

TRANSCRIPT OF PROCEEDINGS

IN THE SUPREME COURT OF THE UNITED STATES

In the Matter of:

CARNEGIE-MELLON UNIVERISTY,
ET AL.

Petitioners

v.

MAURICE B. COHILL, JR., JUDGE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
PENNSYLVANIA, ET AL.

No. 86-1021

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1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x
3 CARNEGIE-MELLON UNIVERSITY, ET AL., x

4 Petitioners, x

5 v. x No.86-1021

6 MAURICE B. COHILL, JR., JUDGE, x

7 UNITED STATES DISTRICT COURT x

8 FOR THE WESTERN DISTRICT OF x

9 PENNSYLVANIA, ET AL. x

10 -----x

11 Washington, D.C.

12 Tuesday, November 10, 1987

13 The above-entitled matter came on for oral argument
14 before the Supreme Court of the United States at 12:59 p.m.

15 APPEARANCES:

16 WALTER P. DeFOREST, III, ESQ., Pittsburgh, Pennsylvania;

17 on behalf of Petitioners.

18 ALLAN J. OPSITNICK, ESQ., Pittsburgh, Pennsylvania; on behalf
19 of Respondents.

C O N T E N T S

ORAL ARGUMENT OF

PAGE

WALTER P. DeFOREST, III, Esq.

on behalf of Petitioners

3

ALLAN J. OPSITNICK, Esq.

on behalf of Respondents

23

WALTER P. DeFOREST, III, Esq.

on behalf of Petitioners -- Rebuttal

45

P R O C E E D I N G S

CHIEF JUSTICE REHNQUIST: We will hear argument now in No.86-1021, Carnegie-Mellon University v. Maurice B. Cohill. Mr. DeForest, you may proceed whenever you are ready.

ORAL ARGUMENT BY WALTER P. DeFOREST, ESQ.

ON BEHALF OF PETITIONERS

MR. DeFOREST: Chief Justice, and may it please the Court:

The issue before the Court in this case is whether a district court has the authority to remand a properly-removed case to the state court for a reason not set forth in 28 U.S.C. Section 1447(c)?

In this case, the reason for the remand was because the Plaintiffs voluntarily amended the Complaint after removal to federal court to delete the federal cause of action which had provided the basis for removal.

I would first in my argument review the procedural history in this case since it is a procedural case; then discuss the statutory framework.

This Court's decision in Thermtron, which we believe is controlling, and this Court's decision in the Gibbs case, and finally the various policy and statutory considerations that we urge the Court follow in determining that it is not appropriate to create a judicial mechanism for remand beyond that set forth that in the applicable statute.

1 This case arose in the State Court of Common Pleas in
2 Allegheny County. It was filed by William and Carrie Boyle
3 against Carnegie-Mellon University, Mr. Boyle's former employer
4 and John Kordesich, Mr. Boyle's former supervisor. The Claim
5 filed in the state court alleged that Mr. Boyle's discharge and
6 the University's refusal to rehire him violated federal
7 statutes prohibiting age discrimination and state statutes
8 prohibiting age discrimination.

9 The state tort and contract principles -- had a claim
10 in there for Carrie Boyle, which was -- she is Mr. Boyle's wife
11 and her claim was derivative of Mr. Boyle's claim for the
12 alleged injury to the marriage and for loss of consortium, et
13 cetera.

14 The case was timely removed and there was no contest
15 by the Plaintiffs as to the propriety of the removal at that
16 time. An Answer was filed. The district court set a discovery
17 schedule five months. Discovery proceeded.

18 Shortly before the termination of that discovery
19 period, the Plaintiff sought and obtained an extension of that
20 discovery period, for an additional two months. Shortly before
21 the conclusion of that discovery period, the Plaintiffs filed a
22 Motion to Amend the Complaint to delete, inter alia, the
23 federal cause of action, and seeking a Remand to the State
24 Court of Common Pleas of Allegheny County. This was filed
25 seven months after the case had been in litigation in the

1 federal district court.

2 The district court accepted briefs, and more than a
3 year after the case had been in federal court, remanded it,
4 issued an Order of Remand to the State Court of Common Pleas of
5 Allegheny County. The federal court held that the case had
6 been in fact improperly removed. And in fact held that section
7 1447(c) of Title 28 provided no basis for the remand.

8 The district court also recognized clear implication
9 -- the court described it as an "implication;" I believe it is
10 a holding, of the Thermtron decision that prohibited such
11 remands, but the district court nevertheless determined that it
12 would remand the case.

13 The district court held that it would not grant
14 review as a certification under Section 1292 for an appeal, and
15 stated that the reason for that was because review was
16 available pursuant to a writ of Mandamus under the Court's
17 Thermtron Opinion.

18 We filed both an appeal and a Petition for a Writ of
19 Mandamus in the United States Court of Appeals for the Third
20 Circuit; The Third Circuit dismissed the appeal holding that
21 that was not a proper vehicle for review of the determination
22 by the district court; the Third Circuit did, in fact, set the
23 Mandamus petition down for review by a merits panel.

24 The Merits Panel, by a 2 to 1 vote held that the
25 district court erred; the Thermtron decision by this Court was

1 controlling; and in fact there had been no reason for remand of
2 this action, as provided under Section 1447(c), and accordingly
3 issued a Writ of Mandamus.

4 A Petition for Rehearing was filed; the court en banc
5 accepted rehearing and under their internal operating
6 procedures, vacated the Panel Opinion in the Third Circuit --
7 their Grant of Rehearing vacates the Panel Opinion.

8 The Third Circuit heard the case en banc, and by a 5
9 to 5 vote divided equally on the issue, did not issue an
10 Opinion, and accordingly denied the Writ of Mandamus.

11 QUESTION: Mr. DeForest, what do you say the district
12 court should have done with this case in the posture in which
13 it was when it was ruled?

14 MR. DeFOREST: Your Honor, we had held that the
15 district court should have, or urged the district court, to
16 retain the case. Assuming the district court determined that
17 it would not retain the case, it should have dismissed the
18 action without prejudice.

19 QUESTION: And if it had retained the case, it should
20 have just gone on and decided all the state law questions?

21 MR. DeFOREST: Yes, Mr. Chief Justice. If it
22 determined it to be appropriate to retain the case, it could
23 have decided the state law questions. They were all pendent
24 claims arising out of a common nucleus of operative fact with
25 the federal claim. They all arose from Mr. Boyle's discharge

1 from the University.

2 QUESTION: Was there any federal claim left at that
3 point?

4 MR. DeFOREST: No, Justice Brennan.

5 QUESTION: Just the state law claim?

6 MR. DeFOREST: Once the permission was given to the
7 Plaintiff to voluntarily make the federal claim, there were
8 only remaining state law claims.

9 QUESTION: Then there is some question whether they
10 could have retained the case under the constitutional grant of
11 power?

