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Revolutions, like screwdrivers, come in various sizes. The revolution I mean to discuss is one of the smaller ones, even by Supreme Court standards. Gradually and quite unobtrusively it has arrived just one step short of completion. Lawyers ought to be aware of it, yet the Court has done its best to pretend that nothing has happened.

When Congress in 1910 required the convening of an extraordinary three-judge district court in suits to enjoin the enforcement of unconstitutional state laws, it provided a direct appeal to the Supreme Court from three-judge decisions granting or denying injunctions,[1] but it apparently gave no thought to the question of appellate review of the decision whether or not three judges were required. The statute having proved less than self-administering in this regard,[2] the Court was soon confronted with a number of requests for relief against the decision of a single trial judge that three judges were not called for. The Court devised a clear remedy: If a single judge granted or denied an interlocutory injunction,[3] entered a final judgment,[4] or simply denied a request for three judges and held the case for future disposition,[5] there was no appeal either to the Supreme Court or to the Court of Appeals, for the former was open only when three judges had heard the case and the latter only if three judges were not required. The frustrated litigant therefore was to seek a writ of mandamus from the Supreme Court.[6]

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1 Act of June 18, 1910, ch. 309, § 17, 36 Stat. 557 (codified at 28 U.S.C. §§ 1253 (direct review), 2281 (three judges) (1964)). The same procedures were extended to suits attacking federal statutes by Act of Aug. 24, 1937, ch. 754, § 3, 50 Stat. 752 (codified at 28 U.S.C. § 2282 (1964)).

2 *See generally* D. Currie, *The Three-Judge District Court in Constitutional Litigation*, 32 U. CHI. L. REV. 1 (1964).

3 *Ex parte* Metropolitan Water Co., 220 U.S. 539 (1911).

4 *Ex parte* Northern Pacific Ry., 280 U.S. 142 (1929).

5 *Ex parte* Bransford, 310 U.S. 354 (1940).

6 The argument was most plainly spelled out in Stratton v. St. Louis S.W. Ry., 282 U.S. 10 (1930), and in *Ex parte* Metropolitan Water Co., 220 U.S. 539 (1911).

That this interpretation of the statute was correct is by no means clear. In the first place, the statute seems to contemplate an appeal to one or another court from any final judgment and from any order granting or denying an interlocutory injunction.[7] Second, the statute literally seems to say that whether appeal is taken to the Supreme Court or to the Court of Appeals depends on whether three judges were required, not on whether three judges actually sat, and in any event the statute does not suggest, as the Court did, that one court's jurisdiction is determined by the former standard and the other's by the latter. Third, if the Court was right that there was no appeal and that mandamus accordingly was the right remedy, it is not obvious that this writ should be sought in the first instance from the Supreme Court rather than from the Court of Appeals. Yet there was something to be said for the Supreme Court's initial interpretation. The appeal framework was obviously designed with the merits in mind, and to make the jurisdiction of the appellate court to determine whether three judges are required turn on the merits of that question would cause a waste of resources, as illustrated by the *Idlewild* case discussed below. Finally, the All Writs statute authorizes federal courts to issue mandamus only "in aid of their respective jurisdictions."[8] Since cases required to be heard by three judges come ultimately within the appellate purview of the Supreme Court and not of the Courts of Appeals, only the Supreme Court's jurisdiction is aided by the grant of mandamus to convene the special court.

Things went merrily along under this scheme for nearly forty years. Then, in *Idlewild Bon Voyage Liquor Corp. v. Epstein*,[9] a lone trial judge abstained pending state-court resolution of issues in a case appropriate for three judges.[10] An appeal was taken to the Court of Appeals, which held that the decision to abstain was one that could be made only by three judges, and therefore, in accord with the Supreme Court's stated procedure, that the Court of Appeals lacked jurisdiction to review the decision.[11] The trial judge viewed the Court of Appeals' statement that three judges were required as dictum and refused again to

7 *See* 28 U.S.C. §§ 1291, 1292 (Courts of Appeals have jurisdiction over all final decisions and over interlocutory orders granting or refusing injunctions, "except where a direct review may be had in the Supreme Court"), § 1253 (appeal to Supreme Court from orders granting or denying interlocutory or permanent injunctions in any suit "required . . . to be heard and determined by a district court of three judges") (1964). The original statutes were similar.

8 28 U.S.C. § 1651 (1964).

9 370 U.S. 713 (1962), *remanding* Idlewild Bon Voyage Liquor Corp. v. Rohan, 289 F.2d 426 (2d Cir. 1961).

10 Idlewild Bon Voyage Liquor Corp. v. Rohan, 188 F. Supp. 434 (S.D.N.Y. 1960).

11 Idlewild Bon Voyage Liquor Corp. v. Rohan, 289 F.2d 426 (2d Cir. 1961).

call for a special court.[12] The Supreme Court was asked for certiorari to review the Court of Appeals and for mandamus to require the convening of three judges.

