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COMMENTARY: *The Response of the Judiciary*

STATE COURTS AND FEDERALISM IN THE 1980's: COMMENT

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There is danger, it seems to me, that important basic traditions and principles become obscured by complex and technical argument about the allocation of jurisdiction between state and federal courts.

We can agree that a nation's court system functions effectively if it resolves controversies expeditiously, economically, and fairly. From the standpoint of the citizen, it is immaterial whether his case is tried in a federal court or a state court. He has a problem which can only be resolved by judicial decision. Whether that decision is made by a federal court judge or a state court judge is to him a matter of no consequence. Except as advised by his attorney, he does not know the one from the other. But there are historical and institutional reasons which will separate the federal court system and the state court system for our lifetime. It is important for us to keep these historical and institutional circumstances in mind.

While the United States Constitution makes specific provision for "one Supreme Court,"¹ it leaves the establishment of "inferior Courts" entirely to the discretion of Congress.² It seems agreed that the intent was that the courts of the states would be the principal forums for dispute resolution in the country, with the federal trial courts limited to problems involving interstate conflicts and to cases in which the United States or one of its officers would be

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1. U.S. CONST. art. III, § 1.

2. *Id.*; see, e.g., *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943).

involved as a party. The Judiciary Act of 1789³ empowered the Supreme Court to review only those state court decisions which denied a claimed federal right and restricted review to the federal question alone;⁴ it was not until 1914 that the United States Supreme Court was empowered to review state court decisions to assure uniformity of interpretation of federal law.⁵

It is interesting that the first substantial extension of the authority of the federal judiciary came about as a consequence of nonuse of power by the states following the Civil War. The Reconstruction Congress, concerned by the failure of the states to protect the constitutional rights assured by the fourteenth amendment, gave plaintiffs with civil rights grievances against the states access to the federal district courts. That is the origin of 42 U.S.C. § 1983,⁶ which creates liability for the deprivation under the color of state law of rights, privileges, or immunities secured by the federal Constitution and laws.

It is important for those of us who are charged with the responsibility for the operation of state court systems to keep in mind that, while the increase of federal authority has been due in significant measure to the economic growth and the increase in numbers and mobility of our population, that increase has occurred most frequently in the judicial branch of government when there has been a failure or a refusal by state courts to fulfill the obligation imposed by article VI of the United States Constitution to enforce and respect federal law. The solution to that problem, if it is a problem, is easy enough to discern.

The United States Supreme Court construed the authority given by section 1983 with great restraint for almost one hundred years. Access to federal courts by litigants claiming state action in denial of federally protected rights was limited by judicial doctrines which presumed that the states would correct the claimed infringement if given the unsupervised opportunity to do so.

It was the failure of state courts to deal effectively with governmental intrusions upon the rights of the individual which led to

3. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

4. *Id.* § 26.

5. Act of Dec. 23, 1914, ch. 2, 38 Stat. 790 (current version at 28 U.S.C. § 1257 (1976)) (granting Supreme Court jurisdiction to hear cases by writ of certiorari).

6. 42 U.S.C. § 1983 (1976) (codifying Civil Rights Act of 1871, ch. 22, § 1, 17 Stat. 13).

the decisions of the United States Supreme Court during the Warren era making access to the federal courts for the protection of individuals offended by unconstitutional state action easier to obtain. Once again history teaches us a salient point: justice abhors a vacuum, and when state courts fail to protect the constitutional rights of individuals sympathetically and forcefully, federal courts will fill the void so created.

Prior to 1963, the United States Supreme Court frequently expressed itself as being disturbed by procedures tolerated in state courts with respect to such matters as the admission of confessions challenged as not voluntarily given by persons charged with crime. It was only after admonitions extending over a period of almost twenty years that the series of decisions by the United States Supreme Court which established federal standards for the trial of criminal cases were promulgated. And while there remain differences of opinion as to the wisdom of some of these decisions—the *Miranda* case in particular—there seems to be substantial consensus that the overall effect of the United States Supreme Court decisions bearing on the trial of criminal cases in state courts has been all to the good and probably long overdue. The significant point is that it was the failure of state court systems to fulfill clear obligations which resulted in the extension of federal judicial authority.

