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DIRECT APPEALS FROM THREE-JUDGE COURTS

MTM, Inc. v. Baxley, 420 U.S 799 (1976)

The Supreme Court held last term in *MTM, Inc. v. Baxley*[1] that direct appeals to the Supreme Court under 28 U.S.C. § 1253[2] would lie only when the three-judge panel below[3] rendered a decision upon the constitutional merits of the claim.

Appellant was an Alabama corporation which owned the Pussycat Adult Theater in Birmingham, Alabama. The Pussycat Theater had been convicted of violating local obscenity statutes. As a result of these violations, the state of Alabama moved to have the theater closed down as a nuisance.[4] A state court issued a temporary injunction to close down the theater.

While action on a permanent injunction was pending in state court, MTM filed an action under 42 U.S.C. § 1983 in the United States District Court for the Northern District of Alabama to have the Alabama nuisance law declared unconstitutional as violative of the first, fifth, and fourteenth amendments and to enjoin enforcement of the temporary injunction.

In compliance with 28 U.S.C. § 2281,[5] a three-judge district court was convened. This panel, however, never reached the merits of MTM's constitutional claims. Rather, the court utilized the abstention test set out in *Younger v. Harris.*[6] The district court found that while the *Younger* doctrine had originally been applicable only in suits challenging state criminal statutes, it would be proper to apply it to this civil litigation.[7]

Appellent carried its appeal directly to the Supreme Court under section 1253, which provides that

> any party may appeal to the Supreme Court from an order granting or denying . . . an . . . injunction in any civil action . . . required . . . to be heard and determined by a district court of three judges.[8]

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[1] 420 U.S. 799 (1975).

[2] *See* note 8 *infra.*

[3] Three judges are required to hear requests for injunctions where a state (28 U.S.C. § 2281 (1970)) or federal (28 U.S.C. § 2282 (1970)) statute is challenged on a constitutional basis. These panels are also available at the request of the United States Attorney General pursuant to the Voting Rights Act of 1965, 42 U.S.C. § 1971(g) (1970) and the Civil Rights Act of 1965, 42 U.S.C. §§ 2000a-5(b), e-6(b) (1970). Also, three-judge courts are required to hear actions challenging the appointment of the attorney general on grounds of violation of constitutional provisions governing compensation and other emoluments (28 U.S.C. § 2284 (Supp. III, 1973)), final rail consolidation plans (45 U.S.C. § 719(b) (Supp. III, 1973)), and relief under and suits contesting the Presidential Election Campaign Fund Act, 26 U.S.C. §§ 9010(c), 9011(b)(2) (Supp. III, 1973).

Until the last session of Congress, three-judge district courts heard ICC cases (Act of Oct. 22, 1913, ch. 32, 38 Stat. 220), and some antitrust cases (Act of Feb. 11, 1903, ch. 544, § 1, 32 Stat. 823).

[4] Alabama's nuisance law defines a nuisance as "any place . . . upon which lewdness, assignation, or prostitution is conducted, permitted, continued, or exists, and the personal property and contents used in conducting or maintaining any such place for any such purpose." ALA. CODE tit. 7, § 1091 (1958).

[5] The full text of section 2281 is:

> 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 unconstitutionality of such statute unless the application therefore is heard and determined by a district court of three judges under section 2284 of this title.

28 U.S.C. § 2281 (1970).

[6] 401 U.S. 37 (1971). *Younger* and several cases handed down the same day effectively restricted the scope of federal court jurisdiction in passing on the constitutionality of state criminal statutes. Federal courts were required to abstain from hearing such claims when there was a pending criminal action in state court except upon a showing of irreparable, great, and immediate injury if the court abstained, 401 U.S. at 46, or bad faith and harassment by state officials, *Id.* at 49. Prior to *Younger,* the abstention doctrine from Railroad Comm'n v. Pullman Co., 312 U.S. 496 (1941), required that the federal court retain jurisdiction while the state issues were tried in the state court. *Younger* requires a complete dismissal by the federal court.

