Reining In District Courts

By Glenn Harlan Reynolds

A possible solution to lawfare: Back to the future?

We've seen a lot of single-judge national injunctions in the last month. These will, for the most part, be reversed in time by higher courts; they're performative acts more than legal ones. But they do harm, and they certainly don't increase respect for the legal system. (That "Hawaiian judge" has become a joking synonym for District Court overreach is not a good thing.)

So what can we do? Well, in the short term, let the system run its course. Most of these orders will be overturned, and the rest can probably be addressed by Congressional action or by a modest rewording of executive orders.

But there's another solution, one that was deployed in the past when district judges seemed out of hand: The 3-judge district court.

Image generated by Grok. Note the antigravity gavel.

The requirement for three-judge district courts was established by the Three-Judge Court Act of 1910 (originally 36 Stat. 539) and was later codified in 28 U.S.C. § 2281 and § 2282.

28 U.S.C. § 2281 (repealed in 1976) required a three-judge panel for cases seeking to enjoin (block) the enforcement of a state statute on grounds of unconstitutionality.

28 U.S.C. § 2282 (also repealed in 1976) mandated the same for injunctions against federal statutes.

Other statutes, like those under the Voting Rights Act or certain apportionment cases, also triggered this requirement.

The current § 2284(a) retains this for specific cases, such as challenges to congressional or state legislative

apportionment.

Per § 2284(b), the panel consisted of three judges: one district judge (usually the one to whom the case was initially assigned) and two others designated by the chief judge of the circuit, at least one of whom had to be a circuit judge. This mix aimed to balance local and appellate perspectives.

Appeals went straight to the Supreme Court, bypassing the Courts of Appeals. We wouldn't have to keep that, though, and I'm not sure we should.

These did not apply to Temporary Restraining Orders, which are the problem here, and I don't believe they applied to challenges to executive orders, which is unsurprising as those were much less common in 1910. But such could be required easily enough, by a modest amendment. (And Covid experience means that the panel could convene via video conferencing, making a hearing on a TRO just as fast as by a single judge.)

With a diverse three-judge panel, the chance for grandstanding district judges to create national headlines would be less, and the likelihood of a kooky result would be less as well. And, obviously, it would make "judge shopping" harder.

Sen. Mike Lee has proposed something like this already, and says he plans to introduce legislation on the subject. John Lucas has also jumped on this idea, with the added proposal that the three judges should be drawn from three different circuits, which I like. I think this may be an idea whose time has come (again).

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