The initial reaction of state judges to the 1960-1970 extensions of the authority of the federal courts was hostile and defensive. Many of the chief justices of the several states looked upon these decisions of the United States Supreme Court as an affront to be opposed as a matter of survival. By contrast, there is today substantial agreement among the state judges of this country with whom I have regular contact that the decisions of the United States Supreme Court affecting the trial of criminal cases in state courts are sound in principle and should be adhered to in letter and in spirit in the trial of all criminal cases. However, the view that challenged state criminal convictions which have been approved by the final court of appeals of a state should not, in effect, be reversed by a judge of the federal district court persists—most emphatically.

The implicit assumption of what has been said by some of the panelists during this seminar is that state courts will not protect

individual rights as effectively as will the federal courts. A vital state court system cannot accept this criticism passively.

The challenge to the jurisdiction of state courts with respect to criminal cases and with respect to civil rights cases together with other factors have stimulated extraordinary efforts to improve state court systems. Illustrative are these developments:

1. A national college for the judiciary has been established at Reno, Nevada, and most state court judges have the opportunity of attending courses there which emphasize current developments in the law.

2. In most states, minimum qualifications for judges serving in courts with significant responsibilities have been established and commissions have been created whose function it is to eliminate incompetence and venality.

3. Modern management methods have been introduced to expedite the disposition of litigation, and training in this field is available through the Institute for Court Management at Denver, Colorado.

4. Technical assistance and support for state court systems concerned with the improvement of judicial service is provided through the National Center for State Courts at Williamsburg, Virginia and through its regional offices throughout the United States.

5. The American Judicature Society and the American Bar Association have joined with civic groups in highly motivated efforts to improve state judicial systems.

As a result, the quality of justice available in state court systems has improved greatly throughout the United States during the past twenty years, and there is every reason to believe that improvement will continue. It is important that it should because over ninety percent of the cases and controversies arising in this country are decided in state courts.

The improvement in the functioning of state court systems throughout the country is important for an additional reason. Notwithstanding recent increases in the number of federal judges in this country, the appeals to the federal courts for relief are increasing at a rate even greater than that experienced by most states. This has resulted in backlogs in federal courts throughout the United States which have caused grave concern to leaders of gov-

ernment at all levels. Typical is the recent statement of Chief Justice Burger made during the course of an address to the American Law Institute at Washington, D.C., to the effect that a reexamination and a reallocation of jurisdiction presently exercised by the federal judicial system is a top priority for the 1980's.⁷ This same combination of factors, that is the increasing strength of state court systems and the inundation of federal courts, has moved the Conference of Chief Justices of the United States to urge that the diversity jurisdiction presently lodged in the federal courts should be returned to the states.⁸ While there is a difference of opinion as to advisability of this course, it is the opinion of the Conference of Chief Justices that diversity jurisdiction should be yielded to the states for these reasons:⁹

1. Article III, section 2 of the United States Constitution provides that the judicial power of the United States extends to controversies between citizens of different states, and since 1789 the constitutional provision has been implemented by the provisions of congressional enactment. But the demands on federal courts in the eighteenth century were limited, and trial of diversity cases was then considered more as an opportunity than a burden. This is no longer true. Our federal courts are overwhelmed by the demands of the criminal cases and the federal question cases which must be given prior attention.

2. Diversity cases involve interpretations of state law. In our federal system, state courts are the final arbiters of state law. It is an awkward situation for federal trial judges to be interpreting state law and precedents when errors which are bound to occur cannot be corrected by the highest court of the state, the laws of which are being applied. This is particularly true where the law of torts is involved, this being an area of the law characterized by constant change and modification.

7. Address by Chief Justice Warren E. Burger, 57th American Law Institute Annual Meeting (June 10, 1980).

8. *Diversity of Citizenship Jurisdiction/Magistrates Reform: Hearings on H.R. 1046 & H.R. 2202 Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary*, 96th Cong., 1st Sess. 109-14 (statement of Robert J. Sheran) [hereinafter cited as *Hearings*].

9. The following reasons were presented to the House subcommittee studying reform of federal diversity jurisdiction. *Id.* at 111-12.

