commission of crime only those persons [those ready and willing to commit further crimes should the occasion arise] and not others who would normally avoid crime and through self-struggle resist ordinary temptations. This test shifts attention from the record and predisposition of the particular defendant to the conduct of the police and the likelihood, objectively considered, that it would entrap only those ready and willing to commit crime.⁵⁷

The objective theory, particularly in the variant form evolved by Justice Frankfurter, has shown great resiliency in the lower courts, despite *Sherman's* affirmation of the subjective theory. Several lower courts, sometimes making much of the "fact" that *Sherman* had not "expressly" disapproved the objective theory, applied it, in the alternative, alongside the subjective theory.⁵⁸

mandated sentence during the good behavior of the defendant, and which said in part: "[It would be in] disregard of the Constitution [to hold that] the plain legislative command fixing a specific punishment . . . is subject to be permanently set aside by an implied judicial power upon considerations extraneous to the legality of the conviction, [for] it would seem necessarily to follow that there could be likewise implied a discretionary authority to permanently refuse to try a criminal charge because of the conclusion that a particular act made criminal by law ought not to be treated as criminal." *Id.* at 42.

54. Mikell 260-63; cf. *Ex parte United States*, 242 U.S. 27, 42 (1916).

55. 356 U.S. at 380 (Frankfurter, J., concurring).

56. *Id.* at 381 (Frankfurter, J., concurring).

57. *Id.* at 384 (Frankfurter, J., concurring).

58. E.g., *Morrison v. United States*, 348 F.2d 1003 (2d Cir.), cert. denied, 382 U.S. 905 (1965); *Accardi v. United States*, 257 F.2d 168 (5th Cir.), cert. denied, 358 U.S. 883 (1958); *United States v. Kros*, 296 F. Supp. 972 (E.D. Pa. 1969); *United States v. Dillet*, 265 F. Supp. 980 (S.D.N.Y. 1966); see *Whiting v. United States*, 321 F.2d 72 (1st Cir.), cert.

Other courts spoke in terms of "supervisory powers" or expressed extreme discomfort with the present state of the law.⁶⁰ Still other courts dutifully recited the subjective formula, and then reversed convictions on facts leaving little doubt as to defendant's obvious "predisposition."⁶⁰ These three lines of thought constituted a pull at the tether of *Sherman* but did not depart from it.

Quite distinct from these were two lines of cases which emerged by 1972 and which constituted grimly defiant departures from the subjective theory. The first of these involved unusual fact patterns wherein the contraband serving as the basis of defendant's prosecution under the appropriate contraband statute was supplied by the government.⁶¹ In none of these cases was there much doubt as to defendant's predisposition, yet in each case the pattern was held to constitute entrapment. The second series of cases found entrapment by an intense degree of governmental participation in the crime, although all defendants concededly were predisposed.⁶² One such case, *Greene v. United States*,⁶³ held that, even though there was no entrapment under the *Sherman* analysis, reversal was nonetheless in order when the governmental activity was so intense, so pervasive, and of such duration as to become "repugnant to American criminal justice."⁶⁴

At this juncture the Court of Appeals for the Ninth Circuit considered *United States v. Russell*,⁶⁵ the facts of which suggested both of the aforementioned caselines. Noting that defendant had conceded his predisposition,⁶⁶ the court nonetheless concluded that apart from the rule of *Sherman*, a defense to a criminal charge could be founded on an "intolerable degree of governmental participation."⁶⁷ Authority for this conclusion was found by relying squarely on both the contraband cases and the *Greene* line, which, the court asserted, differed in label only—both being grounded in "fundamental con-

denied, 375 U.S. 884 (1963); cf. *United States v. Abbadessa*, 470 F.2d 1333 (10th Cir. 1972); *United States v. Tatar*, 439 F.2d 1300 (9th Cir.), cert. denied, 404 U.S. 866 (1971). But cf. *Kadis v. United States*, 373 F.2d 370 (1st Cir. 1967).

59. E.g., *Dixon v. District of Columbia*, 394 F.2d 966 (D.C. Cir. 1968); *Robison v. United States*, 379 F.2d 338 (9th Cir. 1967), vacated, 390 U.S. 198 (1968); see *Smith v. United States*, 331 F.2d 784 (D.C. Cir. 1964) (en banc).

60. E.g., *Carbajal-Portillo v. United States*, 396 F.2d 944 (9th Cir. 1968); *Henderson v. United States*, 261 F.2d 909 (5th Cir. 1958); *United States v. Campbell*, 235 F. Supp. 190 (E.D.N.Y. 1964).

61. *United States v. McGrath*, 468 F.2d 1027 (7th Cir. 1972), vacated mem., 412 U.S. 936 (1973); *United States v. Bueno*, 447 F.2d 903, 906 (5th Cir. 1971), cert. denied, 411 U.S. 949 (1973); *United States v. Mahoney*, 355 F. Supp. 418 (E.D. La. 1973); *United States v. Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970).

62. *Greene v. United States*, 454 F.2d 783 (9th Cir. 1971); *Williamson v. United States*, 311 F.2d 441 (5th Cir. 1962), cert. denied, 381 U.S. 950 (1965); *United States v. Silva*, 180 F. Supp. 557 (S.D.N.Y. 1959).

63. 454 F.2d 783 (9th Cir. 1971).

64. *Id.* at 787.

65. 459 F.2d 671 (9th Cir. 1972), rev'd, 411 U.S. 423 (1973).

66. *Id.* at 672.

67. *Id.* at 673.

cepts of due process,⁶⁸ and both compelling reversal of Russell's conviction.

The Supreme Court, in a five-to-four decision,⁶⁹ reversed the judgment of the Ninth Circuit, and reasserted the subjective theory. At the outset, the Court rejected the argument, advanced by the court of appeals,⁷⁰ that the government's conduct violated due process, for no independent right of Russell's had been violated, nor had the government's methods contravened its own laws.⁷¹ Thus, any analogy to the exclusion of evidence obtained by illegal searches and coerced confessions was faulty.⁷² The Court conceded, however, that the conduct of law enforcement agents, on other facts, might be so outrageous as to contravene due process.⁷³

The Court then turned to Russell's non-constitutional contentions. Noting that criticisms of the subjective theory were "not devoid of appeal,"⁷⁴ the Court nonetheless delivered a recitation of the difficulties which enforcement authorities would face if they were forbidden to rebut entrapment claims with a recital of defendant's past misdeeds.⁷⁵ In any event, the Court noted, so long as entrapment did not assume constitutional dimensions, Congress could overrule *Sorrells* legislatively any time it pleased.⁷⁶ In fact, the Court mentioned, but did not discuss, one proposed statutory formulation of the entrapment doctrine, which contemplates substantial changes in the existing law.⁷⁷

68. *Id.* at 674.

69. *United States v. Russell*, 411 U.S. 423 (1973).

70. 459 F.2d at 674.

71. 411 U.S. at 431-33. In *Raley v. Ohio*, 360 U.S. 423 (1959), defendants were prosecuted for failing to testify before a state investigative body, whose chairman had assured them, apparently in good faith, that the state constitution guaranteed them immunity from self-incrimination. This "entrapment" was held to have violated due process. *Id.* at 442. The dissimilarity of these facts to the paradigmatic formulation of encouragement-entrapment, discussed at notes 6 & 7 *supra* and accompanying text, makes *Raley* poor authority for basing the entrapment doctrine on due process grounds. One commentator, however, has proposed a graduation of the true entrapment doctrine to constitutional status. Note, *The Serpent Beguiled Me and I Did Eat: The Constitutional Status of the Entrapment Defense*, 74 *Yale L.J.* 942 (1965).

72. 411 U.S. at 431.

73. *Id.* at 431-32.

74. *Id.* at 433.

75. *Id.* at 434-35.

76. *Id.* at 433.

77. *Id.* n.9.

"Entrapment (a) Bar.—It is a bar to prosecution that the defendant was entrapped into engaging in prohibited conduct.

(b) Occurrence.—Entrapment occurs when a law enforcement officer or a person requested by a law enforcement officer to assist him induces or encourages a person to engage in prohibited conduct, using such methods of inducement or encouragement as create a substantial risk that the conduct would be committed by persons other than those who are ready to commit it. Conduct merely affording a person an opportunity to engage in prohibited conduct does not constitute entrapment. A risk is less substantial where a person has previously engaged in similarly prohibited conduct and such conduct is known to such officer as [sic] a person assisting him.

Having left *Sorrells* intact, the Court touched upon the lower court departures from that case. Emphasizing that the subjective theory did not give the courts a "chancellor's foot" veto over questioned law enforcement methods, the Court denounced the Ninth Circuit's opinion in *Russell* as "contrary to the holdings of this Court."⁷⁸ Neither the contraband cases nor the *Greene* line were disapproved specifically, but inasmuch as the court of appeals expressly had relied on both, presumably both have been rejected, at least implicitly. The Court's subsequent treatment of one of the contraband cases indicates exactly that.⁷⁹

From the Court's reaffirmation of *Sorrells* there were two dissenting opinions. That of Justice Douglas identified itself with the objective theory of entrapment, and sought to ground the contraband cases squarely within its tenets.⁸⁰

It was left to Justice Stewart⁸¹ to assume the mantle of chief activist for the objective theory. Justice Stewart asserted that only the objective theory is consistent with the underlying rationale of the entrapment defense, *i.e.*, the manufacture of crime by the government.⁸² He also rejected statutory construction as the basis of the defense: entrapment by definition does not come into play until a proscribed act has been committed, and it is illogical to decide at that point that Congress intended not to proscribe the act after all.⁸³ Justice Stewart, however, then erased Justice Frankfurter's major contribution to the objective theory. It is apparently Justice Stewart's intent to turn from supervisory powers and return the objective theory's doctrinal basis to the public policy of preserving the integrity of the courts.⁸⁴ If such is his intent, he has unfortunately placed the objective theory back into the lion's mouth from

(c) No Bar.—The bar to prosecution afforded by this section is unavailable when causing or threatening serious bodily injury is the prohibited conduct." S. 1, 93d Cong., 1st Sess. § 1-3B2 (1973).

The section's dissimilarities from the subjective theory are substantial. The first sentence of (b) is closely similar to Justice Frankfurter's objective test, set forth at text accompanying note 57 *supra*. The second sentence is common ground to both subjective and objective theories. The third sentence appears, unfortunately, to preserve the notion that what is impermissible *vis-à-vis* the law-abiding citizen may yet be permissible against a chronic offender. However, under this clause, a prior course of criminal conduct must be known, and not merely suspected. Subdivision (c) is an attempt to resolve the issue which the courts employing the subjective theory are supposed to decide, yet do not (*i.e.*, whether entrapment is available regardless of the nature of the prohibited conduct), discussed at text accompanying notes 38-40 *supra*.

78. 411 U.S. at 435.

79. *United States v. McGrath*, 412 U.S. 936 (1973) (mem.), vacating 468 F.2d 1027 (7th Cir. 1972). See *United States v. Workopich*, 479 F.2d 1142, 1144-45 (5th Cir. 1973) (post-*Russell*).

80. 411 U.S. at 436-39 (Douglas, J., dissenting).

81. Justice Stewart's opinion was joined by Justices Brennan and Marshall. Justice Brennan also joined Justice Douglas's opinion.

82. 411 U.S. at 441-42 (Stewart, J., dissenting); see text accompanying note 41 *supra*.

83. 411 U.S. at 441-42 (Stewart, J., dissenting).

