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RICHARD W. WIEKING  
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U.S. DISTRICT COURT  
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**NOT FOR CITATION**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ROBERT-JOHN FOTI, et al.,  
Plaintiffs,  
v.  
OFFICER McHUGH, et al.,  
Defendants.

No. C 04-2567 PJH



**ORDER DENYING REQUEST FOR  
THREE-JUDGE PANEL<sup>1</sup>**

Pro-se plaintiffs Robert-John:Foti, Joe Neufeld, and Ken Augustine filed this action on June 25, 2004, alleging violation of their rights under the First, Fourth, Fifth, Thirteenth, and Fourteenth Amendments to the United States Constitution, and also alleging various common-law torts. The basis of plaintiffs' suit is the allegation that defendants Officer McHugh, U.S. Marshals Service, and Federal Protective Services unlawfully refused them admittance to the Federal Building located at 450 Golden Gate in San Francisco, California, because they refused to produce state-issued identification.

Plaintiffs have requested that their case be assigned to a panel of three district judges. The court has carefully reviewed plaintiffs' papers and has considered the relevant legal authority, and finds that the request must be DENIED.

<sup>1</sup> Pursuant to Civil Local Rule 7-13, this order may not be cited except as provided by Civil Local Rule 3-4(e).

**PROCEDURAL BACKGROUND**

1  
2 The caption of the original complaint filed in this action states, "Immediate  
3 Emergency Hearing requesting Injunctive Relief requested before July 9, 2004," and also  
4 states "Trial by Jury Demanded." Plaintiffs did not file an application for a temporary  
5 restraining order, a request for an order to show cause re preliminary injunction, or a  
6 motion for preliminary injunction.<sup>2</sup> Plaintiffs filed a return of service on July 13, 2004,  
7 indicating that defendant Officer McHugh had been served with the summons and  
8 complaint on June 30, 2004; and a return of service on August 24, 2004, indicating that  
9 defendants Federal Protective Service and United States Marshals Service had been  
10 served on July 19, 2004.<sup>3</sup>

11 On September 16, 2004, defendants filed a motion to dismiss the complaint. On  
12 November 9, 2004, the day before the scheduled hearing on defendants' motion, plaintiffs  
13 filed a first amended complaint. At the November 10, 2004, hearing, plaintiffs stated that  
14 they intended the notation "Immediate Emergency Hearing requesting Injunctive Relief" on  
15 the caption of the complaint as a request for a preliminary injunction. The court then set a  
16 briefing schedule for a motion to dismiss the first amended complaint, and for plaintiffs'  
17 motion for injunctive relief.

18 On the caption page of the first amended complaint, plaintiffs added the notation,  
19 "Because of immense importance THREE JUDGE PANEL DEMANDED," directly above  
20 the notation "Trial by Jury Demanded." On November 17, 2004, plaintiffs filed a motion for  
21 summary judgment. The caption page of the motion stated, "Trial by Jury Demanded" and  
22 "THREE JUDGE COURT CR 9(i)." Plaintiffs added a footnote to the "THREE JUDGE  
23 COURT" notation, citing a number of United States Supreme Court opinions, and a  
24 reference to an unspecified constitutional claim being adjudicated by a three-judge court.

25  
26 <sup>2</sup> In seeking injunctive relief, plaintiffs did not comply with the provisions of Federal Rule  
27 of Civil Procedure 65 or Civil Local Rule 65-1.

28 <sup>3</sup> Defendants had no notice that plaintiffs were seeking injunctive relief until they were  
served with the summons and complaint.

1 On November 18, 2004, the court issued an order staying briefing on the motion for  
2 summary judgment, pending resolution of the defendants' motion to dismiss and the  
3 plaintiffs' motion for injunctive relief. On November 29, 2004, plaintiffs filed a "Formal  
4 Objection to Judge Hamilton's denial to entertain a Rule 56(a) Motion." This document  
5 also stated, on the caption page, "Trial by Jury Demanded" and "THREE JUDGE COURT  
6 9(i)," with the same footnote as on the motion for summary judgment described above.

### 7 DISCUSSION

8 As is apparent from the description of the procedural history of this case set forth  
9 above, plaintiffs did not file a motion requesting a three-judge panel, in contravention of the  
10 requirement of Civil Local Rule 7-1 that "[a]ny written request to the [c]ourt for an order  
11 must be presented by" either a motion or the stipulation of the parties. In their Objection to  
12 the order staying briefing on their motion for summary judgment, however, plaintiffs  
13 complain that the court is "ignoring" their request for a three-judge panel," which they state,  
14 for the first time, is "asked for because of the gravity of the constitutional violations in this  
15 case" and because "this judge is biased against them."

16 The court's research has uncovered only two statutory provisions authorizing the  
17 creation of a three-judge panel of district court judges. Under 28 U.S.C. § 2284, a district  
18 court of three judges shall convene when otherwise required by Act of Congress, or when  
19 an action is filed challenging the constitutionality of the apportionment of congressional  
20 districts or the apportionment of any statewide legislative body. Under 42 U.S.C. § 1973c,  
21 actions dealing with alteration of voting qualifications and procedures shall be heard and  
22 determined by a court of three judges.

