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THE ALLIANCE FOR JUSTICE OPPOSES H.R. 1252, THE "JUDICIAL REFORM ACT"

H.R. 1252 is an omnibus bill that changes the powers, duties, and responsibilities of federal judges. As detailed below, the Alliance for Justice is concerned about many of the provisions contained within H.R. 1252 and opposes this legislation.[1] The provisions of this bill are efforts at judicial gerrymandering, directed at a specific group of cases with certain Members disagree, and wholly lacking in any coherent approach to the issue.

I. Limitation on Court-Imposed Taxes (Section 5)

Section 5 of H.R. 1252 prohibits a district court from entering any order or approving any settlement that "requires" any state or political subdivision to impose, increase, levy or assess any tax for the purpose of enforcing any federal or state common law, statutory, or constitutional right or law unless the court finds by clear and convincing evidence that six enumerated conditions are met. Any tax that meets these conditions automatically terminates in one year, and no tax can be levied if imposition contravenes state or local law. The original language considered by the House Subcommittee on Courts and Intellectual Property used the term "require"; this was amended to "expressly directs" at the subcommittee

[1] The bill marked-up and approved by the House Judiciary Committee contains other provisions on which the Alliance takes no position, including Section 8, which deals with media coverage of federal appellate court proceedings; Section 9, involving the adjustment of salaries of federal judges; Section 10, which deals with multiparty, multi-forum litigation; and Section 11, involving appeals from the Merit Systems Protection Board.

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mark-up, and then amended back to "require" at the full committee mark-up.

The notion that federal judges often "expressly direct" a state or political subdivision to impose taxes is chimerical. Representative Donald A. Manzullo (R-IL), the original sponsor of Section 5 of H.R. 1252, testified about a case in his district: "Here, a federal judge issued an order having the effect of raising property taxes to pay for past desegregation injustices. . . . Federal judges have ordered tax increases to build public housings and expand jails. Any state or local government is subject to such rulings from the federal courts." Outside the context of nineteenth-century municipal bond cases, the federal courts have not imposed a tax except for one school desegregation dispute, Missouri v. Jenkins, 672 F. Supp. 400 (W.D. Mo. 1987). Ultimately, the Supreme Court unanimously rejected the concept of direct federal court imposition of taxes, but a majority upheld the power of federal courts to direct local government bodies to levy taxes to fund constitutional remedies for educational segregation, but only in limited instances. See Missouri v. Jenkins, 515 U.S. 70 (1995). The "expressly direct" version of the bill should have no effect given the Supreme Court's ruling in Missouri v. Jenkins.

If, however, the language prohibiting a district court from "requiring" taxes were retained, as is presently the case, it would destroy judicial remedial power. Based on Representative Manzullo's statement, he objects not simply to the direct remedial power of the federal courts to impose taxes, but also to all of the costs of complying with judicial orders. Chairman Hyde made equally clear that his intention was to restrict not only explicit judicial taxation, but also any judicial remedy that is expensive and would require raising of taxes by the elected government. According to Chairman Hyde, when a judge issues an order "in many cases, the locality has no choice but to raise taxes, so in practical effect, that judge has raised taxes."

The prohibition on "requiring" taxes would vitiate a wide variety of federal court remedies. State or local authorities might argue that virtually any order or settlement requiring substantial expenditures to conform institutions to constitutional or federal law requirements would "require," if not explicitly impose, tax increases, thus triggering the requirements of this provision. Brown v. Board of Education arguably required expenditures by the local government to desegregate the public schools. A suit under the American with Disabilities Act to require access to courthouses or town halls would require funds for construction. Were concerned citizens to bring suit to compel a locality to clean up environmental waste, the district court could not order relief were the local government to contend that the cleanup was not budgeted for and would require them to raise taxes. According to the Judicial Conference, this provision "may undermine the very foundation of judicial power."

Even worse, this provision was amended at the Committee mark-up to apply to all pending cases and pending orders or settlements. This provision will therefore affect long-running litigation over school desegregation, environmental cleanup, or any other matter even where such litigation began years ago. Intervening into pending cases, in which the federal courts handling such disputes have crafted very delicate compromises between the parties, would be extremely disruptive. The amendment, offered by Representative Bryant (R-Tennessee), elicited no debate

and was approved by voice vote.

II. Reassignment of Case as of Right (Section 6)

This provision would effectively allow a peremptory strike not against a juror, but against a judge. According to the chief proponent of this provision, Congressman Charles Canady (R-FL), "the peremptory challenge provision represents one important way to increase public confidence in the judicial system and to ensure that justice is administered in an impartial manner for all litigants." Indeed, the exercising party need make no showing, nor even any allegation, of bias or prejudice to invoke automatic reassignment. Because the strike must be exercised at the outset of a case in most instances, the decision is more likely to be based on a judge's race, gender, or experience before taking the bench, instead of a demonstrated bias for or against a particular party. Reassignment will not necessarily result in the appointment of an unbiased judge, because the peremptory challenge of one judge assigned at random will simply result in the random assignment of another judge.

