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Practice and Procedure -- Review of Order Remanding to State Court -- Tactical Windfall Under the Civil Rights Act of 1964

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incompetent would have done, the court seems to have modified the legislative intent as well as to have rejected the sounder policy approach.

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Practice and Procedure—Review of Order Remanding to State Court —Tactical Windfall Under the Civil Rights Act of 1964

Title IX of the Civil Rights Act of 1964[1] institutes a procedure unique in present trial practice.[2] When a case, removed to the United States district court under section 1443 of title 28, is ordered remanded to the state court, that order may now be reviewed "by appeal or otherwise."[3] This amendment of the former rule exempting all orders to remand from review makes it possible for the defendant who alleges that a question of civil rights is involved to delay trial on the merits until the whole arsenal of federal review weapons has been exhausted. Extensive use of this delaying tactic may lead to a narrowing of the scope of review of these remand orders by legislative action or judicial interpretation.[4]

[1] 78 Stat. 266, 28 U.S.C.A. § 1447(d) (Supp. 1964).

[2] Unique as a practical matter; the United States may appeal from an order of remand in cases relating to lands of the five Civilized Tribes of Oklahoma. Act of Aug. 4, 1947, ch. 458, § 3(c), 61 Stat. 732. Professor Moore calls this a "minor statutory exception." 1A MOORE, FEDERAL PRACTICE ¶ 0.169 [2.-1], at 1452 (2d ed. 1961) [hereinafter cited as MOORE]. The description seems appropriate.

[3] Civil Rights Act of 1964 § 901, 78 Stat. 266, 28 U.S.C.A. § 1447(d) (Supp. 1964).

[4] Textual discussion here will be limited to the practical implications of section 901; no attempt will be made to justify or condemn it. Congressional debate on the merits of the amendment is summarized to exemplify the legislative intent behind the provision:

Experience over a period of eighty years has demonstrated the wisdom of making the decision of the judge of the U. S. District Court final in removal proceedings. This amendment would give to the civil rights litigant alone a right to appeal the remand order. This is an attempt to by-pass the state and district courts. The removal process is simple, and once the petition is filed the case is automatically removed. This deprives the state court of all powers of process and of the power to enter any order while the case is pending in the federal courts. [*But cf.* 28 U. S. C. § 1450 (1958).] Allowing appeal from removal orders upsets the delicate balance of power between the state and federal courts. 110 CONG. REC. 2769 (1964) (remarks of Representative Tuck).

The first removal statute in the field of civil rights was enacted shortly after the Civil War for the purpose of giving justice in civil rights cases.

Section 1443 of title 28 is the successor of that legislation and that section is not changed by the Civil Rights Act of 1964. Section 1447 is being amended and there is precedent for this change in that from 1875 to 1887 appeal was allowed in all cases ordered remanded to the state court. It is at least arguable that the 1887 law did not affect the right to appeal in civil rights cases. In any event, section 1443 has been narrowly applied. Removal is allowed under virtually one set of circumstances only, to wit, when a state law or state constitution on its face denies equal rights to a defendant. The Attorney General, in his testimony given when the bill was in committee, reported that without appeal section 1443 is useless. Proponents of the legislation are not asking for an extraordinary remedy. They are asking only that the useless law be reviewed, and that the appellate courts be able to re-interpret the extent of section 1443 so that, hopefully, it would be held to include state criminal prosecutions brought to intimidate the petitioner, cases involving community hostility making fair trial in state or local court unlikely or impossible, and other cases where circumstances make it likely or certain that a fair trial is precluded. This legislation does not upset the balance of judicial power and is not dilatory. *Id.* at 2770 (remarks of Representative Kastenmeier).