12 MR. DeFOREST: Justice Scalia, I believe, and it is
13 clear that Section 1441(a) and (b) provide that these actions
14 may be removed, and under this Court's holding under United
15 Mine Workers v. Gibbs, both the federal claim and the pendent
16 state claim require one constitutional case, and that under the
17 statute, it is, I think, clear that, as one constitutional case
18 the district court had the power to dispose of that case, once
19 it had accepted remand.

20 QUESTION: Well, it is a constitutional case when it
21 is removed, because there is a federal question in it when it
22 is removed. But once the federal question in it is excised,
23 how can you say that there is a case or a controversy any
24 longer arising under the laws of the United States?

25 MR. DeFOREST: Justice Scalia, the work of this Court

1 in the case of St. Paul Indemnity Casualty Co., has I believe,
2 addressed that issue, and held that an amendment held after
3 removal, is not a basis for the defeat of removal jurisdiction
4 once it has attached, and we believe that Congress had an
5 appropriate power to permit the, under 1441(a), federal courts,
6 to take these cases.

7 Similarly, in the Gibbs case itself, this Court made
8 clear that there are -- can be, situations in which the
9 district court may determine to retain a case, even
10 notwithstanding dismissal of a federal claim, and I think,
11 Justice Scalia, in the given case itself, the facts in Gibbs,
12 if we look at it where a situation where there was a Section
13 303 claim under the Labor Management Relations Act, as well as
14 the state law claims, and the Court, I believe in that case, on
15 the facts of it that, notwithstanding the fact that the federal
16 claim properly was dismissed, that a jury verdict on the state
17 law claim could have been maintained on a procedural ground.

18 In that case, because of this Court's interpretation
19 of the Norris-LaGuardia Act, they found that the Norris-
20 LaGuardia Act precluded that particular type of cause of
21 action, so in my judgment, Congress did appropriately determine
22 that these cases could be maintained and --

23 QUESTION: Mr. DeForest, what is the sole reason that
24 you can get in the federal court from a state court? The sole
25 reason? It is because you have a federal question, is it not?

1 Is that not the sole reason? The only reason?

2 MR. DeFOREST: Justice Marshall, I believe that

3 diversity cases can go into federal court --

4 QUESTION: I am not talking about -- I am talking

5 about removal cases --

6 MR. DeFOREST: Well, diversity cases can be --

7 QUESTION: The only way you can remove is because you

8 have a federal question.

9 MR. DeFOREST: You can remove a diversity case,

10 Justice Marshall.

11 QUESTION: Well, this is not a diversity case.

12 MR. DeFOREST: This is not a diversity case.

13 QUESTION: So the only reason for removal was a

14 federal question in this case.

15 MR. DeFOREST: In this case the basis for removal was

16 a federal question.

17 QUESTION: That was removed?

18 MR. DeFOREST: It was removed after the case went

19 over to the federal district court.

20 QUESTION: Then it was removed. The federal question

21 was removed. Under normal procedure, would it go back?

22 MR. DeFOREST: Justice Marshall, there is two

23 questions: one, whether or not the federal court can keep the

24 case, and secondly, what it should do with it if it determines

25 it should not keep the case. Those are two separate issues.

1 QUESTION: On what grounds would they keep it?

2 MR. DeFOREST: Well, Justice Marshall, it is this
3 Court's decision in Gibbs does indicate that in some situations
4 that the federal courts can keep it. I would also say that
5 this Court's decision in the St. Paul Indemnity & Casualty
6 case, where there was an amendment after the removal of the
7 case, to reduce the amount of the damages claimed, below the
8 jurisdictional amount, so there was no longer a federal
9 jurisdiction, this Court held that that amendment could not and
10 would not, mean jurisdiction. So the Court has addressed this
11 issue previously and held, and I think there is longstanding
12 law on this issue, that the federal court, if it determined it
13 appropriate, would have had jurisdiction.

14 QUESTION: Mr. DeForest, a long time ago, someone
15 asked you what the courts should do, and among the options you
16 stated, it should dismiss.

17 MR. DeFOREST: I think it had that option.

18 QUESTION: Without prejudice? Without prejudice to
19 what?

20 MR. DeFOREST: If a plaintiff sought to restate those
21 claims again.

22 QUESTION: But suppose that the statute of
23 limitations has run?

24 MR. DeFOREST: Justice, if in fact the statute of
25 limitations had run --

1 QUESTION: It is just his hard luck?

2 MR. DeFOREST: I suggest that that is one factor that
3 the, the district court might want to consider in determining
4 whether or not to dismiss the case or to keep it. It is not
5 crucial to my position that the federal court --

6 QUESTION: Or to remand it?

7 MR. DeFOREST: Excuse me?

8 QUESTION: Or to remand it?

9 MR. DeFOREST: My position on that is, which I would
10 like to address right now, is that the statutes on remand have
11 very clearly specified over a long history over a hundred
12 years, the bases on which cases may properly be remanded.

13 QUESTION: Where do you find the express statutory
14 authority for the Court to dismiss to dismiss the case after
15 removal?

16 MR. DeFOREST: Justice O'Connor, I believe that under
17 this Court's decision under United Mine Workers v. Gibbs, that
18 was an option available to the district court.

19 QUESTION: It certainly is not based on any express
20 statutory provision, is it?

21 MR. DeFOREST: I believe that the Court's decision in
22 Gibbs was not based on statutory provision. And I would like
23 to indicate --

24 QUESTION: Right. And similarly, perhaps, the option
25 is open to remand? Or dismiss?

1 QUESTION: Well, Justice, I would like to address
2 that: it seems to me that there are several factors that are
3 crucial here. First of all, removal jurisdiction is purely a
4 creation and a creature of statute, and remand is purely a
5 creation and a creature of statute. If the Court determines in
6 this case that there is some sort of general power, that is a
7 very far-reaching issue, in my judgment not limited to removal
8 cases. Because if you are going to create some power I do not
9 know how you are going to say it is limited to removal cases.

10 But the removal statutes themselves, you have a long
11 history of very careful delineation of bases in which to permit
12 remands. You do not have that in the Gibbs type situation.

13 Secondly, Gibbs, and the Gibbs decision arises based
14 on a longstanding traditional power of the court system to
15 dismiss cases. And this Court in the case of Link v. Wabash
16 made very clear that that is an inherent and deep-rooted power
17 in the district courts. We also have in the Federal Rules
18 Rules that provide for dismissal.

19 We have no such counterpart in the remand area. In
20 fact, we have direct contrary congressional intent in the
21 removal area, because it specifically provides very limited
22 situations -- only two, in which remand may be permitted under
23 the removal statutes. Those two situations are set forth in
24 Sections 1447(c) "if the case was in fact removed improvidently
25 and without jurisdiction," -- not applicable here.

1 Secondly, Congress set forth in Section 1441(c) a
2 power, a discretionary power. Congress clearly knew how to set
3 forth a discretionary power if they wished it to be there.
4 They set it forth in 1441(c) for a discretionary power whenever
5 you had a case in which there were separate and independent
6 claims removed.