3. Diversity cases, for the most part, involve claims arising out of contracts or suits for damages for personal injuries caused by defective products or automobile accidents.¹⁰ These are the kinds of litigation which state court judges handle regularly and routinely. Federal court judges, whose major responsibilities are in other areas, have neither a special interest nor expertise in cases of this kind.

4. Diversity jurisdiction attaches only if the amount in controversy exceeds \$10,000.¹¹ Often the amount in controversy question—wholly irrelevant to the merits of the case—is challenged, and valuable judicial time is wasted in a contest over this collateral issue. Apart from this, there is no reason in principle why the \$10,000 judicial limit—or any other larger amount—should distinguish cases triable in federal court from those which are not.¹² The citizen's right to justice should not turn on the dollar value of his claim. The suggestion that "federal" is "better" and that the "big" claim deserves the "better" treatment is inconsistent with accepted notions of fair play in a democratic society.

5. Diversity jurisdiction attaches only if diversity of citizenship as between the parties is entire.¹³ For example, if a resident of Minnesota sues Ford Motor Company, a Michigan corporation, because of a claimed defect in an automobile manufactured by it, the Ford Motor Company can, if the case is venued in Minnesota, remove the lawsuit to federal court if the amount in controversy exceeds \$10,000, unless it has a principal place of business in Minnesota.¹⁴ The question of whether a place of business is a principal

10. Between October 1, 1979 and September 30, 1980, 40,650 diversity cases were filed in federal district courts. Contract and tort claims accounted for 19,877 and 19,317 of these cases, respectively. Of the tort claims, 7,020 involved automobile, airplane, or marine accidents. AD. OFF. U.S. COURTS, FEDERAL JUDICIAL WORKLOAD STATISTICS DURING THE TWELVE-MONTH PERIOD ENDING SEPTEMBER 30, 1980, at 28 (1980).

11. 28 U.S.C. § 1332 (1976).

12. Congressional support for this belief appears to be growing. Witness the abolition of the amount in controversy requirement for federal question jurisdiction. Federal Question Jurisdiction Amendments Act of 1980, Pub. L. No. 96-486, 94 Stat. 2369 (amending 28 U.S.C. § 1331).

13. The requirement of complete diversity dates from *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267 (1806) (Marshall, C.J.). For a full discussion of this doctrine and its history, see C. WRIGHT, *LAW OF FEDERAL COURTS* 94-96 (3d ed. 1976).

14. See, e.g., *Canton v. Angelina Cas. Co.*, 279 F.2d 553 (5th Cir. 1960). See generally C. WRIGHT, *supra* note 13, at 102-03.

place of business as well as the question of whether a true diversity of citizenship exists can be placed in issue, and if it is, valuable judicial time is wasted on a question having nothing to do with the merits of the case. If it is established that the Ford Motor Company, a Michigan corporation, does not have a principal place of business in Minnesota, the case is tried in federal court. But if the plaintiff in such an action were to join a Minnesota dealer as a defendant, the case could not be removed. The requisite complete diversity of citizenship between the parties would not exist. How can it be argued that the Ford Motor Company needs protection from Minnesota courts in the one case but not the other?

6. In the great bulk of cases in which a nonresident is a party, the case is tried in state courts and cannot be removed. The numbers of these cases in state courts have increased greatly because of the enactment of long-arm statutes which permit effective service on nonresidents. No one seriously contends that the nonresident party suffers from local prejudice in these cases because of its non-residence. If it suffers a disadvantage because of its being a corporation, this is due to factors which apply to every business entity involved in litigation, resident or nonresident. There is no reason to give a nonresident business entity an advantage not available to the others. There is even less reason for allowing a resident plaintiff to sue a nonresident defendant in the federal court of plaintiff's home state.

7. In any event, removal to federal court does not change the situation insofar as it is affected by claims of prejudice based on nonresidence. The jurors in federal courts are residents of the same state as are state court jurors. Federal court judges have the same essential background as do state court judges. Many of them have served as state court judges before moving to the federal branch. The security of life tenure of federal judges is an irrelevant consideration in the kinds of cases—contracts and torts—where diversity jurisdiction is involved.