Initially all federal questions were decided in state courts. When removal to federal court was authorized by statute, no appeal was allowed because this was not considered a final judgment but rather an interlocutory decision. In 1885 [1875] legislation was enacted allowing appeals from all orders to remand. In 1887 the former practice was restored. This act would return the right to appeal in one class of cases only. What is the justification for such a procedure? The 1887 act denied appeal because the appeal procedure involves excessive delays. This is especially significant because the state court loses all jurisdiction while the case is being considered in the federal court. The *status quo* cannot be maintained. [*But see* 28 U.S.C. § 1450 (1958).] No process can issue. Subpoenas may expire. Witnesses may be lost. Substantive rights are still protected without legislation as proposed by Title IX. The federal appellate procedure protection from improper state court action is still available if constitutional rights need to be protected. *Id.* at 2771 (remarks of Representative Poff).

The proposed legislation is a direct slap at all district court judges. It will cause chaos in the administration of justice in state courts, for the process of state courts in civil rights cases will be paralyzed. "It would give so-called civil rights groups a special 'weapon' all their own, to use the terminology of Attorney William M. Kunster, counsel for CORE. It would effectively prevent for a long period of time any trial, Federal or State." Since 1887 the only procedure that has proved feasible is to make the decision of the district judge final. The devastating effect of the proposed legislation is apparent. Removal is automatic. The legal relief is an application for remand. The defendent already gets "two bites at the apple" in that the district court can keep the case by denying the application to remand, or, if the remand is ordered, an appeal in the federal courts is available after the case has been through the state courts. Further, injunction of an illegal act by the state court is nullified upon removal [*contra,* 28 U.S.C. § 1450 (1958)], and the question might be moot by the time of trial. In the criminal context, removal might come minutes before trial, and "trial could be put off almost indefinitely, especially considering the congested dockets of the federal courts of appeal." As to the charge that the present section is "useless," it is obvious that removal is useless where there is no federal jurisdiction. The inference of the Attorney General that judges of the federal district courts "have been less than honest in testing their own jurisdiction"

The first federal law allowing removal of a case from a state court on civil rights grounds was enacted in 1866 and provided that "citizens, of every race and color . . . shall have the same right . . . to full and equal benefit of all laws . . . as is enjoyed by white citizens."[5] The first case in which this statute was interpreted was decided by the Supreme Court of North Carolina, which held that an allegation of local community racial hostility entitled the defendant to remove.[6] The present statute, which dates from 1911,[7] provides that:

> Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant

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is a serious charge against the judges or an indication of lack of understanding of the purpose of removal. The Attorney General may not understand that the end does not justify the means. The wisdom of the end sought here is very debatable. Justice is delayed, and an appeal from a remand is not necessary to protect federal rights. *Id.* at 2771-73 (remarks of Representative Dowdy).

The reason for the special rule in civil rights is that there is a special problem which needs a solution. The proposed legislation provides a procedual remedy to handle the special problem. There has been difficulty especially in the voting cases. *Id.* at 2773 (remarks of Representative Lindsay).

The proposed legislation is the work of "bleeding hearts." It provides a special remedy for ten per cent of the population. *Id.* at 2780 (remarks of Representative Watson).

This amendment of section 1447(d) of title 28 was not a part of the original administration bill but rather was added by sub-committee. There is little about the provision in three volumes of testimony before the sub-committee. It is possible that this is an example of action without full realization. Dilatory practices are possible under this legislation, and it might be a bad precedent. *Id.* at 2782 (remarks of Representative Meader).

Litigants may be frustrated at the district court level in cases of harsh denial of constitutional rights if there is no right to appeal. "If the State prevails, the State has a right to appeal, but the plaintiff does not. [*sic*] . . . [T]itle IX . . . will get at those cases which are most tragic and where justice is in truth denied unless we can get the case to the appellate courts." *Id.* at 2784 (remarks of Representative Corman).

Civil rights cases might be exactly the kind that should be reviewed. The proposed legislation seeks to cure injustice. *Id.* at 2784 (remarks of Representative Edwards).