The prospects of judge-shopping allowed by the peremptory strike provision could have the effect of chilling judicial decision making in difficult or controversial cases. California Attorney General Daniel Lungren, a supporter of this provision, argues that the mere existence of a peremptory challenge procedure "is perhaps most significant in its effect on judicial conduct." Thus the peremptory challenge is clearly intended, or at least acknowledged by its supporters, to be an attempt to influence future judicial behavior, including rulings on particular issues.

According to Frederick B. Lacey, a former U.S. Attorney and U.S. District Judge in New Jersey who testified on parts of the legislation, "Every trial lawyer wants to judge shop. The strike promotes this practice, and I think it discredits the judicial system. It also poses a threat to proper and fair case management." Judges are already removable for bias or prejudice for or against a party, pursuant to 28 U.S.C. §§ 144 and 455. Constitutional due process guarantees an impartial and competent judge, not a specific judge whom a party does or does not want.

This reassignment provision would detrimentally affect case management and increase litigation costs. Under this proposal, parties joined in the case after the initial filings have a right to seek reassignment within 20 days after service of the complaint or other pleading. The section contains broad loopholes that would allow challenges at many stages of the proceedings, even after the court has made substantive rulings. This would waste judicial resources and allow parties dissatisfied with the judge's ruling to get a second bite of the apple. To the extent the reassignment statute is designed to increase public confidence in the judicial process, a provision which allows parties to change judges after receiving adverse rulings undermines this goal. Because of the liberal rules for joinder of parties within the Federal Rules of Civil Procedure, the right of reassignment under the current proposal may be reopened at all stages of the case. This would lead to gamesmanship where parties may be encouraged to add new parties or withhold an initial joinder of parties, for the purpose of creating a new right of reassignment later in a case.

Finally, this provision only applies to the 21 judicial districts with the largest number of

appointed judges. Presumably this limitation is to avoid the administrative problems of automatic reassignment in districts with a small number of judges. If automatic reassignment is needed to insure impartiality and confidence in the judicial system, as proponents claim, should it not be equally available in all districts? Conversely, if the current system is good enough for small districts, why should large districts have a different system? Limiting this provision to only 21 judicial districts, moreover, will encourage forum-shopping: Lawyers clearly have an interest in bringing cases to the districts in which they may exercise an additional peremptory challenge.

III. Three-Judge Panel Requirement for Injunctions of State Referenda (Section 2)

This proposal was originally drafted as a free-standing bill sponsored by the late Representative Sonny Bono (R-CA), that responded to federal judicial action on certain California referenda. When Chairman Henry Hyde introduced H.R. 1252, he proclaimed that this particular provision would ensure that "where the entire populace of a State democratically exercises a direct vote on an issue, one Federal judge will not be able to issue an injunction preventing the enforcement of the will of the people of that State." This provision seeks to change the normal procedure whereby a claimant who opposes a state referendum attempts to obtain a federal injunction from a single judge, substituting a three-judge panel with direct appeal to the Supreme Court for the single judge. While Chairman Hyde expresses a noble principle, his provision is deeply flawed. Section 2 would lead to a two-tier system of state law that decades of experience have shown to be cumbersome, inefficient, and confusing.

This procedure has been tried before with disastrous results. At the beginning of this century, federal procedure permitted a judge to issue an ex parte injunction that could paralyze an important state statute without the possibility of a hearing on the merits; this order was deemed unappealable because it was interlocutory. As one law review has commented, "It was the boast of representatives of the railroads that in 13 minutes after the governor had signed at Pierre [South Dakota in 1908] the act fixing passenger shares at 2 cents per mile [far lower than the customary rate] the Federal judge at Sioux Falls had signed his sweeping order restraining the Attorney General and all State attorneys from enforcing it." In response to the increased use of federal injunctions and procedural infirmities, Congress passed the Three-Judge Court Act of 1910, which provided that any action seeking an order to enjoin a state official from enforcing a state statute on the ground that the law violated the Constitution must be decided by a district court composed of three judges, and the panel's decision was subject to direct review by the Supreme Court.

From 1910 through 1976, this rule applied when claimants sought to enjoin the enforcement of state statutes on the ground that they violated the federal Constitution. After years of criticism, Congress largely abolished this practice for reasons that also militate against its revival today:[2] the inefficiency of requiring three judges to perform the work of fact-finding, the

[2] A subsequent amendment to the Federal Rules of Civil Procedure limited temporary restraining orders to no more than 10 days' duration and required notice and a hearing prior to the

most labor-intensive part of the litigation process; the awkward and unwieldy situation of having a trial conducted by three judges; the increase in the Supreme Court's workload by vesting direct appeals with the Court; the use by the Court of summary affirmance or denials of panel decisions, precluding any thorough and meaningful appellate review; and the harmful effect of the lack of intermediate appellate review on the Supreme Court's decision making.

