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APPROVED  
AUG 12 1976

88/12/76

THE WHITE HOUSE  
WASHINGTON

ACTION

Last Day: August 16

MEMORANDUM FOR

THE PRESIDENT

FROM:

JIM CANNON

SUBJECT:

S. 537 - Three-judge courts

Attached for your consideration is S. 537, sponsored by Senator Burdick.

The enrolled bill would change the requirement for three-judge courts in cases in which the constitutionality of a Federal or State statute is in question; would clarify the composition of and procedures for convening three-judge court; and would ensure the right of States to intervene in cases where the constitutionality of State law is challenged.

A discussion of the provisions of the enrolled bill is provided in OMB's enrolled bill report at Tab A.

OMB, Max Friedersdorf, Counsel's Office (Lazarus) and I recommend approval of the enrolled bill.

RECOMMENDATION

That you sign S. 537 at Tab B.





EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

AUG 9 1976

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill S. 537 - Three-judge courts  
Sponsor - Sen. Burdick (D) North Dakota

Last Day for Action

August 16, 1976 - Monday

Purpose

To change the requirement for three-judge courts in cases in which the constitutionality of a Federal or State statute is in question; to clarify the composition of and procedures for convening three-judge courts; and to insure the right of States to intervene in cases where the constitutionality of State law is challenged.

Agency Recommendations

Office of Management and Budget	Approval
Department of Justice	Approval
Administrative Office of the United States Courts	Approval

Discussion

Current law requires that a special three-judge Federal district court must hear cases seeking to enjoin the enforcement of State or Federal laws on the grounds that they are unconstitutional. Decisions of these courts can be appealed directly to the U.S. Supreme Court. The reason for the three-judge court requirement is to prevent the precipitous issuance of interlocutory injunctions by single Federal district court judges against allegedly unconstitutional State statutes.



In recent years, three-judge courts have been criticized for (a) disrupting the work of district and circuit court judges, (b) burdening the Supreme Court (since appeals from three-judge district courts account for about one-fifth of the cases heard by the Supreme Court), (c) generating unproductive litigation over jurisdictional issues arising out of statutory ambiguities relating to such courts, and (d) serving no substantial purpose because alleged precipitous injunctions of district court judges can be dealt with through grants of stays pending appeal to the circuit courts or the Supreme Court. Some critics have argued that these courts should be abolished; others have argued for a substantial reduction in their activities.

The enrolled bill is based on the views of the Judicial Conference and the Department of Justice that a substantial reduction in the activity of three-judge courts is required. It would:

-- eliminate the requirement for three-judge courts except in cases challenging the constitutionality of any statute apportioning congressional or State legislative districts. A three-judge court would also be convened when required by an Act of Congress such as under certain provisions of the Voting Rights Act of 1965 and the Civil Rights Act of 1964.

-- clarify the composition of and procedures for convening three-judge courts. The bill provides that the judge to whom a request is made must determine whether a three-judge court is required and the chief judge of the circuit court must designate the membership of the three-judge court.

Finally, the enrolled bill would also permit States to intervene in any case challenging the constitutionality of a State statute when the State is not a party in the case. This would give States the same option to intervene in such cases as is given to the United States in cases involving Federal statutes.

*James M. Frey*  
Assistant Director for  
Legislative Reference

Enclosures



**Department of Justice**  
**Washington, D.C. 20530**

August 6, 1976

Honorable James T. Lynn  
Director, Office of Management  
and Budget  
Washington, D. C. 20503

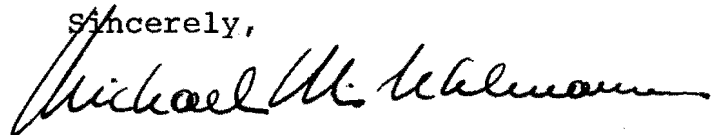
Dear Mr. Lynn:

In compliance with your request we have examined the facsimile of the enrolled bill, S. 537 "to improve the judicial machinery by amending the requirement for a three-judge court in certain cases and for other purposes."

The enrolled bill would eliminate the requirement for three-judge courts to hear actions for injunctions restraining the execution of State statutes, or restraining the enforcement of Federal statutes, on the grounds of unconstitutionality.

The Department of Justice recommends executive approval of the enrolled bill.

Sincerely,



Michael M. Uhlmann  
Assistant Attorney General



ADMINISTRATIVE OFFICE OF THE  
UNITED STATES COURTS

SUPREME COURT BUILDING  
WASHINGTON, D.C. 20544

August 4, 1976

ROWLAND F. KIRKS  
DIRECTOR

WILLIAM E. FOLEY  
DEPUTY DIRECTOR

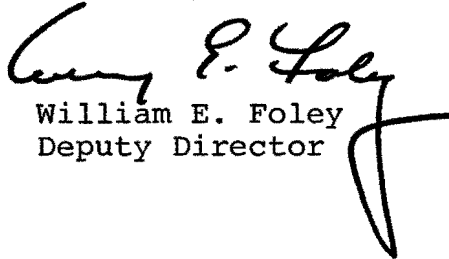
James M. Frey  
Assistant Director for  
Legislative Reference  
Office of Management and Budget  
Washington, D. C.

Dear Mr. Frey:

This is in response to your request of August 3, 1976 for views and recommendations on the enrolled bill "To improve judicial machinery by amending the requirement for a three-judge court in certain cases and for other purposes."

Inasmuch as this act will carry out recommendations made by the Judicial Conference of the United States, Executive approval is recommended.