Essentially the same arguments were made when the Senate considered the bill sent up from the House. *Id.* at 6451 (remarks of Senator Dirksen), 6551 (Senator Humphrey), 6955 (Senator Dodd), 7784 (Senator Smathers), 11320 (Senator Sparkman), 11848 (Senator Humphrey), 13172 (Senator Byrd of W. Va.), 13468 (Senator Ervin), 13879 (Senator Byrd of W. Va.), 14459 (Senator Morton).

[5] Act of April 9, 1866, ch. 31, 14 Stat. 27.

[6] State v. Dunlap, 65 N.C. 491 (1871).

[7] Act of Mar. 3, 1911, ch. 231, § 31, 36 Stat. 1096.

to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or refusing to do any act on the ground that it would be inconsistent with such law.[8]

An order remanding a case to the state court was made reviewable "on writ of error or appeal" in 1875.[9] Twelve years later Congress stated categorically "that no appeal or writ of error from the decision . . . remanding . . . shall be allowed."[10] This practice, in substance, has been carried forward to the present time. When the revisers of the Judicial Code inadvertently overlooked the provision in the 1948 revision, an amendment was hastily enacted to clarify the intention that orders to remand would not be reviewed.[11] This legislation stated concisely that "an order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise."[12] The Civil Rights Act of 1964 adds the exception "that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise."[13]

The procedure to be followed to effect removal is uncomplicated and is set out in the statute.[14] All that is required is that the defendant file a petition in the appropriate United States district court. The petition must be verified and contain a concise statement of the facts supporting removal. Copies of the process, pleadings, and orders of the state court must accompany the petition. In civil cases the petition must be filed within twenty days after receipt of the initial pleading or service of the summons, depending upon the circumstances, and must be accompanied by a bond sufficient to reimburse the plaintiff-respondent for expenses incurred because of the removal proceedings if the district court

[8] 28 U.S.C. § 1443 (1958).
[9] Act of Mar. 3, 1875, ch. 137, § 5, 18 Stat. 472.
[10] Act of Mar. 3, 1887, ch. 373, § 2, 24 Stat. 552.
[11] MOORE, COMMENTARY ON THE U.S. JUDICIAL CODE, ¶ 0.03(43) (1949).
[12] Act of May 24, 1949, ch. 139, § 84, 63 Stat. 102.
[13] 78 Stat. 266, 28 U.S.C.A. § 1447(d) (Supp. 1964).
[14] 28 U.S.C. § 1446 (1958).

remands. In criminal cases no bond is required, and the petition may be filed anytime before trial. In any case, if the defendant is actually in custody, a writ of habeas corpus will issue and the United States Marshal assumes custody of the petitioner. After the petition is filed the petitioner must give written notice to all adverse parties and file a copy of the petition in the state court. The latter act effects removal, and the state court is then powerless to proceed.

The procedural steps are relatively simple, but the courts have required almost literal compliance:[15] facts, rather than conclusions, must be alleged in the petition, and those facts must set forth a proper basis for removal under the section of the statute relied upon by the petitioner;[16] this is particularly true in criminal cases;[17] the twenty day time limit in civil actions has been held to be a clear legislative expression that standardization is to be enforced;[18] in a criminal case, the action must have been commenced, *e.g.*, arrest alone is not sufficient if an information has not yet been issued;[19] in all, "strict compliance with the express provisions of the statute is required."[20]

These historical and procedural aspects of removal are not of present concern, however, nor are the pragmatic arguments for or against removal. The latter have been the subject of extensive study and publication. The conclusion usually drawn is that so many variables are involved that no general rule can be formulated.[21] The critical points for consideration here are con-

[15] 1A MOORE, ¶ 0.168[3.-1].

[16] Chesapeake & O. Ry. v. Cockrell, 232 U.S. 146 (1914); Smith v. Southern Pac. Co., 187 F.2d 397 (9th Cir.), *cert. denied*, 342 U.S. 823 (1951); Gratz v. Murchison, 130 F. Supp. 709 (D. Del. 1955).