8. There are prejudices to be found in both state and federal courts which impede the administration of justice—prejudice based upon hostility toward corporations, upon excessive identification with the underdog, and upon consideration of race and sometimes ethnic or religious background. But prejudice based upon the state of residence is so insignificant as to be unimportant.

To the extent that prejudice of any kind exists in a court system, it should be corrected. But to suggest that it can be cured even in part by permitting removal of diversity cases is to compound the problem by obscuring its cause.

9. The power to remove diversity cases from state to federal court gives tactical advantage to the party seeking delay. This is so because given the priorities to be accorded criminal cases under the Speedy Trial Act¹⁵ and the pressing demands involved in many federal question cases, the trial of diversity cases in many federal courts is extremely difficult to achieve.

10. The implicit assumption of diversity jurisdiction, that a fair trial cannot be secured in state court notwithstanding the fact that the case involves state law exclusively, demeans state court systems at a time when national efforts to improve the state courts should be recognized and encouraged. Assignment of jurisdiction of all diversity cases to state courts will stimulate the movement to strengthen and improve state judicial systems in every part of the country so that the ultimate goal of justice uniformly and expeditiously afforded will be available to every citizen of the United States.

Whatever the final resolution of the diversity question may be, the basic principle will persist: jurisdiction as between federal and state courts should be allocated in such a way as to avoid unnecessary duplication of effort and to assign to each of the court systems that type of litigation which, in terms of history and natural aptitude, each is best able to carry out. From my perspective, subsidiary principles which should be applied in making this allocation include these:

1. If state courts are able to deal with legal problems as well as or almost as well as the federal courts, jurisdiction should be assigned to state courts not only because this is consistent with our national history but also because it is a policy which conforms with the rule that governmental authority, whenever possible, should be exercised by that level of government most directly connected with the citizenry affected by its performance.

15. Speedy Trial Act of 1974, Pub. L. No. 93-619, 88 Stat. 2076 (codified at 18 U.S.C.A. §§ 3152-3156, 3161-3174, 28 U.S.C.A. § 604 (West Supp. 1980)), as amended by Speedy Trial Act Amendment Act of 1979, Pub. L. No. 96-43, 93 Stat. 327.

2. So far as possible, supervision of and correction of errors in the functioning of state trial courts and state agencies should be the exclusive responsibility of the highest appellate court of the state involved. Federal trial courts should not be encouraged and indeed, except in the most extraordinary of circumstances, should not be permitted to intrude upon or overturn the deliberative judgments of the highest appellate court of a state.

3. State courts should defer to and respect the unique capacity of the federal courts to delineate the meaning of the United States Constitution and the enactments of the United States Congress. If the principle that federal courts will not override or "second guess" state courts, except in the most egregious of circumstances and then only after affording the state court systems an opportunity to deal with the problem involved in their own way, is observed, the judicial, the legislative, and the executive departments of state government should accede to appropriate federal judicial directives involving state action with grace and good will.

4. State courts should be prepared to recognize the superior capacity of the federal court system to adjudicate certain kinds of complicated litigation when numerous parties based in different parts of the country are involved, cases when the national fund of expertise should be brought to bear on the issues, and cases when the subject matter involved impacts significantly on the interests of other states.

5. Every state should regularly review its procedures relating to criminal cases to be sure that affirmative and aggressive action is taken to assure respect for federally protected rights of the individual as defined by the appropriate courts in the judicial branch of the federal government. In states where this is being done, federal intervention should be kept at a minimum. It is my personal belief that our experience in Minnesota is illustrative of the way in which this potentially disruptive problem can be handled effectively and in the public interest.

The net result of the application of these principles will be to limit federal jurisdiction to those cases where the peculiar characteristics of the federal judiciary give it a special capacity to resolve contention. The great bulk of the cases will continue to be handled in state courts as they should be, and if state court systems improve, some of the jurisdiction presently exercised by federal

courts can and I think will be assigned to the courts of the states.

