Department of Justice

THE FEDERAL GOVERNMENT AND THE STATE COURTS

An Address

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To be asked to participate in the Robert H. Jackson Lecture series is a distinct privilege for any lawyer. Justice Jackson was one of the eminent lawyers and judges of our day. He provides an enduring model of professional competence and integrity. Among his many qualities I think most often of his analytical mind and his mastery of the English language. I saw Justice Jackson only twice. In September 1954, shortly after I had arrived to clerk for Justice Hugo Black, he dropped by to chat. A couple of weeks later, I passed him in the corridors of the Supreme Court when he was on the way to a Court conference. Five days later he was dead. The law clerks for all the justices sat together at his funeral in the National Cathedral in Washington. Seventeen years later, almost to the week, I was again at a funeral in National Cathedral, this time for Justice Black. In my memory's eye, these two strong minded men are linked in this curious way. They had a genuine respect for each other, despite all of the controversy that

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The views expressed here are those of the lecturer and do not necessarily represent the position of the Department of Justice or of the Attorney General.

swirled about them at one time.

It is also a privilege to participate in this Lecture series because it gives me an opportunity to visit the National College of the State Judiciary. Nothing more clearly symbolizes the new era in the American judiciary than does the flourishing activity in judicial education especially as embodied in this institution. Twenty years ago this was unknown. It is now clearly an idea whose time has come. There is a substantial rising interest in formal educational programs for judges at all levels of the judiciary, state and federal. This is one of the most promising signs that the American courts, while beset with troubles of many sorts, are alive and thriving, with the promise of continued vitality. All of you are to be congratulated on participating in this essential aspect of a career on the bench today.

Out of a wide range of subjects which we could usefully discuss, I have chosen to talk about the federal government and the state courts. This is a subject on which you and I presently have a mutual interest, and it is a subject which raises provocative questions about the future shape of American government. Trends are afoot which, if continued in their present direction, could lead to quite a different governmental arrangement from that which we have known in

our own time and indeed from the beginning of our present Constitution.

This subject can be put into perspective by beginning with a brief of history. Then we can survey the contemporary scene, underscoring the changes which have come about in the mid-20th century and noting the significant trends. Finally, I shall attempt to peer through the mist of the future and to suggest the possibilities which lie ahead.

In many respects the evolution of the state courts in their relationship to the federal government is part of the general evolution of government in this country. Most discussions of that subject, however, focus on executive and legislative powers, and there has been little attention paid specifically to the peculiar relationships of the state judicial systems and the federal government as a whole. My general thesis here is that the state courts today occupy a radically altered position in relationship to the federal government, compared to that which they occupied originally and for well over a century after the formation of the federal union. This, of course, is hardly a secret. But its full dimensions may not be widely understood. It is further my thesis that we are in a transition period which could lead to a judicial structure quite different from the original state-federal design.

We begin with some elementary observations. When the members of the Constitutional Convention convened in Philadelphia in 1787, courts already existed in the thirteen newly independent states. Each of these states was an autonomous entity, and each had its own courts, with a structure and a jurisprudence to a large extent inherited from England, though heavily infused with North American frontier customs and conditions. At that time, each state was like England itself, that is, each state had a unitary government and unitary set of courts; there was no federal overlay or dual governmental structure such as that brought into being by the work of those men in Philadelphia.

The adoption of the Constitution and the passage of the Judiciary Act of 1789 set the stage for all that has followed. The Constitution created a dual sovereignty throughout the United States. Alongside of, or on top of, the state courts, a federal judicial system was erected. But for many decades the position of the state judiciaries was not altered very much. In the beginning, the trial courts of the new federal system were given very little jurisdiction that impinged in any way upon the state courts. Admiralty was perhaps the most important element of change at the trial level, with a shift of that jurisdiction from the previously independent state courts over

to the new federal district courts. The Supreme Court was given jurisdiction to review state court judgments, but this power was exercised only scantily for many years. In the first decade of its existence, the Supreme Court reviewed only seven state court decisions, and for the next several decades the average was about one state judgment per year. The state judges, by virtue of the Federal Supremacy clause, were compelled to apply federal law whenever it came into play, but federal law was so skimpy in the early decades that this posed little or no added burdens on the state judges. There was, of course, no remote hint from the beginning and throughout the nineteenth century of any federal funding for the state judiciaries. Any suggestion along that line would likely have been thought of as subversive or revolutionary or the product of a deranged mind.