[17] Maryland v. Soper, 270 U.S. 9 (1926); North Carolina v. Jackson, 135 F. Supp. 682 (M.D.N.C. 1955).

[18] Richlin Advertising Corp. v. Central Fla. Broadcasting Co., 122 F. Supp. 507 (S.D.N.Y. 1954).

[19] Michigan v. Banning, 88 F. Supp. 449 (E.D. Mich. 1950).

[20] Kovell v. Pennsylvania R.R., 129 F. Supp. 906, 908 (N.D. Ohio 1954).

[21] Some arguments which have been advanced are: (for removal) the quality of jurors is higher in federal courts; federal juries return smaller verdicts; federal rules of joinder are more liberal in states still bound to code pleading; appeals in federal cases are generally confined to appeals from final judgments; the federal judge has greater control over the jury, for example by being able to comment upon the evidence; the federal jury must be unanimous, absent agreement of the parties; *et cetera;* (against removal) in some jurisdictions federal juries return larger verdicts; state court judges have less discretion and are more susceptible to appellate reversal; the *Erie-*

cerned with the strategic implications of this amendment which provides for review of orders remanding certain cases to the state court. What tactical advantage can be gained or lost? What cases will be affected?

Assuming that the pragmatic factors affecting the desirability of removal are balanced, the overwhelmingly significant aspect of the availability of review of the remand order is that *time will be consumed in the appeal procedure.* This problem was considered in the congressional debates on the Civil Rights Act of 1964.[22] Senator Sparkman pointed out specifically that cases could be "tied up for long periods of time on appeals and other Federal proceedings on the Federal interest allegation that they pertain to equal protection of the laws or civil rights."[23] It was also said that the then existing law denying appeal after a remand order arose out of the fact that such appeals delayed trial, and that state laws could not be enforced while the appeal was pending.[24] Arguing along the same lines, Senator Byrd of West Virginia said that the new provision opened the door to dilatory tactics which might frustrate state law enforcement.[25] Summing up this point of view, Senator Morton stated that:

> [T]itle IX . . . contains probably the most radical departure from Federal rules and procedures of the entire bill. . . .
>
> Any lawyer can easily see that jurisdiction of any given State court could be virtually stalled while endless litigation was carried forth in the Federal courts appealing adverse decisions all the way to the Supreme Court of the United States.[26]

In answering these arguments, proponents of the bill admitted that some delay would occur but felt that this was a small price

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Tompkins doctrine gives no advantage in the application of substantive law; pre-trial discovery procedures may be avoided; the state docket may be more congested and allow more time before trial for a favorable settlement; the jury will be selected from a more localized area in state court; *et cetera.* See, *e.g.,* 1A MOORE, ¶ 0.157 [13]; Rogers, *Problems of Removal of Causes from State to Federal Courts,* 22 U. Kan. City L. Rev. 78 (1953).

[22] See note 4 *supra.*

[23] 110 CONG. REC. 11320-21 (1964).

[24] *Id.* at 13468 (remarks of Senator Ervin). That all review of orders to remand is prohibited by statute, including review on mandamus, to obviate delay is announced judicially by Judge John Johnston Parker in *Ex parte* Bopst, 95 F.2d 828 (4th Cir. 1938).

[25] 110 CONG. REC. 13879 (1964).