The Supreme Court studiously avoided saying anything relevant except that three judges were in fact required. The brief opinion did cast some cold water on the Court of Appeals' position, pointing out that the principal precedent relied on by that court[13] had held only that a Court of Appeals lacked power to review *on the merits* and had not held the Court of Appeals "powerless ever to give any guidance when a single judge has erroneously invaded the province of a three-judge court."[14] This was true enough as to holding,[15] though the opinion had very plainly said the sole remedy for the refusal to call three judges was mandamus in the Supreme Court, and the *Idlewild* opinion, after declaring precedent not decisive, stopped short of saying what the powers of the Court of Appeals actually were. By no means did the Court intimate that it was changing the law of appellate review.

Five years later the following memorandum appeared as the Supreme Court's full opinion (apart from a one-line dismissal of the appeal) in a case called *Schackman v. Arnebergh*:[16]

> Appellants seek review by this Court of the refusal by the District Court to convene a three-judge District Court pursuant to 28 U.S.C. §§ 2281-2284. We have held that such review is available in the Court of Appeals, *Idlewild Bon Voyage Liquor Corp. v. Epstein*, 370 U.S. 713, and not in this Court. *Buchanan v. Rhodes*, 385 U.S. 3.

This was interesting indeed. It was nice to know that *Idlewild* had upheld the power of the Court of Appeals, since the Court in *Idlewild* had not bothered telling us what it was doing. It was also interesting to discover that a subsequent decision had held the Supreme Court could no longer review the refusal to convene three judges, for that meant that somewhere along the line the Court had overruled forty years of precedents without ever saying a word about it.

Buchanan v. Rhodes,[17] on which the Court relied in dismissing the *Schackman* appeal, is a shorter opinion than *Schackman* itself: "The motion to dismiss is granted and the appeal is dismissed for want of

12 194 F. Supp. 3 (S.D.N.Y. 1961).

13 Stratton v. St. Louis S.W. Ry., 282 U.S. 10 (1930).

14 370 U.S. 713, 716 (1962).

15 The single district judge in Stratton v. St. Louis S.W. Ry., 282 U.S. 10 (1930), had dismissed on the merits; the Court of Appeals had ordered him to grant the injunction; the Supreme Court reversed and sent the case back for trial before three judges.

16 387 U.S. 427 (1967).

17 385 U.S. 3 (1966).

jurisdiction." Such a disposition is scarcely calculated to inform the Bar of a sweeping change in appellate procedure, but there it is. Presumably we are expected to have divined this switch from reading *Idlewild,* for that decision, as we were later to be told for the first time in *Schackman,* held that the Court of Appeals could review the denial of three judges. It was after all only because the Courts of Appeals lacked that power that the Supreme Court had earlier said mandamus was available; affirming the power of the Courts of Appeals therefore removed a necessary prop from the argument for Supreme Court review. This projection would not have been too much to expect the lawyers to make if the Court had not gone to such lengths in *Idlewild* to pretend it was saying nothing new about the powers of the Courts of Appeals.

The lower-court opinion in *Buchanan*[18] reveals that the trial judge had dismissed a suit to reapportion state judgeships on the dual grounds that the controversy was political and that the complaint failed to state a claim on which relief could be granted. Thus the Supreme Court seems finally to have rejected the untenable distinction drawn by the Second Circuit in *Idlewild,* which allowed the Court of Appeals to review a single-judge dismissal for lack of jurisdiction but not a single-judge dismissal on the merits.[19] After *Buchanan,* it seems, the Court of Appeals is to review any appealable judgment entered by a single judge, and to order a special court convened if the judge erred in not calling for one.[20]

The Court's statement in *Schackman* is broader still, purporting to allow Court of Appeals review of any "refusal . . . to convene" the special court. The trial judge's opinion, however,[21] shows that as in both *Idlewild* and *Buchanan* the district judge had entered an appealable order, this time a dismissal apparently on the basis that no substantial federal question was presented. Thus it might be premature to take the *Schackman* statement at face value; the Court was not there called on to decide whether or not it still had authority to issue mandamus to a trial judge who refused to call for two colleagues and who had not entered an appealable judgment.

The Supreme Court's next helpful pronouncement on this subject

18 249 F. Supp. 860 (N.D. Ohio 1966).

19 See the discussion in D. Currie, *supra* note 2, at 66-73.

20 This position can be reconciled with the statutes by coupling the position in Stratton v. St. Louis S.W. Ry., 282 U.S. 10 (1930), that direct appeal to the Supreme Court is contemplated only when three judges have passed on the merits, with the evident statutory command that all final judgments and orders respecting interlocutory injunctions are appealable.