[7] General Corp. v. Sweeton, 365 F. Supp. 1182 (M.D. Ala. 1973). The district court expanded upon the scope of the *Younger* language, which had been limited to pending criminal actions, 401 U.S. 37, 55 (Stewart & Harlan, JJ., concurring), to include nuisance actions, which are civil in nature.

[8] The full text of section 1253 is:

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

28 U.S.C. § 1253 (1970).

Before the Court, appellant challenged the validity of the lower court's application of the *Younger* abstention doctrine to the instant case.

The Supreme Court rendered a per curiam decision, with Justice White concurring in the result and Justice Douglas dissenting. The Court's holding failed to reach the abstention issue, but rested instead upon a flaw in the act of appeal. The Court interpreted section 1253 to allow direct appeals to the Court after the denial of an injunction only when the denial is based upon the three-judge panel's adjudication of the merits of the constitutional claim presented. If the three-judge panel fails to reach the merits of a plaintiff's claim, then a party's recourse is not directly to the Supreme Court, but rather via the general appeals route through the court of appeals.[9]

Appellant claimed the benefit of section 1253's direct appeal on the basis that the district court's abstention on *Younger* grounds was "an order . . . denying . . . an injunction" just as surely as a decision denying an injunction on the merits would have been.[10] The Court rejected this straightforward logic, relying on its decision in *Gonzalez v. Automatic Employees Credit Union.*[11] In *Gonzalez,* direct appeal to the Supreme Court under section 1253 was not permitted for two reasons, neither of which was clearly explained. First, the constitutional merits of the case had never been reached, and the Court thus held that the appeal must go through the court of appeals, rather than directly to the Supreme Court by section 1253.[12] Alternately, the Court found that since the appellant lacked standing *ab initio,* section 1253 did not come into play and the proper route was through the court of appeals.[13] By such reasoning, the Court sidestepped a direct confrontation on the question of what constituted a "denial" of an injunction under section 1253.

The Court in *MTM* rested its reasoning upon the groundwork laid by *Gonzalez* in restricting direct appeals from three-judge determinations.[14] The Court thus extended the reasoning outlined in *Gonzalez* to a case that, absent the abstention doctrine, would have had its constitutional claims adjudicated, holding that

> a direct appeal will lie to this Court under § 1253 from the order of a three-judge federal court denying interlocutory or permanent injunctive relief *only when such order rests upon resolution of the merits of the constitutional claim presented below.*[15]

In bootstrapping itself so, the Court admitted its decision might be contrary to past authority, although it added that past decisions were somewhat in conflict.[16] The Court maintained that its restricted reading of section 1253 would not impinge upon the original purpose Congress had envisioned for three-judge courts.[17] On the contrary, a broad reading of the section would "be at odds with the historic congressional policy of minimizing the mandatory docket of this Court,"[18] and would hamper the effective workings of the Court by distending its workload.

Section 1253 was originally passed to placate increased resentment by states against the actions of single judge district courts. At the turn of the century, a great number of state taxation and regulatory measures were held unconstitutional by a single judge district court, who then issued injunctions to restrain their enforcement.[19] Following the validation of this procedure by the Supreme Court in *Ex parte Young,*[20] Congress provided for the establishment of three-judge panels to hear such claims of unconstitutionality. It was felt that the use of three judges, at least one of whom would be of circuit court rank, would eliminate the possibility of capricious action by a single judge, pool the knowl-

[9] "The courts of appeals shall have jurisdiction of appeals from final decisions of the district courts . . . except where a direct review may be had in the Supreme Court." 28 U.S.C. § 1291 (1970).

[10] 420 U.S. at 802.

[11] 419 U.S. 90 (1974).

[12] *Id.* at 101.

[13] *Id.*

[14] 420 U.S. at 802–03.

[15] *Id.* at 804 (emphasis added).