[26] *Id.* at 14459. See also *id.* at 6451 (remarks of Senator Dirksen).

to pay for "ensuring the proper administration of the removal remedy provided by Congress."[27]

Reports in at least one national news magazine indicate that opportunities will not be wasted:

> [T]here is a prickly prospect that federal courts may be deluged with every single state case bearing the slightest alleged connection to civil rights. In short, Title IX might turn out to be a gateway through which much state-court business will vanish.
>
> Civil rights leaders are ecstatic at the possibilities. "It's a tremendous device—how to screw up the system in one easy lesson," says a Florida lawyer. "Anyone who wants to can delay a case for two years."[28]

It is possible that the last statement is exaggerated, but there can be no question that the dockets of the federal courts are crowded and that litigation can be delayed. During fiscal year 1962 the following statistics were recorded: median time of eight months from filing to disposition of civil matters not requiring trial action (district courts);[29] median time of seven months from filing of a complete record to final disposition (courts of appeal);[30] median time of one and one-half months in civil cases and two months in criminal cases from filing of notice of appeal in the lower court to filing of a complete record in a court of appeal;[31] median time of twenty-six months in civil cases and eighteen months in criminal cases from docketing in the lower court to final disposition in courts of appeal.[32] Time studies are not available reflecting the status of the Supreme Court docket, but at the end of the October term of 1962 that docket was behind 474 cases, an increase of over ten per cent from the previous year.[33] Obviously, delay will be present when a case is taken into the appellate courts. It was argued in the Senate that this time would be cut to a minimum, for when the defendant-petitioner asks the court of appeals to stay the remand order of the district court the case will be examined and this examination will disclose whether removal was clearly improper and, if it was, the stay will be

[27] *Id.* at 6955 (remarks of Senator Dodd).
[28] Time, Oct. 30, 1964, p. 88.
[29] 1963 DIR. OF ADMIN. OFFICE U.S. COURTS ANN. REP. 209.
[30] *Id.* at 192.
[31] *Id.* at 193.
[32] *Ibid.*
[33] *Id.* at 178.

denied.[34] In short, the argument is that preliminary appellate determination can effectively avoid abuse of the statute.[35]

Even minimal delay, however, may result in deterioration of evidence,[36] or place an emphasis on the desirability of settlement or dismissal,[37] or allow state subpoenas to expire,[38] or have any one of an almost unlimited number of debilitating effects upon the adverse party. Thus, it would be profitable for a "civil rights" group using means that are, in fact, violent to avoid a hearing on a temporary restraining order issued by a state court by petitioning for removal to federal court and delaying the finality of decision, by the appeal procedure if necessary, until after the return date on subpoenas issued by the state court. In the meantime, arrangements could be made for key witnesses to avoid later service of process.[39] It would likewise be advantageous for a gambler free on bail and charged with contempt of the state court for refusing to testify before a local grand jury to petition for removal to federal court and appeal an order remanding the case.[40] It is to be expected that defense counsel for many reasons, proper or improper, will attempt to shield their clients behind the delaying buttress of appeal from an order remanding to state court. This may be accomplished merely by an allegation that the defendant's civil rights will be violated in the state court.

It is now well settled that a state statute or constitution that, on its face, deprives a defendant of his civil rights provides a solid basis for removal to federal court.[41] The legislative history of the amending statute would clearly seem to call for the federal courts to now extend the right to remove to members of minority groups who show that their defense in pending litigation is affected by local prejudice, or by systematic exclusion from juries, or for any reason involving the unconstitutional *application* of state laws.[42]

[34] 110 CONG. REC. 6956 (1964) (remarks of Senator Dodd).

[35] *Ibid.*

[36] ZEISEL, KALVEN & BUCHHOLZ, DELAY IN THE COURT, at xxii (1959). The state could minimize this danger, however, by adopting a practice similar to FED. R. CIV. P. 26 providing for depositions pending the action.

[37] ZEISEL, KALVEN & BUCHHOLZ, *op. cit. supra* note 36, at xxii.

[38] 110 CONG. REC. 2771 (1964) (remarks of Representative Poff).

[39] *Id.* at 2772-73 (remarks of Representative Dowdy).

[40] See Time, Oct. 30, 1964, p. 88.

[41] Virginia v. Rives, 100 U.S. 313 (1880). See generally 1A MOORE, ¶ 0.165.

[42] 110 CONG. REC. 6551, 6995 (1964) (remarks of Senators Humphrey and Dodd).