84. See *id.* at 439, 441-44 (Stewart, J., dissenting).

which Justice Frankfurter had extracted it.⁸⁵ Justice Stewart's application of the objective test to the facts at bar turned on the scarcity of P-2-P that prevailed because several large drug firms had ceased production at the government's request.⁸⁶ Russell would have found it very difficult to commit his crime had he not been supplied with the ingredient. Under the objective theory, the government had gone too far.⁸⁷

The objective theory, however, has never been the law. It is *Sorrells* which presents the definitive analysis underlying both the statutory construction basis and the genesis of intent test of the subjective theory of entrapment. In context, *Sherman*, and now *Russell*, essentially amount to little more than statements that no good reasons exist to warrant a reexamination of that landmark case. The hint in *Russell* that entrapment may at some point assume constitutional dimensions⁸⁸ does not change this; if the Court did not find such a case in *Russell* or in the cases it tacitly labelled at odds with the subjective theory,⁸⁹ then the constitutional threshold is indeed very far away.

Thus, *Russell* for all practical purposes affirms the subjective theory as a matter of stare decisis. The constancy lent the law by this doctrine is dearly bought when the constant is inequity. Nine justices⁹⁰ deciding *Sorrells*, *Sherman*, and *Russell* have written or joined opinions indicting the subjective theory as fictitious in its basis, inconsistent in its formulation of a test for all cases, and possessed of undesirable practical consequences. The vast majority of the commentators to varying degrees have aligned themselves with these criticisms.⁹¹ As might be expected, the first cases to consider *Russell* are not in complete agreement that it has settled the law.⁹² But neither torrents of criticism from

85. The objections to the public policy basis are discussed at notes 53 & 54 supra and accompanying text.

86. 411 U.S. at 426-27.

87. Id. at 449-50 (Stewart, J., dissenting).

88. Id. at 431-32 (opinion of the Court).

89. See id. at 435.

90. *United States v. Russell*, 411 U.S. 423, 436 (1973) (Douglas & Brennan, JJ., dissenting); id. at 439 (Stewart, Brennan & Marshall, JJ., dissenting); *Sherman v. United States*, 356 U.S. 369, 378 (1958) (Frankfurter, Douglas, Harlan & Brennan, JJ., concurring); *Sorrells v. United States*, 287 U.S. 435, 453 (1932) (Roberts, Brandeis & Stone, JJ., concurring).

91. E.g., Bancroft, supra note 2, at 170-71; Donnelly, supra note 3, at 1107-08, 1110, 1113-14; Mikell, supra note 38, at 250-52, 255-59; Rotenberg, supra note 4, at 897-99; Note, Entrapment: An Analysis of Disagreement, 45 B.U.L. Rev. 542, 556-57 (1965); Note, Entrapment, 73 Harv. L. Rev. 1333, 1336-37 (1960); Note, Judicial Control of Secret Agents, 76 Yale L.J. 994, 994-95 & nn.6-7 (1967); Note, The Serpent Beguiled Me and I Did Eat: The Constitutional Status of the Entrapment Defense, 74 Yale L.J. 942, 943 (1965); 33 N.Y.U.L. Rev. 1033, 1038-41 (1958). But see DeFeo, supra note 9, at 273-76.

92. The majority of the cases to consider *Russell* have taken it as settling the law of entrapment. *United States v. Rosner*, No. 73-1511 (2d Cir., Sept. 26, 1973); *United States v. Ewbank*, 483 F.2d 1149 (9th Cir. 1973); *United States v. Johnson*, 484 F.2d 165 (9th Cir. 1973); *United States v. Workopich*, 479 F.2d 1142 (5th Cir. 1973). But see *United States v. Archer*, Nos. 73-1527, 73-1528, 73-1711 (2d Cir. July 12, 1973) (dictum).

Supreme Court minorities and legal scholars, nor dozens of discordant lower court cases can alter the hard fact that the Court has analyzed definitively the entrapment doctrine once, and twice reaffirmed its analysis.

Edmund P. Bergan, Jr.

Federal Courts—Procedure—Denial of Franchise to Prisoners Awaiting Trial Requires Convening of Three-Judge Court Pursuant to 28 U.S.C. § 2281.—Prisoners awaiting trial in Philadelphia County, Pennsylvania, brought an injunctive class action in a federal district court alleging that the Pennsylvania Election Code was unconstitutional because it denied them the right to vote. Appearing before a single district judge, Commonwealth officials conceded that the Election Code as applied to the prisoners was unconstitutional; but municipal officials, also named as defendants in the action and not bound under Pennsylvania law by their co-defendants' concession, defended the statute. The judge deemed the Commonwealth officials the principal defendants and decided that their concession rendered the court without jurisdiction because no case or controversy was presented. He therefore dismissed the case and did not empanel the three-judge court normally required by 28 U.S.C. § 2281 when an injunction against a state law is sought in a federal court on grounds of unconstitutionality. The Third Circuit Court of Appeals affirmed the dismissal, not for the absence of a case or controversy, but for the lack of a substantial constitutional question.¹ The court of appeals cited *McDonald v. Board of Election*,² which held that a state's failure to provide absentee ballots for prisoners awaiting trial was not unconstitutional,³ and decided that the Pennsylvania prisoners' constitutional claim was, therefore, insubstantial.⁴ A unanimous Supreme Court, however, rejected the reasoning of both lower courts and remanded the case for a hearing by a three-judge court to be empanelled pursuant to 28 U.S.C. § 2281.⁵

The district judge had "clearly erred,"⁶ the Court ruled. Since municipal officials were not bound by the concession of the Commonwealth officials and, in fact, had continued to assert the constitutionality of the statute, "the concession of the Commonwealth officials could not have the effect of dissipating the existence of a case or controversy."⁷ The court of appeals also had erred, for its reliance on *McDonald* was not justified. In that case, the prisoners did not allege that they were denied the right to vote but only that they were denied the use of absentee ballots; hence, the *McDonald* Court refused to assume that the right to vote per se had been denied.⁸ The Philadelphia prisoners, on the

1. *Goosby v. Osser*, 452 F.2d 39, 40 (3d Cir. 1971), rev'd, 409 U.S. 512 (1973).

2. 394 U.S. 802 (1969).

3. *Id.* at 810.

4. 452 F.2d 39, 40.

5. *Goosby v. Osser*, 409 U.S. 512 (1973).

6. *Id.* at 516.

7. *Id.* at 517.

8. 394 U.S. 802, 807-08 (1969). The Court said there was no indication "that the State

other hand, alleged not only that they were denied absentee ballots but also that they were denied any alternative means of voting.⁹ Thus, concluded the Court, the two cases were distinguishable. Constitutional claims are insubstantial only if "prior decisions inescapably render the claims frivolous."¹⁰ Whatever its merits, the Philadelphia prisoners' claim was not inescapably rendered frivolous by *McDonald*. Therefore, it was not insubstantial, and the case required consideration by a three-judge district court convened pursuant to 28 U.S.C. § 2281. *Goosby v. Osser*, 409 U.S. 512 (1973).

The critical statute here relevant reads:

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.¹¹

This section, together with supplementary provisions, was enacted originally in 1910,¹² but has undergone frequent amendment since that time.¹³ The

might not, for instance, possibly furnish the jails with special polling booths or facilities on election day, or provide guarded transportation to the polls themselves for certain inmates, or entertain motions for temporary reductions in bail to allow some inmates to get to the polls on their own." *Id.* at 808 n.6.

9. 409 U.S. at 513-14.

10. *Id.* at 518.

11. 28 U.S.C. § 2281 (1970). This case note deals only with the three-judge requirement in attacks on state statutes and administrative orders set forth in 28 U.S.C. § 2281 (1970). Three-judge federal district courts are required in a number of other cases. The most important of these are: (1) certain suits to enforce antitrust and interstate commerce laws (15 U.S.C. § 28; 49 U.S.C. § 44 (1970)); (2) suits seeking to enjoin the operation of federal statutes as unconstitutional (28 U.S.C. § 2282 (1970)); (3) suits seeking to restrain orders of the Interstate Commerce Commission (28 U.S.C. § 2325 (1970)), and (4) certain suits to enforce orders of the Federal Communications Commission (47 U.S.C. § 401(d) (1970)).

12. Act of June 18, 1910, ch. 309, § 17, 36 Stat. 557. The statute was codified in 1911 as section 266 of the Judicial Code. Act of Mar. 3, 1911, ch. 231, § 266, 36 Stat. 1162. The original statute has since been separated into its component parts and now appears, as amended, in 28 U.S.C. §§ 1253 (providing direct appeal to the Supreme Court), 2281 (set forth in text), and 2284 (prescribing composition and procedure for the three-judge court).

13. The original statute referred only to suits against state "statutes" but in 1913, it was amended to include suits against state administrative orders. Act of Mar. 4, 1913, ch. 160, 37 Stat. 1013 (codified at 28 U.S.C. § 2281 (1970)). The 1913 legislature also saw fit to provide for abstention by the three-judge court in certain cases where the statute or order in question was being considered by a state court. Act of Mar. 4, 1913, ch. 160, 37 Stat. 1013 (codified at 28 U.S.C. § 2284(5) (1970)). The latter amendment has been described as "unrelated and little-used." Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. Chi. L. Rev. 1, 12-13 n.68 (1964) [hereinafter cited as Currie]; see Note, *A Survey of the Three Judge Requirement*, 47 Geo. L.J. 161, 164 (1958).

The original statute applied only to applications for interlocutory injunctions, with the

legislative purpose behind the Act has been the subject of some confusion,¹⁴ but the broad *raison d'être* of the Act seems clear: to protect state policy from the caprice of a single federal judge.¹⁵ *Ex parte Young*,¹⁶ which had affirmed the power of a federal judge to enjoin the operation of allegedly unconstitutional state laws, provided impetus for the enactment.¹⁷ Precedent for the procedure was found in the three-judge mechanism already established to enforce the Interstate Commerce Act and to enjoin violations of antitrust acts.¹⁸

In theory, the three-judge procedure is quite simple: (1) the cases described by 28 U.S.C. § 2281 are decided by three judges sitting as a district court; and (2) appeal from that decision lies directly and of right to the Supreme Court.¹⁹ Unfortunately, the procedure has not been so simple in practice. The statutes involved, particularly section 2281, have remained, despite amendment, both ambiguous and incomplete,²⁰ creating a "procedural labyrinth,"²¹ into which the unwary litigant descends at his peril. The problematic threshold question—whether or not to convene a three-judge court in the first instance—must, of course, be decided by a single judge; but this question the statute fails to consider. Must the single judge convene the larger court simply because it is requested? If not, when must he convene it, and when may he decline

an anomalous result that three judges ruled on the interlocutory injunction, but only one judge ruled on the permanent injunction. The Act of Feb. 13, 1925, ch. 229, § 238(3), 43 Stat. 938, apparently intended to remedy this situation by saying that the three-judge requirement "shall also apply to the final hearing." The Supreme Court interpreted this to mean that three judges were required if both interlocutory and permanent injunctions were sought in the same suit, but that an application for permanent relief only did not require three judges. *Smith v. Wilson*, 273 U.S. 388, 391 (1927). In 1948 the words "or permanent" were added to section 2281. Act of June 25, 1948, ch. 151, § 2281, 62 Stat. 968. This made it clear that three judges were required to hear applications for either type of injunction.

14. Note, *The Three-Judge District Court: Scope and Procedure Under Section 2281*, 77 *Harv. L. Rev.* 299, 300 (1963).

15. *Phillips v. United States*, 312 U.S. 246, 251 (1941); *Cumberland Tel. Co. v. Louisiana Pub. Serv. Comm'n*, 260 U.S. 212, 216 (1922); *Hutcheson, A Case for Three Judges*, 47 *Harv. L. Rev.* 795, 812-13 (1934); Note, *A Survey of the Three Judge Requirement*, 47 *Geo. L.J.* 161, 163 (1958).

"It is a matter of history that this procedural device [the three-judge court] was a means of protecting the increasing body of state legislation regulating economic enterprise from invalidation by a conventional suit in equity." *Phillips v. United States*, 312 U.S. 246, 250 (1941).

16. 209 U.S. 123 (1908).