[16] *Compare* Lynch v. Household Finance Corp., 405 U.S. 538 (1972), *with* Mitchell v. Donovan, 398 U.S. 427 (1970); Rosado v. Wyman, 395 U.S. 826 (1969); Mengelkoch v. Industrial Welfare Comm'n, 393 U.S. 83 (1968).

[17] In *Gonzales* the Court declared: "Congress established the three-judge-court apparatus for one reason: to save state and federal statutes from improvident doom at the hands of a single judge." 419 U.S. at 97.

[18] 420 U.S. at 804.

[19] In the Senate debates caused by the actions of federal district courts, Senator Overman of North Carolina stated that:

> I saw in Moody's Magazine last week that there are 150 cases of this kind now where one federal judge has tied the hands of state officers, the governor and the attorney-general . . . . My experience is that the State is sometimes delayed a solid year in collecting taxes . . . Whenever one judge stands up in a State and enjoins the governor and the attorney-general, the people resent it, and public sentiment is stirred, as it was in my State . . . and you find the people of the State rising up in rebellion.

45 CONG. REC. 7256 (1910) (remarks of Senator Overman).

[20] 209 U.S. 123 (1908). The Supreme Court held that the eleventh amendment was not a bar to injunctive relief in federal courts against unconstitutional state activities.

edge of the three judges in such delicate cases, and receive greater respect from the state agencies and officials at whose actions its decision would be directed.[21] When the Court and Congress clashed over controversial legislation in the 1930's, three-judge jurisdiction was extended to constitutional challenges of federal statutes.[22]

Over time, the reasons behind the establishment of the three-judge court have disappeared. In 1912, equity rules for the federal courts were promulgated which greatly restricted the circumstances under which injunctions could be issued.[23] Furthermore, subsequent Congressional legislation prohibited the courts from enjoining certain types of state activity.[24] The increasing scope of the federal court's abstention doctrine further undermined the need for three judges.[25] Ultimately, Congress began to repeal some of the acts which form the jurisdiction of the three-judge courts.[26] Thus, the Court reasoned that, insofar as the original purpose of the act was to save "state and federal statutes from improvident doom by a single judge,"[27] the constricted reading placed upon section 1253 was not in conflict with those original purposes. As a consequence, such procedural pitfalls in three-judge litigation as justifiability, subject matter jurisdiction, standing, and abstention are no longer directly appealable to the Supreme Court.

[21] During the Senate debates, Senator Bacon said that if three judges were to pass upon the constitutionality of the statute,

> the officers of the state would be less inclined to resist the orders and decrees of our Federal Courts. The people and courts of the state are more inclined to abide by the decision of three judges than they would of one subordinate Federal judge.

42 CONG. REC. 4853 (1908) (remarks of Senator Bacon). *See also* Note, *The Three-Judge Court Reassessed: Changing Roles in Federal-State Relationships*, 72 YALE L. J. 1646, 1652–53 (1963); Letter of Anthony Amsterdam to House Subcommittee on Courts, Civil Liberties, and the Administration of Justice, *Hearings on S. 271 and H.R. 8285 Before the Subcomm. on Courts, Civil Liberities, and the Administration of Justice of House Comm. on the Judiciary*, 93d Cong., 2d Sess. 122–24 (1974) [hereinafter cited as *House Hearings*].

[22] 28 U.S.C. § 2282 (1970).

[23] Equity Rule 73, 198 F. xxxix (1912), *currently* FED. R. CIV. P. 65(b).

[24] 28 U.S.C. § 1341 (1970) prohibits federal courts from restraining state rate fixing actions, while 28 U.S.C. § 1342 (1970) prohibits federal courts from restraining state tax collections.

[25] *See* Huffman v. Pursue Ltd., 420 U.S. 592 (1975) (abstention doctrine extended to civil action); Younger v. Harris, 401 U.S. 37 (1971). *See also* note 6 *supra*.

[26] *See* note 3 *supra*.

[27] Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 97 (1974).