Under H.R. 1252, three-judge court cases would come to the Supreme Court without the filtering of facts and contentions normally applied by the courts of appeals. Those courts winnow the record, narrow the issues, and sharpen arguments; without this layer of review, the Supreme Court will be forced to decide cases on records that are diffuse and imprecise. Moreover, for laws passed by the legislature, a legislative record has been developed. This is not true for those adopted by referendum, thus there would be even less material for the Supreme Court to rely on in these situations. Direct review would also deprive the Supreme Court of hearing what the courts of appeals have to say about difficult legal questions. This undermines the goal proponents have in mind when they state the "important cases" deserve a three-judge district court. If these cases are important, it seems wiser to have a district court judge rule first, then allow review by a three-judge appellate panel. Furthermore, the Supreme Court has almost complete discretion over which cases to hear, and it hears only a tiny fraction of appeals. Section 2 therefore replaces automatic review by a court of appeals with unlikely review by the Supreme Court.

Section 2 of H.R. 1252 would lead to the absurd result that an identical law adopted by two different states would be treated completely differently by the federal courts. H.R. 1252 sets up two classes of democratic activity. Referenda are "first class" democratic exercises worthy of a three-judge court review, immediately appealable to the Supreme Court. Statutes adopted by legislatures are "second class," meriting only a single judge's review. There is no consensus that referenda are superior to legislative work; thus the Constitution guarantees that the states shall have a republican, not majoritarian, form of government.

IV. Removal of Judicial Conduct Complaints (Section 4)

Sponsors of Section 4 of H.R. 1252 complain that it is unseemly for judges to be judged by their peers, and they propose removing the evaluation of judicial conduct complaints to a different circuit. In fact, there has been no showing of a need for a new discipline system, and this provision would be expensive and burdensome. The current system of judicial discipline, where complaints are resolved within a particular circuit, dates to at least 1939. Following years of study and compromise, Congress passed the Judicial Council Reform and Judicial Conduct and Disability Act of 1980, which stressed that informal resolution of discipline problems should be encouraged. According to the 1993 Report of the National Commission on Judicial Discipline and Removal, the 1980 Act has "yielded substantial benefits both in those few instances where it was

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issuance of preliminary injunctions. The preliminary injunction is deemed a final order, permitting immediate appeal to the circuit court. This eliminated many of the problems that originally gave rise to three-judge panels.

necessary for the judicial councils to take action and, more importantly, in the many instances where the existence of its formal process enabled chief judges to resolve complaints through corrective action and, indeed, to resolve problems before a complaint was filed."

Clearly the benefit of informal resolution of judicial misconduct problems is likely to be lost if complaints are handled outside of the circuit in which the judge resides. This would also increase costs if every complaint must be considered by judges who might be hundreds or thousands of miles away. Moreover, judges regularly make tough decisions, and they are certainly accustomed to ruling against their colleagues in panel proceedings. This provision is unnecessary and would harm a system that is working well.

V. Interlocutory Appeals of Class Action Decisions (Section 3)

While on balance we support the principle incorporated into Section 3 of H.R. 1252, which provides for the interlocutory appeal of court orders pertaining to class actions, this proposal is currently being considered by an alternative and more appropriate forum. The Rules Enabling Act of 1934 (28 U.S.C. § 2072), states that Congress shall not adopt procedural rules for the judiciary, and under the 1934 law, proposed amendments to the Federal Rules are prescribed by the Supreme Court and presented to Congress only after being subjected to extensive scrutiny by the public, bar, and bench. This laborious process results in precise draftsmanship by the parties most affected by the rules. In 1992, Congress enacted a new provision that authorized the Supreme Court to provide for an appeal of an interlocutory decision to the courts of appeals. In the last few months, the Judicial Conference Advisory Committee on Civil Rules, the Standing Rules Committee, and the Judicial Conference have all approved an amendment to Rule 23 of the Federal Rules of Civil Procedure that would allow interlocutory appeals, and this provision has been submitted to the Supreme Court. The change is likely to be presented to Congress by May of 1998, and thus the instant provision is premature and unnecessary.

VI. Random Assignment of Habeas Corpus Cases (Section 7)

For reasons involving equity, the Alliance for Justice is supportive of the principle, embodied in this provision that all new cases filed in court should be randomly assigned. However, where there are repeated habeas corpus claims brought on the same case, it would waste judicial resources to assign each claim to a different judge, who would have to rehear the whole case from start to finish. Because of scarce judicial resources, a number of federal courts have adopted rules where a second or subsequent case filed to achieve a post-conviction remedy, including writs of habeas corpus, would be filed with the judge who heard the first post-conviction case. Section 7 of H.R. 1252 jeopardizes this pragmatic rule by requiring random assignment of habeas corpus cases. There is no evidence showing that the current assignment of habeas corpus petitions is improperly exercised.