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FEDERAL QUESTION JURISDICTION

CHARLES ALAN WRIGHT*

My particular responsibility in the American Law Institute study of division of jurisdiction is with federal question jurisdiction.

When Chief Justice Warren asked the American Law Institute to begin this study in 1960, I am perfectly sure that it was not his thought this was merely to be a proposal for relief of federal courts by finding ways to send large bodies of cases back to the state courts. Any such effort I think would be inevitably self-defeating.

When one looks at the projections as to the population in future decades and the number of cars on the road and the other things that give rise to litigation, it is quite apparent that in the years of my lifetime and yours there is going to be far more than enough work for all the courts of the United States, state and federal, to do, and so the study which we have made as I understand it is an attempt simply to rationalize the division of functions, to find out which cases appropriately should be heard by a federal court and which cases appropriately should be heard by a state court. When and if Congress adopts proposals along these lines, it will then be the task of the states and the federal government to provide enough judges to handle the business which properly falls in each sphere.

In the area of federal question jurisdiction we began by asking ourselves why have it at all; why not simply have federal question cases litigated in state courts? The Supreme Court of the United States is always available to review if the state court errs on a federal question.

This may seem a silly hypothesis even to consider. Of course, federal courts should be hearing cases which involve questions of federal law; and yet from 1789 to 1875 there was no original federal question jurisdiction in the federal courts. The hypothesis which I put forward was exactly the situation then. You did litigate these cases in state courts with review in the Supreme Court.

When we asked ourselves this question we came to the conclusion that it would not be sound at this time to return to the situation which existed in 1789 to 1875. We think that federal

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question cases are a part of the appropriate business of the federal courts and I would like to indicate rather briefly why we came to that conclusion.

First, there is a large body of cases in which the federal courts have considerable expertness which state courts do not have: such cases as patent cases, for example, and federal anti-trust cases. These are cases which presently can be heard only in a federal court. There is no reason, therefore, why state court judges should develop an adeptness in them. Undoubtedly a state court judge could learn to be expert in patent litigation and some of these other complicated federal specialties, but we see no advantage in dissipating the expertness which the federal courts have built up in handling this kind of case and asking judges who specialize in other kinds of cases to take on these new burdens.

But we go beyond the federal specialty cases, the most obvious cases for federal jurisdiction, for it seemed to us, as it seemed 150 years ago to Mr. Justice Story, that it would be an intolerable thing if the Constitution and the laws of the United States were to have different meanings in different states, and the great goal to be sought is that of uniformity in interpretation of federal law. The only way we can achieve true uniformity would be if every federal question case were decided by the Supreme Court, because only the Supreme Court can say ultimately what the Constitution and the laws mean. Quite obviously that is a goal which we cannot attain. In the fiscal year 1964 the federal courts disposed of, by final judgment after trial, 3,403 federal cases. Quite apparently the Supreme Court cannot review even a small fraction of those cases, much less all of them. So we ask, assuming that only a few cases are going to get to the Supreme Court: How do you best achieve uniformity in the interpretation of federal law? It was our conclusion you do so by making available a federal forum.

We think that lack of uniformity in the interpretation of federal law can come from a misunderstanding of federal law or from a lack of sympathy to it. With regard to misunderstanding of the law, certainly the judges of the states are as able and upright men as the judges of federal courts. Nevertheless, we think that we are more likely to get an understanding application of federal law from federal judges. They are, first, picked by the same appointing authority which names judges and justices of the United States Supreme Court and presumably chosen by the

same standards. Second, they are dealing day in and day out with these questions of federal law. Even if we were to abolish federal question jurisdiction tomorrow, the number of these cases in the states would constitute only a small portion of the work load of the state court; and so the state judge would have to make a major effort to become as knowledgeable as the federal judge necessarily must be. Third, federal judges gather on numerous occasions throughout the year in order to learn and talk about the newest developments in federal law. They are indulging in the process of a continuing legal education with regard to what the federal decisions have been and what the federal law means, and so we think that there is an advantage in having an understanding application of the law and looking to federal judges to do it.