17. *Florida Lime Growers, Inc. v. Jacobsen*, 362 U.S. 73, 77 (1960); see Comment, *Requirement of Substantial Constitutional Question in Federal Three-Judge Court Cases*, 19 *La. L. Rev.* 813, 814-15 (1959).

18. Act of Feb. 11, 1903, ch. 544, 32 Stat. 823 (codified at 15 U.S.C. § 28 (1970) and 49 U.S.C. § 44 (1970)).

19. 28 U.S.C. § 1253 (1970).

20. See Currie 12-13. "The reviser, who failed to combine §§ 2281 and 2282, should be immersed for twelve years in a pot of his own verbiage." *Id.* at 12 n.67.

21. *Rosado v. Wyman*, 414 F.2d 170, 187 (2d Cir. 1969) (Feinberg, J., dissenting), *rev'd*, 397 U.S. 397 (1970).

to do so? Who is to review his determination? Over the years, these questions have been left to case law, and even so, not fully resolved. No case found has held that a three-judge court must be convened merely because it is requested.²² The question of appellate review of the threshold determination is a labyrinth in itself,²³ but it appears at last near a resolution in favor of the courts of appeals.²⁴

The problem presented by *Goosby* remains: when may the single judge decline to convene the larger court? Some answers have been provided. Cases presenting both constitutional and non-constitutional grounds for decision have required the three-judge court even though they might have been resolved without reaching the constitutional question.²⁵ Cases arising solely under the supremacy clause of the Constitution are not within the purview of section 2281.²⁶ Similarly, suits seeking to restrain purely executive action²⁷ and challenges to state statutes not of "statewide" application²⁸ do not require the convening of a section 2281 court. Many questions, however, remain unanswered. Justice Frankfurter has said that the section is to be regarded "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

22. Cf. Bowen, Note, 28 Minn. L. Rev. 131, 132 (1944). But cf. Currie 22.

23. The paradigm case of the appellate review dilemma is *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962). In *Idlewild*, the district judge refused to convene a three-judge court. *Idlewild Bon Voyage Liquor Corp. v. Rohan*, 188 F. Supp. 434 (S.D. N.Y. 1960). The court of appeals, however, determined that the case properly was within the purview of section 2281 and thus required the convening of a three-judge court; but, having made that determination, the circuit court found itself ipso facto without jurisdiction over the appeal, since appeal from a case "required by any Act of Congress to be heard and determined by a district court of three judges" lies, under 28 U.S.C. § 1253 (1970), directly to the Supreme Court. *Idlewild Bon Voyage Liquor Corp. v. Rohan*, 289 F.2d 426 (2d Cir. 1961). "To be sure," said Judge Waterman, "this result leaves us in a somewhat anomalous position." *Id.* at 429. On remand to the district court, the district judge took his circuit court brethren at their word, declared their opinion dictum, and again refused to convene a three-judge court. *Idlewild Bon Voyage Liquor Corp. v. Rohan*, 194 F. Supp. 3 (S.D.N.Y. 1961). The Supreme Court, on certiorari, decided the case required three judges, and remanded to the district court with instructions to convene a three-judge court. *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713 (1962). The three-judge court was convened then and the merits of the case considered for the first time. *Idlewild Bon-Voyage Liquor Corp. v. Epstein*, 212 F. Supp. 376 (S.D.N.Y. 1962), *aff'd sub nom. Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324 (1964).

24. Currie, Appellate Review of the Decision Whether or Not to Empanel a Three-Judge Federal Court, 37 U. Chi. L. Rev. 159 (1969).

25. E.g., *Florida Lime Growers, Inc. v. Jacobsen*, 362 U.S. 73, 85 (1960).

26. *Swift & Co. v. Wickham*, 382 U.S. 111, 125-27 (1965), overruling *Kesler v. Department of Pub. Safety*, 369 U.S. 153 (1962); *The Supreme Court*, 1965 Term, 80 Harv. L. Rev. 91, 217-20 (1966).

27. *Phillips v. United States*, 312 U.S. 246, 252 (1941).

28. *Moody v. Flowers*, 387 U.S. 97, 104 (1967); see *Ex parte Collins*, 277 U.S. 565, 568 (1928).

such."²⁹ But the doctrine of strict construction is not a solution to the interpretive problems of the section. Indeed, due to the operation of inherently contradictory forces, the section seems immune to any remedy short of repeal.³⁰ On the one hand, to effectuate the protective purposes of the Act,³¹ the powers of the single judge must be constricted. On the other hand, the conservation of judicial resources³² would seem to require the expansion of the powers of the single judge. Something more than a superficial claim must be demanded in order to justify the drain upon judicial resources created by the three-judge procedure. In trying to define this "something more," while balancing the contradictory forces just described, the Supreme Court has evolved the "insubstantial question"³³ rule.

*Ex parte Poresky*³⁴ was the first case squarely to affirm the jurisdictional power of a district court judge to dismiss a case without convening a three-judge court where the constitutional question was insubstantial.³⁵ After *Poresky*,

29. *Phillips v. United States*, 312 U.S. 246, 251 (1941).

30. Chief Justice Burger has called for the abolition of the three-judge court procedure. Burger, *The State of the Federal Judiciary—1972*, 58 A.B.A.J. 1049, 1053 (1972).

31. See note 15 *supra* and accompanying text.

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

33. This case note assumes that "substantial" is the word which describes both sufficient federal questions and sufficient section 2281 questions. It further assumes that if a question is not "substantial," it is then "insubstantial," and vice-versa. The phrases used in the cases (e.g., "wholly insubstantial," "obviously without merit," "inescapably frivolous") are understood to be attempts to clarify the meaning of substantiality and not to be separate standards in themselves. In other words, this case note assumes not a hierarchy of sufficiency, but a dichotomy: substantial and insubstantial questions.

34. 290 U.S. 30 (1933) (*per curiam*).

35. This holding had been foreshadowed by dicta in several earlier cases. Take, for example, the curious language in *Ex parte Metropolitan Water Co.*, 220 U.S. 539 (1911), the first case to interpret the 1910 Act. Although the Act said an interlocutory injunction in the prescribed cases could not be granted by a single judge, *Ex parte Metropolitan Water Co.* decided that the injunction could be neither granted nor denied by the single judge: "[T]he statute evidences the purpose of Congress that the application for the interlocutory injunction should be heard before the enlarged court, whether the claim of unconstitutionality be or be not meritorious Congress [has] declared that the merits of the application for an interlocutory injunction . . . should be considered and determined by a tribunal consisting of three judges . . ." *Id.* at 545. The apparent implication of the language is that jurisdictional questions, as opposed to questions of the merits, do not require the larger court. Two years later, in *Louisville & Nash. R.R. v. Garrett*, 231 U.S. 298 (1913), Justice Hughes stated that the three-judge court statute "applies to cases in which the preliminary injunction is sought in order to restrain the enforcement of a state enactment upon the ground of its 'unconstitutionality.' The reference, undoubtedly, is to an asserted conflict with the Federal Constitution, and the question of unconstitutionality, in this sense, must be a substantial one." *Id.* at 304 (*dictum*). The language is only *dictum*, but its import is clear: since the statute only applies when the question of unconstitutionality is substantial, someone, presumably the single judge, must make that determination before a three-judge court can be convened. And if the judge can decide the question is substantial and convene the larger court, he must also be able to judge it insubstantial and decline to

a Massachusetts citizen,³⁶ had been denied a motor vehicle registration for failure to comply with that state's compulsory automobile liability insurance statute, he sought to enjoin its enforcement as a violation of the fourteenth amendment. A single district judge dismissed Poresky's complaint and the Supreme Court denied application for leave to file a petition for mandamus to compel the district judge to convene a three-judge court.³⁷

The Court noted the absence of power in the single judge to dismiss on the merits.³⁸

But the provision requiring the presence of a court of three judges necessarily assumes that the District Court has jurisdiction. . . . That provision does not require three judges to pass upon this initial question of jurisdiction.

. . . . [T]he District Judge clearly has authority to dismiss for the want of jurisdiction when the question lacks the necessary substance and no other ground of jurisdiction appears. Such was his authority in the instant case, in view of the decisions of this Court bearing upon the constitutional authority of the State, acting in the interest of public safety, to enact the statute assailed.³⁹

The Court did not explain exactly why Poresky's claim lacked the "necessary substance;" it simply cited its earlier decisions affirming a state's power to regulate motor vehicles.⁴⁰ However, the Court did attempt a two-point exposition of the insubstantial question concept: A question is insubstantial when (1) it is "obviously without merit"⁴¹ or (2) "its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy."⁴² The exposition was brief and the expository language was borrowed,⁴³ but *Poresky* brought three-judge court procedure into a new

convene the larger court. The requirement of a substantial question of constitutionality is reiterated in *Ex parte Buder*, 271 U.S. 461, 467 (1926) (dictum) and in *Stratton v. St. Louis S.W. Ry.*, 282 U.S. 10, 15 (1930) (dictum).

36. The absence of diversity of citizenship is important. It has been argued that a state citizen who brings a suit in federal court under section 2281 may have that suit dismissed for want of a substantial federal question; but that the same suit by an out-of-state citizen may be retained by the court because of the existence of diversity jurisdiction. Berg, *Three-Judge District Courts: Some Jurisdictional Problems*, 46 A.B.A.J. 291, 293 (1960). Other aspects of this problem are discussed in text accompanying notes 47-49 *infra*.

37. 290 U.S. at 30-31.

38. *Id.* at 31.

39. *Id.* at 31-32 (citations omitted).

40. *Id.* at 32.

41. *Id.*

42. *Id.*

43. *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 105-06 (1933); *Hannis Distilling Co. v. Baltimore*, 216 U.S. 285, 288 (1910); *McGilvra v. Ross*, 215 U.S. 70, 80 (1909). Two of these cases were decided before the 1910 three-judge statute and all three dealt with the necessity of a substantial federal question to confer federal question jurisdiction. Thus, *Ex parte Poresky* seemed to apply federal question terminology to the three-judge procedure. For a fuller treatment of Poresky's holding see text accompanying notes 47-51 *infra*.

era. Despite controversy, confusion, and a 1942 enactment⁴⁴ which some initially interpreted as overruling *Poresky*,⁴⁵ the case has proved a "hardy weed"⁴⁶ endowed with unusual staying power.

The problem with the *Poresky* case is that its holding is ambiguous. On the one hand, it may be regarded as an ordinary Article III decision denying federal jurisdiction absent diversity or a substantial federal question.⁴⁷ Under this view, the absence of diversity of citizenship and the determination that there was no substantial federal question disposed of the case without further inquiry; thus, any language going to the three-judge question is regarded as dictum. On the other hand, the case is said to support the proposition that a substantial question of unconstitutionality is a prerequisite to the convening of a three-judge court.⁴⁸ This reading would mean there were really two analytically distinct substantiality questions fused together in *Poresky*: (1) substantiality for purposes of federal jurisdiction (*i.e.*, a substantial federal question) and (2) substantiality for purposes of section 2281 (*i.e.*, a substantial claim of unconstitutionality).⁴⁹ *Poresky's* ambiguity results because both questions were resolved in the negative, at once, and by the same criterion. It remained for *Bailey v. Patterson*⁵⁰ to establish beyond doubt the existence of a section 2281 substantiality requirement quite apart from the federal jurisdictional requirement.⁵¹

In *Bailey*, a three-judge court was convened⁵² because the plaintiffs, Mississippi blacks, sought injunctions to enforce their constitutional right to unsegregated transportation, a right allegedly denied them under color of state law.⁵³ The three-judge court abstained, pending construction of the challenged statutes

44. Act of April 6, 1942, ch. 210, § 3, 56 Stat. 199 (codified at 28 U.S.C. § 2284(5) (1970)). This provision denies a single judge power to order references to masters, to determine applications for interlocutory injunctions, or to dismiss suits or enter judgments, but applies only after it is determined that the case is one properly requiring three judges.