Justice White, while concurring with the result, was unable to accept the Court's construction of "the plain terms of § 1253."[28] The Justice agreed with the majority that it was judicially wasteful and inconsistent with the purpose of the direct appeals act to hear issues which had "little if any connection with the reasons for requiring either three-judge courts or direct review of their decisions."[29] However, he felt that the correct approach would be one that restricted those issues which the three-judge court would be called upon to decide. Justice White reasoned that 28 U.S.C. §§ 2281, 2284, the legislative provisions which authorize three-judge adjudication of the controversies in question, should be construed to apply "only to orders granting or denying . . . injunctions where the constitutionality of the state statute is involved."[30] Under such a construction, the procedural and jurisdictional contentions would be first sorted out by a single district court judge or, if decided by a three-judge court, would be "deemed" to be made by a single judge court.[31] In either situation, the decision would be appealable only to the court of appeals. This was preferable to the majority's approach since "the result of the Court's holding is to require a three-judge court to pass on *Younger v. Harris* issues *and* to direct appeals . . . [to] be heard again by three judges. This is an exorbitant expenditure of judicial manpower . . . "[32]

Justice Douglas, in dissent, agreed with Justice White that the plain terms of section 1253 allowed direct appeals to the Supreme Court upon the dismissal of an action before a three-judge court.[33] However, Justice Douglas attacked what he conceived to be the true reason for the result—the Court's increasing hostility to three-judge district courts. The Justice agreed with the majority that three-judge courts have outlived their original purpose and are an expensive use of judicial resources. Nonetheless, Justice Douglas pointed out that they are becoming an increasingly important input forum for civil rights and welfare litigants.[34] The Justice also stated that "three judges may well display more sensitivity to national policies and perspectives than would a single judge. . . . "[35]

Moreover, Justice Douglas found that the determi-

[28] 420 U.S. at 805.

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] *Id.* at 807.

[33] *Id.*

[34] *Id.* at 808.

[35] *Id.*

nation of the Court's jurisdiction is Congress's responsibility rather than the Court's.[36] Some cases had become fragmented into many disparate parts as a result of the Court's interfering with its with own jurisdiction, "making it difficult for courts to resolve issues in a way which takes into account all relevant aspects of the lawsuit."[37]

MTM, Inc. v. Baxley is the latest in a series of recent Supreme Court rulings which effectively limit either the availability of three-judge panels or the direct appealability of their decisions to the Supreme Court.[38] The result of this latest decision is to route appeals from three-judge final determinations which fail to reach the constitutional merits through the court of appeals, rather than the Supreme Court.

There are two further ramifications of this decision. First, the ultimate time required to reach a final decision will be appreciably lengthened. This is further clouded by the uncertainty whether procedural issues must be heard by three-judge panels or may be screened by a single judge as suggested by Justice White. In either route, the appeals process becomes further attentuated, distorted, and unclear.

Second, the burden on the Court's docket from section 1253 appeals will be lessened. Although the total number of three-judge cases and section 1253 appeals to the Supreme Court are relatively minute,[39] a surprisingly hefty amount of the cases set for oral argument before the Court come from this pool of three-judge holdings.[40]

Disregarding their origin, there is inefficiency, wastefulness, and redundancy in having three judges try these cases. Moreover, severe logistical impediments exist in convening three-judge panels in the more sparsely populated regions of the nation.[41] Given the increasing number of cases filed in federal courts, the utilization of three judges to try one case is a flagrant abuse of judicial time and resources.[42] Finally, as a result of the burdens arising from the convening of three-judge panels, these courts have a disturbing tendency to attempt to carry on their work by mail—to try the case on paper, instead of in the courtroom.[43] These considerations argue for the elimination of the three-judge panel.