Where the danger is not a misunderstanding but lack of sympathy with federal law, we think again the marked advantage is in having a federal forum. It is perfectly true that there can be and have been federal judges who have been every bit as unsympathetic with particular developments in federal law as state judges, but when this happens the remedies are far easier if the case is in the federal system. We have decisions reviewed not by fifty state courts but by eleven intermediate appellate courts, each drawn from a broad region. The courts of appeals have powers over inferior federal courts which no federal court has over the courts of the state, and when a case is making its way up through the state system for possible review in the United States Supreme Court there are a number of ways in which a proper resolution may be delayed or defeated. Delay is always possible if you have an unsympathetic state court. Aside from delay, review by the Supreme Court can be defeated altogether if the state court finds some adequate state ground upon which to rest a decision, and anyone who has tried to make sense of the Supreme Court decisions in this area knows that it is very difficult to say what is an adequate state ground and what is not an adequate state ground. Finally, and I think most importantly, as the Supreme Court has observed many times, how you decide a question of federal law often will turn on what you find the facts to be, and if a case has come up through the state system the findings of fact by the state tribunal are very largely insulated from review by the Supreme Court.

For these reasons we have thought a desirable system would be that every case in which a principal element in the position

of either party is the application or interpretation of federal law should be able to get to a federal forum. We do not say that these cases should be litigated exclusively in a federal forum, although I have eminent state judicial friends who would push us to go even that far. They say, "Take all these cases away from us."

We have thought that historically the choice by Congress has been to say, "We will make the federal forum available to you but then leave it to the parties to decide whether they want to take advantage of it." If both parties are satisfied to litigate in their state court and are confident that the federal law will be properly applied by their state court, then, except in a few special instances, there is no important national interest to say, "No, you have to come willy-nilly to the federal court."

It is on that rationale that we have prepared these proposals on federal question jurisdiction. They have the approval of the Council of the American Law Institute but have not yet been approved by the membership of the Institute.

Of the most significant of our proposed changes, the first appears, by its absence really, in section 1311(a),¹ which is the basic grant of federal question jurisdiction. This section differs in various respects from the existing section 1331, but the difference to which I now refer is that the present federal question statute grants jurisdiction only where more than 10,000 dollars, exclusive of interest and costs, is in controversy. There is no such limitation here.

It is argued that federal question cases should be heard by the federal courts without regard to the amount in controversy. We come to that view because we think, first, that the stated requirement now in the Judicial Code is largely illusory. Although section 1331 says you must have more than 10,000 dollars in order to come into federal court in a federal question case, Congress has proceeded in the Judicial Code and elsewhere with a number of other statutes which say that, in this class of cases and that class of cases, there is jurisdiction without regard to the amount in controversy. When the amount in controversy was raised from 3,000 dollars to 10,000 dollars in 1958, the Congressional reports said that the only classes of cases in which you really have to have a definite amount in controversy where there

1. ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS (Tent. Draft No. 3, 1965).

is a federal question are Jones Act² cases and cases raising constitutional questions. As to Jones Act cases, there is simply no authoritative decision which has ever so held and so we do not believe it. We think that the Supreme Court under the existing law would say that a Jones Act case arises under an act regulating commerce and therefore that it may be entertained without regard to the amount in controversy under section 1337 of the code.³ On constitutional cases the matter is less clear. No one really knows when you have to have an amount in controversy there, but we say this is exactly the sort of case which ought to be able to come to a federal court even if it involves only a small sum. In the diversity area where the claim is a state created claim we can defend saying: "Okay, if the claim is for a small matter let the state provide a forum for it and we will provide a forum where there are larger interests involved"; but where the claim is a federal claim, one which raises a federal question, we do not think this is a defensible position. We think it is the obligation of the national government to provide courts in which questions of national law are to be decided and that it would smack too much of regarding the state courts as inferior tribunals rather than as co-ordinate tribunals if you were to say: "Well, we regard the state courts as sort of small claims courts; they can hear the little stuff and we will hear the big interesting cases." Therefore, we propose to do away with the requirement of the amount in controversy.