45. Berueffy, *The Three Judge Federal Court: Recent Statutory Limitations*, 15 *Rocky Mt. L. Rev.* 64, 73 (1942); see H.M. Hart & H. Wechsler, *The Federal Courts and the Federal System* 972 (2d ed. 1973).

46. Currie 22.

47. See *Rosado v. Wyman*, 397 U.S. 397, 403 n.3 (1970); *Wilentz v. Sovereign Camp*, 306 U.S. 573, 582 (1939).

48. E.g., *Flast v. Cohen*, 392 U.S. 83, 91 n.4 (1968); *Water Serv. Co. v. City of Redding*, 304 U.S. 252, 254 (1938); *Pervis v. LaMarque Ind. School Dist.*, 466 F.2d 1054, 1057 n.2 (5th Cir. 1972).

49. To put the problem in the terminology of the Federal Rules of Civil Procedure: was *Ex parte Poresky* a 12(b)(1) case (lack of jurisdiction over the subject matter), or was it a 12(b)(6) case (failure to state a claim upon which relief can be granted)? Or was it both? See Note, *The Three-Judge District Court: Scope and Procedure Under Section 2281*, 77 *Harv. L. Rev.* 299, 308 (1963).

50. 369 U.S. 31 (1962).

51. *Id.* at 33; see Note, *The Three-Judge District Court and Appellate Review*, 49 *Va. L. Rev.* 538, 551 (1963).

52. See *Bailey v. Patterson*, 199 F. Supp. 595 (S.D. Miss. 1961).

53. 369 U.S. at 32; 199 F. Supp. at 596.

by state courts,⁵⁴ and a direct appeal of the abstention was taken to the Supreme Court. The Court said:

We have settled beyond question that no State may require racial segregation of interstate or intrastate transportation facilities. . . . The question is no longer open; it is foreclosed as a litigable issue. Section 2281 does not require a three-judge court when the claim that a statute is unconstitutional is wholly insubstantial, legally speaking nonexistent. . . . We hold that three judges are similarly not required when, as here, prior decisions make frivolous any claim that a state statute on its face is not unconstitutional.⁵⁵

The Court remanded, directing the district judge to take jurisdiction and grant relief without convening a three-judge court.⁵⁶ It is clear from *Bailey* that the substantiality issue in putative three-judge cases is not necessarily a jurisdictional one. There was no diversity of citizenship in *Bailey*, so federal jurisdiction must have been based on a substantial federal question,⁵⁷ but the constitutional question was deemed insubstantial for purposes of the three-judge court. Thus, the two questions fused together by circumstance in *Poresky* became quite distinct in *Bailey*: (1) for purposes of federal jurisdiction the question was substantial, but (2) for purposes of section 2281 the question was insubstantial.

Taken together (but perhaps with emphasis on the less ambiguous *Bailey*), *Poresky* and *Bailey* comprise the insubstantial question rule and would appear to admit of summary: *Poresky* allows the single judge to *deny* relief without convening a three-judge court when the constitutional *attack* is insubstantial;⁵⁸ *Bailey* allows the single judge to *grant* relief without convening a three-judge court when the constitutional *defense* is insubstantial.⁵⁹

The most obvious defect of the insubstantiality rule is readily apparent from *Goosby v. Osser*.⁶⁰ The rule is vague,⁶¹ whether the test of insubstantiality be "obviously without merit"⁶² or "foreclosed by previous decisions."⁶³ As to the former formulation, Professor Currie has asked: "Since a single judge may not dismiss a constitutional claim that is 'not meritorious,' why may he dismiss one that is 'obviously without merit?'"⁶⁴ Seemingly in reply, the *Goosby* opinion states that "[t]he limiting words 'wholly' and 'obviously' have cogent legal significance."⁶⁵ But what is obvious to one judge is not necessarily obvious to another. That, at least, *is* obvious. As to the latter formulation, an insub-

54. 199 F. Supp. at 603.

55. 369 U.S. at 33 (citations omitted).

56. *Id.* at 34.

57. U.S. Const. art. III, § 2; 28 U.S.C. § 1331(a) (1970).

58. See text accompanying notes 34-39 *supra*.

59. See text accompanying notes 52-56 *supra*.

60. 409 U.S. 512 (1973).

61. See Berueffy, *supra* note 45, at 71-72.

62. 409 U.S. at 518.

63. *Id.*

64. Currie 22.

65. 409 U.S. at 518. But see note 33 *supra*.

stantial question, as defined in *Poresky*, was one whose "unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the question sought to be raised can be the subject of controversy."⁶⁶ The explanation of this language given by the *Goosby* Court, *i.e.*, that a question is insubstantial if it is inescapably rendered frivolous by previous decisions,⁶⁷ does not cure its vagueness. What is foreclosed for one judge is not necessarily foreclosed for another. This is shown by the history of *Goosby*. A petition for rehearing en banc was denied,⁶⁸ apparently because the majority agreed that the *Goosby* plaintiffs' claims were foreclosed by the *McDonald* decision; but three judges did not agree.⁶⁹ Displaying impressive prescience, the dissenters noted the same distinction that the Supreme Court would later note⁷⁰—the allegation in *Goosby* of denial of the vote as against the allegation in *McDonald* of denial of the absentee ballot. It is as hard to know what is foreclosed by previous decisions as it is to know what is obviously without merit.

A more serious defect than vagueness, however, is that the insubstantial question rule wastes time—particularly the Supreme Court's time. Many cases require a double appellate proceeding. William Berueffy has made the point succinctly:

In the first instance it [is] argued: this statute is unconstitutional, to which the Court replie[s], that is a substantial question. Then the case [is] argued before the three judge district court, and upon appeal. The Court then might consider the matter on the merits.⁷¹

This is the exact procedure which will evolve in *Goosby* should either side be dissatisfied with the ruling of the three-judge court, and appeal to the Supreme Court from the three-judge ruling is as of right.⁷²

The three-judge court procedure has been criticized for many things,⁷³ but it has been criticized most consistently for the added burden it places on the federal judiciary.⁷⁴ It requires three judges instead of one (not only do calendars stagnate, but it may be physically difficult and time-consuming to get three

66. 290 U.S. at 32 (citations omitted).

67. 409 U.S. at 518.

68. 452 F.2d 39, 41.

69. *Id.* (Adams, Rosenn & Van Dusen, JJ., dissenting).

70. 409 U.S. at 522.

71. Berueffy, *supra* note 45, at 72.

72. 28 U.S.C. § 1253 (1970).

73. See Comment, *The Three-Judge Federal Court in Constitutional Litigation: A Procedural Anachronism*, 27 U. Chi. L. Rev. 555 (1960).

74. *E.g.*, *Oklahoma Gas & Elec. Co. v. Oklahoma Packing Co.*, 292 U.S. 386, 391 (1934); Federal Judicial Center, *Report of the Study Group on the Caseload of the Supreme Court* (1972) (*The Freund Report*), reproduced at 57 F.R.D. 573, 598 (Report discussed in Comment, *The National Court of Appeals: Composition, Constitutionality and Desirability*, 41 *Fordham L. Rev.* 863 (1973)); C. Wright, *Federal Courts*, § 50, at 194 (2d ed. 1970 & Supp. 1972).

judges together).⁷⁵ It produces repetitious litigation of the threshold question up and down the federal judicial system. And, the decision of the three-judge court, once properly convened, produces a direct appeal as of right to the already crushingly overburdened Supreme Court. Chief Justice Burger recently has recommended abolition of the three-judge court procedure because of the unacceptable burden it places on the federal courts.⁷⁶ An amendment to section 2281, proposed in 1971, would eliminate the requirement of a three-judge panel.⁷⁷ Though the Supreme Court is without power to amend the statute, the Court, in the past, has manifested its concern for the problem in a judicial fashion: it has promulgated a series of decisions limiting the application of section 2281. The insubstantiality rule of *Bailey* and *Poresky* is perhaps the prime, but by no means the only, example of a definite trend toward limitation.⁷⁸ *Goosby* does not continue the trend. The decision comes at a time when an expansion of the single judge's powers seemed probable; but *Goosby* appears to limit, rather than expand, the powers of the single judge.

The decision in *Goosby* has much to commend it to those who marvel at judicial sleight of hand. While citing *Poresky* and *Bailey*, landmark cases in the expansion of the single judge's powers under section 2281, the Court has in fact promulgated a constrictive precedent. Although the tests of insubstantiality in *Goosby* are virtually identical to those of earlier cases, the emphasis and spirit of their application is new. The emphasis now is on words such as "obviously," "clearly," and "inescapably," and the spirit is one of scrupulous legal scrutiny. Where none before (except the three circuit court dissenters) had perceived a substantial question, the Court in *Goosby* not only found such a question but did so unanimously. The almost cavalier attitude of *Poresky* is gone. In *Poresky* it was sufficient to declare the question insubstantial "in view of the decisions of this Court bearing upon the constitutional authority of the State . . . to enact the statute assailed."⁷⁹ No further explanation was offered. But the Court in *Goosby* saw fit not only to examine the prior decision relied on, but also to scrutinize that decision and to construe it strictly.

It can be expected that the Court's new attitude will not go unnoticed. In fact, *Goosby* already has forced the Southern District of New York to change its position in one case.⁸⁰ There, plaintiffs alleged certain provisions of the

75. See, e.g., *Holbrook v. Taitano*, 125 F. Supp. 14, 17 (D. Guam 1954).

76. Burger, *The State of the Federal Judiciary—1972*, 58 A.B.A.J. 1049, 1053 (1972); N.Y. Times, Aug. 7, 1973, at 17, col. 1.

77. H.R. 3805, 92d Cong., 1st Sess. (1971), reproduced at Ammerman, *Three-Judge Courts: See How They Run!*, 52 F.R.D. 293, 313 (1971).

78. See *Moody v. Flowers*, 387 U.S. 97 (1967); *Swift & Co. v. Wickham*, 382 U.S. 111 (1965), overruling *Kesler v. Department of Pub. Safety*, 369 U.S. 153 (1962); *Phillips v. United States*, 312 U.S. 246 (1941); Note, *The Three-Judge Court Reassessed: Changing Roles in Federal-State Relationships*, 72 Yale L.J. 1646, 1647 (1963). See generally H.M. Hart & H. Wechsler, *supra* note 45, at 972-75.

79. 290 U.S. at 32.

80. *Sero v. Oswald*, 355 F. Supp. 1231 (S.D.N.Y. 1973), rev'g 351 F. Supp. 522 (S.D. N.Y. 1972).

New York Penal Law, dealing with reformatory sentences, were unconstitutional on their face and moved to convene a three-judge court to consider the question. The motion was denied because the district court felt that the constitutional question had been foreclosed by prior decisions of higher courts.⁸¹ Three months later, plaintiffs successfully moved for reconsideration of the denial in light of *Goosby*, which had just been decided. The court said: "In light of the *Goosby* language and holding, there is no doubt, as a brief analysis will show, that reconsideration of our prior decision is necessary, and that the issues previously held to be foreclosed should be submitted to the three-judge court"⁸² The ground for the prior denial was the similarity of the New York statute to the Federal Youth Corrections Act which frequently had been upheld in the face of constitutional challenge. However, in its reconsideration the court felt that "the analogous federal statute differs from New York's provisions in one respect which in the light of *Goosby* may be considered material."⁸³ The prior decisions upholding the federal statute were on point, and perhaps even controlling; but, as the district court emphasized, they did not *inescapably* render the claims *frivolous*.⁸⁴ The decision is clearly in conformity with the new, constrictive mandate of *Goosby*.

