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TRENDS IN THE RELATIONSHIP BETWEEN THE FEDERAL AND STATE COURTS FROM THE PERSPECTIVE OF A STATE COURT JUDGE

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We live in an imperfect world. Most people would agree our court system suffers from some of that imperfection. We appear to be the only major country with two parallel court systems. Among other things, such an arrangement affords most convicted criminal defendants opportunities for multiple post-conviction appellate court reviews. The labyrinth of judicial reviews of the various stages of a state criminal felony case would appear strange, indeed, to a rational person charged with devising an ideal criminal justice system. Changes and improvements come very slowly, if at all, and, more often than not, incrementally, in small case by case adjustments.

State courts, which annually process the great majority of all civil and criminal cases filed in this country, handle their workload for the most part without a great deal of concern about the federal court system which exists alongside them. Trial judges in both systems are busy hearing cases. Most state court trial judges do not have time to think about what jurisdiction the federal courts should have; they simply take each case assigned and do the best they can with it, whether or not it involves a federal legal question. On the other hand, state appellate court judges occasionally become so frustrated with the extent of federal court intervention that they simply abdicate in favor of the federal jurisdiction. For example, concern in the Supreme Court of Arizona with the extent of the exercise of federal jurisdiction of prisoner complaints led it to refuse to hear any prisoner complaints because of "preemption of the field" by the federal courts.¹

It is my purpose to comment on some of the trends in the relationship between the state and federal courts as viewed from the

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1. *Patricella v. Arizona*, No. H 650 (Ariz. April 24, 1973).

practical perspective of a state court judge.

CRIMINAL PROCEEDINGS

Application of federal constitutional law by state courts is made most often in state criminal prosecutions. A state criminal defendant gains access to the federal courts by alleging that a violation of the Federal Constitution occurred during the state proceedings. There is seldom a state criminal felony trial in which the defendant is convicted that does not result in an appeal at the state level alleging some federal constitutional error in order to exhaust the state remedies before seeking federal review. As noted by Justice Powell in his concurring opinion in *Rose v. Mitchell*: "Federal constitutional challenges are raised in almost every state criminal case, in part because every lawyer knows that such claims will provide nearly automatic federal habeas corpus review."²

Every state court trial judge realizes, of course, that federal constitutional challenges will be raised in almost every state criminal case and that, after the state appellate review is exhausted, further review will be attempted in the federal courts. As a result, state courts in urban areas have tended to assign certain judges to hear only criminal cases in order that they may become more familiar with applicable state and federal, substantive and procedural, criminal and constitutional law. In addition, the National Center for State Courts, the Institute of Judicial Administration, and the National Judicial College continually offer assistance to courts and to state judges on various aspects of how they can appropriately function within the state and federal constitutional parameters. There is a keen awareness among state court judges in state criminal cases of the federal constitutional protections of the defendant.

With the election of President Reagan, there is no reason to think the recent trend in the United States Supreme Court shifting to the state courts some additional responsibility for determination of federal constitutional questions in state criminal cases will not continue. As stated by Charles Whitebread:

[T]he Warren Court, which was extremely energetic in expanding the scope of federal constitutional claims open to state

2. 443 U.S. 545, 581 (1979) (Powell, J., concurring).

prisoners, seemed to act on the premise that the state courts could not be depended upon to vindicate these newly created rights. Thus, it forged new law on the procedural as well as substantive front by providing greater access to federal court for state defendants. Federal habeas corpus became the principal remedy through which the newly created rights could be asserted and protected. By contrast, as the Burger Court has limited the substantive federal constitutional rights of the state criminal defendant, it has simultaneously reduced dramatically the avenues available for state prisoner access to the lower federal courts.³

A recent example of the increased reluctance of the United States Supreme Court to overturn by federal habeas corpus proceedings state court determinations in criminal cases is found in *Sumner v. Mata*.⁴ The Court in *Sumner* held that a federal court that grants federal habeas corpus relief to a state criminal defendant is required by 28 U.S.C. § 2254(d) to presume the state appellate or trial court's factual findings are correct and to explain the reasons for determining that the state court's findings were not fairly supported by the record. The majority opinion states: "Federal habeas has been a source of friction between state and federal courts and Congress obviously meant to alleviate some of that friction when it enacted subsection (d) in 1966 as an amendment to the original Federal Habeas Act of 1867."⁵

The response of state courts to the trend toward some restriction of review of state criminal cases by federal habeas corpus is explored in an article by A.E. Dick Howard.⁶ Professor Howard concludes that in the area of criminal procedure, most state courts show "an inertial tendency simply to follow the . . . federal decisions" because of the deference owed to the United States Supreme Court or the desirability of uniformity of state and federal law.⁷ However, he details examples of a number of state courts

3. C. WHITEBREAD, CRIMINAL PROCEDURE § 28.01, at 574 (1980).

4. 101 S. Ct. 764 (1981).