7 QUESTION: Is there any real disagreement about the
8 inapplicability of 1447(c) and 1441(c) here?

9 MR. DeFOREST: I do not think there is.

10 QUESTION: I do not think there is either, and I
11 wonder why you are dwelling on it so?

12 MR. DeFOREST: Well, because I suggest to you, by the
13 fact that Congress has provided in Section 1441(c) for a
14 discretionary power, it very clearly knew how to create this
15 power. They did not provide it in any other area.

16 Now, I would also urge that there are very strong
17 policy judgments and questions that arise. Remand is not the
18 function --

19 QUESTION: You are saying that they would not have
20 needed 1441(c) if there were a general power to remand anyway?

21 MR. DeFOREST: That is correct, and I will also say
22 --

23 QUESTION: Especially since they do not mandate
24 remand, but just put it within the courts' discretion at all?

25 MR. DeFOREST: And I also say that it indicates that

1 very clearly in their mind that they knew they could do it if
2 they wished to. It was not just something in the back of their
3 mind; here they did it in another section of the statute, so
4 1441(c) makes pretty clear they knew how to do it if they
5 wanted it done.

6 It is important to remember in my judgment, that
7 removal in this Court in the Shamrock Oil and Gas case made
8 very clear the removal area, because of a long history of
9 statutory regulation -- in fact, the Court said, "the policy of
10 the success of Acts of Congress regulating the jurisdiction of
11 the federal courts, is one calling for strict construction of
12 such legislation.

13 We are dealing here in the removal area with
14 interpretation of legislation. We are dealing with
15 interpretation of legislation which also contains in it a
16 discretionary power when Congress wished it to be here.

17 QUESTION: We are also dealing, are we not, with
18 interpretation of Thermtron?

19 MR. DeFOREST: Yes, Justice.

20 QUESTION: Because obviously, the courts and the
21 justices below were all -- go off in all directions.

22 MR. DeFOREST: I would like to address that, if I
23 might, for a second here: in this Court --

24 QUESTION: Thermtron certainly does not control this
25 case. That was a diversity case. This is a pendent claims

1 case.

2 MR. DeFOREST: Thermtron was a case in which -- I do
3 not believe it was diversity: I believe it was a case in which
4 there was a remand for a reason of the judge saying that there
5 was a crowded docket.

6 Now, I understand there was a diversity aspect to the
7 case, but my view of it is that the Court.

8 QUESTION: How did they get out of the state court?

9 MR. DeFOREST: I agree, it was a diversity -- it was
10 initially a diversity case --

11 QUESTION: Yes, that is why it was removed.

12 MR. DeFOREST: Yes, but I was going to say that this
13 Court's decision was not in any way conditioned upon the fact
14 that it was a diversity case. The Court said --

15 QUESTION: Well, the fact is, we did not have a
16 federal question case before us.

17 MR. DeFOREST: Well, I would urge the Court, where
18 Congress has passed a statute that says a diversity case is
19 removable, that there is just as much a right in that situation
20 for somebody to be in federal court as if the Congress had
21 passed a statute saying "age discrimination is illegal."

22 So I personally believe both diversity cases and
23 jurisdiction for diversity cases and a jurisdiction for age
24 discrimination cases is conditioned upon congressional statute,
25 Justice, and that is why I am saying that I do not believe that

1 the diversity there was contingent -- was a factor in the
2 determination. The Court said --

3 QUESTION: The difference is in that the reason it
4 was in the federal court survived and still existed at the time
5 of the remand, which is not true here. That does not mean that
6 it does not make any difference, but at least the difference --

7 MR. DeFOREST: No, that is a difference -- there is a
8 difference there, Justice, and I would address that by saying
9 that obviously there are many reasons why claims, whether they
10 be federal, initial federal claims under federal statutes, or
11 diversity statutes, are removed from cases.

12 And this Court dealt with one in Gibbs, where in fact
13 the federal claim was in fact held. It was dismissed, but it
14 was also held that in state courts a judgment could have been
15 maintained. In that case they determined not to do it for
16 reasons of interpretation of the Morris-LaGuardia Act, so what
17 my suggestion is is that there is in fact that factor, but I do
18 not think it is a distinction.

19 QUESTION: You are asking about discretion, which I
20 guess is what we are talking about: do you think that the
21 district court would have had discretion to grant a Motion to
22 Abstain Pending the Plaintiff's Attempt to Refile, and get a
23 ruling on the statute of limitations question in the state
24 court, and then just hold the case until it finds out what
25 happens in the state court, and then dismiss? Or either to go

1 ahead and dismiss and then go ahead and retry it?

2 MR. DeFOREST: Justice Stevens, I do not believe that
3 that type of abstention is authorized under any of the
4 abstention doctrines that I am familiar with under Younger,
5 Pullman, or Burford. I do not believe that that would be an
6 appropriate type of abstention in my opinion.

7 QUESTION: Do you think the judge would have the
8 power to do that? Maybe it has not been done before, but is
9 there anything to restrict his power to do that?

10 MR. DeFOREST: It would be creating a new basis for
11 abstention, Mr. Justice, and I guess if you wanted to do it,
12 you, the Court, probably could, but -- so I cannot say that you
13 cannot create it, but it does not seem to me to be -- I mean,
14 the Court's -- the district courts, as a practical matter, in
15 the administration of cases would have to deal with many
16 different contingencies and factors. And they make many --

17 QUESTION: Of course, one consideration, federal
18 judges, if they can get state judges to decide state law
19 issues, they kind of like to do it that way.

20 MR. DeFOREST: I can understand that, Justice, but it
21 seems to me that the basic -- so I suppose that there could be
22 an abstention for the purpose --

23 QUESTION: And the question they might be uncertain
24 about is whether the statute of limitations had run, and so why
25 not hold the case on the docket until they could find out?

1 MR. DeFOREST: I suppose that is a possibility,
2 Justice, but frankly it is not within any of the doctrines of
3 abstentions which I am --

4 QUESTION: Who moved for a remand here?

5 MR. DeFOREST: The Plaintiffs did. They deleted and
6 -- at the same time deleted the federal claim and moved to
7 remand it to state court.

8 QUESTION: And why is it worth your time to argue
9 that, well, the judge could have gotten rid of the case, but if
10 he wanted to get rid of it, he had to dismiss it rather than
11 remand it?

12 MR. DeFOREST: Well, are you asking a practical
13 question or a question of statutory interpretation?

14 QUESTION: I am asking why it was worthwhile for your
15 client to send you up here on a Petition?

16 MR. DeFOREST: Yes, because as a practical matter,
17 there are several factors, one of which is that this case, in
18 our judgment, would have been and should, have been tried
19 shortly. And in our -- and in one month left in our --

20 QUESTION: That may well be, but you say the judge
21 could have gotten rid of the case. He was not required to keep
22 it.