In a recent Second Circuit decision,⁸⁵ then Chief Judge Friendly commented on the curious result in *Goosby*: "In the face of recent strong advocacy of the abolition of the three-judge court requirement in constitutional cases, a unanimous Supreme Court has just defined the standard permitting a single judge to dismiss a complaint seeking an injunction on the ground of unconstitutionality in the most limiting terms the Court has ever used."⁸⁶ The case involved an appeal from a dismissal by a district judge and the court of appeals, in conformity with *Goosby*'s constrictive mandate, reversed with instructions to the district judge to convene a three-judge court.⁸⁷ If other district and circuit courts are as quick to grasp the significance of *Goosby*, it is to be expected that fewer and fewer alleged section 2281 cases will be deemed resolvable without a three-judge court, and if there is no diminution of attacks upon state statutes, the result will be to require more and more three-judge courts.

The question raised by this result is why was *Goosby* decided as it was? As previously indicated, the time seemed ripe for a rule expansive of the single judge's power. It is curious that a unanimous Court should decide at this time to take a narrow view of the powers of the single judge. One answer, albeit purely speculative, is that *Goosby* was a judicial nudging of the Con-

81. *Sero v. Oswald*, 351 F. Supp. 522 (S.D.N.Y. 1972). "Applying this ["foreclosed by previous decisions"] test, it is clear that the issue of whether the provisions of the statute before us are unconstitutional on their face is foreclosed." *Id.* at 526. A different result was reached on the potential unconstitutionality of the provisions as applied. *Id.* at 528-29.

82. 355 F. Supp. at 1233 (footnote omitted).

83. *Id.*

84. *Id.*

85. *Roe v. Ingraham*, 480 F.2d 102 (2d Cir. 1973)

86. *Id.* at 105-06 (footnote omitted).

87. *Id.* at 109.

gress.⁸⁸ Perhaps the Court was really saying that amendment or repeal of the three-judge court procedure is not a judicial but a legislative burden, and that it is now time for the legislature to shoulder that burden. Perhaps the Court was really saying that it refuses to do the legislature's work. If so—if this is the real meaning of *Goosby*—perhaps Congress will perceive the problem and act. But if it does not—if legislative change is not forthcoming—it can be expected that the severity of the *Goosby* precedent will soon prove intolerable and that the judiciary eventually will relax the constrictive mandate of the case.

Charles H. Cochran

Federal Courts—Procedure—Review of the Actions of the Judicial Council of the Circuit.—Pursuant to a resolution of the Judicial Council¹ of the Third Circuit, a district court judge removed Joseph M. Nolan as counsel to the trustee in a Chapter X reorganization.² Seeking personal vindication, Nolan

88. It may be noted with some irony that it was judicial action, albeit inadvertent, which originally prompted enactment of the three-judge procedure. See notes 15-17 *supra* and accompanying text.

1. 28 U.S.C. § 332 (1970) provides in pertinent part: "(a) The chief judge of each circuit shall call, at least twice in each year and at such places as he may designate, a council of the circuit judges for the circuit, in regular active service, at which he shall preside. Each circuit judge, unless excused by the chief judge, shall attend all sessions of the council.

(b) The council shall be known as the Judicial Council of the circuit.

(c) The chief judge shall submit to the council the quarterly reports of the Director of the Administrative Office of the United States Courts. The council shall take such action thereon as may be necessary.

(d) Each judicial council shall make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit. The district judges shall promptly carry into effect all orders of the judicial council."

2. *Nolan v. Judicial Council of the Third Circuit*, 346 F. Supp. 500, 501 (D.N.J. 1972), *aff'd sub nom. In re Imperial "400" Nat'l, Inc.*, 481 F.2d 41 (3d Cir.), cert. denied, 94 S. Ct. 71 (1973). The order of removal stated in pertinent part:

"It had been the opinion of [the district court] that limitations imposed upon the function of Joseph M. Nolan, Esq., as counsel for the Trustee provided protection against any conflict of interest or even the appearance thereof. Such opinion of the Court has been overruled by the above cited resolution of the Council [see text at note 15 *infra*] and this Court considers the resolution as a mandate to terminate the services of counsel to the Trustee. . . .

. . . It is . . . clear to this Court that it must give effect to the resolution of the Circuit Council. . . .

Accordingly, it is . . . ORDERED that the legal services of Joseph M. Nolan, Esq., as counsel for the Trustee be and the same hereby are terminated effective immediately." *In re Imperial "400" Nat'l, Inc.*, No. B-656-65 (D.N.J., May 2, 1972) (mem. & order), cited in *Petitioner's Motion for Leave to File Petition for Writ of Prohibition and/or Mandamus at 2a-3a, Nolan v. Judicial Council of the Third Circuit*, 409 U.S. 822 (1972) [hereinafter cited as *Petitioner's Motion*].

was faced with the dilemma that there was neither statutory authority nor precedent for the review of resolutions adopted by circuit councils.³ Assuming jurisdiction, a three-judge panel⁴ sitting by designation in the Third Circuit reviewed the removal order, thereby establishing a necessary and logical precedent for the review of the actions of a circuit council. *In re Imperial "400" National, Inc.*, 481 F.2d 41 (3d Cir.), cert. denied, 94 S. Ct. 71 (1973) [hereinafter referred to as *Nolan*].⁵

Nolan, an established bankruptcy lawyer, had been appointed counsel to the trustee in a Chapter X reorganization in 1966.⁶ During the course of the prolonged reorganization, friction developed between one of the creditors and Nolan concerning *inter alia* the amount of interim payments allotted to Nolan and the trustee. This dispute gave rise to litigation resulting in an order directing Nolan to return a portion of his interim allowance.⁷ In 1971, in the midst of this feuding, Schiavone Construction Co., a client of Nolan's law firm, indicated an interest in proposing a plan of reorganization.⁸ Although Nolan helped to bring Schiavone's interest to the attention of the trustee and the creditors committee, at the suggestion of the district court judge he promptly disassociated himself from consideration of any of the proposed reorganization plans. With the consent of the district court judge and all interested parties,⁹ however, Nolan continued to serve as counsel to the trustee, but limited his participation to advising on the day-to-day management of the estate. Schiavone retained outside counsel to represent it in the reorganization.

3. *In re Imperial "400" Nat'l, Inc.*, 481 F.2d 41, 50 (3d Cir. 1973). See notes 85-93 *infra* and accompanying text.

4. Senior Judges Lumbard and Smith of the Second Circuit, and Senior Judge Aldrich of the First Circuit. Judges Lumbard and Aldrich formerly were chief judges of their respective circuits.

5. See also *Union Bank v. Nolan*, 94 S. Ct. 68 (1973) (denying certiorari in a related proceeding).

6. 346 F. Supp. at 503. Nolan had been appointed with the approval of the district court judge pursuant to 11 U.S.C. § 557 (1970) and General Order in Bankruptcy 44. Regarding the requirements for appointing counsel to a trustee, see generally 2 W. Collier, *Bankruptcy* ¶ 44.23 (14th ed. 1971).

7. See, e.g., *In re Imperial "400" Nat'l, Inc.*, 432 F.2d 232, 240 (3d Cir. 1970).

8. 346 F. Supp. at 503. Although the circuit council was under the impression that Schiavone was a creditor of the estate in bankruptcy, it was later established that this impression was erroneous. Brief for Appellant at 11-12, *In re Imperial "400" Nat'l, Inc.*, 481 F.2d 41 (3d Cir. 1973).

9. 346 F. Supp. at 504. Having conferred with Nolan regarding his connection with Schiavone, the district court judge sent a letter to all interested parties informing them that he had directed Nolan not to take any further part in the Schiavone proposed plan and concluding: "If it is felt by any interested party that this is not the appropriate way to proceed to gain the financing of Schiavone Construction Co., the Court will entertain and consider objections which, if any, should be promptly presented." *Id.* The court received no objections. It did receive two letters—one each from the SEC and from the creditor whose later criticisms provoked the council's resolution—endorsing the court's suggestion with the proviso that Nolan not participate in the consideration of any plan of reorganization. *Id.*

Meanwhile, the friction between Nolan and the dissatisfied creditor had escalated into a vitriolic vendetta.¹⁰ Although Nolan had been required to return a portion of his interim allowance, the district court ruled that he was not required to pay interest thereon.¹¹ Appealing this ruling in early 1972, the creditor wrote a letter to the court urging that it exercise its equity powers to remove the trustee and Nolan.¹² Since no formal motion had been filed, this matter was not adjudicated. However, two of the members of the court who had heard other appeals in the reorganization expressed concern to the chief judge of the Third Circuit over the possible "appearance of impropriety to laymen" occasioned by Nolan's continued representation of the trustee.¹³ Because Nolan's firm still represented Schiavone in other matters, and because of the bitter litigation over fees, they recommended that it be suggested to the district judge that Nolan resign as counsel.¹⁴

In February, 1972, the Judicial Council of the Third Circuit met to consider the matter and after some discussion enacted the following resolution:

RESOLVED that in all bankruptcy proceedings this Council holds as incompatible the continued representation as attorney for the trustee by any lawyer or his firm who represents a third party who submits a plan for reorganization in the bankruptcy; and that the recusal by the attorney only from commenting on proposed reorganization plans is not an adequate immunization from the appearance of a conflict of interest.¹⁵

The substance of this resolution was communicated to the supervising district court judge together with the suggestion that Nolan be given the opportunity to resign.¹⁶ Responding that Nolan declined to resign because he believed that it would be a "tacit concession of wrongdoing,"¹⁷ the district court opined that

10. 481 F.2d at 43-44.

11. *Id.*

12. *Id.* at 44. The circuit court required Nolan to pay interest on the returned interim allowance. 456 F.2d 926 (3d Cir. 1972).

13. Letter from Circuit Judges Van Dusen and Adams to Chief Judge Seitz, Jan. 31, 1972, in Petitioner's Supplemental Brief and Appendix at 10a-12a, *Nolan v. Judicial Council of the Third Circuit*, 409 U.S. 822 (1972).

14. *Id.* The letter continued: "Even though counsel for the trustee has disqualified himself from acting on the plans, he continues to advise the trustee on a regular basis in other matters and the trustee is favoring the last plan filed, submitted by one of the best clients (Schiavone Co.) of his counsel's law firm, even though a plan favored by many of the creditors had been submitted many months before the Schiavone plan and gives them cash, which is what they want. We believe that the public will not understand how the court permits Mr. Nolan to act as counsel for the trustee in any matters under these circumstances, particularly in view of the litigation over fees and interest on such fees involved in the various appeals to this court." *Id.* Reviewing this letter, the court of appeals characterized it as factually inaccurate and incomplete. 481 F.2d at 47.

15. 346 F. Supp. at 501.

16. Letter from Chief Judge Seitz to Judge Shaw, Mar. 10, 1972, in 346 F. Supp. at 514.

17. Letter from Judge Shaw to Chief Judge Seitz, Mar. 22, 1972, in Petitioner's Motion, *supra* note 2, at 55a.

were Nolan directed to resign, fundamental fairness would require that he be afforded an evidentiary hearing.¹⁸

After discussing this letter at a subsequent council meeting, the chief judge, quoting the original resolution, emphasized "that [the council's] resolution is directed at the *appearance* of a conflict of interest. Consequently, it does not view Mr. Nolan's case as presenting any issue of removal 'for cause' in the sense of any alleged personal wrongdoing. . . . We are talking policy."¹⁹ For this reason, the council asserted, no evidentiary hearing was necessary. Shortly after learning of this decision, the district court signed an order removing Nolan as counsel to the trustee.²⁰ Arguing that due process had been violated, Nolan sought judicial review of the removal order and the underlying resolution. However, "[n]o statute, no rule and no decision [provided] any procedure for such review."²¹

Composed of the active circuit judges of the circuit who meet at least twice a year,²² the judicial council of each circuit is the instrumentality charged with the maintenance of administrative efficiency and public confidence in the federal court system.²³ The councils were created by the Administrative Office Act of 1939,²⁴ because it had become apparent during the 1930s that some admin-

18. *Id.* at 58a. Judge Shaw commented: "It is my opinion that with an unblemished career behind him, he has a right to a hearing which will afford him the opportunity to dispell [sic] any cloud which would be cast upon his reputation by resignation submitted under pressure." *Id.* Although Judge Shaw conceded that there was no statutory requirement for such hearing, he noted that 11 U.S.C.A. § 11(a)(17) provided for a hearing in the event of the removal of a trustee and suggested that the instant circumstances required no less. *Id.* at 60a.