5. *Id.* at 770.

6. Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873 (1976).

7. *Id.* at 905. See also Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

which have relied upon their own state constitutions as a means of defining rights of criminal defendants more broadly than do the federal courts.⁸

In the next decade, there will probably be significant additional state court variations in cases involving the issue of illegal search and seizure under the fourth amendment. Since *Stone v. Powell*,⁹ state criminal defendants who have had a "full and fair opportunity" to raise their claims of illegal search and seizure in the state courts may not, thereafter, obtain federal habeas corpus relief. We do not yet know the tests to be employed in determining what is a "full and fair opportunity." However, assuming the state courts are providing a full and fair opportunity for the claims to be raised, and that federal habeas corpus review is unavailable, the state courts are more likely than their federal counterparts to reach widely varying results on search and seizure issues. Even the federal cases on search and seizure are not models of clarity and simplicity. The standards tend to be confusing and obtuse in some instances.¹⁰

One area where federal court review of state courts' determinations of federal constitutional questions may be expected to increase, however, is the area of state criminal defendants' waiver of their constitutional objections. State criminal defendants seeking habeas corpus relief in the federal court must raise their constitutional objections in a timely fashion in the state proceedings, or they will be held to have waived their claim for relief, absent a showing of cause why the objection was not raised and also a showing of actual prejudice.¹¹ We can expect a number of petitions to be filed for habeas corpus relief to test the extent to which failure

8. See, e.g., *People v. Brisendine*, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975); *State v. Kaluna*, 55 Haw. 361, 520 P.2d 51 (1974); *State v. Johnson*, 68 N.J. 349, 346 A.2d 66 (1975) (Eagen, J., concurring); *Commonwealth v. Richman*, 458 Pa. 167, 320 A.2d 351 (1974); Advisory Opinion to the Senate, 108 R.I. 628, 278 A.2d 852 (1971). See generally Howard, *supra* note 6, at 891-905.

9. 428 U.S. 465 (1976).

10. For some articles addressing the confusion in the case law in the fourth amendment area, see Burkoff, *The Court that Devoured the Fourth Amendment: The Triumph of an Inconsistent Exclusionary Doctrine*, 58 OR. L. REV. 151 (1979), and Countryman, *Search and Seizure in a Shambles? Recasting Fourth Amendment Law in the Mold of Justice Douglas*, 64 IOWA L. REV. 435 (1979).

11. *Francis v. Henderson*, 425 U.S. 536, 542 (1976).

of defense counsel to raise the issue in the state proceedings will establish good cause for avoiding the waiver. Competence of counsel may be relevant to the determination of good cause and of prejudice.¹²

Closely related to the question of waiver of the constitutional issue at the state level is the question of competence of counsel as a ground for collateral attack on state convictions on the basis of the sixth amendment. This issue is one which will undoubtedly be raised very frequently during the next few years. At present, it is the single issue raised most frequently in Arizona appellate courts in petitions for post-conviction relief in criminal cases.¹³

The United States Supreme Court has held that counsel must render legal services "within the range of competence demanded of attorneys in criminal cases."¹⁴ This standard is far from definitive. No doubt the range of competence varies somewhat from community to community and from state to state. The older test of whether the proceedings were a "farce and mockery of justice" has been rejected in all but three of the federal circuits.¹⁵ The other circuits have developed differing standards for determining the competence of counsel.¹⁶ The majority follow a "reasonable compe-

12. See *Wainwright v. Sykes*, 433 U.S. 72, 94-96 (1977) (Stevens, J., concurring).

13. Seventy-five petitions for appellate post-conviction relief in criminal cases were filed in Arizona in 1980. Of these, twenty-seven, or 36%, raised the issue of competence of counsel. Letter from John Sticht, Staff Attorney, Arizona Court of Appeals to Judge Sandra D. O'Connor, Arizona Court of Appeals (Feb. 25, 1981).

Direct appeals from state criminal convictions frequently involve an allegation that there was a failure at trial to raise a defense, to make an evidentiary objection, or to request a jury instruction. Unless the failure resulted in "fundamental error," the state appellate court will ordinarily affirm the conviction. See, e.g., *State v. Workman*, 123 Ariz. 501, 600 P.2d 1133 (Ariz. Ct. App. 1979); *Bell v. State*, 598 S.W.2d 738 (Ark. 1980); *People v. Means*, 97 Mich. App. 641, 296 N.W.2d 14 (1980); *State v. Moon*, 602 S.W.2d 828 (Mo. Ct. App. 1980); *People v. Vasquez*, 430 N.Y.S.2d 501 (Sup. Ct. 1980); *State v. Foddrell*, 269 S.E.2d 854 (W. Va. 1980). The same is true in appeals to federal appellate courts from convictions in federal criminal cases. FED. R. CRIM. P. 52; see, e.g., *McKissick v. United States*, 379 F.2d 754 (5th Cir. 1967).