23 MR. DeFOREST: I am attempting to say to you --

24 QUESTION: I know -- is that not your position, that
25 he was not required to keep it? He could have dismissed it?

1 MR. DeFOREST: I believe that, under this Court's
2 Gibbs, he probably had the discretionary power. I am not
3 saying he should have done it; in fact, I would, if I were the
4 district court judge, I do not believe that I would have done
5 it, and I do not think that this judge would have done it.

6 QUESTION: Go ahead, what are the other questions?

7 MR. DeFOREST: What I am saying to you is that I do
8 not think that the district judge would have dismissed it. I
9 think that he would have kept the case and would have had a
10 trial. That is my -- you are asking me the practical
11 consequences of the process that I went through, or we go
12 through in our mind here, that if he does not have an option to
13 remand here, I do not think he is going to dismiss it. I think
14 he probably would have kept the case and tried it.

15 QUESTION: Why would he not?

16 MR. DeFOREST: Because I think he probably would have
17 been concerned about these statute of limitations issues.

18 QUESTION: Well, was it arguably barred by the
19 statute or not?

20 MR. DeFOREST: Some of the claims would have been,
21 Justice. In my opinion.

22 QUESTION: Well, that -- I can understand why you did
23 not want to remand, then. Was that one of the reasons?

24 MR. DeFOREST: I am telling you our reason. We felt
25 we would get a trial, and that is what -- that is our reason.

1 We thought it would have been appropriate.

2 But as a matter of statutory interpretation, which I
3 believe is really the crucial issue here in my opinion, that we
4 have the question whether under the removal statutes, this
5 Court is going to create a power that does not exist clearly
6 under the statutes now, and where that power is going to come
7 from. I have urged all the reasons why I think it is a matter
8 of statutory interpretation, that in looking at the
9 legislation, in my opinion, it would be inappropriate for the
10 Court to do so.

11 I would like to suggest that the Gibbs case itself
12 does not provide any independent power, which is the district
13 court seemed to feel, and that is another avenue here. It is
14 even assuming that the Court is not going to follow the strict
15 interpretation of the removal statute that you would still have
16 to face the question where does this power to remand come from?

17 QUESTION: Mr. DeForest, what is a remand? Is it a
18 -- mandate by a federal court? If I am a state court judge and
19 I get a remand case, can I decline to entertain it? I mean is
20 it just a request to a state court to entertain it? Or is a
21 state court bound to entertain it on remand as though --

22 MR. DeFOREST: Well, Justice, I think it is an Order.
23 I am not a state court judge either and I do not --

24 QUESTION: Where it started off is in the state
25 court?

1 MR. DeFOREST: Yes, so I do not know whether in some
2 situations a state court judge might say he will not take it,
3 but --

4 QUESTION: Well, I am wondering if a state court
5 judge says, "I will not take it," for whatever reason, you will
6 have to refile and take your chances with the statute of
7 limitations, I wonder if that is in violation of a federal
8 court Order, but you do not know?

9 MR. DeFOREST: In my opinion I think it would be, but
10 again, I do not know if that is the way that I have ever seen
11 it.

12 QUESTION: Are you not creating a new rule of law
13 when you see it violate a federal statute? Not when the
14 federal statute says they have to take it. Or they can dismiss
15 it?

16 MR. DeFOREST: Justice, I do not know if I am
17 creating a new rule.

18 QUESTION: You seem to be, on what the judge wants to
19 do. I guess he makes it up as he goes along?

20 MR. DeFOREST: I do not know what the state court
21 judge is going to do, Justice.

22 QUESTION: And the statute does not tell us the
23 answer to that question, you are saying?

24 MR. DeFOREST: I do not think it does, in my opinion.

25 QUESTION: Well, on the remand --

1 QUESTION: Congress must have thought some judges
2 had to do a little filling in of holes in the statute, I
3 suppose?

4 MR. DeFOREST: I think perhaps. But I think that if
5 you are alluding to this issue, this issue is clearly addressed
6 by Congress well in their contemplation, and I think that there
7 is a very different issue when you have an area that Congress
8 has specifically addressed, as they have here, both under
9 1447(c) and 1441(c).

10 I would like to discuss just briefly --

11 QUESTION: I know you may have covered it but I just
12 want to be sure I have your answer: what is the source of the
13 district court's power to dismiss a diversity case?

14 MR. DeFOREST: I believe that the district court
15 probably would have discretion in the application of the Gibbs
16 factors.

17 QUESTION: But before Gibbs was decided, say this
18 came up?

19 MR. DeFOREST: That power has been recognized in this
20 Court for a long time. It goes back to the case of Osborne v.
21 Bank of U.S., Chief Justice Marshall. And that power before
22 that comes the inherent power that this Court recognizes in the
23 case of Link v. Wabash R.R., of nonsuit and non-prosecutor at
24 the common law.

25 QUESTION: So there is an inherent power to dismiss a

1 case, like there no inherent power to remand it?

2 MR. DeFOREST: I think that is correct. Remand is
3 very specifically a creation of statute. This Court has so-
4 held, both in the Shamrock Oil & Gas case, and I believe that
5 if you look at the St. Paul Indemnity & Casualty case, where
6 they say, once you get the jurisdiction from federal court,
7 that the plaintiff's subsequent amendments cannot remove it.

8 I would just like to state, too, a few policy
9 considerations. One, it seems clear to me that Congress, which
10 knew how to create this power, did so in certain sections of
11 the statute, did not create it here.

12 Secondly, that if this court would create such a
13 power, it would be -- make meaningless the creation of that
14 power to remand set forth in the limitations in Sections
15 1447(c) and in 1441(c).

16 It would also in my opinion be an unwieldy situation
17 in the district courts where the district courts now, contrary
18 to the rule of this Court in Thermtron, and in the case of
19 Gravitt v. Southwestern Bell, where the Court said, "the
20 appellate courts are not to get into reviews here of these
21 things, but just determine whether there is a power there."

22 Once we create this additional power, non-statutory
23 power, to remand, we are now saying to the circuit courts, you
24 are going to have to somehow administer that; we are going to
25 embroil the circuit courts, in my opinion, in mandamus review

1 of our actions and, if they are not embroiled in that, there
2 would be no appellate review at all --

3 QUESTION: By "circuit court," you mean court of
4 appeal? Is that what you are talking about?

5 MR. DeFOREST: Yes, Justice.

6 And finally, it can lead to the possibilities of
7 manipulation of the forum, as well as, in my opinion, needless
8 delay and duplicate procedures --

9 QUESTION: Cannot the district judge supervise and
10 control alleged manipulation? He knows when counsel are
11 manipulating.

12 MR. DeFOREST: Well, Justice, I am not sure that you
13 can tell what someone's reason for doing something is in their
14 mind. I mean, I am just saying that, where somebody wants to
15 get out of federal court, it is going to be very easy to do
16 under this power.

17 QUESTION: I want to go back to your comment, too,
18 about you do not know what a state court judge is going to do.
19 The state court judge has nothing to do with removal at all,
20 does he? If a Petition for Removal is filed, the case is
21 removed. And -- any issue of the propriety of removal is a
22 federal court issue, not a state court issue. So if the court
23 -- if the case is remanded, the state court judge merely finds
24 it back in his files again, and of course he is going to try
25 it.