Sincerely,

  
William E. Foley  
Deputy Director

THE WHITE HOUSE

ACTION MEMORANDUM

WASHINGTON

LOG NO.:

Date: August 9

Time: 300pm

FOR ACTION: Dick Parsons  
Max Friedersdorf  
Ken Lazarus

cc (for information): Jack Marsh  
Jim Cavanaugh  
Ed Schmults

FROM THE STAFF SECRETARY

DUE: Date: August 10

Time: 100pm

SUBJECT:

S.537-Three-judge courts

ACTION REQUESTED:

For Necessary Action

For Your Recommendations

Prepare Agenda and Brief

Draft Reply

For Your Comments

Draft Remarks

REMARKS:

please return to judy johnston, ground floor west wing

PLEASE ATTACH THIS COPY TO MATERIAL SUBMITTED.

If you have any questions or if you anticipate a delay in submitting the required material, please telephone the Staff Secretary immediately.

\_\_\_\_\_  
K. R. COLE, JR.  
For the President

THE WHITE HOUSE

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For Your Comments

Draft Remarks

REMARKS:

please return to judy johnston, ground floor west wing

No objection -- Ken Lazarus 8/9/76



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James M. Cannon  
For the President



THE WHITE HOUSE

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WASHINGTON

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REMARKS:

*Approve. [Signature]*

please return to judy johnston, ground floor west wing

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James M. Cannon  
For the President

THE WHITE HOUSE  
WASHINGTON

August 10, 1976

MEMORANDUM FOR: JIM CAVANAUGH  
FROM: MAX L. FRIEDERSDORF *MLF*  
SUBJECT: S.537 - Three-judge Courts

The Office of Legislative Affairs concurs with the agencies  
that the subject bill be signed.

Attachments



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
• WASHINGTON, D.C. 20503

AUG 9 1976

MEMORANDUM FOR THE PRESIDENT

Subject: Enrolled Bill S. 537 - Three-judge courts  
Sponsor - Sen. Burdick (D) North Dakota

Last Day for Action

August 16, 1976 - Monday

Purpose

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Current law requires that a special three-judge Federal district court must hear cases seeking to enjoin the enforcement of State or Federal laws on the grounds that they are unconstitutional. Decisions of these courts can be appealed directly to the U.S. Supreme Court. The reason for the three-judge court requirement is to prevent the precipitous issuance of interlocutory injunctions by single Federal district court judges against allegedly unconstitutional State statutes.

# Ninety-fourth Congress of the United States of America

## AT THE SECOND SESSION

*Begun and held at the City of Washington on Monday, the nineteenth day of January,  
one thousand nine hundred and seventy-six*

### An Act

To improve judicial machinery by amending the requirement for a three-judge court in certain cases and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 2281 of title 28, United States Code, is repealed.

SEC. 2. That section 2282 of title 28, United States Code, is repealed.

SEC. 3. That section 2284 of title 28, United States Code, is amended to read as follows:

**“2284. Three-judge court; when required; composition; procedure**

“(a) A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body.

“(b) In any action required to be heard and determined by a district court of three judges under subsection (a) of this section, the composition and procedure of the court shall be as follows:

“(1) Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

“(2) If the action is against a State, or officer or agency thereof, at least five days' notice of hearing of the action shall be given by registered or certified mail to the Governor and attorney general of the State. The hearing shall be given precedence and held at the earliest practicable day.

“(3) A single judge may conduct all proceedings except the trial, and enter all orders permitted by the rules of civil procedure except as provided in this subsection. He may grant a temporary restraining order on a specific finding, based on evidence submitted, that specified irreparable damage will result if the order is not granted, which order, unless previously revoked by the district judge, shall remain in force only until the hearing and determination by the district court of three judges of an application for a preliminary injunction. A single judge shall not appoint a master, or order a reference, or hear and determine any application for a preliminary or permanent injunction or motion to vacate such an injunction, or enter judgment on the merits. Any action of a single judge may be reviewed by the full court at any time before final judgment.”

SEC. 4. The analysis of chapter 155 of title 28, United States Code, is amended to read as follows:

“Sec.

“2281. Repealed.

“2282. Repealed.

“2283. Stay of State court proceedings.

“2284. Three-judge district court; when required; composition; procedure.”

SEC. 5. (a) Section 2403 of title 28, United States Code is amended—

(1) by inserting the subsection "(a)" immediately before "In" and

(2) by adding at the end thereof the following new subsection:

"(b) In any action, suit, or proceeding in a court of the United States to which a State or any agency, officer, or employee thereof is not a party, wherein the constitutionality of any statute of that State affecting the public interest is drawn in question, the court shall certify such fact to the attorney general of the State, and shall permit the State to intervene for presentation of evidence, if evidence is otherwise admissible in the case, and for argument on the question of constitutionality. The State shall, subject to the applicable provisions of law, have all the rights of a party and be subject to all liabilities of a party as to court costs to the extent necessary for a proper presentation of the facts and law relating to the question of constitutionality."

(b) The catchline to section 2403 of title 28, United States Code, is amended to read as follows:

**"§ 2403. Intervention by United States or a State; constitutional question".**

SEC. 6. Item 2403 of the analysis of chapter 161, of title 28, United States Code, is amended to read as follows:

"2403. Intervention by United States or a State; constitutional question."

SEC. 7. This Act shall not apply to any action commenced on or before the date of enactment.

*Speaker of the House of Representatives.*

*Vice President of the United States and  
President of the Senate.*