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FEDERAL COURTS - JURISDICTION OVER VIOLATIONS OF CIVIL LIBERTIES BY STATE GOVERNMENTS AND BY PRIVATE INDIVIDUALS

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FEDERAL COURTS — JURISDICTION OVER VIOLATIONS OF CIVIL LIBERTIES BY STATE GOVERNMENTS AND BY PRIVATE INDIVIDUALS — The long-term security of civil liberties in the United States must in the end depend upon the spirit and attitude of the public. Many violations of these rights never reach the stage of justiciable issues. But even when they do, public sentiment is often reflected in the courts. Especially is this true in the state courts, which are often too near local prejudices and entrenched mores to withstand their effect. This situation was recognized as long ago as the Reconstruction Era, when the various civil rights acts provided for federal protection of civil liberties. Apparently it was felt that from their slightly detached position, federal judges could take a more objective approach to the problem. This belief has been well rewarded. The protection afforded, especially in the Supreme Court, has been outstanding the past few years.

It becomes important, therefore, to determine just when the federal courts will take jurisdiction in cases involving civil rights. Unfortunately for the persecuted individual, certain statutes and self-imposed restrictions prohibit these courts from considering some violations of civil liberties. Yet the potentialities in other directions are enormous and remain largely unexplored.

Oppression may arise from one of three sources: (1) the federal government or its agents; (2) the state governments or their agents; (3) private individuals. The jurisdiction of the federal courts over violation by the first of these groups is at once obvious and unqualified. Either by way of a defense in proceedings brought to enforce a statute or as the basis for an affirmative action by way of injunction or some other extraordinary remedy,[1] the aggrieved individual can assert his alleged right. It is in the realm of state and individual action, however, that most oppression occurs and it is there that the controversial aspects of federal jurisdiction arise. It is well, therefore, to examine in detail the power of the federal courts over these two groups.

1. *Violations of Civil Rights by State Governments*

(a) *Original Jurisdiction of the Federal Courts*

Where local authorities and judges are apparently intent on denying civil rights, the original jurisdiction of the federal courts becomes highly important, for the chances of a minority group securing legal protection are far greater in the federal tribunals. The most obvious grounds for this jurisdiction are the broad provisions of the first para-

[1] See in general, Culp, "Methods of Attacking Unconstitutional Legislation," 22 VA. L. REV. 723, 891 (1936); Fleischmann, "Injunctions Restraining Prosecutions Under Unconstitutional Statutes," 9 A. B. A. J. 169 (1923).

graph of section 41 of the Judicial Code,[2] wherein the federal district courts are given original jurisdiction in all cases at common law or in equity where the controversy involves more than $3,000 and arises under the Constitution, laws, or treaties of the United States. But the pecuniary requirement makes this paragraph of little utility to the individual bringing a suit against state officers to redress his civil rights, since "There are many rights and immunities secured by the Constitution, of which freedom of speech and assembly are conspicuous examples, which are not capable of money valuation, and in many instances . . . no suit in equity could be maintained for their protection if proof of the jurisdictional amount were prerequisite."[3] There is some authority, largely discredited, however, that because such an action sounds in tort and the jury may award exemplary damages, the pecuniary requirement of jurisdiction is met if plaintiff claims more than $3,000 damages in his complaint.[4]

In order to find a firmer basis for original jurisdiction, it is necessary to look at some of the modern counterparts of the civil rights acts. Broad and sweeping is the right given every citizen or person within the United States to bring an action at law or in equity or other proper proceeding against every person acting under color of state authority who deprives him of "any rights, privileges, or immunities secured by the Constitution and laws."[5] Original jurisdiction over suits of this character is expressly given to the district courts in paragraph 14 of section 41 of the Judicial Code, regardless of the pecuniary amount involved.[6] On the surface, this paragraph overlaps paragraph 1 of that

[2] 36 Stat. L. 1091 (1911), 28 U. S. C. (1934), § 41(1).

[3] Justice Stone, concurring, in Hague v. Committee for Industrial Organization, 307 U. S. 496 at 529, 59 S. Ct. 954 (1939).

[4] This argument was set forth by Circuit Judge Biggs in Hague v. Committee for Industrial Organization, (C. C. A. 3rd, 1939) 101 F. (2d) 774 at 789. But this view was contested by the dissenting judge and by Justices Roberts and Stone in the Supreme Court's version of the case. Justice Roberts said, 307 U. S. at 507-508: "In suits brought under subsection (1) a traverse of the allegation as to the amount in controversy, or a motion to dismiss based upon the absence of such amount, calls for substantial proof on the part of plaintiff of facts justifying the conclusion that the suit involves the necessary sum."

[5] 17 Stat. L. 13 (1871), 8 U. S. C. (1934), § 43.