1 MR. DeFOREST: I did not say he was not. Someone
2 asked me if in fact he could refuse to try, if it would be a
3 violation of a court Order, and I do not know the answer to
4 that.

5 I would like to reserve whatever time I have left.

6 CHIEF JUSTICE REHNQUIST: Thank you, Mr. DeForest.

7 We will hear now from you, Mr. Opsitnick.

8 ORAL ARGUMENT BY ALLAN J. OPSITNICK, ESQ.

9 ON BEHALF OF RESPONDENTS

10 MR. OPSITNICK: Mr. Chief Justice, may it please the
11 Court:

12 While the District Court has clearly the ability to
13 dismiss pendent state claims, I believe also the Court has the
14 power in this case to remand those pendant state claims and
15 return them to the state court.

16 This case, unlike the situation in Thermtron, is a
17 pendent jurisdiction case. It is a federal law claim linked
18 with certain state law claims that arise from a common nucleus
19 of operative fact. There has been no debate to that point.

20 As a result, this case is controlled by the doctrine
21 of pendant jurisdiction that began, I believe, as Mr. DeForest
22 said, by the Oswald or the Osborne case in the 1800s, and was
23 most recently discussed by this Court in the Gibbs case.

24 QUESTION: You do have some rather strong intimations
25 in the St. Paul Mercury case to overcome, do you not, or where

1 they say that the fact that a district court could not dismiss
2 a case means a fortiori it could not remand it. The authority
3 to remand is more strictly construed and more circumscribed
4 than the authority to dismiss.

5 MR. OPSITNICK: I think that rule is clear, Mr. Chief
6 Justice. However, the policy of strictly construing removal
7 statutes would, I believe in this case, even reinforce the
8 decision of the district court, that removal is limited in that
9 this case because there is no federal issue at this point in
10 time, it should be returned to the state court.

11 QUESTION: Well, St. Paul does not say removal should
12 be more strictly -- it says remand should be more strictly
13 construed. And you are saying it should be remanded?

14 MR. OPSITNICK: Yes, Your Honor. The, I guess, the
15 best answer to that would be the analysis in Gibbs which came
16 after St. Paul, lays out certain elements that have to be
17 adhered to for the court to retain jurisdiction. There has to
18 be an analysis of judicial economy; convenience and fairness to
19 the litigants.

20 Chief Judge Cohill in the district court made that
21 analysis in this case, found that the case, when the federal
22 claim was deleted, there were no other federal claims -- the
23 state claims predominated; the case was not at the point of
24 trial, and the state claims that remained would not implicate
25 any important federal policy. He therefore remanded the case

1 in line with Gibbs, even though Gibbs, since it was not a
2 removed case, dealt strictly with dismissal, without prejudice,
3 as opposed to remand.

4 QUESTION: Counsel, it may be utterly irrelevant, but
5 what is the state of the state court calendars in Pittsburgh?

6 MR. OPSITNICK: Justice Blackmun, the civil calendar
7 in the Court of Common Pleas in Allegheny County is such that,
8 from when the phrase is, "the case is placed at issue," it
9 would be approximately 18 months before the case was listed for
10 jury trial.

11 QUESTION: How does that compare with the federal
12 calendar?

13 MR. OPSITNICK: I do not think that there is any
14 doubt that this case would be tried faster in federal court
15 than if it were turned over to state court. Obviously, we were
16 willing to -- "we," on behalf of the Plaintiffs in this case,
17 were willing to take a little more time. We did not factor in
18 this two-plus year detour to this honorable Court.

19 QUESTION: What happened to the federal issue?

20 MR. OPSITNICK: Justice White, the federal issue was
21 raised in the Complaint. The Complaint was filed shortly
22 before the one-year statute of limitations on the state
23 defamation claim that expired. Upon preparation of the
24 depositions of Plaintiff and his wife, we determined that both
25 procedurally and in fact, the allegation of age discrimination

1 under the Age Discrimination Employment Act simply was not
2 viable, that the factual thrust and where Plaintiffs will
3 succeed if they do succeed, is solidly on a just common-law
4 Pennsylvania employment unlawful discharge case. At that
5 point, shortly after the deposition was taken of the Plaintiffs
6 is when the Motion to Amend the Complaint, to delete the
7 federal age discrimination claim, a very similar state age
8 discrimination claim, state common law defamation claims and
9 certain consortium allegations, was deleted.

10 QUESTION: If you are the Plaintiff in this case and
11 you are in federal court by virtue of the removal, you have an
12 opportunity to get to trial in federal court in a couple of
13 months, and you are going to wait a lot longer in state court,
14 why is it not to the Plaintiff's interest to have it tried in
15 federal court?

16 MR. OPSITNICK: Three reasons, I believe, Mr. Chief
17 Justice: one, the state court system would provide for quite
18 possibly a settlement that would be favorable to the
19 Plaintiffs.

20 QUESTION: You mean compulsory arbitration or
21 something like that?

22 MR. OPSITNICK: Not compulsory arbitration. Simply
23 the state court, given their, by comparison, crowded civil
24 schedule, I think exercises much more --

25 QUESTION: Much more pressure.

1 MR. OPSITNICK: Much more "pressure," thank you,
2 Justice White --
3 QUESTION: Pressure on both sides.
4 MR. OPSITNICK: On both sides.
5 QUESTION: And you wanted that?
6 MR. OPSITNICK: I did. While it sounds rather
7 confusing, I must given the facts of this case --
8 QUESTION: Well, it sounds pretty plain to me.
9 QUESTION: So you want us to foul up all of the laws
10 so you can do that?
11 MR. OPSITNICK: I do not, Justice Marshall. I do not
12 think any law has to be fouled up.
13 QUESTION: Did you not file this case originally?
14 MR. OPSITNICK: Yes I did, Your Honor.
15 QUESTION: Did you not remand it?
16 MR. OPSITNICK: Yes I did, Your Honor.
17 QUESTION: You removed it?
18 MR. OPSITNICK: No, it was removed by the Defendant,
19 by Carnegie-Mellon University.
20 QUESTION: And so now you want it remanded?
21 MR. OPSITNICK: Yes, Your Honor.
22 QUESTION: "Go back where I came from."
23 QUESTION: Well, you have wanted to be in the state
24 court all along.
25 QUESTION: Right.

1 MR. OPSITNICK: Yes, Your Honor. It was filed by the
2 Plaintiffs initially in state court in Pennsylvania.

3 QUESTION: So you wasted a lot of time, did you not?

4 MR. OPSITNICK: A lot of time has been consumed,
5 Justice Marshall. I do not know whether Plaintiffs or this
6 counsel would consider we had wasted a lot of time. I would
7 agree with you.

8 QUESTION: Well, at this stage in this litigation,
9 would you not be willing to agree that one of the courts is
10 being maneuvered? Either the federal or the state? And after
11 you answer that, which one?