Thus, in an oversimplified way, it might be said that for nearly a century after the creation of the federal union the only impingement of the federal government on the state courts was the occasional review by the U.S. Supreme Court of a State Supreme Court decision. Otherwise, the state courts went their way largely unaffected by the coexistence of the federal government.

The situation began to change--and the seeds for

radical alteration were planted--as a result of that water shed disaster in American history, the War Between the States and Reconstruction. The state judiciaries were directly affected by the great upsurge of national sentiment and increasing assertions of federal authority which came during and after that era. A major development was the opening of the federal trial courts to business which would otherwise have been channeled through the state courts. For example, in the late 1860's Congress broadened removal to the federal courts of diversity of citizenship cases. In that same period Congress also, for the first time, provided writs of habeas corpus for persons detained under state authority. And most significant of all was the adoption of the Fourteenth Amendment in 1868, imposing directly upon the states, as a matter of federal law, the constraints of due process and equal protection. The immediate effect of these measures was not great, but in the long run they have served to channel to the federal district courts a large volume of litigation which would otherwise have been confined to the state courts, subject only to the possibility of U.S. Supreme Court review of the final state judgment.

More was yet to come. In 1875, Congress enacted, for the first time, a general provision authorizing federal

trial courts to entertain suits arising under federal law. It is anomalous that up until that time there had been no general federal question jurisdiction in the federal trial courts. The 1875 provision has had enormous consequences on the business of both the state and federal courts. Since that time, plaintiffs with claims based on federal law can initiate actions in the federal courts, rather than in the state courts, and they have done so in vastly increasing numbers in recent decades.

This 1875 jurisdictional grant combined with the Fourteenth Amendment in 1908 to produce the Supreme Court's decision ex parte Young. That decision held that federal courts could enjoin state officials from conduct in violation of the Constitution. It worked an enormous shift of authority. In effect, it put the federal district courts in the business of supervising the constitutionality of state official activity. A federal trial court with authority to hear evidence, decide facts, and issue injunctions is armed with a powerful device, one far more potent than U.S. Supreme Court review of a final state supreme court judgment. Constitutional questions which would previously have been decided initially by the state courts are thus channeled instead through the federal system. Not only has this given the federal courts a vastly enhanced amount of

business, but it has also shifted ultimate authority over many important economic and social questions into the hands of the federal judiciary.

It was not until the middle of this century that the full fruits of the 1867 habeas corpus statute materialized. That statute, combined with the Fourteenth Amendment, has now been interpreted by the Supreme Court to permit federal district courts to review state criminal cases in a pervasive way. Any federal Constitutional issue concerning the state criminal process can now be asserted in the federal trial courts following an otherwise final state court conviction. The range of those issues has also been broadened considerably through the Supreme Court's expanded construction of the Fourteenth Amendment, as applied to the state criminal process. Here again is a major reallocation of state-federal authority, about as large as that worked by ex parte Young. The federal judiciary has acquired vastly enhanced powers to supervise the state courts in criminal cases.

The last major development I wish to cite is the blossoming of Section 1983. Between 1875 and 1939, there were only 19 reported cases brought in the federal courts under this statute. Last year alone, however, 7,752 were filed in the federal courts. In effect, this statute, as

presently construed, converts many state tort and property cases into Constitutional cases thereby opening the way for their litigation in the federal district courts.