There exists a chicken and egg controversy in the theories attempting to explain the exponential increase in civil rights litigation before three-judge district courts.[44] One argument is that the increase solely reflects the general increase in civil rights cases.[45] A second argument finds the reason for the increase from active attempts to get before the three-judge forum.[46] Attorneys may attempt to gain a three-judge court for several possible reasons. Many commentators feel that three-judge panels, despite their clumsiness and inefficiency, provide a better forum than a single judge court for the hearing of constitutional issues.[47] Since the three-judge panel represents a broader spectrum of experience and background, it may also be less prone to reflect or reinforce prejudices which, on occasion, exist in some locales.[48] Moreover, the use of multiple judges will tend to provide a panel more aware of and responsive to national considerations, exigencies, and goals.[49]

[36] "In all other Cases before mentioned [not those of original jurisdiction], the Supreme Court shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art. III, § 2, cl. 2.

[37] 420 U.S. at 809. *See also* Parks v. Harden, 504 F.2d 861, 865-67 (5th Cir. 1974).

[38] *See* Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90 (1974); Hagans v. Lavine, 415 U.S. 528 (1974).

[39] There were 249 three-judge panels in 1974. 2 DIR. ADM. OFF. UNITED STATES COURTS ANN. REP. 241 (1974) [hereinafter cited as 1974 ANN. REP.]. Moreover, ICC rulings and antitrust actions will no longer have to be heard by three judges. *See* note 3 *supra*. At the same time, 143,284 cases were filed in federal district courts. 1974 ANN. REP. at 200. Only 3 per cent of the cases filed with the Supreme Court in 1972 were from three-judge courts. *House Hearings, supra* note 21, at 12 (testimony of Judge J. Skelley Wright).

[40] Twenty-two per cent in 1972. *House Hearings, supra* note 21, at 104 (testimony of Edmond D. Campbell on behalf of the American Bar Association).

[41] For instance, in order to convene a three-judge district court for a constitutional challenge in Billings, Montana, one judge would be from Billings; the closest district judge, if available, would be in Missoula, Montana, approximately 300 miles distant; and the circuit judge would be in Portland, Oregon, 700 miles distant.

[42] The number of cases filed in United States District Courts in 1960 was 89,112. The number of cases filed in United States District Courts in 1974 was 143,284. 1974 ANN. REP., *supra* note 39, at 200.

[43] *Hearings on S. 1876 Before the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary*, 92d Cong., 2d Sess. 763, 767 (1972) (testimony of Charles Alan Wright).

[44] In 1963, there were nineteen civil rights suits tried before three-judge panels (out of a total of 129). In 1974, there were 171 civil rights suits tried before three-judge panels (out of a total of 249). 1974 ANN. REP, *supra* note 39, at 241.

[45] Anytime a substantial constitutional claim is made against a statute, it automatically goes before three judges, subject to various preliminary hurdles. *See* text accompanying notes 51-64 *infra; House Hearings, supra* note 21, at 15 (testimony of J. Skelly Wright).

[46] *House Hearings, supra* note 21, at 145 (testimony of Nathaniel Jones, General Counsel of the NAACP).

[47] *See* note 21 *supra*.

[48] *Id.*

[49] *Id.*

Thus, while the original rationale for convening three-judge courts no longer exists, the underlying considerations which made the institution originally valuable are still retained by the needs of current civil rights and welfare litigants.

Following the decision in *MTM*, two threshold barriers must be surmounted before direct appeal is available from a three-judge decision. The first is a finding of substantiality (a substantial constitutional question) and equitable jurisdiction by the single judge district court. The second is the generally encountered procedural and jurisdictional pitfalls of litigation.[50] The bare language of sections 2281 and 2282 require the convening of a three-judge court whenever any constitutional claim against a statute has been made. Nevertheless, the Supreme Court has construed the language to require the single judge court to first make a battery of determinations. First, the single judge is required to find that a substantial constitutional question is presented.[51] Conversely, it must then be found that the complained of statute is not obviously unconstitutional.[52] Since three-judge panels are required only in constitutional claims requesting an injunction, an historical instrument of equity,[53] equitable jurisdiction must be properly alleged.[54] Finally, it must be determined that the other requirements of sections 2281 and 2282 have been fulfilled.[55]