12 MR. OPSITNICK: Justice Marshall, I believe that by
13 your use of the word, "maneuvering," you try -- I hear
14 something that says, "something improper." If the question is,
15 "is one court over another chosen for a tactical reason, yes.
16 At this point in time I could not say whether the state or the
17 federal court --

18 QUESTION: Did you not withdraw that one particular
19 clause in order to get it remanded?

20 MR. OPSITNICK: That was part of the reason, yes,
21 Your Honor. In addition, there were state claims that simply
22 were not viable. I mean, we were at a point after deposition
23 where certain claims, among them the federal claim, was
24 deleted.

25 QUESTION: The whole aim was to get it back to the

1' state court?

2 MR. OPSITNICK: That was one of the thoughts, yes,
3 Your Honor.

4 QUESTION: Well what was the other one?

5 MR. OPSITNICK: The other thought was to simply not
6 pursue claims that were not going to be viable.

7 QUESTION: Your federal claim just was not any good,
8 you decided?

9 MR. OPSITNICK: Yes, Your Honor.

10 QUESTION: You started to tell us there were three
11 reasons why you wanted to be in state court. One is you wanted
12 to settle the case. What are the other two reasons?

13 MR. OPSITNICK: I was getting to that, Justice
14 Stevens. The -- I believe -- hindsight could prove me wrong
15 that the state court jury that would be empaneled from
16 residents of Allegheny County would give a more favorable
17 hearing to the case than would the federal court jury empaneled
18 from the Western District of Pennsylvania.

19 QUESTION: That is very interesting because I talked
20 to the counsel who argued the Thermtron case here a couple of
21 years after Thermtron. And he had exactly that reason for
22 wanting to be in the federal court. He said, "I get jury from
23 all over eastern Kentucky if I am in the federal court. If I
24 am in this particular county, I get all welfare cases."

25 MR. OPSITNICK: Okay, but it is not the same

1 situation, but we believe that -- excuse me?

2 QUESTION: It is vice-versa.

3 MR. OPSITNICK: Yes it is. And I would prefer
4 having, rather than having a six-person jury from out of the
5 20-some counties that comprise the federal district, I would
6 prefer the singular Pennsylvania county.

7 The third reason was that --

8 QUESTION: -- jury in the --

9 MR. OPSITNICK: State court, yes, Your Honor.

10 QUESTION: And only six in federal court?

11 MR. OPSITNICK: Only six in federal court.

12 The third reason, Justice Stevens, was and still is,
13 that the state court rules permit an award of post-verdict
14 delay damages in certain personal injury actions. Without
15 going into detail, that was a --

16 QUESTION: It is kind of ironic. You expected delay
17 damages, and yet you wanted to take the slower route to
18 judgment?

19 MR. OPSITNICK: Well, that was not the overriding
20 consideration, Your Honor.

21 QUESTION: No?

22 MR. OPSITNICK: It was a consideration nonetheless.

23 QUESTION: Mr. Opsitnick, if we agree with you that
24 there is an inherent power to remand, explain to me what
25 function is served by Section 1441(c)? Why does that provision

1 not become completely superfluous?

2 MR. OPSITNICK: As Mr. DeForest pointed out, there
3 are two types of remand in the statute. The mandatory remand
4 under 1447(c) which everybody agrees does not apply, and the
5 discretionary remand, that in 1441(c), although there is some
6 confusion among circuit courts of appeal, it seems to say that
7 in cases where there is a separate and independent controversy
8 or cause of action, that is, cases where the non-federal claim
9 would not be removable as pendent under 1441(b), there should
10 be, similar to a pendent jurisdiction claim to remand, there
11 should be a statutorily-created ability for the Court to have a
12 discretionary remand.

13 QUESTION: But I am saying why would it have to be
14 statutorily created? If you say that the courts have the
15 authority to determine what they may remand, if it is not a
16 federal question over which they must exercise jurisdiction,
17 why would you have needed 1441(c)? What function does it serve
18 if we take your view in the case?

19 MR. OPSITNICK: If my understanding, my reading of
20 pendent jurisdiction is that because of the close factual
21 proximity of the federal and state causes of action, the case
22 would be removed. In a 1441(c) type removal, you do not have
23 that close factual -- nexus --

24 QUESTION: I understand all that, but why do you have
25 to tell the court you may remand if as you just told us we

1 always have authority to remand? Why did Congress feel it
2 necessary to say in 1441(c) that we have discretionary
3 authority to remand? When you are telling us we always have
4 it?

5 MR. OPSITNICK: The discretionary authority to remand
6 comes from the doctrine of pendent jurisdiction which would
7 apply in a 1441(c) case.

8 QUESTION: "The discretionary authority?"

9 MR. OPSITNICK: If I may continue for a moment, it
10 seems as though cases removed pursuant to 1441(b) can be
11 remanded -- there is provision already for discretionary remand
12 pursuant to the pendant jurisdiction doctrine. Cases remanded
13 -- or cases removed, excuse me -- pursuant to 1441(c) are not,
14 as I read the statute and the cases, are not pendent
15 jurisdiction cases. The case in front of this court was a
16 pendent jurisdiction case pursuant to 1441(b), and not (c).

17 QUESTION: So you think there is inherent authority
18 to remand pendent jurisdiction cases? That is just inherent,
19 right? But there is no inherent authority to remove cases
20 which even have less reason to be in federal court than pendent
21 jurisdiction cases, to wit: separate and independent claims?

22 MR. OPSITNICK: Yes, Your Honor. I admit that is
23 confusing --

24 QUESTION: It is not confusing. It is strange.

25 MR. OPSITNICK: It was inserted in, I believe, 1948.

1 The Thermtron case must be discussed and
2 distinguished at this point. As I pointed out earlier, there
3 were certain factual differences. The primary factual
4 difference is the fact that Thermtron was a diversity case and
5 Justice White in his Opinion framed the issue, "shall a" -- I
6 am sorry, Your Honor.

7 It was not a pendent jurisdiction case: pendent
8 jurisdiction was not discussed. The Thermtron case --

9 QUESTION: When you say, "pendent jurisdiction," Mr.
10 Opsitnick, your distinction between "pendent jurisdiction" and
11 "federal question jurisdiction," I mean, (b) of 1441 really
12 does not talk about "pendent jurisdiction." It talks about
13 federal question jurisdiction.

14 MR. OPSITNICK: Yes, it does. I agree with you. So
15 you are using the two interchangeably -- pendent question and
16 federal question?

17 MR. OPSITNICK: I am in this context, and I do not
18 know if that is technically correct.

19 QUESTION: I do not either, so I will not correct it.

20 MR. OPSITNICK: Mr. Chief Justice, the case -- the
21 basis for the removal in Thermtron was the diversity. The
22 basis for the removal in the present case is the existence of a
23 federal question.