These sketchy highlights from our history are enough to underscore a huge growth in federal judicial business, much of which has been diverted from the state courts. These highlights also show a greatly enhanced federal judicial power over state activity in all of its aspects. In other words, the growth and relative power of the federal judiciary is consistent with the general pattern of growth of federal power in other aspects over the last hundred years, and particularly in the middle decades of the twentieth century.

There have been only two developments inconsistent with this pattern. One was the Supreme Court's decision in 1938 in Erie R.R. v. Tompkins, holding that state decisional law was to be as binding on federal judges as state statutory law. As a practical matter, this meant that in diversity of citizenship cases federal courts were no longer to exercise an independent, creative common law function in formulating decisional rules. This decision reallocated power to the state courts; it made the state courts the authoritative expositors of state common law. Federal judges were to follow them in diversity cases, which after

all involve essentially state law questions. This holding deprived the federal judges of a large power of creative development of common law doctrine, and shifted responsibility for that back into the state courts.

The diversity jurisdiction itself is the subject of the other development which promises to shift back to the state courts a large amount of business. Bills are now pending in Congress to restrict that jurisdiction. There has been a great growth in sentiment in that direction, and it is likely that this Congress will enact a bill to contract the federal diversity jurisdiction at least to some extent. Thus, a significant number of cases will be reallocated to the state courts. However, in no single state will this volume be huge. The Conference of Chief Justices, at their annual meeting this past August, adopted a resolution stating that the state courts are prepared and willing to assume whatever increased volume of business results from the restriction of federal diversity jurisdiction.

Assuming this restriction of federal jurisdiction is enacted, and considering the Erie decision, we are still left with a substantial net gain in federal judicial business and power, compared to the situation which existed a century ago. The state courts, nevertheless, remain with

large and ever growing volumes of business. Our system is still structured on the basic premise that the state courts are the primary forums for deciding the ordinary controversies which arise in the great mass of day-to-day dealings among citizens. Contract, tort, property, domestic relations, and criminal law matters are all still dealt with largely by the state courts. In sheer volume, the totality of state court business is enormously greater than the totality of federal court business. Moreover, in numbers of judges the state court systems far exceed the federal system.

Thus far we have been speaking largely of a net growth of federal jurisdiction. But this does not reveal the full dimensions of the present relationship between the federal and the state courts. In addition to the growth of federal jurisdiction, there are now more points of contact between the state and federal judicial systems and more overlapping of jurisdiction. Criminal actions are a case in point. Both state and federal courts decide a large number of identical due process and equal protection questions which now abound in the criminal process. Another example is diversity cases, in which federal courts are deciding issues of law identical to those being decided in the state courts. FELA cases may be brought in both state and federal courts

so that both systems decide these matters. Litigation involving the legality of state official action takes place in both systems. In other words, the business of the two systems is not neatly divided but rather is shared to a substantial degree.

The accretion of federal jurisdiction and the growing dominance of the federal judiciary are reminiscent of developments in England centuries ago. After the Normans arrived and established the seeds of a central national government, there arose in England, for the first time, some central, national courts. But at the beginning and for many, many years, these courts had very limited jurisdiction. The great bulk of everyday dispute settlement rested in the local courts of various sorts--county courts, fuedal courts, and others. Gradually, however, as the centuries passed the jurisdiction of the central courts increased. By various procedural inventions and fictions they drew unto themselves an ever increasing amount of judicial business which previously had been in the hands of the local courts. Ultimately, the local courts were eclipsed, and the central courts became all embracing in their authority.

Whether the trends afoot in this country will lead to such a result is one of the fascinating questions to ponder.