19. Letter from Chief Judge Seitz to Judge Shaw, Apr. 14, 1972, in Petitioner's Motion at 54a.

20. See note 2 *supra*. At a subsequent hearing, Judge Shaw made clear that he had entered this order only at the insistence of the judicial council. In re Imperial "400" Nat'l, Inc., No. B-656-65 (D.N.J., Transcript of Hearing held May 11, 1972), in Petitioner's Motion at 42a.

21. Petitioner's Motion at 21.

22. 28 U.S.C. § 332(a) (1970).

23. See generally *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 95-111 (1970) (Harlan, J., concurring); *Judicial Conference of the United States, Report on the Powers and Responsibilities of the Judicial Councils*, H.R. Doc. No. 201, 87th Cong., 1st Sess. (1961) [hereinafter cited as H.R. Doc. No. 201]; Fish, *The Circuit Councils: Rusty Hinges of Federal Judicial Administration*, 37 U. Chi. L. Rev. 203 (1970).

24. Act of Aug. 7, 1939, Pub. L. No. 76-299, 53 Stat. 1223. Section 306 of the Act provided in pertinent part: "To the end that the work of the district courts shall be effectively and expeditiously transacted, it shall be the duty of the senior circuit judge of each circuit to call at such time and place as he shall designate, but at least twice in each year, a council composed of the circuit judges for such circuit, who are hereby designated a council for that purpose The senior judge shall submit to the council the quarterly reports of the Director required to be filed by the provisions of section 304, clause (2), [now 28 U.S.C. § 604(a)(2) (1970)] and such action shall be taken thereon by the council as may be necessary. It shall be the duty of the district judges promptly to carry out the directions of the council as to the administration of the business of their respective courts."

istrative control over the federal courts was necessary.²⁵ Public concern had been aroused concerning certain judicial abuses—particularly court congestion.²⁶ However, as Chief Judge Groner noted:

Under the present judicial set-up we have no authority to require a district judge to speed up his work or to admonish him that he is not bearing the full and fair burden that he is expected to bear, or to take action as to any other matter which is the subject of criticism . . . for which he may be responsible.²⁷

The imposition of administrative control upon a federal judge, accustomed to being "lord of all he surveyed,"²⁸ was viewed by many as a threat to judicial independence. A far more serious threat to judicial independence was the vesting of administrative control over the judiciary in the executive branch.²⁹ This was seen as a very real threat in 1937 owing to President Roosevelt's court-packing efforts.³⁰ As a matter of self-preservation, the notion that the judiciary should "clean [its] own house"³¹ gained support. Accordingly, a primary objective of the Act was to remove every vestige of administrative and budgetary control over the courts from the executive branch while authorizing the judiciary itself to take whatever steps were necessary to eliminate abuses.³²

The Act created the Administrative Office of the United States Courts³³ primarily to assemble data regarding the functioning of the courts so that administrative problems could be brought to the attention of the judiciary.³⁴ An early version of the Act proposed that the actual supervisory control over the courts be centralized in the Supreme Court.³⁵ At the suggestion of the then Chief Justice,³⁶ this proposal was rejected by Congress in favor of decentraliza-

25. See, e.g., Hearings on S. 188 Before a Subcomm. of the Senate Comm. on the Judiciary, 76th Cong., 1st Sess. 9-10 (1939).

26. *Id.* at 11.

27. *Id.*

28. Lumbard, *The Place of the Federal Judicial Councils in the Administration of the Courts*, 47 A.B.A.J. 169, 170 (1961).

29. Hearings on the Independence of Federal Judges Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary, 91st Cong., 2d Sess. 294 (1970) (statement of Peter G. Fish).

30. *Id.* at 304, 372.

31. Hearings on S. 188, *supra* note 25, at 9.

32. See *id.* at 8-9. In the words of Judge Groner, the Act would "provide a method, a legitimate, valid, legal method, by which, if necessary, and when necessary, the courts may clean their own house . . . [and would] give a body, in which the authority is firmly lodged, the power to do that and to do it expeditiously." Hearings on H.R. 5999 Before the House Comm. on the Judiciary, 76th Cong., 1st Sess. 8 (1939).

33. Act of Aug. 7, 1939, Pub. L. No. 76-299, § 302, 53 Stat. 1223 (codified at 28 U.S.C. § 601 (1970)).

34. *Id.* § 304 (codified at 28 U.S.C. § 604 (1970)).

35. See H.R. Doc. No. 201, at 2-3.

36. Address of Chief Justice Hughes to the Judicial Conference of the United States, Sept. 30, 1938, in *Transcript of the Proceedings of the Judicial Conference*, Sept. Sess. 178 (1938).

tion.³⁷ There were thought to be numerous advantages to vesting supervisory control at the circuit level:

The circuit judges know the work of the district judges by their records that they are constantly examining, while the Supreme Court gets only an occasional one. And the circuit judges know the judges personally in their districts; they know their capacities. And if complaints are made, they have immediate resort to the means of ascertaining their validity.³⁸

In accord with this theory of decentralization, the Act created the judicial councils of the circuits and vested in them actual supervisory authority over the courts and their officers.

It was the intention of Congress "to charge the judicial councils of the circuits with the responsibility for doing all and whatever was necessary of an administrative character to maintain efficiency and public confidence in the administration of justice."³⁹ The statutory language, characterized by one judge as "about as broad as it could possibly be,"⁴⁰ reflected this intention. A council was authorized to "make all necessary orders for the effective and expeditious administration of the business of the courts within its circuit."⁴¹ Together with various other statutes⁴² which charge the councils with certain specific responsibilities, this broad grant of power vests a council with far-reaching authority. A report of the Judicial Conference in 1961 concluded:

The responsibility of the councils "for the effective and expeditious administration of the business of the courts within its circuit" extends not merely to the business of the courts in its technical sense (judicial administration), such as the handling and dispatching of cases, but also to the business of the judiciary in its institutional sense

37. H.R. Doc. No. 201, at 3. Reviewing the historical background of § 332, the Report emphasized: "Congress enacted the section dealing with judicial councils precisely as the committee [of the Judicial Conference of 1938] had formulated it. It thus gave to the judiciary, in exact form and content, what the Committee of the Conference, under the responsibility imposed upon it by the Conference, was convinced . . . embodied the responsibility and had the capacity to function as an effective instrumentality in the correlated scheme being enacted, for 'The Administration of the United States Courts.'" *Id.* at 4.

38. Address of Chief Justice Hughes to the Judicial Conference of the United States, Sept. 30, 1938, as quoted in H.R. Doc. No. 201, at 3.

39. Celler, Foreword to H.R. Doc. No. 201, at v.

40. Lumbard, *The Place of the Federal Judicial Councils in the Administration of the Courts*, 47 A.B.A.J. 169 (1961).

41. 28 U.S.C. § 332(d) (1970); see note 1 *supra*.

42. E.g., 28 U.S.C. § 134(c) (1970) (directing a district judge to reside near his court); 28 U.S.C. § 137 (1970) (dividing the business of the district court among the district judges if those judges are unable to agree among themselves); 28 U.S.C. § 140(a) (1970) (consenting to the pretermination of a district court session); 28 U.S.C. § 142 (1970) (approving the court quarters of the district court); 28 U.S.C. § 294(c) (1970) (assigning retired judges to duties within the circuit); 28 U.S.C. § 295 (1970) (consenting to the assignment of judges from outside the circuit); 28 U.S.C. § 372(b) (1970) (certifying to the President the disability of a judge who is eligible to retire); 28 U.S.C. § 457 (1970) (designating the place where court records shall be stored).

(administration of justice), such as the avoiding of any stigma, disrepute, or other element of loss of public esteem and confidence in respect to the court system, from the actions of a judge or other person attached to the courts.⁴³

Despite the fact that the district court judges are statutorily required to carry into effect the orders of a council,⁴⁴ the councils have no explicit statutory authority to enforce their orders. Although various authorities have speculated on measures which a council theoretically might invoke against a recalcitrant judge,⁴⁵ the rationale underlying this "lack of teeth" may well have been that:

[a]s members of a professional guild, with its own process of socialization and with its own recognized standards of conduct and ways of doing things, judges accepted as legitimate those actions resting on acceptable premises. With such individuals, unabashed exercises of administrative power were not only unacceptable, but, hopefully, unnecessary. Confidence in voluntary compliance was widely expressed at the time of the council's establishment.⁴⁶

Regarding themselves as senior advisors rather than as policemen, the councils preferred to implement the findings of the Administrative Office by personal, informal overtures to particular judges rather than by edict.⁴⁷ "Orders" were rarely issued and seldom reported.⁴⁸ "Formal action by the judicial council," one chief judge admonished, "should be the last resort and only after it has become quite clear that other means have failed."⁴⁹

This informal *modus operandi* and reliance on the socialized compliance of district court judges, while consistent with the council's lack of enforcement power, obfuscated a basic deficiency in the administrative scheme—the lack of an orderly process for review of council actions. Although there is nothing in

43. H.R. Doc. No. 201, at 8-9.

44. 28 U.S.C. § 332(d) (1970); see note 1 *supra*.

45. See, e.g., Fish, *The Circuit Councils: Rusty Hinges of Federal Judicial Administration*, 37 U. Chi. L. Rev. 203, 230 (1970). It has been suggested that a council might punish a problem judge "by temporarily assigning him to 'a nonexistent place' where court was never held or to a place of court where little judicial business was generated." *Id.* Other possibilities suggested include the threat of a certification of disability pursuant to 28 U.S.C. § 372(b) (1970); the removal of cases assigned to the judge (see notes 53-65 *infra* and accompanying text); and the institution of an action in the nature of *mandamus*. Fish, *supra*, at 230-33.

46. *The Independence of Federal Judges*, *supra* note 29, at 295 (statement of Peter G. Fish). Although the advocates of § 332 thought that the instances of non-compliance with the council's orders would be so rare that they need not be considered, it was believed that in such an instance the council would have adequate power. See, e.g., *Hearings on S. 188*, *supra* note 25, at 18-19. Concurring that the instances of a council's order being disregarded would be rare, Chief Judge Bailey Aldrich expressed a contrary view as to the ultimate result: "I think if a district judge tells us to go to hell, he tells us to go to hell." *The Independence of Federal Judges*, *supra* note 29, at 366.

47. H.R. Doc. No. 201, at 9.

48. Fish, *The Circuit Councils: Rusty Hinges of Federal Judicial Administration*, 37 U. Chi. L. Rev. 203, 230 (1970).

49. Lumbard, *The Place of the Federal Judicial Councils in the Administration of the Courts*, 47 A.B.A.J. 169, 171 (1961).

the legislative history of section 332 to suggest that Congress intended the councils to be entirely free from scrutiny,⁵⁰ the lack of a review procedure was not thought vital—possibly because it was believed “[t]hat the council[s] [would] be restrained by the inherent limitations of the situation. They would know that if they commanded a judge to do something, unnecessarily or unwisely, he would refuse to do it, and that would probably be the end of the matter.”⁵¹ The restraint displayed by the councils caused them to be criticized severely as ineffectual.⁵² Partly as a result of this self-restraint, however, there were no reported cases in which the propriety of a council’s order was challenged. Thus, for the first twenty-five years of the councils’ existence, the establishment of a formal procedure for judicial review was academic.