14. *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

15. Schwarzer, *Dealing with Incompetent Counsel — The Trial Judge's Role*, 93 HARV. L. REV. 633, 641 n.40 (1980); *Fifth Annual Ninth Circuit Survey—Criminal Law and Procedure—New Effective Assistance of Counsel Standard—Prejudice Required*, 10 GOLDEN GATE U.L. REV. 75, 79 n.29 (1980). See generally Strazzella, *Ineffective Assistance of Counsel Claims: New Uses, New Problems*, 19 ARIZ. L. REV. 443 (1977).

16. See authorities cited note 15 *supra*.

tency" or analogous standard.¹⁷ The District of Columbia Circuit has adopted a standard which requires the defendant to show that his counsel performed measurably below accepted standards and that the inadequacy of counsel had a "likely" effect on the outcome of the trial.¹⁸ State standards for determining competency likewise vary.¹⁹

It is reasonable to expect that we will continue to see many state and federal cases dealing with the appropriate standard for effective assistance of counsel under the sixth amendment. In view of the conflicting holdings in the federal appellate courts, the Supreme Court may accept jurisdiction and attempt to establish a more definite standard. It is also likely that some strain may be felt by some state courts as their determinations of attorney competence are reviewed in the federal courts.

CIVIL CASES

Although the present trend in federal review of state criminal matters appears to be to restrict some of the federal jurisdiction, quite the reverse trend seems to be occurring in civil cases, both by federal judicial decisions and by congressional action. Although not arising as frequently as in the criminal area, federal constitutional law, as it applies to state legislative and executive action, is perhaps of more concern to state courts in terms of forcing significant decisions to be made in cases of great public interest. We have seen recently examples of acute confrontations between federal district courts and state courts in school busing and school desegregation cases. Application of the federal guaranty of equal protection of the laws has resulted in court review of state voting requirements,²⁰ state durational residence requirements for welfare

17. See *Cooper v. Fitzharris*, 586 F.2d 1325, 1328 n.3 (9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1979).

18. *United States v. Decoster*, 624 F.2d 196 (D.C. Cir. 1976) (plurality opinion) (quoting *Commonwealth v. Saterian*, 366 Mass. 89, 96, 315 N.E.2d 878, 883 (1974)).

19. See, e.g., *Bays v. State*, 240 Ind. 37, 159 N.E.2d 393 (1959) (requiring reasonable skill and diligence), *cert. denied*, 361 U.S. 972 (1960); *State v. Osgood*, 266 Minn. 315, 123 N.W.2d 593 (1963) (requiring consultations that adequately inform the accused of all his legal rights).

20. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

benefits,²¹ and other state welfare eligibility requirements,²² in addition to public educational opportunities.²³ Application of the due process clause of the fourteenth amendment has resulted in court review of state prison regulations,²⁴ state procedures for garnishment,²⁵ and prejudgment attachment of property by creditors.²⁶

The *Sniadach*,²⁷ *Fuentes*,²⁸ and *Mitchell*²⁹ decisions of the United States Supreme Court have resulted in a great many state court cases which have focused on interpretations of those cases, and in various state legislative amendments to prior state laws on prejudgment garnishments and attachments. Confusion exists among students of the subject concerning the meaning and import of the Supreme Court decisions on prejudgment creditors' rights and remedies.³⁰ The subject of creditors' rights is surely one of the subjects most often addressed in state courts on a continuing basis. It is apparent that we have not heard the end of the matter from a federal constitutional perspective, and that the federal courts will continue to issue additional opinions defining the validity of various state laws on the subject.

Another area of recent contact and some confusion between the state and federal courts is in medical malpractice cases in some states. With the rapid escalation of malpractice insurance premiums, many states have adopted legislation requiring administrative

21. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

22. *Graham v. Richardson*, 403 U.S. 365 (1971).

23. *Keyes v. School Dist. No. 1*, 413 U.S. 189 (1973).

24. *Wolff v. McDonnell*, 418 U.S. 539 (1974).

25. *North Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

26. *Fuentes v. Shevin*, 407 U.S. 67 (1972).

27. *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969).

28. *Fuentes v. Shevin*, 407 U.S. 67 (1972).

29. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974).