"Substantiality" and "obviously unconstitutional" have not been given clear constructions by the Court. The substantiality doctrine was originally introduced to conserve judicial resources by disposing of frivolous constitutional claims used to secure delay or a federal forum.[56] A substantial constitutional question is presented if there is at least some metit to the constitutional allegations.[57] Likewise, the doctrine of "obvious unconstitutionality" is designed to conserve judicial resources where "prior decisions make frivolous any claim that a state statute on its face is not unconstitutional."[58]

Equitable jurisdiction for three-judge district courts requires that the single judge find that the complaint (1) seeks either a temporary or permanent injunction, and (2) displays either a lack of an adequate remedy at law or an irreparable injury, or the existence of other special circumstances that warrant injunctive relief.[59] If the pleadings inadequately allege the above factors, one judge may dismiss the action without convening a three-judge district court.

Sections 2281 and 2282, as construed by the courts, also require that the unconstitutionality of the contested statute be alleged;[60] that it is a federal or state statute or administrative order being contested;[61] and that a state officer be made a party in challenging a state act.[62] Again, if a complaint lacks any of these items, the single judge will dismiss the action. Moreover, after *Hagans v. Lavine*,[63] any statutory challenge is generally adjudicated by a single judge prior to a hearing on the constitutional merits before three judges.

Consequently, before a single judge will convene three judges, it is first necessary that the single judge find that (1) the plaintiff's constitutional claim is substantial; (2) the defendant's constitutional claim is not obviously frivolous; (3) there is not a concurrent statutory attack which should be heard first; (4) equitable jurisdiction has been properly alleged; (5) the attacked statute or administrative order is of sufficient geographical scope; and (6) a state officer has been made a party to the litigation against a state action. After these preliminary questions have been correctly determined, the first barrier has been successfully hurdled. Yet, a greater barrier lies ahead, after the case has reached the three-judge court.[64]

[50] *See* text accompanying notes 65–67 *infra*.

[51] *Ex parte* Poresky, 290 U.S. 30, 32 (1933).

[52] Bailey v. Patterson, 369 U.S. 31, 33 (1962).

[53] 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1184 (14th ed. 1918).

[54] Idlewild Liquor Corp. v. Epstein, 370 U.S. 713, 715 (1962).

[55] *Id.*

[56] *Ex parte* Poresky, 290 U.S. 30 (1933).

[57] Note, *The Three-Judge Court Act of 1910: Purpose, Procedure and Alternatives*, 62 J. CRIM. L. & C. 205, 208 (1971).

[58] Bailey v. Patterson, 369 U.S. 31, 33 (1962).

[59] *See* Public Service Comm'n v. Wycoff Co., 344 U.S. 237 (1952); Toomer v. Witsell, 334 U.S. 385, 390–91 (1948); Ayrshire Collieries Corp. v. United States, 331 U.S. 132, 140–41 (1947).

[60] *See* note 3 *supra*.

[61] 28 U.S.C. § 2281 (1970). A corollary of this requirement is that the challenged statute or order must not only be an enactment of the state, but also, be of "general application." That is, that it affects all of the state or discrete portions of it. *Ex parte* Collins, 277 U.S. 565 (1925). This effectively exempts all municipal ordinances and some state laws.

[62] This is a corollary to the general application concept, note 61 *supra*. Since only widely applied state statutes and regulations are covered by the act, a "state" officer is required to be a party. However, it is possible for a local official to act as a "state" officer. City of Cleveland v. United States, 323 U.S. 329 (1945).

[63] 415 U.S. 528. *See* note 38 *supra*.

[64] If any of these first level criteria have not been fulfilled or if the district court has erred in determinations of them, appeal is to the court of appeals, rather than the Supreme Court. *See* note 9 *supra*.