24 The Thermtron decision concentrated primarily -- the
25 primary thrust was whether not so much that mandamus should

1 issue, but whether the matter should be reviewed at all. That
2 is not an issue in this case. In fact, the Thermtron decision
3 holds in part when it gets to near the end of the Opinion,
4 where it indicates that mandamus should indeed issue in this
5 case because there was no basis to remand, no valid basis to
6 remand the case to state court, it says in essence that,
7 because there was no foundation at all, having the phrases,
8 "resting on grounds having no warrant in the law," and "not
9 limiting it strictly to the statute."

10 For those reasons, I believe that the holding of this
11 Court in Thermtron is non-applicable to this situation. That
12 the discretion that the district court would have to remand the
13 case under Gibbs and pendent jurisdiction, can be dealt with
14 consistently with the holding of this Court in Thermtron, that
15 indeed, non-1447(d), 1447(c), remand cases, can be reviewed
16 under mandamus and strictly in Thermtron, mandamus should
17 issue.

18 QUESTION: Thermtron also discussed, and in the first
19 part of the Opinion, the provision of 1447(c) about the
20 circumstances under which a district court could remand, could
21 it not?

22 MR. OPSITNICK: Yes, it did. The circumstances under
23 1447(c) where it must remand, the 1447(c) type of remand when
24 there is a lack of jurisdiction or the removal was improvident,
25 is mandatory.

1 QUESTION: What other types of remand are there
2 provided by the statute?

3 MR. OPSITNICK: In 1441(c), as pointed out by Justice
4 Scalia, there is a discretionary remand, where the removal is
5 pursuant to that section, where separate and independent claims
6 --

7 QUESTION: That is not your case, is it?

8 MR. OPSITNICK: It is not. This is not a 1441(c)
9 removal, no, Your Honor.

10 QUESTION: So what kind of a remand is yours?

11 MR. OPSITNICK: It is a remand pursuant to the
12 admittedly non-statutory doctrine of pendent jurisdiction.

13 QUESTION: In other words you are saying that the
14 district court may, under some circumstances remand in areas
15 not specified under the removal and remand statutes?

16 MR. OPSITNICK: Yes, Mr. Chief Justice.

17 QUESTION: And is there any case from our Court that
18 says a district court does have authority to remand in a
19 situation where a remand is not authorized by the statute?

20 MR. OPSITNICK: I have not found one. Because, as it
21 was mentioned, Gibbs was not a removal case, remand was not a
22 viable alternative. Obviously, the thrust of my argument is
23 that logically remand in this case would follow under the
24 directive or under the ability, of the local court in Gibbs to
25 dismiss without prejudice.

1 QUESTION: Maybe the district court could have kept
2 the case? If you are relying on Gibbs in pendent jurisdiction,
3 I suppose you would say --

4 MR. OPSITNICK: Under an analysis of those factors,
5 with the district court making the finding that it did, that
6 there were no federal ramifications, and that trial was not
7 near, I think the Court would be hard-pressed, given the
8 factual findings, to retain jurisdiction of the case; retain
9 the case.

10 QUESTION: Well, do you think if you would have
11 retained it, and the case got here, we should say he made an
12 error in retaining it? That he did not have the discretion
13 really to retain it?

14 MR. OPSITNICK: No, because he -- the lower court has
15 a certain amount of --

16 QUESTION: Well, do you think he could have -- did he
17 have three options: retain it; remand it; or dismiss it?

18 MR. OPSITNICK: He did, Your Honor. Dismissal
19 without prejudice. He had three options. And the court, on
20 the factual --

21 QUESTION: There are two ways, you agree, that he
22 could have gotten rid of the case?

23 MR. OPSITNICK: Yes, Your Honor. Those ways being,
24 to remand it or to --

25 QUESTION: Well, Gibbs would say, would point to,

1 dismissal.

2 MR. OPSITNICK: To dismiss it, because the remand was
3 not an option. The -- I think remand in a case like this, and
4 dismissal without prejudice from the point of the federal
5 court, sending it to state court, is equivalent.

6 QUESTION: Is there -- when a remand takes place and
7 it is a proper remand, is it -- it is just out of the state
8 court, is it not?

9 MR. OPSITNICK: When removal takes place?

10 QUESTION: When a case is -- removed from a state
11 court, it is just out of a state court?

12 MR. OPSITNICK: Yes, Your Honor.

13 QUESTION: And they just burn up the file, or what do
14 they do with it?

15 MR. OPSITNICK: Well, no. They simply, as I
16 understand the mechanics, transfer the file from the state
17 court to the --

18 MR. OPSITNICK: It goes right out?

19 MR. OPSITNICK: Right. It went in Pittsburgh from
20 one end of the street to the federal clerk at the other end of
21 the street.

22 QUESTION: How old is the -- is the remanding of that
23 the so-called "remand to the state court," in a case like this
24 any different than if the case had been filed in federal court?
25 And under a Gibbs pendent jurisdiction theory, and then the

1 federal claim dropped out, could the federal court then remand
2 it to a state court?

3 MR. OPSITNICK: I do not -- if it were an original
4 jurisdiction case to begin with, I do not think so.

5 QUESTION: Why not?

6 MR. OPSITNICK: Your Honor, "remand" seems to be a
7 docket-clearing --

8 QUESTION: Well, then why could you do it in this
9 case?

10 MR. OPSITNICK: Because it was in state court
11 originally. I say that from the state court view, they are not
12 the functional equivalent. From the federal court -- from the
13 court sending the case to state court, they are the functional
14 equivalent.

15 QUESTION: Do you not think that the file -- is in
16 the state court again?

17 MR. OPSITNICK: My understanding is if the Order
18 remanding the case is upheld -- no, Your Honor. That it would
19 simply go back -- the file would be lodged -- back in the civil
20 court Prothonotary. I would then have the opportunity to list
21 the matter for trial.

22 QUESTION: It even takes the old Court file number,
23 does it not?

24 MR. OPSITNICK: Excuse me, Your Honor?

25 QUESTION: It even reassumes the old court file

1 number?

2 MR. OPSITNICK: I would think it would.

3 QUESTION: At least that is the way it used to be 100
4 years ago when I was practicing.

5 MR. OPSITNICK: Yes, Your Honor. In talking to the
6 Prothonotary, or the Civil Clerk's staff, that is my
7 understanding. It would go right back where it was.

8 QUESTION: Mr. Opsitnick, can I ask you sort of the
9 same kind of question that I was asking Mr. DeForest: it is my
10 guess that if a federal court remands under 1441(c), which is a
11 specific congressional authorization to remand, it is my guess,
12 although I have not heard argument on it, that the state court
13 would have to take the case back.

14 Now, under the remand that you are proposing to us,
15 would the state court have to take the case back? I think they
16 would because it was properly filed in the state court to begin
17 with, and this comes from our inherent powers. We have an
18 inherent power to make the state court take the case back.

19 MR. OPSITNICK: I do not think we do, Mr. Justice. I
20 think the state court, when that case is returned to it, has
21 the power, the obligation to permit that case to proceed.

22 QUESTION: But you are saying that that is a state
23 law obligation? It has a state law obligation to entertain
24 suits that are properly filed with the state court?