30. See, e.g., Kheel, *New York's Amended Attachment Statute: A Prejudgment Remedy in Need of Further Revision*, 44 BROOKLYN L. REV. 199 (1978); Levine, *Due Process of Law in Pre-Judgment Attachment and the Filing of Mechanics' Liens*, 50 CONN. B.J. 335 (1976); Nickles, *Creditors' Provisional Remedies and Debtors' Due Process Rights: Attachment and Garnishment in Arkansas*, 31 ARK. L. REV. 607 (1978); TeSelle & Love, *Attachment, Garnishment, Replevin, and Self-Help Repossession in Oklahoma*, 30 OKLA. L. REV. 253 (1977); Comment, *Can Georgia Bank on Its Garnishment Laws?*, 28 MERCER L. REV. 341 (1976); Comment, *Attachment in California: Another Round of Creditors' Rights and Debtor Protection*, 20 U.C.L.A. L. REV. 1015 (1979).

review, quasi-judicial review, or mediation prior to trial.³¹ The procedures are generally not binding on the parties and are designed to screen out frivolous claims.

When the malpractice suit is filed in a federal court under its diversity jurisdiction, the federal courts are divided on whether they must follow the state's review procedure when that procedure is to be implemented after the lawsuit is filed.³² The issue focuses on whether the federal court in a diversity suit must apply the substantive law of the forum state as required by *Erie Railroad Co. v. Tompkins*,³³ and thereby discourage forum shopping,³⁴ or whether the federal court should refuse to apply the state law because it would violate an important federal policy or would "alter the essential character or function of [the] federal court."³⁵ Where the state law requires submission to a state review or mediation panel *before* the lawsuit is filed, the federal cases uniformly appear to dismiss the federal action if the state prefiling procedure is not followed.³⁶ As states attempt to control more of the tort litigation by arbitration and other devices, we can anticipate more confusion and confrontation with federal courts on whether the state procedures must be followed in the diversity cases.

The next decade is also likely to see continued expansion of litigation in the federal courts under 42 U.S.C. § 1983,³⁷ the civil rights statute, unless Congress decides to limit the availability of relief under that statute. Many, if not most, of the cases alleging

31. See, e.g., ARIZ. REV. STAT. ANN. § 12-567 (West Supp. 1980); VA. CODE ANN. §§ 8.01-581.1 to .20 (1977 & Supp. 1980). See generally Alexander, *State Medical Malpractice Screening Panels in Federal Diversity Actions*, 21 ARIZ. L. REV. 959 (1979).

32. Compare *Wheeler v. Shoemaker*, 78 F.R.D. 218 (D.R.I. 1978) (refusing to refer a diversity malpractice action to a Rhode Island mediation panel), with *Byrnes v. Kirby*, 453 F Supp. 1014 (D. Mass. 1978) (following the Massachusetts system of presenting offer of proof to a state panel), and *Von Mosher v. Tan*, No. Civ. 77-3 (D. Ariz. March 27, 1979) (referring the matter to state medical review panel).

33. 304 U.S. 64 (1938).

34. *Hanna v. Plumer*, 380 U.S. 460, 466-69 (1965).

35. *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 538-39 (1958) (quoting *Heron v. Southern Pacific Co.*, 283 U.S. 91, 94 (1931)).

36. See *Edelson v. Soricelli*, 610 F.2d 131 (3d Cir. 1979); *Davidson v. Sinai Hosp. Inc.*, 462 F Supp. 778 (D. Md. 1978), *aff'd*, 617 F.2d 361 (4th Cir. 1980); *Marquez v. Hahnemann Medical College & Hosp.*, 435 F Supp. 972 (E.D. Pa. 1976); *Flotemersch v. Bedford County Gen. Hosp.*, 69 F.R.D. 556 (E.D. Tenn. 1975).

37. 42 U.S.C. § 1983 (1976).

due process or equal protection violations by the states, their officers, and employees are filed under section 1983. Allegations that the plaintiff has been deprived of either personal liberty or property of any amount in violation of his civil rights will give the federal court jurisdiction to hear the claim. Even state court judges are not immune from a section 1983 suit if the allegation is that the judge acted in the clear absence of jurisdiction in the matter.³⁸ Judge Aldisert has observed that each expansion of the use of section 1983 to challenge state action has been prompted by a distrust of the state courts as proper forums to consider the issues raised.³⁹

In the past, the United States Supreme Court has held that plaintiffs alleging state civil rights violations need not exhaust state remedies before filing suit in the federal court under section 1983.⁴⁰ More recently, however, the Court has stated, "whether this is invariably the case . . . is a question we need not now decide."⁴¹ In *Barry v. Barchi*,⁴² the Court reaffirmed the *Gibson v. Berryhill*⁴³ holding that exhaustion of administrative remedies is not required when the question of the adequacy of the administrative remedies is for all practical purposes identical with the merits of the section 1983 action. The United States courts of appeals are divided on the issue of whether exhaustion of state administrative remedies is a necessary prerequisite to the federal suit.⁴⁴

38. *Rankin v. Howard*, 633 F.2d 844, 849 (9th Cir. 1980).