Once the three-judge panel is convened, it is the panel's duty to pass on the standing of the parties, the justiciability of the question presented, the existence of subject matter jurisdiction of the question, the advisability of abstaining from hearing the merits,[65] and other similar procedural and jurisdictional questions.

Prior to *Gonzalez*[66] it was generally held that decisions on such procedural and jurisdictional issues were directly appealable to the Supreme Court under section 1253, since they effectively denied the requested injunction. *MTM* cleared the murkiness of the edges of the *Gonzalez* decision[67] by holding that none of these three-judge findings are directly appealable to the Supreme Court.

Therefore, *MTM* answered one of the complaints against three-judge district courts: that they detract from the Supreme Court's ability to deal with the plethora of major issues presented before it each term.[68] However, the convoluted appellate procedure, which currently accompanies three-judge adjudications, has been further attenuated. It is possible to become entwined in an appellate procedure leading parties through eight courts.[69]

Following the decision in *Younger v. Harris,*[70] which generally required federal courts to abstain from hearing challenges to state criminal statutes,[71] the three-judge district court was an institution of little impact in the field of criminal law. Currently, the federal criminal statutes are only rarely the target of constitutional attack. However, if Congress succeeds in passing the codification of the federal criminal laws, commonly referred to as S. 1,[72] then it is quite likely that the Supreme Court's decision in *MTM, Inc. v. Baxley* will have serious repercussions upon attempts to challenge the constitutionality of the more controversial sections of the new code.

The criminal provisions of the *United States Code* have never before been codified. Congress is now making an attempt at codification (S. 1). Not only will the new code, if passed, bring order to the criminal provisions currently scattered throughout the code, it will make substantive changes in the federal criminal law. Of these changes, some, such as the disclosure and criminal liability provisions concerning government documents and information, are controversial and potentially plentiful sources of future constitutional litigation.[73] Thus, if S. 1 is passed by Congress, the three-judge panel will be of increased interest to the criminal lawyer. As a consequence, the holding of *MTM, Inc. v. Baxley* will be of interest as it will impede the swift appeal of such litigation to the Supreme Court.

The result of the Supreme Court's decision in *MTM, Inc. v. Baxley* is to allow direct appeals to the Supreme Court under section 1253 only when the three-judge decision has been on the constitutional merits. If the three-judge court rests its determination on procedural or jurisdictional grounds, the losing party must pursue a prolonged and potentially tortuous path of litigation stretching from a single judge district court to a three-judge district court to a single judge district court to the court of appeals and, ultimately, to the Supreme Court. *MTM, Inc. v. Baxley* represents the latest attempt by the Supreme Court to actively dissuade potential litigants from utilizing the vehicle of three-judge courts by artificially elongating the appellate process.

[65] Lynch v. Household Financial Corp., 405 U.S. 538, 541 n.5 (1972).

[66] Gonzalez v. Automatic Employees Credit Union, 419 U.S. 90, 95 (1974).

[67] The uncertainty as to whether both the alternative grounds for the *Gonzalez* decision were necessary to the result or whether each of the above was self-sufficient. 420 U.S. at 804. The conflicting grounds are discussed in the text accompanying note 11 *supra.*

[68] Chief Justice Burger speaking to the Judicial Conference in 1972, 58 A.B.A.J. 1049, 1053 (1972).

[69] For an in depth analysis of the potential procedural pathways see Note. *The Three-Judge Court of Act of 1910: Purpose, Procedure and Alternatives,* 62 J. CRIM. L. & C. 205, 213–17 (1971).

[70] 401 U.S. 37; *see* note 6 *supra.*

[71] *Id.*

[72] S. 1, 94th Cong., 1st Sess (1975).

[73] Section 1124 of the proposed code states:

Disclosing Classified Information.

(a) Offense—A person is guilty of an offense, if, being or having been in authorized possession or control of classified information, or having obtained such information as a result of his being or having been a federal public servant, he communicates such information to a person who is not authorized to receive it.

See generally Washington Post, Sept. 29, 1975, at 1, col. 7.