25 MR. OPSITNICK: Yes.

1 QUESTION: The question has never come up. I have
2 never heard of it coming up. When they are remanded they just
3 take one folder from the federal court and put it in the state
4 court. It is the same folder.

5 MR. OPSITNICK: Yes, Your Honor. I think Justice
6 Scalia's point was, "what if," and it is, "was there some way
7 we could contest that?" I do not know the answer to it, but I
8 think in a remand --

9 QUESTION: Arguably they have done so, because there
10 is a federal statute that says the thing can be remanded. I
11 would assume that has the force of federal law and that the
12 state court would have to take it back. I am not quite as
13 certain about the fact of what happens if we decide that we
14 have some inherent power to remand -- is it a mandatory power
15 binding the state court, or is it just sort of precatory? I
16 have no idea.

17 QUESTION: Well, may I just say that I do not think
18 the state court would have to take it back if as a matter of
19 state law there no jurisdiction and no viable cause of action,
20 I suppose they could dismiss it just like they could dismiss a
21 suit that was filed in the state court in the first place.

22 MR. OPSITNICK: If there were no jurisdiction and no
23 cause of action, I would agree with you.

24 QUESTION: Is there no service on the Defendant? The
25 fact that a federal judge sends the papers over is no

1 different, is it, than if the Plaintiff sends and files the
2 papers. If there are papers before a judge then he has some
3 kind of state law duty to do what he is supposed to do with
4 them.

5 MR. OPSITNICK: No, I think there is a difference,
6 Your Honor. I think, as in this case, if the case is timely
7 filed and proper service was made, whether it is transferred to
8 state court --

9 QUESTION: What Justice Scalia is suggesting and you
10 are apparently agreeing with him, the duty to go forward with
11 the case after it is remanded, is a federal duty, rather than a
12 state duty. I just question that.

13 MR. OPSITNICK: Well, I say that I believe I say that
14 while I am certainly not solid on that point, because as
15 Justice Marshall said, it is something that has not, or
16 presumably would not come up, I would think my basis would be
17 under state law, since the case was timely filed and served
18 properly, that they under state law have an obligation to
19 proceed with the litigation until such time as it would be --
20 go to verdict or be dismissed on some other valid basis, but I
21 do not think they could reject it out of hand just by virtue of
22 the fact that, "we have not had this case."

23 QUESTION: Has there been any indication from the
24 Prothonotary or otherwise, that they were going to reject it
25 out of hand?

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MR. OPSITNICK: None at all, Mr. Chief Justice.
(Continued on next page.)

1 Their limited experience is, as I found out in investigation,
2 that they simply take the case -- physically return it to where
3 it would go and it begins again where it left whenever it was
4 removed.

5 To conclude, the doctrine of pendent jurisdiction was
6 not affected by the holding of this Court in Thermtron
7 Products. They are both viable rulings. The district court's
8 remand of a pendent state law claim, as in here, when the
9 underlying federal law claim, the basis for removal has been
10 deleted, is permissible, in that Order remanding the case to
11 state court should be upheld, it is the position of the
12 Respondents that no mandamus should issue. Thank you.

13 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Opsitnick.
14 Mr. DeForest, you have three minutes remaining.

15 ORAL ARGUMENT BY WALTER P. DeFOREST, ESQ.

16 ON BEHALF OF PETITIONERS -- REBUTTAL

17 MR. DeFOREST: Thank you Mr. Chief Justice.

18 First I would like to emphasize one very important
19 consideration that has not been considered: there is a very
20 important difference between remand and dismissal, and that is
21 in regard to the scope and nature of appellate review. And
22 that is a very important factor to a litigant, as I can say.

23 If we are talking about remands, there are going to
24 be situations in which there is much more limited scope of
25 review. If you are talking about dismissals it is very clear

1 that the courts have set up a very strict mechanism for
2 reviewing dismissals, and that is an important consideration.
3 I suggest that there are a number of "what if" questions that
4 have not arisen simply because up until now, remand has been
5 pursuant to a federal statute, that these have been occurring,
6 remand is in --

7 QUESTION: But is it not a fact that there is a
8 conflict on the point we were discussing today in that a lot of
9 courts have been following the rule you think has not -- should
10 not, apply.

11 MR. OPSITNICK: Well, Justice, I do not think those
12 courts, and there has been some suggestion if you look at the
13 Fourth, the Eighth and the Second Circuits' Opinions, they do
14 not even discuss this Court's Thermtron Opinion. So I am not
15 sure what they were doing.

16 QUESTION: But some of the other courts do.

17 MR. OPSITNICK: Yes, Justice, they do. The Sixth
18 Circuit does, and the Sixth Circuit essentially goes off on the
19 pendent jurisdiction theory. And that pendent jurisdiction in
20 my judgment talks about the power to keep a case.

21 What we are talking here of is a power to transfer a
22 case. I think that -- is an important consideration. I do not
23 think it could be arguably limited to removal cases. If there
24 is a power to transfer cases, it is going to apply to any case
25 in federal court that I know of if there is some inherent

1 power. I do not know how we would have some common law
2 inherent power that is going to be limited to the removal
3 statute. If it is there it is going to be for all transfer of
4 all cases in federal courts, in my opinion.

5 Second, the considerations Mr. Opsitnick set forth to
6 you, the three considerations, in my judgment are situations
7 where a litigant desires to control a forum. For whatever
8 reason, that seems to me a consideration that Congress has
9 faced and determined when there will be permission to remand
10 these cases. And it does not want the power to control the
11 forum to be in the hands of the litigant.

12 And in the St. Paul case --

13 QUESTION: That is precisely what you are trying to
14 do.

15 MR. DeFOREST: No, Justice.

16 QUESTION: You removed to federal court.

17 MR. DeFOREST: I had a statutory right to do that,
18 Justice.

19 QUESTION: But of course. But you still are trying
20 to control it. You could have left it in state court.

21 MR. DeFOREST: I had --

22 QUESTION: The case would have been tried long-since.

23 MR. DeFOREST: I am urging that the power to control
24 the forum is not a basis for the creation of a judicially-
25 created power. My decision to exercise a statutory power that

1 Congress has given me is in my judgment something that is
2 permissible under the statute.

3 CHIEF JUSTICE REHNQUIST: Thank you, Mr. DeForest.
4 The case is submitted.

5 [Whereupon at 1:52 p.m. the case in the above-
6 entitled matter was submitted.]

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REPORTER'S CERTIFICATE

DOCKET NUMBER: 86-1021

CASE TITLE: CARNEGIE_MELON UNIVERSITY v. MAURICE B. COHILL, J
JUDGE, UNITED STATES DISTRICT COURT FOR W. PENNSYLVANIA
HEARING DATE: November 10, 1987

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence
are contained fully and accurately on the tapes and notes
reported by me at the hearing in the above case before the
UNITED STATES SUPREME COURT.

Date: November 10, 1987

Margaret Baliz

Official Reporter

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