There are some parallels. For example, one of the instruments used in England by the central royal courts to gather jurisdiction unto themselves was the writ of habeas corpus. Through that writ, cases could be taken from the local tribunals over into the central courts. As noted above, it is largely through the habeas corpus writ that we have developed what has been characterized as a federalization of the state criminal process. The superimposing of Constitutional doctrine on state tort and property law, through Section 1983 actions, also has some parallels in the English historical development which led ultimately to the dominance of the central national courts. Of course, in this country, the state courts represent a much more firmly established and deeply entrenched system than did the local courts in England. Moreover, the federal-state division of authority is much more sharply etched in our system than was the national-local authority in England.

Returning now to the contemporary scene in the United States, I have not yet mentioned the most radical and novel development of all. This is the rise of federal funding for the state judiciaries. There was, of course, no federal funding whatsoever for state courts at the beginning of the American Union and for the century and a half following its foundation. The first significant step in this

direction came with the creation of the Law Enforcement Assistance Administration in 1968. This federal agency was created to assist the states in what was intended to be a massive war on crime. Funds were to be provided to bolster the criminal justice capabilities of the states. While no one previously had specifically considered the courts to be part of the criminal justice system, they quickly came to be so perceived. LEAA money began to be channeled to the state courts, directly and indirectly. At first a trickle, it has grown to sizeable sums. Grants to state courts in 1969 from LEAA amounted to $2.5 million; in 1976 the annual figure was $140 million. To date a total of $715 million has been channeled through LEAA to the state judiciaries. Such financing is openly advocated. State judges are appearing before Congressional committees urging federal funding for the state courts. Indeed, the prospect of any diminution in the present level of funding is viewed with dismay by judges and court administrators in many states. Strenuous lobbying and public relation efforts are mounted to ensure that federal funding continues to flow and to increase. Along with this, of course, goes the demand for safeguards around the independence of the state judiciaries. On this federal funding question, there has seldom been a more dramatic turnabout. It was only a few years ago that many voices could be heard resist-

ing any federal money for the state judiciaries. Faced with stringent state budgets, however, the lure of the federal dollar became irrestible.

Another significant development in this unfolding saga of our dual court systems is the creation of a national center for each. In December 1967, the Federal Judicial Center was established followed in 1972 by The National Center for State Courts. These two central, national Centers have many interests in common and they have collaborated on a variety of projects and activities. The existence of these Centers makes it possible for the federal and state judiciaries to interrelate in ways that would not have been possible without them and increasing collaboration is predictable. The National Center for State Courts, too, has provided a focal point for federal funding and attention. The Center has largely been funded up to now by federal grants from LEAA. And today many people are urging that the Center and its activities be funded by a direct appropriation from Congress. The Attorney General had endorsed this idea, and it is not far fetched to believe that such arrangements may come about. With direct federal funding going to the State Court Center, it is not a great additional step to contemplate federal funding going directly and expressly to the state courts themselves, rather

than indirectly through LEAA.

Unquestionably, we have reached a point now where an interrelationship exists between the state and federal courts and between the state courts and the federal government that was unknown and uncontemplated a century ago. This interrelationship is both jurisdictional and financial.

There are other developments pulling the systems closer together. The Conference of Chief Justices more and more concerns itself with federal matters and federal-state relationships. With the encouragement and support of the Federal Judicial Center, state-federal judicial councils have been formed in 40 states. Recognizing an identity in many of their concerns, the appellate judges of the federal courts have joined state appellate judges in a single, voluntary association within the American Bar Association. And it has been suggested that state and federal trial judges do the same.

A still newer development of potentially large significance is the entry into this state-federal picture of the federal Executive Branch. We have a new Attorney General who has repeatedly espoused the view that the Department of Justice should increasingly exercise a national leadership role in justice at all levels. He has advocated that the

Department take the initiative in creating a "national policy on justice" by bringing together local, state and federal groups to collaborate and develop policies to improve the quality of justice and the courts at all levels. To promote this view, since taking office in January 1977, he has met with groups of state Chief Justices, Governors, state attorneys general, representatives of The National Center for State Courts, and others concerned with justice at the state and local levels. He has established a new office within the Justice Department called the Office for Improvements in the Administration of Justice to develop proposals which will affect state as well as federal courts.

