LAW AND CONTEMPORARY PROBLEMS

VOLUME 13 WINTER, 1948 NUMBER 1

FOREWORD

"The indispensability of the federal judicial system to the maintenance of our federal scheme may be taken as a political postulate."[1] The validity of this postulate has rarely been questioned since 1789, when the First Judiciary Act established, as its "transcendent achievement,"[2] the tradition of a system of inferior federal courts for this country.[3] Still less is it likely to be challenged today, when the federal judiciary enjoys the highest prestige, when federal procedural reform has set an example to be emulated by courts everywhere, and when expanding federal functions have sharply emphasized the necessity of a system of courts to serve both as an instrument of national policy and as a moderator of relations between the nations and the states.

It is significant, however, that this acknowledgment of the indispensability of the federal judicial system was formulated by one of the system's most jealous critics—one who insisted that the specific functions assigned to the federal courts should be subject to continuing scrutiny, and that special care should be taken to protect those courts from "an excess of responsibility which may seriously impair their peculiar federal tasks."[4]

A re-examination in this spirit of the federal judicial system as an institution is particularly appropriate at this time. The opportunity for comprehensive reconsideration does not come often; when it does come, it is usually related to legislative proposals for rather general revision of the jurisdiction and functions of the judiciary.[5] Now the Federal Judicial Code, which dates from 1911, is in process of

[1] Frankfurter, *Distribution of Judicial Power between United States and State Courts*, 13 CORN. L. Q. 499, 503 (1928).

[2] FELIX FRANKFURTER AND JAMES M. LANDIS, THE BUSINESS OF THE SUPREME COURT 4 (1927).

[3] Doubts have nevertheless been expressed occasionally, even in modern times. See, *e.g.*, Max Radin, *Courts*, in 4 ENCYC. SOC. SCI. 515, 527 (1931): "The federal judicial system is based upon the premise that the federal judicial power cannot be entrusted to the state courts but requires a separate organization of federal courts. Doubtless no other arrangement was possible at the time when the federal judicial system was inaugurated, since the states and the federal government were too jealous of each other to tolerate a unitary system. But a great deal can be urged against it under present conditions of national unity, and it may well be doubted if it would be adopted now if another federal constitutional convention were to meet."

[4] Frankfurter, *supra* note 1, at 503.

[5] "For forty years [since the Judiciary Acts of 1887-88] there has been no organic reconsideration of the scope of business entrusted to the lower federal courts. . . . But in truth, for more than fifty years there has been no comprehensive revision. For the Act of 1887-88 largely took for granted the jurisdictional assumption which underlay the Judiciary Act of 1875." Frankfurter, *supra* note 1, at 502-503.

revision;[6] so is the Federal Criminal Code.[7] Even though the revision of the Judicial Code is a project of limited objectives, it is an undertaking which calls once again for appraisal of the uses to which we put our unique system of federal courts.

It has been twenty years since a study of such scope and purpose has claimed the attention of American lawyers and statesmen.[8] In those years there have been several developments which ought to be taken into account. Not the least of these is the establishment of an Administrative Office of the United States Courts, which since 1940 has been compiling information of a sort that is prerequisite to adequate statistical analysis of the judicial system. One of the most interesting developments was the Supreme Court's abrogation, in *Erie Railroad v. Tompkins*,[9] of a doctrine which had been thought by some to be a reason for the important jurisdiction of the district courts in suits between citizens of different states, and which certainly appeared to be a reason for the popularity of that jurisdiction.[10] Of greatest importance, however, is the fact that new problems of national life have been reflected in the demands made on the courts and in the roles to which they have been assigned in the functioning of the federal system. LAW AND CONTEMPORARY PROBLEMS therefore presents this group of essays with confidence that "nothing but good can come from a re-examination of the purposes to be served by the federal courts."[11]

BRAINERD CURRIE.

[6] H. R. 3214, 80th Cong., 1st Sess. (1947).

[7] H. R. 3190, 80th Cong., 1st Sess. (1947).

[8] In 1928 the Norris Bill (S. 3151, 70th Cong., 1st Sess.), which would have drastically curtailed the jurisdiction of the district courts, evoked strong protests from bar associations and was perhaps responsible for a historic discussion of federal jurisdiction in the law reviews. See 69 CONG. REC. 8078 (1928) and references in Frank, *Historical Bases of the Federal Judicial System, infra* at 23.

[9] 304 U. S. 64 (1938).

[10] Such evidence as there is, however, fails to show that the *Erie* case has had an appreciable effect on the business of the courts in this category. The best available figures on the use of diversity jurisdiction prior to the *Erie* case are those given in the American Law Institute's STUDY OF THE BUSINESS OF THE FEDERAL COURTS (1934), an analysis of thirteen selected districts for the year 1930. According to that study, diversity cases amounted to 18.4 per cent of all cases (*cf.* Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code, infra* at note 91), or 43 per cent of all private cases. The Annual Reports of the Director of the Administrative Office give full information for the years 1940-47. Over that period the number of diversity cases increased from 7254 to 8586. From 1940 to 1946 the ratio of diversity cases to all private cases varied within the narrow range of 50 to 53 per cent, dropping to 44 per cent in 1947. This decline is probably not significant; if the figures for 1947 are adjusted to eliminate portal-to-portal suits, diversity jurisdiction again accounts for 50 per cent of all private cases. The continued attractiveness of the diversity jurisdiction despite the loss of the incentive furnished by *Swift v. Tyson* has interesting implications for a study of the federal courts.

[11] Frankfurter, *supra* note 1, at 499.