The next major change which we make, and in the tentative discussion which the Institute has had on our proposals this has been certainly the one which has caused the most argument, is to permit a defendant to take the case to federal court if he has a federal defense.

There was a time from 1875 until 1887 when this was the law. It probably got changed so far as anyone knows purely through accident, but it is clearly not the law now. Since 1887 the pattern has been that if the plaintiff is relying on federal law he can start his case in a federal court, or, if he starts it in a state court, the defendant can say: "I am going to take you over to federal court; this is a federal question case." On the other hand, if the plaintiff's claim is state created and the defendant has some defense which raises an important issue of federal law, there is no way whatever in the ordinary case that the case can

2. Merchant Marine Act § 33, 41 Stat. 988, 1007 (1920), 46 U.S.C. § 688 (1958).

3. Judicial Code, 28 U.S.C. § 1337 (1958).

get into a federal district court. The federal defense has to be litigated through the state system with possible review in the Supreme Court, with the resulting dangers which underlie our general rationale by which we would allow the federal courts to hear originally all cases involving important issues of federal law. We have thought that this was wrong.

We think that the labor union, for example, which is enjoined in a state court and which has the defense that the state cannot act (because this is an area pre-empted by the National Labor Relations Act) is as much entitled to a hearing in a federal district court as is the claim of a labor union which wants to sue for damages under section 301 of the Taft-Hartley Act.⁴

As a further example, take the case of a libel action brought by a public official against a newspaper in his state. Under the decision a year ago in *New York Times Co. v. Sullivan*,⁵ this raises very difficult federal constitutional issues because the press has an as yet not clearly defined constitutional privilege when commenting on the behavior of public officials. So the newspaper in a political case undoubtedly would plead the defense that under the first and fourteenth amendments it cannot be made to pay damages for what it says. Under existing law such a case must be litigated in state courts. This is precisely the sort of case where the legal question of the newspaper's "bad faith" is closely tied in with the federal question. We think that kind of a case, where there is a federal constitutional defense, is a very appropriate case to be heard in a federal district court. We have generalized in section 1312, particularly section 1312 (a) (2), to provide that wherever there is a substantial defense arising under the Constitution, laws, or treaties of the United States and this defense, if maintained, would be dispositive of the claim in the action, that the case may then be removed on the basis of this federal defense to federal court. We also have a related provision to cover the case where a federal question comes in by way of reply or by way of counterclaim.

We have sought to provide some safeguards here, and I think my friend Mr. John P. Frank will suggest that our safeguards are not yet enough, and he may well be right. We recognize that removal may be used as a harassing check. A plaintiff's attorney brings a case in state court; he is not familiar with practice in federal court, the federal court may be, as is the case in my state,

4. 29 U.S.C. § 185 (1958).

5. 376 U.S. 254 (1964).

several hundred miles away; and so the defendant in the age-old tradition of defendants will seek to make it very difficult for the plaintiff by saying: "I am removing this case to the federal court." If the case is a small one this may cause the plaintiff to lose interest and make it hard for the plaintiff to win even on a just claim.

In subsection (d) of 1312 we have listed a number of kinds of cases that are not to be removed at all. We have sought to identify those cases where a state forum is most appropriate and where removal is most likely to be used as a harassing measure.

There has been some sentiment that we ought to put in a dollar limitation on removal, although, for reasons I have indicated, we should not require any amount in controversy for original jurisdiction. Nevertheless people say, "Why don't you say you can only remove a case that is over 10,000 dollars or some other sum certain." We have thought it preferable, though the question is recognized as a close one, to handle it as we have done in subsection (d) by types of cases, thinking that this responds to the problem with more subtlety than a flat dollar amount does.