Beginning in 1964, however, *Chandler v. Judicial Council of the Tenth Circuit*,⁵³ raised—but did not settle—important jurisdictional and procedural questions regarding judicial review of council action.

In *Chandler*, a continuing controversy between the Circuit Council of the Tenth Circuit and Chief Judge Chandler of the Western District of Oklahoma culminated in the council’s issuing a three-pronged order directing Chandler to take no further action in any cases pending before him, assigning those cases to other judges, and prohibiting the assignment to him of any new cases.⁵⁴ This order was interlocutory pending further hearings.⁵⁵ When Chief Judge Chandler asserted his right to continue to hear the cases then before him, the order was modified to that effect.⁵⁶ Although the council invited Judge Chandler and the other district court judges to attend a hearing, Judge Chandler indicated by letter that the order as modified was agreeable to him and to the other district judges. For this reason no hearing was held.⁵⁷

In July, 1967, noting that Judge Chandler had only twelve cases left on his docket, the council asked the district judges to consider anew a division of his

50. Cf. *Chandler v. Judicial Council of the Tenth Circuit*, 398 U.S. 74, 108-09 (1970) (see note 74 *infra*). But cf. *The Independence of Federal Judges*, *supra* note 29, at 1051 (memorandum of Arthur S. Miller). Writing prior to the decision in *Chandler*, Professor Miller opined: “The councils act as autonomous units within each circuit; they are responsible to no one and, from all appearances, their decisions may not be subject to review.” *Id.*

51. Hearings on H.R. 5999, *supra* note 32, at 22.

52. See, e.g., Staff of Senate Appropriations Comm., 86th Cong., 2d Sess., *Field Study of the Operations of United States Courts 84* (Comm. Print 1959) (popularly known as *The Cotter Report*).

53. 398 U.S. 74 (1970). *Chandler* occasioned wide comment because of its implications as an alternative to impeachment. See Comment, *Removal of Federal Judges—New Alternative to an Old Problem: Chandler v. Judicial Council of the Tenth Circuit*, 13 U.C.L.A.L. Rev. 1385 (1966); Note, *Removal of Federal Judges—Alternatives to Impeachment*, 20 Vand. L. Rev. 723 (1967); 51 B.U.L. Rev. 106 (1971).

54. 398 U.S. at 78.

55. On Jan. 6, 1966, Chandler sought a stay of the council’s order in the Supreme Court. The stay was denied on the ground that the order was “entirely interlocutory in character pending prompt further proceedings . . .” 382 U.S. 1003 (1966).

56. 398 U.S. at 79-80.

57. *Id.* at 80.

caseload. Judge Chandler and the other judges responded that "the [modified] order for the division of business in this district [was] agreeable under the circumstances."⁵⁸ Maintaining that this letter of acquiescence had been merely a strategic move to prevent the council from invoking its powers under 28 U.S.C. § 137,⁵⁹ Judge Chandler filed a petition for a writ of prohibition and/or mandamus in the Supreme Court⁶⁰ on the grounds that the council had usurped the impeachment power and had unconstitutionally stripped him of his judicial function.⁶¹

The Court noted that the case presented questions of the first impression,⁶² but it avoided both the ultimate question—whether the council's action had been beyond "the line defining the maximum permissible intervention consistent with the constitutional requirement of judicial independence"⁶³—and the threshold question—whether the Supreme Court had jurisdiction to review the council's actions. Pointing to Judge Chandler's acquiescence in the council's modified order, and his failure to seek relief "from either the Council or some other tribunal,"⁶⁴ the Court held:

Whether the Council's action was administrative action not reviewable in this Court, or whether it is reviewable here, plainly petitioner has not made a case for the extraordinary relief of mandamus or prohibition.⁶⁵

Although the holding provided no answers to the questions posed, the opinion contained interesting dicta. The Court suggested that Congress had intended the councils to function as administrative bodies—"board[s] of directors' for the circuit"—and had not intended to and did not vest in them traditional judicial powers.⁶⁶ The Court noted that "the action of the Judicial Council here complained of has few of the characteristics of traditional judicial action and much of what we think of as administrative action."⁶⁷ While not deciding whether the actions of the council were subject to review, the Court strongly intimated that it was unnecessary, and perhaps constitutionally impermissible for the Supreme Court to exercise such review.⁶⁸ While it did not endorse any

58. *Id.* at 82.

59. *Id.* at 86-87. 28 U.S.C. § 137 (1970) provides in part: "If the district judges in any district are unable to agree upon the adoption of rules or orders for that purpose [of dividing and assigning cases] the judicial council of the circuit shall make the necessary orders."

60. 398 U.S. at 79.

61. *Id.* at 82.

62. *Id.* at 75.

63. *Id.* at 84.

64. *Id.* at 87.

65. *Id.* at 89.

66. *Id.* at 86 n.7.

67. *Id.* at 88 n.10.

68. *Id.* at 86. The Court noted: "The authority of this Court to issue a writ of prohibition or mandamus 'can be constitutionally exercised only insofar as such writs are in aid of its appellate jurisdiction.' If the challenged action of the Judicial Council was a judicial act or decision by a judicial tribunal, then perhaps it could be reviewed by this

procedure, the Court suggested at least two other possibilities—petitioning the council itself for review,⁶⁹ or instituting a mandamus action in a district court pursuant to 28 U.S.C. § 1361.⁷⁰ In any event, the Court conceded that:

Standing alone, § 332 is not a model of clarity in terms of the scope of the judicial councils' powers or the procedures to give effect to the final sentence of § 332. Legislative clarification of enforcement provisions of this statute and definition of review of Council orders are called for.⁷¹

Although concurring in the denial of the extraordinary remedies of mandamus or prohibition,⁷² Mr. Justice Harlan flatly contradicted the majority's implication that the actions of a judicial council were administrative rather than judicial. While he conceded that "Congress . . . has not spoken, one way or the other, regarding review of the orders of Judicial Councils,"⁷³ Justice Harlan nonetheless assumed that such review was possible.⁷⁴ Pointing to the legislative history of section 332, he argued that it was clearly the intention of Congress to place the responsibility for administering the courts in the judiciary.⁷⁵ "[T]he Council's orders for the handling of cases in the district court serve as one step in the progress of those cases toward judgment. Those orders can be expected to apply commonly accepted notions of proper judicial administration to the special factual situations of particular cases or particular judges."⁷⁶ Justice Harlan was of the opinion that the non-judicial powers vested in the councils⁷⁷ were not inconsistent with "a conclusion that the Council, when performing its central responsibilities under 28 U.S.C. § 332, exercises judicial power granted under Article III."⁷⁸ Since the councils could be characterized as *judi-*

Court without doing violence to the constitutional requirement that such review be appellate. . . . [A] conclusion that we do have appellate jurisdiction in this case would be no mean feat." *Id.* (citations omitted) (footnote omitted).

69. *Id.* at 87.

70. *Id.* n.8. 28 U.S.C. § 1361 (1970) provides: "The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." Presumably the mandamus action in the district court would lie only if the council were "administrative" rather than "judicial." 398 U.S. at 87 n.8.

71. 398 U.S. at 85 n.6.

72. *Id.* at 118. Justice Harlan believed that "[s]erious questions would be presented if, after exhausting much of his pending business, Judge Chandler had sought additional business and the Council had declined without advancing substantial additional justification for the refusal. However, because of Judge Chandler's inaction, that situation is not presented on this record." *Id.* at 126.

73. *Id.* at 112.

74. *Id.* at 108-09. "Their [the councils'] discretion in this matter, while broad, does not seem to be of a different order from that possessed by district judges with respect to many matters of trial administration. In both instances, review can correct legal error or abuse of discretion where it occurs; that the scope of review will often be very narrow does not in itself establish that the exercise of such discretion is a nonjudicial act." *Id.*

75. *Id.* at 107-08.

76. *Id.* at 108.

77. See note 42 *supra*.

78. 398 U.S. at 110.

cial rather than *administrative*, review of their actions by the Supreme Court would be an exercise of appellate rather than constitutionally impermissible original jurisdiction. Justice Harlan found statutory authority for such jurisdiction in the All Writs Act.⁷⁹

The All Writs Act had been construed to empower the Supreme Court to issue an extraordinary writ to a lower federal court in a case falling within its statutory appellate jurisdiction where the issuance of the writ would further the exercise of that jurisdiction.⁸⁰ For the writ to issue it was not necessary that the case be before the Supreme Court. A writ could issue if the "lower court's action might defeat or frustrate this Court's *eventual* jurisdiction, even where that jurisdiction could be invoked on the merits only after proceedings in an intermediate court."⁸¹ Noting that by removing Judge Chandler the council had affected hundreds of cases over which the Court had eventual appellate jurisdiction, and that the effect of his removal on those cases could not adequately be remedied by appellate review,⁸² Justice Harlan concluded:

[T]he actions challenged by Judge Chandler sufficiently affect matters within this Court's appellate jurisdiction to bring his application for an extraordinary writ within our authority under § 1651 (a), and that his charges, if sustained, would present an appropriate occasion for the issuance of such a writ.⁸³

Against this background and with only *Chandler* for guidance, Nolan was uncertain how to proceed:

Petitioner in this case does not know whether he is required to seek relief in the Court of Appeals which has already denied his right to a hearing, or before the Judicial Council, which is unlikely to reverse its own decision, or before the senior circuit judges of the Third Circuit who have at least an "appearance" of a conflict of interest and, seemingly, much more, or by engaging in the seeming futility of a separate suit in the United States District Court seeking a determination that its superior judges who compose the Judicial Council are wrong, or by making an original application to the United States Supreme Court.⁸⁴

In an effort to resolve this dilemma, Nolan pursued several avenues. On May 2, 1972, the same day that the order removing him as counsel to the trustee was signed, he filed an action in the nature of mandamus in the district court;⁸⁵ on May 24, he filed a motion for leave to file a petition and a petition for writ of prohibition and/or mandamus in the Supreme Court;⁸⁶ and on May 31, he

79. *Id.* at 117. 28 U.S.C. § 1651(a) (1970) provides: "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

80. 398 U.S. at 112 (Harlan, J., concurring in denial of writ).

81. *Id.* (emphasis in original).

82. *Id.* at 113.

83. *Id.* at 117. Justice Harlan acknowledged that this was an expansive interpretation of 28 U.S.C. § 1651(a) which had no direct precedent; however, he stated, "it seems to me wholly in line with the history of that statute and consistent with the manner in which it has been interpreted both here and in the lower courts." *Id.* at 113.

84. Petitioner's Motion, *supra* note 2, at 21-22.

85. See 346 F. Supp. 500 (D.N.J. 1972) (dismissing mandamus application).

86. *Nolan v. Judicial Council of the Third Circuit*, 409 U.S. 822 (1972).

appealed to the Court of Appeals for the Third Circuit from the removal order of May 2, 1972.⁸⁷

The motion to file a petition for writ of prohibition and/or mandamus was denied without opinion.⁸⁸ Although the district court took upon itself the task of assembling a record, it dismissed the complaint on the dual grounds that Nolan had an adequate remedy by way of appeal from the removal order, and that a declaratory judgment action could not be substituted for an appeal.⁸⁹ Nolan's appeal from this decision was consolidated with his original appeal⁹⁰ and came on for hearing before a panel of senior judges from other circuits sitting by designation.⁹¹

The panel saw no real issue on the question of whether it had jurisdiction to hear the appeal from the removal order. Noting that the council had taken the position in the mandamus proceeding that it would have such jurisdiction,⁹² the panel held:

We are not reviewing the action of the Court of Appeals, but, directly, of the district court. Admittedly we are reviewing indirectly the action of the Council The circuit council, while composed of judges, is an administrative body, and not a court. Reviewing the district court's May 2 order, which drew its substance from the Council's resolution, seems in no material respect different from reviewing a similar district court order which drew its substance from statutory provisions such as 11 U.S.C. §§ 557, 558. The latter task is our statutory duty under 11 U.S.C. § 47. At least in a situation where there is a district court order capable of being reviewed, we see no reason, in the absence of any statutory provision, why the Council's actions are untouchable except by the Supreme Court"⁹³

87. See 481 F.2d 41. Nolan was granted an interim stay of the removal order which was vacated after hearing. See 346 F. Supp. at 507. The order vacating the stay was affirmed by a panel of senior judges of the Third Circuit, see *id.*, and by the Supreme Court, 406 U.S. 956 (1972).