39. Aldisert, *Judicial Expansion of Federal Jurisdiction: A Federal Judge's Thoughts on Section 1983, Comity and the Federal Caseload*, 1973 L. & Soc. ORDER 557, 572.

40. *Wilwording v. Swenson*, 404 U.S. 249 (1971) (per curiam); *Damico v. California*, 389 U.S. 416 (1967) (per curiam); *McNeese v. Board of Educ.*, 373 U.S. 668 (1963).

41. *Gibson v. Berryhill*, 411 U.S. 564, 574-75 (1973).

42. 443 U.S. 55, 63 n.10 (1979).

43. 411 U.S. 564 (1973).

44. For cases holding exhaustion of state administrative remedies is required, see *Patsy v. Florida Int'l Univ.*, 634 F.2d 900 (5th Cir. 1981); *Secret v. Brierton*, 584 F.2d 823 (7th Cir. 1978); *Gonzales v. Shanker*, 533 F.2d 832 (2d Cir. 1976); *Wishart v. McDonald*, 367 F. Supp. 530 (D. Mass. 1973), *aff'd*, 500 F.2d 1110 (1st Cir. 1974).

For a case holding exhaustion of state administrative remedies is required only when prospective relief is sought, see *Canton v. Spokane School Dist. No. 81*, 498 F.2d 840 (9th Cir. 1974).

For cases holding exhaustion of state administrative remedies is not required, see *Simpson v. Weeks*, 570 F.2d 240 (8th Cir. 1978); *United States ex rel. Ricketts v. Lightcap*, 567 F.2d 1226 (3d Cir. 1977); *Gillette v. McNichols*, 517 F.2d 888 (10th Cir. 1975); *Hardwick v. Ault*, 517 F.2d 295 (5th Cir. 1975); *McCray v. Burrell*, 516 F.2d 357 (4th Cir. 1975), *cert. dismissed*, 426 U.S. 471 (1976); *Jones v. Metzger*, 456 F.2d 854 (6th Cir. 1972).

In view of the great caseload increase in the federal courts and the expressed desire of the Reagan administration to hold down the federal budget, one would think that congressional action might be taken to limit the use of section 1983. It could be accomplished either directly, or indirectly by limiting or disallowing recovery of attorneys' fees. Such a move would be welcomed by state courts, as well as state legislatures and executive officers. In fact, however, Congress appears to have moved recently to open further the federal jurisdictional doors. In the closing days of the 96th Congress, the \$10,000.00 amount in controversy requirement was totally eliminated for federal question jurisdiction under 28 U.S.C. § 1331.⁴⁵ The elimination of the amount in controversy requirement may have been prompted by the fact that there is no amount in controversy requirement for section 1983 actions filed under the jurisdictional statute, 28 U.S.C. § 1343(a)(3).⁴⁶ For claims arising under the Constitution or a federal statute securing equal rights, plaintiffs wishing to file in federal court were able to simply couch their complaints in terms of section 1343(a)(3) rather than section 1331. Regardless of the reasons, Congress has expanded the jurisdiction of the federal courts by the amendment to section 1331.

Congress has also added to the scope of federal court jurisdiction in the Bankruptcy Reform Act of 1978.⁴⁷ The Act gives the federal district courts "original but not exclusive jurisdiction of all civil proceedings arising in or related to" the debtor in a Title 11 proceeding.⁴⁸ Starting in 1984, that jurisdiction will be exercised by the new bankruptcy courts.⁴⁹ Effectively, then, this broad grant of

45. Federal Question Jurisdictional Amendments Act of 1980, Pub. L. No. 96-486, § 2, 94 Stat. 2369. However, the Act retains the \$10,000.00 amount in controversy requirement for suits based on knowing violations of consumer product safety rules unless suit is brought against the United States or an agency of the United States or an officer or agent of the United States in his official capacity. *Id.* § 3.2.

46. 28 U.S.C. § 1343(a)(3) (Supp. III 1979) grants district courts original jurisdiction to hear claims alleging a "deprivation, under color of any State law, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens." *Id.* (emphasis added). Because a § 1983 claim may be based upon the deprivation of any statutory right provided by Congress, *Mame v. Thiboutot*, 100 S. Ct. 2502 (1980), § 1983 and § 1343(a)(3) are not coextensive.

47. Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified in scattered sections of 11, 28 U.S.C.).

48. 28 U.S.C. § 1471(b) (Supp. III 1979).