For example, this Office, with LEAA funding, is establishing experimental Neighborhood Justice Centers in three cities with the announced objective of establishing more if these are successful. The disputes which will come to these Centers would otherwise go to state tribunals if they went to court at all. Thus, the Department of Justice seems to be assuming something of the role of a ministry of justice with nationwide, rather than strictly federal, concerns.

Increased centralization and uniformity are characteristics of contemporary American life. It is not surprising, therefore, that we should also see that phenomenon reflected in our justice systems. At the same time that federal

judicial power has increased, the state and federal court systems are drawing closer together; there is a growth in uniformity and the blending of functions. Growth in uniformity can be seen in the law being applied and in the rules of procedure. Some of this has come about as the result of decisions under the Fourteenth Amendment. In criminal cases, as already noted, there has developed a closer relationship between federal and state law enforcement and a further blending of functions between the state and federal courts. Some forty states have adopted rules of civil procedure which are virtually identical to the Federal Rules of Civil Procedure. Greater uniformity in the law of evidence may likewise follow the adoption of the Federal Rules of Evidence. Largely as a result of the work of the National Conference of Commissioners on Uniform State Laws, much state law has been revised to achieve a higher degree of nationwide uniformity. And the American Law Institute continues its work on the restatements thereby encouraging uniformity in development of the common law. It is fair to say that the courts of the nation, both state and federal, are today deciding more legal questions in common than ever before. Also, there is greater possibility now for federal judicial involvement in matters which formerly would have been the exclusive province of the state courts.

Federal appropriations are also serving to bring the systems together in new ways. The federal government is investing over $30 million a year through LEAA in justice research directed primarily at matters of state concern. There is wide agreement that federal funding for justice research should continue, but that it should be broadened to include civil as well as criminal justice matters, state and federal. The newly created Federal Justice Research Fund is a move in that direction. That Fund, administered by the Office for Improvements in the Administration of Justice, is to be used to support research in all aspects of the justice system, without the LEAA-type of restrictions. Consideration is being given to creating a new federal structure to administer justice research funds. Whether such a structure would be modeled on the National Institute of Justice, as recommended by the American Bar Association, or be contained within the Department of Justice or elsewhere, is as yet undecided.

Federal funds to improve and support state courts in other respects are increasingly viewed as a necessity because state courts are chronically underfinanced by their own legislatures. In a recent letter to the Attorney General, commenting on the proposed restructuring of LEAA, The National Center for State Courts endorsed the position

of the Conference of Chief Justices, that federal funding should continue for the National College of the State Judiciary, for The National Center for State Courts and for the State Judiciaries. In encouraging such funding the Center and the Conference offer warnings and admonitions that federal money must be supplied to the state courts with few or no strings because of the nature of the recipient institutions. The Conference says, for example, "there is a proper federal role in improving the justice system but it must be performed in a manner that respects the identity and independence of state courts." While those are laudible sentiments, similar admonitions have preceded federal funding in other areas of American life. But inevitably, federal regulation tends to follow federal money, at least where the money flows in substantial amounts over a period of time. The bureaucratic grip of the federal government, through HEW, on the colleges and the universities of this country rests entirely upon the flow of federal money to those institutions, sometimes in relatively small amounts to each. It is not clear that the state courts will be in any stronger position to resist the federal power that follows federal money than the institutions of higher education which, like the state courts, make legitimate and historically well-grounded claims to independence.

Only a modest imagination is needed to foresee the development of federal standards for state courts in order for them to be eligible for federal appropriations. And, of course, once such standards are promulgated, some arrangements must be provided to determine whether they have been met. While this need not in theory impair the independence of state judicial decisions, the appearance of such impairment will be unavoidable. Any similar kind of overseeing of the federal courts by Congress or the Executive would almost certainly be thought unconstitutional. It would be strange indeed for the state judiciaries to be subject to greater federal authority than are the federal courts. Yet that prospect is not far fetched and may indeed already be happening under present funding arrangements.