[6] 36 Stat. L. 1092 (1911), 28 U. S. C. (1934), § 41(14): "Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States." The first paragraph, 28 U. S. C. (1934), § 41(1), ends with the sentence, "The foregoing provision as to the sum or value of the matter in controversy shall not be construed to apply to any of the cases mentioned in the succeeding paragraphs of this section."

section and if it is read without reference to its title—"Suits to redress deprivation of civil rights"—it seems to cover every case falling under section 41(1) and thus to nullify the $3,000 requirement. Since this reaches an absurd result, obviously not contemplated by Congress, the courts have attempted to reconcile the two paragraphs on the basis of the nature of the rights protected under each. But the decisions are far from clear in defining what rights are within the confines of section 41(14). The following various interpretations have been made:

(1) The Supreme Court in *Carter v. Greenhow*[7] seized upon the peculiar phrase present in section 41(14)—"any right, privilege, or immunity, *secured* by the Constitution of the United States"—as referring to rights "directly conferred" by the Constitution. However, no definition or clue was given as to what rights are directly conferred.

(2) The Court in *Holt v. Indiana Mfg. Co.*[8] said that only "civil rights" were included within 41(14), but made no attempt to define them. The Court may have been referring to the various civil rights acts from which 41(14) is derived. But the 1871 act defines civil rights merely as those "secured by the Constitution."[9] Therefore, this test appears to be of no real value.

(3) One of the more popular interpretations is that given by Judge Learned Hand in *Marcus Brown Holding Co. v. Pollak.*[10] He claimed that section 41(14) referred to those rights which have their "origin in the Constitution" and are therefore "secured" by it. Presumably, such rights are to be distinguished from the category of natural rights, which antedate the Constitution. This test would limit section 41(14) to the few vague and ill-defined rights that can be said to arise because of the peculiar form of government created by the Constitution—such as the right to cross state lines freely.[11] Such rights as freedom of speech

[7] 114 U. S. 317, 5 S. Ct. 928, 962 (1884).

[8] 176 U. S. 68, 20 S. Ct. 272 (1889).

[9] 17 Stat. L. 13 (1871), 8 U. S. C. (1934), §§ 43, 47, 48. Specific rights mentioned in the 1866 Civil Rights Act, 14 Stat. L. 27 (1866), 8 U. S. C. (1934), § 42, and the 1870 act, 16 Stat. L. 144 (1870), 8 U. S. C. (1934), § 41, are, of course, thereby secured by the laws of the United States, and thus within the further provision of 28 U. S. C. (1934), § 41(14).

[10] (D. C. N. Y. 1920) 272 F. 137.

[11] Justice Roberts in Hague v. Committee for Industrial Organization, 307 U. S. 496, 59 S. Ct. 954 (1939), apparently adopts much the same position, saying in effect that section 41(14) applies to the privileges and immunities of national citizenship under the Fourteenth Amendment. In this connection, it is interesting to note that the same phrase, "secured by the Constitution or laws of the United States," appears in the criminal statute punishing those who conspire to deprive citizens of such rights. One of the recent cases under this section seems to follow Judge Hand's distinction, holding that a defendant can be punished only if he conspires to deprive a citizen of the rights given him by the Constitution or laws. Freedom of speech and press are not included. Powe v. United States, (C. C. A. 5th, 1940) 109 F. (2d) 147.

and press are said to originate outside the Constitution, which serves only to protect them from encroachments by the states. The difficulty with this test is obvious. Metaphysical theories and dogmas as to what are and are not natural rights should not serve as the touchstones of federal jurisdiction in such vital, practical matters.

(4) Justice Stone in *Hague v. Committee for Industrial Organization*[12] has laid down a practical and logical meaning for section 41(14): "whenever the right or immunity is one of personal liberty, not dependent for its existence upon the infringement of property rights, there is jurisdiction in the district court under § 24(14) of the Judicial Code to entertain it without proof that the amount in controversy exceeds $3,000." In other words, section 41(1) embraces all suits arising under the Constitution, including suits for deprivation of civil rights, where the amount in controversy can be shown to exceed $3,000. On the other hand, since civil rights suits are seldom if ever capable of money valuation, section 41(14) gives jurisdiction over them regardless of the money involved. This interpretation does some violence to the phrase "any right, privilege, or immunity" by making it mean "any *personal or civil* right, privilege, or immunity," but it is in obvious accord with the true intent of Congress[13] and with the title affixed to section 41(14). More important, it opens up a hitherto unused broad remedy for protection of the individual. The aggrieved plaintiff need not worry whether his right arose before or under the Constitution. As long as it is protected against state encroachment by the Constitution, he may enjoin the state officers or sue them for damages. Thus in the *Hague* case, a bill for an injunction against state officers for violating the right of speech and assembly was allowed under this section. The limitless possibilities of this realistic interpretation were strikingly shown in the later case of *Ghadiali v. Delaware State Medical Society*,[14] where a retired physician who had been delivering free public lectures was allowed to enjoin state officials who sought to prevent him from speaking. No pecuniary damages were

[12] 307 U. S. 496 at 531-532, 59 S. Ct. 954 (1939).

[13] Section 41(14) was originally enacted in 1871 as a part of the Civil Rights Act of that year, designed to enforce the Fourteenth Amendment, which at that time was regarded primarily as a protection of personal rather than property rights. This was also prior to the Slaughterhouse Cases, 16 Wall. (83 U. S.) 36 (1873), which first made the novel and unreal distinction between rights created and rights protected by the Constitution. See, in general, 52 HARV. L. REV. 1136 (1939).