49. *Id.* § 1471(c).

jurisdiction will allow the bankruptcy courts to hear any proceeding related to the debtor.⁵⁰ Actions which formerly had to be tried in state court, or in a federal district court, such as a tort or contract action involving the debtor, or perhaps even a divorce, may, as of 1984, be tried in the bankruptcy court. The bankruptcy court may abstain from exercising its jurisdiction, but the decision to accept jurisdiction or to abstain is not reviewable by appeal or otherwise.⁵¹ The expanded jurisdiction represents "an assertion of the bankruptcy power over State governments under the supremacy clause, notwithstanding a state's sovereign immunity."⁵² Under the new code, all pending civil proceedings in any forum, with only a few listed exceptions, are stayed by the debtor's filing of a bankruptcy petition.⁵³

The potential effect on state courts of the exercise of jurisdiction by the federal bankruptcy court over proceedings in state courts in which the debtor is a party is great. For example, in Maricopa County, Arizona, there were 4,462 petitions in bankruptcy filed in 1980.⁵⁴ It is estimated that in the Maricopa County Superior Court of Arizona alone there are already 186 pending cases which have been stayed because one of the parties is involved in a federal bankruptcy proceeding.⁵⁵

Another area of federal civil case jurisdiction which Congress may examine in the next few years is the diversity jurisdiction. The debate over whether Congress should eliminate diversity jurisdiction from the federal courts has continued for some years.⁵⁶

Any discussion of whether diversity jurisdiction should be elimi-

50. H.R. REP. NO. 595, 95th Cong., 1st Sess. 48-49 (1977), reprinted in [1979] U.S. CODE CONG. & AD. NEWS 5963, 6010.

51. 28 U.S.C. § 1471(d) (Supp. III 1979).

52. S. REP. NO. 989, 95th Cong., 2d Sess. 51 (1978), reprinted in [1979] U.S. CODE CONG. & AD. NEWS 5787, 5837.

53. 11 U.S.C. § 362 (Supp. III 1979).

54. Unpublished figures compiled by Virginia Fritz, Clerk, United States Bankruptcy Court, District of Arizona.

55. Unpublished figures compiled by Gordon Allison, Maricopa County Superior Court Administrator.

56. For an argument favoring abolition of federal diversity jurisdiction, see Kastenmeier & Remington, *Court Reform and Access to Justice: a Legislative Perspective*, 16 HARV. J. LEGIS. 301, 311-18 (1979), and authorities cited therein. For an argument in support of maintaining federal diversity jurisdiction, see Frank, *The Case for Diversity Jurisdiction*, 16 HARV. J. LEGIS. 403 (1979).

nated, and any discussion of where the line should be drawn for the exercise of federal jurisdiction in state criminal and civil cases generally, requires examination of the assertion often heard that the federal courts are the preferred forum. Let us examine the arguments made to justify the conclusion that federal judges are preferred. First, it is argued that federal judges are better paid and have more prestige.⁵⁷ It is certainly true that most federal judges are better paid.⁵⁸ However, the higher pay does not necessarily attract only the most competent lawyers to the federal bench. Often political considerations are more important than pure competence in the appointing process. In addition, many appointments to the federal bench are made from state court benches.⁵⁹ When the state court judge puts on his or her new federal court robe he or she does *not* become immediately better equipped intellectually to do the job.

Second, it is said that life tenure insulates the judge from majoritarian pressure, and, therefore, the federal judges are more receptive to controversial principles.⁶⁰ In twenty states, however,

57. See, e.g., Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1121, 1124-27 (1977).

58. From March 1977 to December 31, 1980, yearly salaries for federal district judges were \$54,500 and for federal circuit judges, \$57,500. *United States v. Will*, 101 S. Ct. 471, 476 (1980). Beginning January 1, 1981, yearly salaries for federal district judges are \$67,100 and for circuit judges, \$70,900. 67 A.B.A.J. 162, 165 (1981).

As of January 31, 1979, the national average salary for associate justices (excluding chief justices) of the highest state courts was \$45,248; for state intermediate appellate court judges, \$45,278; and for general trial court judges, \$38,971. U.S. DEPT OF JUSTICE, LAW ENFORCEMENT ASSISTANCE ADMINISTRATION, AND NATIONAL CRIMINAL JUSTICE INFORMATION AND STATISTICS SERVICE, *SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS - 1979* 110, Table 1.57 (1980) [hereinafter cited as 1979 SOURCEBOOK].