The other changes—and there are a good many of them—are in the direction carried in our general rationale. Section 1313 deals with a matter Dean Griswold of Harvard says every person who has ever gone to law school will immediately identify: that when you refer to pendent jurisdiction he knows precisely what you are talking about. Having just read some 400 examination papers, I am not sure people fresh out of law school would be quite that good. This deals with a very difficult matter, where you have a case which involves some federal claims and some state claims. The Supreme Court has said that the federal court can hear the state claim where it is closely enough related to the federal claim, but all we have is a Supreme Court decision which tells when you can do this. Moreover, the pendent jurisdiction statute which was adopted in 1948 is not very helpful—in fact, it is rather more confusing than otherwise.

In section 1313 we tried to spell out what the relation must be between the federal claims and state claims so that the federal court can hear the entire case. Then we have also said what is to happen if you have a case which has both a federal claim and a state claim, and therefore is within this broad jurisdiction. Sometimes you can dispose of the federal claim very quickly. If you can see on the face of the pleadings that the federal claim states no claim on which relief can be granted, should the federal court

then go ahead and litigate what is really a state issue simply because the plaintiff is clever enough to join it with a federal claim in his complaint? We have provided in subsection (c) of 1313 for that situation. We said there the federal court ought to have discretion. It ought not to be required to adjudicate the state claim, but it can do so if it finds that this is what the interests of the parties and substantial justice requires. If they do not so require, after you dispose of the federal claim, then remand the state claim to the state court.

We have improved, I hope, in sections 1314 and 1315 the provisions which concern venue and service of process which in federal question cases today are totally irrational. Under the existing statute covering ordinary cases, a federal question case must be brought in the state in which all the defendants reside. This means that if there are two defendants in a federal question case, one of whom resides in West Virginia and one in Covington, Virginia, there is no federal court in the land which can hear the case. This simply is silly, and so we have provided that federal question cases can be heard either where any defendant resides or where the wrong took place. This will usually be the most convenient place—the place where the witnesses are. We have also provided for nationwide service of process in these cases if all the defendants are not resident in one district.

Finally, in section 1371, which applies both to diversity and federal question jurisdiction, but which appears in our federal question proposals because it has its greatest impact there, we have undertaken to deal with a set of doctrines which the Supreme Court developed entirely in case law—doctrines which have no statutory support but which are known as the “abstention doctrines.” These doctrines tell us in general—nobody knows what they tell us in particular because it is still somewhat confused—that there are some cases where a case is properly within the jurisdiction of the federal court that the federal court should decline saying: “Well, we’ll sit back and find out what the state court thinks about this because there are some issues of state law involved.”

Experience with this has been, I think, tragic. These cases shuttle back and forth from the state court to the federal court. They go on endlessly. Delays of seven or eight years to find out the answer to the state law question are not uncommon. In one case after eleven years of bouncing back and forth between courts, the Supreme Court finally decided to dismiss it as moot.

This is quite a lot of useless litigation, and therefore we have tried to put the core of these doctrines, and part of it which deserves to be preserved, into statutory form and say: "Here is when you are to abstain, here are the consequences of abstaining, and except as provided in this section you are not to do it at all."

The most important feature, I think, of our proposal is that if under our section 1371 the federal court finds that the four conditions listed in subsection (c) exist—that this is one of the rare cases in which the state law issues are so important and so difficult that the state court ought to say what the answer is rather than let the federal court guess. After such determination the federal court is to say good-by to the case forever. The case is to go to the state court, it is to be litigated through the state system, and the Supreme Court of the United States is to provide a check in case the state court makes a mistake. This puts an end to the shuttling back and forth which, I think, has been the principal abuse of the "abstention doctrines." Of course, safeguards must be provided and we hope we have the safeguards there. There might be judicial foot-dragging on the part of a state court, or it may be that you think there is a state court remedy, but it does not exist. We have provided in those unusual cases that you can come back and say: "Well, forget about the abstention—go ahead and litigate the whole matter in the federal court." We believe it is important to treat the case as a package and let one court decide the case rather than have different courts and different systems deciding its various features.

These are the principal elements, I think, of our proposals.