This anomalous prospect affords an occasion, if not a necessity, to rethink the structure of the entire American judiciary. It is possible that the combined effect of all the developments noted here, both jurisdictional and financial, will lead us along the route of the English experience. That is, one possibility is the emergence of a unitary, national system of courts. A plausible argument can be made that this is the direction in which all the trends point. The growth of federal judicial power, the increasing

uniformity in legal rules, the blending of functions, and the necessity of substantial federal funding for state courts all seem to suggest that eventually a single national system will evolve. Yet the practical and Constitutional difficulties which stand in the way of such a development are substantial, and it is more likely that some other arrangement will emerge.

One possibility would be a quasi-merger of the federal judiciary with the state court systems. For example, machinery could be developed within the federal judicial branch to administer federal monetary support for the state courts and to integrate those courts more closely with the federal system. This might be done in ways which would not threaten the independence of the state courts, as would federal executive or legislative supervision, but yet would bring about a smoother meshing of the judiciary nationwide.

Another possibility, apart from funding considerations, lies in the reallocation of judicial business between the systems. Duplicating and overlapping jurisdictions could be substantially reduced, and the federal appellate structure could be rearranged so as to integrate state and federal business in a more efficient way. The pending abolition of diversity jurisdiction is a move in that direction; it would confine those cases exclusively in the state

courts. Another idea along this line is the routing of all state criminal cases to the U.S. Courts of Appeals, thereby bypassing federal trial court review.

Still other ideas may be gleaned from the judicial organizations of other federalisms. In Australia and Canada, for example, all state court decisions are reviewable by a federal tribunal which is empowered to decide, with binding force, all legal questions, state and federal. In the Federal Republic of Germany, there are no federal trial courts at all; the same, with rare exceptions, is true in Australia. The courts of first instance in both countries are provided by the states, and cases flow into a federal forum only at the appellate level.

While these arrangements in other countries may be suggestive, it is unlikely that any one of them furnishes an exact model which would be feasible in the United States. We have our own long-standing Constitutional arrangements and legal habits and customs which are likely to lead us to a uniquely American scheme of things.

The one thing that does seem clear from the conditions described here is that we are in a time of transition. The old state-federal structures and jurisdictions are changing, though the new forms are not yet discernible. One thing is certain: our dual court system is no longer the same one it

was 150 or even 50 years ago; but exactly where this shifting and readjusting and drawing together is leading us is uncertain.

I think it is important for all of us to recognize that we are in a transition period. Actions taken or not taken over the next few years will definitely have an impact on the eventual design of the judicial processes in our country. We can, by steps we take or positions we advocate, either have a hand in shaping the direction of events, or events will control us. It seems preferable to me to try to address our situation rationally, and make an effort to design structures best suited to our society and to the conditions of the late 20th century. Otherwise, we will simply drift into new arrangements which may or may not be desirable.

There are serious values and interests which must be accommodated in any American solution. There are, for example, values in decentralization; but there are also values to be served by a more efficient integration nationwide of our judicial systems. Above all, there is the enormous value to our society of the unique role of the judges, state and federal. Whatever we do, through all the restructuring, reorganizing, financing and streamlining, we must not impair that essential role, the deciding of contro-

versies under law. The courts must be a place where citizens can go to have their disputes with each other or with the ever more intrusive other branches of the government decided by detached, disinterested judges, applying evenhandedly the laws and principles that govern us all. All other functions of government can be performed by other agencies.

As trial judges in the state courts, you are in the front line of the legal system. You are in an excellent position to contribute ideas to the development of new structural and procedural arrangements. The National College of the State Judiciary can also play an important part in this development. If the best minds of the legal order can be put on this problem, we may emerge from this time of transition into a far better judicial system than we have yet had.

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