21 258 F. Supp. 983 (C.D. Cal. 1966).

was its one-paragraph memorandum in *Wilson v. City of Port Lavaca*,[22] in which a three-judge court had held itself unnecessary and the relief sought "unwarranted," and the original judge had adopted the panel decision as its own. Despite the once-relevant fact that the three-judge court had rendered a final decision, the Supreme Court said it thought the case was the same as those in which, as in *Idlewild*, *Buchanan*, and *Schackman*, a single judge had refused to call his brethren and had denied relief: ". . . an appeal lies to the appropriate United States Court of Appeals, and not to this Court."

The latest straw is *Mengelkoch v. Industrial Welfare Commission*.[23] A three-judge court had dissolved itself on finding the constitutional issue insubstantial. The same day the original district judge had entered a final judgment dismissing the suit so that a state court could determine the remaining issue of the compatibility of state law with a federal statute. Still the Supreme Court refused to hear a direct appeal: The single judge's final judgment could be taken to the Court of Appeals, as was more or less clear after *Schackman*; moreover, the Court cited *Wilson*, "we have held that when, as here, a three-judge court dissolves itself for want of jurisdiction, an appeal lies to the appropriate Court of Appeals and not to this Court."[24] It was immaterial, a footnote added, that in *Wilson* the single judge had "actually adopted the opinion of the three-judge court as his own."[25]

What was new about *Mengelkoch* was that the decision of the three-judge panel dissolving itself was not itself final or otherwise appealable. In all the preceding cases upholding the power of the Court of Appeals, the order challenged had been appealable; in *Wilson*, the only prior decision concerning the order of a three-judge court, the three judges had dismissed the case on the merits. The jump was easy in *Mengelkoch*, for the single judge's final order dismissing the action had been entered on the same day as the order dissolving the special court; the Supreme Court could well have concluded there was no need for the extraordinary writ of mandamus to review the dissolution since the request for three judges could be immediately reviewed by the Court of Appeals on appeal from the dismissal order.

Yet the language of *Mengelkoch*, as well as the broad language of the earlier *Schackman* decision, raises the additional question whether or not the Supreme Court still possesses the authority to issue mandamus to require the convening of three judges when there has been

22 391 U.S. 352 (1968).
23 393 U.S. 83 (1968).
24 *Id.* at 83-84.
25 *Id.* at 84.

no appealable judgment. This issue can arise in two ways: A single judge may simply refuse a request for three judges, or a three-judge panel may dissolve itself, in both cases leaving the case pending for further disposition before a single judge. In these cases no appeal lies to either the Supreme Court or the Court of Appeals; if there is a remedy it is by way of mandamus under the All Writs Act.[26] The language of *Schackman* and of *Mengelkoch* suggests that mandamus in these situations should now be sought in the Courts of Appeals, and Chief Judge Brown of the Fifth Circuit, without reciting the decisions, assumes that this is so.[27] This interpretation would be in total accord with the Supreme Court's tendency from *Idlewild* onward to shift the burden of determining the need for three judges onto the Courts of Appeals. But, of course, this interpretation is contrary to the forty years of practice prior to *Idlewild*, when the proper remedy was mandamus from the Supreme Court,[28] and it is not easy to show, as section 1651 requires, how mandamus would be in aid of the jurisdiction of the Court of Appeals, which is ousted from jurisdiction by the empanelling of three judges. The First Circuit, after *Schackman* but before *Mengelkoch*, had adhered to the traditional view that only the Supreme Court can review the need for three judges before the entry of an appealable order.[29]

Some day a new statute may make it clear which orders in three-judge cases are reviewable in which courts.[30] As in most procedural matters, it is less important that the question be settled right than that it be settled one way or the other, but because the Supreme Court has better things to do I should prefer to see the power to determine the need for three judges lodged in the Courts of Appeals. The Supreme Court is certainly moving in this direction. So far the new law seems more in accord with the statutes than does the old, as well as less wasteful; I have no objection to overruling bad decisions, but I do think it would be nice for the Court in overruling a long-established procedure

26 The decisions, *e.g.*, *Ex parte* Bransford, 310 U.S. 354 (1940), assume the availability of the writ in such cases without mention of the familiar notion that mandamus lies only to correct "an abuse of judicial power," not when trial courts have "erred in ruling on matters within their jurisdiction." *See* Will v. United States, 389 U.S. 90 (1967); Bankers Life & Cas. Co. v. Holland, 346 U.S. 379 (1953).

27 Jackson v. Choate, 404 F.2d 910, 912 (5th Cir. 1968) (dictum).

28 *See* cases cited notes 3-5 *supra*.

29 Lyons v. Davoren, 402 F.2d 890 (1st Cir. 1968).

30 The American Law Institute's draft statute would give the Courts of Appeals power to review orders denying a request for three judges or dissolving three-judge courts. STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS § 1376(a), at 46 (Tent. Draft No. 6, 1968).

to tell us what it is doing. The final step of transferring the mandamus power to the Courts of Appeals has yet to come, and it will be hard to reconcile with the statute. One hopes that if that step is taken the Court will let us know.