23 In the case presently before the court, plaintiffs do not plead facts relating to  
24 apportionment of any congressional district or any statewide legislative body, or relating to  
25 alteration of voting qualifications. Nor do they identify any Act of Congress that requires  
26 the convening of a three-judge panel. Because neither 28 U.S.C. § 2284 nor 42 U.S.C.  
27 § 1973c authorizes the convening of a three-judge panel because of any alleged "gravity of  
28 constitutional violations" or because of any perceived bias on the part of the district court

1 judge assigned to the case, plaintiffs' request must be DENIED. See, e.g., O'Conner v.  
2 State of Nevada, 27 F.3d 357, 363 (9th Cir. 1994) (denying request for three-judge panel  
3 where statute at issue did not have purpose or effect of denying right to vote on account of  
4 race, color or other language minority group).

5 Plaintiffs support their request with citation to twelve United States Supreme Court  
6 opinions. In the majority of those cases, the Court indicated that the three-judge panel was  
7 allowed because of the presence of substantial constitutional questions. Those cases are  
8 no longer controlling, however, because the statutes relied upon have been repealed.<sup>4</sup>  
9 The remaining cases are easily distinguishable.

10 With regard to the cases that reference the later-repealed statutes, in Tully v. Griffin,  
11 Inc., 429 U.S. 68 (1976); Whalen v. Roe, 423 U.S. 1313 (1975); and Hagans v. Lavine,  
12 415 U.S. 528 (1974), the Court found that a three-judge panel was appropriate under  
13 former 28 U.S.C. § 2281. In Walters v. National Association of Radiation Survivors, 473  
14 U.S. 305, 353 (1985), the Court referred to 28 U.S.C. § 2282 in its discussion of appellate  
15 jurisdiction, but issued no ruling with regard to the appropriateness of a three-judge panel.  
16 In Atchison, Topeka & Santa Fe Railway Company v. Wichita Board of Trade Interstate  
17 Commerce Commission, 412 U.S. 800 (1973), the Court found that a three judge district  
18 court was appropriate under former 28 U.S.C. § 2325.

19 In three of the cases, the Court relied on both later-repealed statutory authority, and  
20 on statutory authority that is inapplicable in this case. In Connolly v. Pension Benefit  
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22 <sup>4</sup> Former 28 U.S.C. § 2281, repealed in 1976, provided that an interlocutory or  
23 permanent injunction restraining the enforcement, operation or execution of a State statute  
24 on grounds of unconstitutionality should not be granted unless the application has been heard  
and determined by a three-judge district court.

25 Former 28 U.S.C. § 2282, also repealed in 1976, provided that an interlocutory or  
26 permanent injunction restraining the enforcement, operation or execution of any Act of  
Congress on grounds of unconstitutionality should not be granted unless the application  
therefor has been heard and determined by a three-judge district court.

27 Former 28 U.S.C. § 2325; repealed in 1975, related to the requirement of a three judge  
28 district court to hear and determine interlocutory or permanent injunctions restraining the  
enforcement, operation, or execution of orders of Interstate Commerce Commission.

1 Guaranty Corporation, 475 U.S. 211 (1986); and Shapiro v. Thompson, 394 U.S. 618  
2 (1969), the Court found that a three-judge panel was appropriate under former 28 U.S.C. §  
3 2282 and under 28 U.S.C. § 2284. In Reynolds v. M.O. Sims, 377 U.S. 533 (1964), the  
4 Court found that a three-judge panel was appropriate under former 28 U.S.C. § 2281 and  
5 under 28 U.S.C. § 2284.

6 Hohn v. United States, 524 U.S. 236 (1998); and Washington v. Confederated  
7 Bands and Tribes of Yakima Indian Nation, 439 U.S. 463 (1979) are distinguishable, as  
8 both those cases involved three-judge panels at the appellate court level. Neither San  
9 Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1993); nor Stratton v. St.  
10 Louis Southwestern Ry. Co., 284 U.S. 530 (1932) contain any discussion of the law  
11 relating to the convening of three-judge panels in the district courts.

12 **CONCLUSION**

13 In accordance with the foregoing, the plaintiffs' request for a three-judge panel is  
14 DENIED.

15  
16 **IT IS SO ORDERED.**

17 Dated: February 2, 2005

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20 PHYLLIS J. HAMILTON  
21 United States District Judge  
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UNITED STATES DISTRICT COURT  
FOR THE  
NORTHERN DISTRICT OF CALIFORNIA

Foti et al,

Plaintiff,

v.

McHugh et al,

Defendant.

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Case Number: C-04-2567 PJH

**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Northern District of California.

That on February 2, 2005, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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Dated: February 2, 2005

*Lurline Moriyama*  
Richard W. Wicking, Clerk  
By: Lurline Moriyama, Deputy Clerk