The legislative history also calls specifically for the courts to redetermine the scope of the right to remove under section 1443.[43] Probably the most significant question to be determined is whether "civil rights" and "due process" are synonymous for this purpose.

The district courts have, in many instances, remanded litigation which involved a denial of due process rather than the traditional area of civil rights, race relations. For example, cases wherein testimony before a state legislative committee was used to obtain an indictment against the witness,[44] wherein state law did not allow a defendant to challenge a member of the grand jury after the juror had been sworn,[45] wherein failure to obtain trial in state court resulted from inability to secure an attorney,[46] and wherein it was claimed that the city ordinances under which the defendants were charged were vague and indefinite[47] have all been returned to the state courts. Would the federal appellate courts now reverse any or all of the orders to remand in these cases?

New, unresolved questions of due process are certain to arise. For example, a case[48] decided in a federal circuit court held that a defendant testifying in his own behalf as to one element of the offense charged may not be cross-examined as to another element since this would amount to requiring the witness to testify against himself in derogation of the fifth amendment. The case has been cited with approval by the Supreme Court.[49] North Carolina holds that once a defendant testifies in his own behalf he opens himself to cross-examination on all issues, the constitutional right having been waived.[50] The Court of Appeals for the Fourth Circuit has never decided a case involving these facts, nor has the Supreme Court directly considered whether due process is denied in this situation. Would a federal court in North Carolina allow removal on the petition of a defendant who alleged that he would be denied due process in a state court because he anticipated testifying about part of the charge against him but not all, in view of this conflict? If not, would a federal appellate court reverse?

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[43] *Ibid.*
[44] New Jersey v. Weinberger, 38 F.2d 298 (D.N.J. 1930).
[45] New Jersey v. Corrigan, 139 Fed. 758 (C.C.N.J. 1905).
[46] Scott v. R.D. Kinney & Co., 137 Fed. 1009 (C.C.E.D. Pa. 1905).
[47] City of Birmingham v. Croskey, 217 F. Supp. 947 (N.D. Ala. 1963).
[48] Tucker v. United States, 5 F.2d 818 (8th Cir. 1925).
[49] Raffel v. United States, 271 U.S. 494 (1926).
[50] State v. O'Neal, 187 N.C. 22, 120 S.E. 817 (1924).

The questions can be answered only by the federal courts. This is exactly the point. The range of cases that can plausibly be argued, to the Supreme Court if necessary, on the basis of "civil rights" is limited only by the imagination of counsel and his sense of ethics. A uniform federal policy may emerge as a result of the legislation, but a means of delay is now readily available to all who would use it. Future events must be weighed. If the balance is uneven because abuse becomes widespread it is to be hoped and expected that the scope of the statute will be limited by legislation or judicial action.

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Securities Regulation—Rule 10b-5—A Federal Corporations Law?

The plaintiff, a corporate director, brought a derivative action in a federal district court against six of his co-directors, alleging a violation of rule 10b-5.[1] This rule makes it unlawful for *any* person to use any instrumentality of interstate commerce or any facility of the securities exchanges to (1) "employ any device, scheme, or artifice to defraud," or (2) "to make any untrue statement of a material fact or to omit to state a material fact . . . or" (3) "to engage in any act . . . or course of business which . . . would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security."[2] The defendants allegedly sought to perpetuate their control by causing the corporation to issue treasury stock to one of the defendants individually or to a third person who would vote the stock as directed by the defendants. The fraudulent aspects of the

[1] 17 C.F.R. § 240.10b-5 (1949). Rule 10b-5 was promulgated by the Securities and Exchange Commission pursuant to § 10(b) of the Securities Exchange Act of 1934, 48 Stat. 891, 15 U.S.C. § 78j(b) (1958).

[2] The entire rule provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails, or of any facility of any national securities exchange,
> (a) To employ any device, scheme, or artifice to defraud.
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b-5 (1949).