By the terms of its preamble, the Constitution of the United States of America was ordained in order to establish justice. The obligation of fulfilling this commitment is a continuing one, demanding a joint effort to achieve these objectives:¹⁶

1. To make the courts of our nation, state and federal, accessible to everyone. This means that adequate court rooms at convenient places must be available, that well-qualified judges be selected and retained to supervise the judicial process, and that adequate legal services be provided to assist with the average person's problems at a cost which the average person can afford.

2. To divert from the courts of the country disputes and controversies which can be settled more expeditiously and effectively by other means and in other places. This objective recognizes that there are circumstances where methods such as arbitration, conciliation, and mediation work better than the formal processes of the courts. The process of identifying these cases is difficult and important.

3. To be certain that the judicial systems of the nation function efficiently. This objective calls for emphasis on the importance of improved methods of judicial administration, the employment of modern management methods, and the training of court-related personnel so that the work of the courts will be conducted as efficiently and effectively as possible.

4. To reduce the costs of dispute resolution. This objective recognizes that justice is frequently unattainable by many people because of the expense involved in obtaining access to the courts. Justice which cannot be afforded is justice denied.

5. To extend educational programs so that those who administer justice are kept fully and currently informed and those who seek justice are made aware of the availability of help through the nation's court systems. This objective implies that the law to be applied in the resolution of disputes is constantly changing as the needs of society change and that all people concerned with justice must be continuously educated to keep abreast with the times.

6. To divide the responsibility for providing access to the court

16. I conveyed these objectives to the Congress on behalf of the Conference of Chief Justices of the United States. *Hearings, supra* note 8, at 113.

systems of the nation between the state and federal court systems in such a way as (a) to employ the total capacity of both systems as effectively as possible, (b) to avoid duplication and repetition of effort, (c) to keep the process of dispute resolution, both civil and criminal, as close to the people affected as possible, and (d) to preserve the independence and integrity of state courts. This implies that the general jurisdictional responsibilities of the court systems should be placed primarily in the courts of the states, that the federal court system should continue to be one of limited and specialized jurisdiction, and that the efforts of both the state and federal court systems should be coordinated and integrated in such a way as to make the system as a whole work as effectively as possible.

The significant principle of federalism is that governmental authority should be exercised so far as possible by that unit of government closest to the people affected by its exercise. This principle acknowledges that in a country like the United States, with a population that moves about freely, and with people who share so many ideals, traditions, and common modes of thought, there must be national standards to which all of the people adhere. But the process by which the judiciary absorbs these standards should be one which so far as possible is managed through courts which are linked as closely to the people affected by their operation as possible.

In the years ahead, it seems to me, we can expect that throughout the country the rules of law that will be applied, whether in federal or in state courts, will increasingly become more uniform because as communication increases—radio, television, the printed news media—people's thinking and attitudes become more uniform. And uniformity also comes about because the decisions of the United States Supreme Court, which are the final authority in construing the Federal Constitution and federal laws, become accepted and implemented by state courts. State legislatures adopt uniform laws dealing with matters that have multistate impact: child custody, marriage dissolution, and things of that kind.

While standards become uniform, the implementation of those standards through the court system, so far as possible and feasible, should be primarily through state courts. If the distinction between federal courts and state courts is altogether dissolved, neglected, or overlooked, we may arrive at a situation where there is

such a separation between the people who are affected by the operation of the courts on the one hand, and the courts themselves on the other, that the kind of voluntary acceptance of authority which is the key to the operation of a judicial system will be endangered.

Having presented this outline of my views with respect to the allocation of jurisdiction as between state and federal courts, I direct my attention to the scholarly statements made by Professors Paul M. Bator, Robert M. Cover, Martha A. Field, and Burt Neuborne.

I find myself in general agreement with most of the positions taken by them in support of the significant role which federal courts must play in the administration of justice in this country during the years ahead, but with these qualifications:

1. Federal courts should not undertake jurisdiction of cases which involve primarily the interpretation of state law.

2. The process by which a single federal district court judge becomes, in effect, a court of review of final decisions made by the highest appellate court of the state should be changed.

3. The national interest in improving the administration of justice in state court systems as possible forums for the protection of rights secured by the Federal Constitution and federal laws should be acknowledged, particularly in light of the fact that the Congress can and someday may limit the jurisdiction of federal district courts in dealing with matters of this kind.