However, the average salaries of state trial court judges increased by more than 90% between 1969 and 1980, while the salaries of federal courts of appeals and district court judges increased by less than 40% during the same period. 67 A.B.A.J. 162, 164 (1981). And certain state judges receive salaries far higher than the averages given above. For instance, the chief justice of the state of California now receives \$77,409 a year, and the chief judge of the highest New York court, the court of appeals, receives \$75,000 a year. *Id.*

59. A study of characteristics of presidential nominees and appointees to United States court judgeships from 1963 to August 27, 1978, broken down by presidential administration, reveals that percentages of nominees who at the time of their nomination or appointment were employed by the judiciary ranged from 28.5% under President Nixon to 42.2% under President Carter. In addition, percentages of nominees with prior judicial experience ranged from 34.3% under President Johnson to 46.7% under President Carter. 1979 SOURCEBOOK, *supra* note 58, at 115, Table 1.60.

60. See, e.g., Neuborne, *supra* note 54, at 1105, 1127-28.

we now have merit selection of state judges rather than popular elections.⁶¹ These judges are relatively safe and secure in their positions. Even those state judges who are elected often have reasonably long terms of office.⁶² I have seen remarkable examples of the exercise of courage and judicial independence by state court judges.

Third, it is argued that federal judges will be more receptive to federal constitutional claims. Professor Bator has answered this argument quite well in his article published in this issue.⁶³ What is really being said is that federal judges are inclined to be more receptive to *some* federal constitutional claims. Professor Bator is correct in stating what is required is a sensitivity and responsiveness to *all* the constitutional principles, not just *some* of them.⁶⁴ There is no reason to assume that state court judges cannot and will not provide a "hospitable forum" in litigating federal constitutional questions. As stated by Justice William H. Rehnquist in a recent opinion:

State judges as well as federal judges swear allegiance to the Constitution of the United States, and there is no reason to think that because of their frequent differences of opinions as to how that document should be interpreted that all are not doing their mortal best to discharge their oath of office.⁶⁵

The allegations concerning relative competency and judicial mindset are essentially subjective impressions not subject to confirmation in fact. Perhaps even the subjective impressions of lawyers are changing. In a recent survey conducted by Justice James Duke Cameron of the Arizona Supreme Court, attorneys in ten jurisdictions, at various locations throughout the United States, were asked certain questions as they filed civil actions in the state courts.⁶⁶ The attorneys were asked to state the nature of the action filed, their preference for the court, state or federal, for filing the

61. Carbon, *Judicial Retention Elections: Are they serving their intended purpose?*, 64 JUD. 210, 213-15 (1980).

62. Adamany & Dubois, *Electing State Judges*, 1976 WISC. L. REV. 731, 769.

63. Bator, *The State Courts and Federal Constitutional Litigation*, pp. 605-37 *supra*.

64. *Id.* at 631-32.

65. *Sumner v. Mata*, 101 S. Ct. 764, 770 (1981).

66. See Appendix A *infra*.

action, assuming there were no jurisdictional barriers or time constraints, and the reasons for that preference. Two hundred and fifty-two lawyers responded. One hundred and ninety-three lawyers stated they preferred to file in the state court, and thirty-four stated they preferred to file in a federal court. Of those preferring the federal court, the reasons most often given were a superior procedure, better judges, and quicker disposition of cases. Of the majority preferring to file in state courts, the reasons most often given were a quicker disposition of cases, familiarity with the state court, and convenience. In general, a majority of lawyers responding to the questionnaire indicated they perceived no difference in the quality of judges between the federal and state courts. The results indicate that the lawyers who responded saw no great difference in the quality of judges or justice between the state and federal courts.

Another indication that attorneys do not perceive substantial differences in the quality of judges in the state and federal courts can be found in the bar association polls taken in jurisdictions having a merit selection system for judges. For example, in Arizona's most recent bar poll, both the state and federal judges were rated on a variety of qualifications. The overall results varied in Maricopa County, Arizona, from a low rating of sixty-three percent for the federal district court judges to a high rating of ninety-seven percent and from a low rating of sixty percent for the state court judges to a high rating of ninety-nine percent.⁶⁷

CONCLUSION

If our nation's bifurcated judicial system is to be retained, as I am sure it will be, it is clear that we should strive to make both the federal and the state systems strong, independent, and viable. State courts will undoubtedly continue in the future to litigate federal constitutional questions. State judges in assuming office take an oath to support the federal as well as the state constitution. State judges do in fact rise to the occasion when given the responsibility and opportunity to do so. It is a step in the right direction to defer to the state courts and give finality to their judgments on

67. 15 ARIZ. B.J. (August 1980) (Newsletter).

federal constitutional questions where a *full* and *fair* adjudication has been given in the state court.