88. 409 U.S. 822 (1972).

89. 346 F. Supp. at 512.

90. See note 87 *supra*.

91. See note 4 *supra*. Although Nolan had moved to disqualify the judges of the Third Circuit, 346 F. Supp. at 507, that motion was never formally decided. Brief for Appellant at 13, *In re Imperial "400" Nat'l, Inc.*, 481 F.2d 41 (3d Cir. 1973). The judges of the Third Circuit, however, recused themselves, and the appeal was heard before a panel of senior judges from other circuits presumably designated pursuant to 28 U.S.C. § 294(d) (1970). This section provides in pertinent part: "The Chief Justice of the United States shall maintain a roster of retired judges of the United States who are willing and able to undertake special judicial duties from time to time outside their own circuit Any such retired judge of the United States may be designated and assigned by the Chief Justice to perform such judicial duties as he is willing and able to undertake in a court outside his own circuit Such designation and assignment to a court of appeals or district court shall be made upon the presentation of a certificate of necessity by the chief judge or circuit justice of the circuit wherein the need arises" *Id.* A judge sitting by designation has "all the powers of a judge of the court, circuit or district to which he is designated and assigned" 28 U.S.C. § 296 (1970).

92. 481 F.2d at 42.

93. *Id.* (citation omitted). 11 U.S.C. § 47 (1970) to which the court analogized provides in

Well aware that the Supreme Court had declined to permit the filing of a petition for mandamus or prohibition,⁹⁴ the panel undercut the other possible avenues of review, by affirming the dismissal of the district court mandamus action,⁹⁵ and by terming "unrealistic" a petition for rehearing to the council itself.⁹⁶

Having assumed jurisdiction, the panel thoroughly reviewed the case and found that "summary action by the Council was manifestly unnecessary."⁹⁷ While it agreed that the matter of conflict of interests was properly within the council's purview, the panel was disturbed by the fact that the council had acted on the basis of information that was both "inaccurate and incomplete,"⁹⁸ and by the feeling that the council's action too closely resembled a traditional judicial function. Suggesting that a more appropriate procedure would have been for the council to request a district court to hold a hearing on the issue of Nolan's continued service,⁹⁹ the panel remanded the case to the district court for a hearing on whether Nolan should be reinstated as counsel.¹⁰⁰

Judge Lumbard dissented on the ground that the council's order was binding on the district court,¹⁰¹ and attacked the assumption of jurisdiction by the majority:

It would be altogether incongruous for any lower court or single panel of judges in the Court of Appeals for the Third Circuit to pass upon whether what the council has done is a lawful and proper exercise of the council's powers. There is no statutory authority or precedent for such review.¹⁰²

Stating that the only options open to Nolan were to petition the council for a

pertinent part: "(a) The United States courts of appeals . . . are invested with appellate jurisdiction from the several courts of bankruptcy in their respective jurisdictions in proceedings in bankruptcy, either interlocutory or final, and in controversies arising in proceedings in bankruptcy, to review, affirm, revise, or reverse, both in matters of law and in matters of fact (b) Such appellate jurisdiction shall be exercised by appeal and in the form and manner of an appeal."

94. 481 F.2d at 42.

95. *Id.* at 42, 49.

96. *Id.* at 48 n.12. "The dissent's suggestion that Nolan might have asked for reconsideration by the Council, we regard as unrealistic. It is true that he could have asked. In the light, however, of the detailed response, ante, to Judge Shaw's letter protesting Nolan's removal without a hearing, we cannot think that a further request, however put, would have been productive." *Id.*

97. *Id.* at 47.

98. *Id.*; see note 14 *supra*.

99. 481 F.2d at 49. The court also mentioned the possibility of the council's conducting a hearing. There was precedent for this in the Third Circuit which held a hearing in 1950 concerning the refusal of a court reporter to make his financial records available to the Administrative Office. In *re Rodebaugh*, 10 F.R.D. 207 (3d Cir. 1950). There was also precedent in *Chandler* where the council planned, but did not hold a hearing. See text at note 57 *supra*.

100. 481 F.2d at 49.

101. *Id.* at 50.

102. *Id.* (dissenting opinion).

rehearing or the Supreme Court for a writ of prohibition or mandamus,¹⁰³ Judge Lombard argued that the judges of the Third Circuit should have heard the appeal en banc. "Thus the same judges making the order under attack would have heard the appeal. . . . The judges would be sitting in a dual capacity—as a court of appeals . . . and as the circuit council."¹⁰⁴

In Judge Lombard's view, the council was in the best position to determine what measures should be taken with regard to Nolan so that public confidence in the judicial system should be maintained.¹⁰⁵ For this reason he urged that the majority decision not be followed in other circuits:

Nothing could be more destructive of supervisory authority than to have cases such as this passed upon by circuit judges from another circuit. Subject only to corrective action by the Supreme Court, circuit council action should be followed by speedy compliance, as the statute contemplates; it should not be permitted to spawn litigation and delay beyond what the circuit council may determine to allow.¹⁰⁶

Notwithstanding Judge Lombard's admonition, it is submitted that the *Nolan* court judiciously resolved a difficult jurisdictional problem. Although there is no evidence that council determinations should be immune from review,¹⁰⁷ the problem remained that no tribunal possessed prima facie authority to review them. Justice Harlan had recognized this oversight in *Chandler*, and attempted to cure it by vesting jurisdiction for review in the Supreme Court.¹⁰⁸ In that Justice Harlan predicated Supreme Court jurisdiction upon his characterization of the councils as judicial, he was arbitrary. Clearly, a council does not function judicially in the sense that it serves as an impartial umpire adjudicating disputes between adversaries. Rather, a council is a protagonist. Its interest is the administration of the business of the courts and, as demonstrated by *Nolan*, this interest may at times conflict with the interest of an individual court officer or judge. Furthermore, a council's operating procedure is non-judicial in that it does not proceed by formal rules which would guarantee consideration of only relevant material.¹⁰⁹ As in *Nolan*, the council may operate ex parte on the basis of factually unverified material.

On the other hand, an intrinsic aspect of the council is its judicial personality. A primary purpose of the Administrative Office Act was to remove administrative control over the courts from outsiders and vest it in the judiciary.¹¹⁰ Moreover, to enforce its orders the council has relied upon voluntary compliance induced by the respect traditionally accorded appellate decisions by lower court judges.¹¹¹ However, while the respect accorded a circuit court has its roots in

103. Id.

104. Id. at 49 n.1.

105. Id. at 51.

106. Id. at 49-50 n.1.

107. See notes 50, 74 supra and accompanying text.

108. See notes 72-83 supra and accompanying text.

109. See notes 46-49 supra and accompanying text.

110. See note 32 supra and accompanying text.

111. See notes 43-45 supra and accompanying text.

the careful, thorough, orderly process of appellate review, the respect given a council is unrelated to the actual process by which a council's decisions are reached. In other words, by operation of statute, the council has been accorded the prestige and moral authority of the circuit court without the necessity of adhering to the procedures which gave rise to that prestige.

In short, the council is a paradox—an institution with administrative purposes and procedures which functions by virtue of judicial prestige. Justice Harlan's characterization of the council as *judicial* was clearly a legal fiction which ignored the unique character of the council in the interest of establishing a basis for appellate review by the Supreme Court. A characterization of the councils as *administrative* so that jurisdiction for review might be established under the Administrative Procedures Act¹¹² is equally arbitrary and raises the possibility that review would be vested in the district courts. At least two considerations would render this awkward if not impractical. First, the council is not an independent, co-equal branch of government, but is composed of circuit judges to whom district court judges traditionally defer. Second, district court judges are statutorily obligated to carry into effect the orders of the council.

The *Nolan* court avoided both of these pitfalls and established its jurisdiction by analogy to 11 U.S.C. § 47¹¹³ on the ground that there was a district court order subject to review by a circuit court. Although the court held that the council was "an administrative body, and not a court"¹¹⁴ this characterization was not offered as a basis for jurisdiction. Rather, it served to answer objections regarding hierarchical propriety, *i.e.* a circuit court reviewing a council would not be reviewing the actions of another circuit court but of a distinct body.

While vesting judicial review of a council's actions in the circuit court solved many problems, the problem remained that the circuit court and the circuit council were composed of the same individuals. As noted above, when the circuit judges sit as a council their primary concern is with the expedition of the business of the courts. To do their duty, they must be active administrators. Regardless of whether their sitting in judgment on their actions as an administrative council would violate 28 U.S.C. § 47¹¹⁵ or 28 U.S.C. § 455,¹¹⁶ as

112. 5 U.S.C. §§ 701-06 (1970). Section 702 provides: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." In the absence or inadequacy of a relevant statute, § 703 permits the maintenance of "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction."

113. See note 93 *supra*.

114. 481 F.2d at 42; see text at note 93 *supra*.

115. 28 U.S.C. § 47 (1970) provides: "No judge shall hear or determine an appeal from the decision of a case or issue tried by him."

116. 28 U.S.C. § 455 (1970) provides: "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, has been of counsel, is or has been a material witness, or is so related to or connected with any party or his attorney as to render it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein."

asserted by Nolan,¹¹⁷ for them to do so clearly is inconsistent with commonly accepted notions of judicial impartiality and non-involvement. This dilemma was avoided in *Nolan* by the recusal of the judges of the Third Circuit and the designation of judges from outside the circuit.¹¹⁸ Contrary to Judge Lumbard's position,¹¹⁹ this solution has the advantages of assembling a tribunal uniquely qualified to consider a conflict involving a circuit council while preserving public confidence in the impartiality of the judiciary. A further practical advantage is that the problem is resolved by judicial proceedings at the circuit level, thus bringing the conflict back within the judicial mainstream and providing a record for eventual review by the Supreme Court. This approach is entirely consistent with the decentralized spirit of administration by judicial council. However, since 28 U.S.C. § 294(d)¹²⁰ conditions the assignment of a judge from outside the circuit upon the presentation of a certificate of necessity by the chief judge or circuit justice of the circuit, there is no requirement that a circuit council adhere to this precedent.

Given the pervasive authority of judicial councils (which is unlikely to be diminished by either Congress¹²¹ or the courts¹²²), a system of judicial review of their actions is required to preserve due process and public confidence in the judiciary. *Nolan* provides a pragmatic procedure for such review. Since a chief judge is not required to request the assignment of judges from outside the circuit, and since in every case there may not be an intervening district court order to provide a jurisdictional foundation, it would be desirable for Congress to codify the procedure evolved in *Nolan* and thereby establish a uniform statutory procedure.

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117. Petitioner's Motion, *supra* note 2, at 29.

118. See note 91 *supra*.

119. See text at note 106 *supra*.

120. See note 91 *supra*.

121. Congress held extensive hearings on judicial administration including the functioning of judicial councils in 1970. See *The Independence of Federal Judges*, *supra* note 29. As a result of these hearings, 28 U.S.C. § 332 was amended to provide for a circuit executive who would aid a council in its administrative functions. 28 U.S.C. § 332(e) (1970).

122. The court in *Nolan*, for example, dismissed the constitutional challenge to § 332 almost summarily: "It cannot be unconstitutional to authorize the courts to manage their own business." 481 F.2d at 45.