The jurisdiction of state courts to decide federal constitutional questions cannot be removed by congressional action, whereas the federal court jurisdiction can be shaped or removed by Congress.⁶⁸ Proposals are sometimes made to restrict federal court jurisdiction over certain types of cases or issues. Among the proposals which have merit from the perspective of a state court judge are the elimination or restriction of federal court diversity jurisdiction, and a requirement of exhaustion of state remedies as a prerequisite to bringing a federal action under section 1983. If we are serious about strengthening our state courts and improving their capacity to deal with federal constitutional issues, then we will not allow a race to the courthouse to determine whether an action will be heard first in the federal or state court. We should allow the state courts to rule first on the constitutionality of state statutes.

At both the state and federal levels, efforts should continue to be made to improve the judicial selection processes, and to provide adequate and appropriate training for those selected. The states should, in my view, adopt procedural rules which are generally patterned after the federal rules of criminal and civil procedure, and evidentiary rules which are the same or parallel to the federal rules of evidence. In this way perhaps parity will become less a myth and more a reality.

68. U.S. CONST. art. III, §§ 1, 2; *Ex parte McCordle*, 74 U.S. (7 Wall.) 506 (1869); *Sheldon v. Sill*, 49 U.S. (8 How.) 440 (1850).

APPENDIX A

Total Compilation of Questionnaire Results

Number of Questionnaires.....	500
Number of Replies	252
1. Nature of action (divorce, contract, tort, etc.)	
Divorce	79
Tort.....	71
Contract	74
Other.....	32
2. If there were no time or jurisdiction problems and you had a choice, would you have preferred to file this case in a federal court or in the state court:	
Federal court.....	34
State Court	193
No Preference	18
3. Would you please list briefly your reasons. [Not all responded; some gave more than one reason.]	
a. Those who prefer to file in federal court(34):	
1. Quicker disposition of cases	11
2. Superior procedure	8
3. Quality of judges.....	8
4. Quality of federal court system	5
5. Individual case assignment method	4
6. Larger damage awards	2
7. Federal Rules of Evidence	2
8. Shorter trials	2
9. More apparent authority.....	2
10. Less likelihood of political influence	2
b. Those who prefer to file in state court (193):	
1. Quicker disposition of cases	48
2. Familiarity	39
3. Convenience	38
4. Cooperation with attorneys and litigants	12
5. Jurisdiction.....	11
6. Jury system (12 jurors and voir dire)	9

7.	Local issues best resolved by state courts	8
8.	Arrogance of federal courts	7
9.	Quality of judges	4
10.	Judges know state law	4
11.	More efficient system	3
12.	Less judicial interference	3
13.	Federal court preference for criminal cases	3
14.	Inflexible procedure of federal courts	3
15.	Small case	2
16.	Inexperience with federal courts	2
	Those who gave no preference (18):	
1.	Quality of judges equal	3
2.	Disposition of cases equally fast	1
3.	Procedural rules identical	1
4.	Simple action	1
5.	Federal judges experienced in state court system	1
4.	In general, do you feel that the interest of your client is better served in the federal court or the state court? Federal court 33 State Court 124 No difference 94	
5.	In general, do you believe that the quality of judges is better in the federal court or the state court? Federal judges 95 State judges 30 No difference 125	
6.	Any comments you may wish to make. [Not all responded with comments; some made more than one comment.]	
a.	Those who thought the quality of the federal judges was better:	
1.	Merit selection system	5
2.	Preparation	3
3.	Law clerks better	2
4.	Superior knowledge	2
5.	Fairer to out-of-state plaintiffs	1

6.	Competence	1
7.	State judge quality uneven	1
8.	Higher paid	1
9.	Lower number of federal judges	1
10.	Pressure on state judges	1
11.	Dignified	1
12.	More compassionate on social matters	1
b.	Those who thought state judges were better:	
1.	Elected, so responsive to need of community and bar	3
2.	Federal judges arrogant because appointed for life	3
3.	More sympathetic to needs of attorneys	2
4.	Federal judges do not understand state law	1
5.	State judges diverse	1
6.	State judges allow litigants to litigate	1
7.	State courts efficiently administered	1
8.	State judges qualified	1
	Those who found no difference:	
1.	Quality of judges equal	2
2.	Federal judges not responsive to public because not elected	1
3.	State judges have more consideration for litigants and attorneys	1
4.	Federal judges not influenced by local pressure	1
5.	Federal judges not familiar with local issues	1
6.	Trial dates earlier in state system ...	1
7.	Life appointments encourage omnipotent behavior	1
8.	Bar is negligent in evaluating judges	1
9.	Availability of two court systems is confusing	1
10.	Illinois Rules of Evidence superior to federal rules	1

11.	Federal Rules of Civil Procedure should be adopted in California	1
12.	Federal courts usurp state's control of family matters	1
7.	Those who thought federal judges were better, but	
a.	preferred to file in state court	58
b.	felt the best interests of the clients were better served by the state court	28