[14] (D. C. Del. 1939) 28 F. Supp. 841. Nixon v. Condon, 286 U. S. 73, 52 S. Ct. 484 (1932), illustrates a damage action brought under this section against state election officials for denying the right of a qualified voter to vote. But this is a rather weak case for section 41(14), since other jurisdictional sections were cited and since the $3,000 jurisdictional amount may have been present. It would seem that a suit for $100 damages could be maintained under section 41(14).

alleged. Under this interpretation it is difficult to find any jurisdictional limitations in suits of this sort.

Of lesser importance is the right of action for damages given[15] any person against whom any two or more individuals conspire to deprive him of the equal protection of the laws, or of equal privileges and immunities under the laws. Such conspirators may be acting under color of state authority, though that is not prerequisite for the action. Exclusive jurisdiction, regardless of the amount of money involved, is given the district courts over cases of this type.[16]

Another possible method of redressing deprivations of civil rights by state officers is through the use of habeas corpus issuing from the federal district courts. Federal courts are given the power to discharge a prisoner who is held "in custody in violation of the Constitution or of a law or treaty of the United States."[17] But there are two serious limitations to the use of the writ in such a case. In the first place, the federal courts have voluntarily placed severe restrictions on the issuance of the writ of habeas corpus by holding that the only inquiry permissible is that of jurisdiction.[18] So unless the prisoner is detained where there is no jurisdiction over the person or subject matter, he is not entitled to a discharge. It matters not how flagrant the errors may be that are committed in exercising the jurisdiction: such errors can be corrected only by appeal to higher courts. In the second place, where the prisoner is held by a state court in violation of an alleged civil right, the federal courts are even more reluctant to grant the writ. They apparently fear that by freeing prisoners from state courts great confusion and chaos will mark the interrelationship of federal and state courts. This fear is often unwarranted. Had the federal courts at the outset used the writ as intended by Congress to enforce civil liberties, such as freedom from race discrimination in jury service (where the problem usually arises), the state courts would have been forced to make their criminal procedure consistent with the federal Constitution.[19] But today the rule

[15] 17 Stat. L. 13 (1871), 8 U. S. C. (1934), § 47(3).

[16] 36 Stat. L. 1092 (1911), 28 U. S. C. (1934), § 41(12). Note also that under 17 Stat. L. 15 (1871), 8 U. S. C. (1934), § 48, an action for damages is given against anyone who knows that the wrongs conspired to be done in violation of 8 U. S. C. (1934), § 47 are about to be committed, and having power to prevent or aid in preventing such acts, neglects or refuses to do so. If death occurs because of such refusal, the legal representatives may recover up to $5,000. Exclusive jurisdiction, regardless of the amount involved, is given the district courts in 36 Stat. L. 1092 (1911), 28 U. S. C. (1934), § 41(13).

[17] 14 Stat. L. 385 (1867), 28 U. S. C. (1934), § 453.

[18] See Ex parte Siebold, 100 U. S. 371 at 375 (1879); In re Wood, 140 U. S. 278, 11 S. Ct. 738 (1890); Andrews v. Swartz, 156 U. S. 272, 15 S. Ct. 389 (1895).

[19] The power to issue the writ where the person is held "in custody in violation of the Constitution or of a law or treaty of the United States" was originally passed by

is that even constitutional errors committed by state courts must be redressed by appeal rather than by habeas corpus in the federal courts. In extreme cases, however, the writ may be issued to challenge state action when a constitutional issue is raised and no other remedy is available.[20] Such writ may then be obtained from any federal court, including the Supreme Court.

Habeas corpus has also issued out of federal courts where labor organizers have been detained without charges by state militia after the governor had unjustifiably declared martial law.[21] Early cases held that the governor's decision in such a situation could never be reviewed, but Chief Justice Hughes, speaking for the Court in *Sterling v. Constantin*,[22] said that this was a proper subject for judicial inquiry by an appropriate proceeding like an injunction or a writ of habeas corpus. Otherwise, "the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the land."

Another possibility, seldom if ever used in civil liberties cases, is an injunction in the federal courts restraining state criminal proceedings. The use of an injunction in such a case is so severely restricted and the quaint idea that equity will restrain criminal proceedings only to protect "property rights" is so strong that little assistance is given the protection of civil rights.[23]

(b) *Removal Jurisdiction of the Federal Courts*

When any civil suit or criminal prosecution is begun in any state court against any person who is denied or cannot enforce in the "judicial tribunals of the state" any right secured to him by any law pro-

Congress as part of the enabling legislation of the Fourteenth Amendment. "It is because the Supreme Court has failed to give full effect to the enabling legislation enacted by Congress, that the guaranties of the Fourteenth Amendment have been partially nullified, and Negroes continue to have a difficult time enforcing their civil rights." Jefferson, "Race Discrimination in Jury Service," 19 BOST. UNIV. L. REV. 413 at 447 (1939).

[20] See Mooney v. Holohan, 294 U. S. 103, 55 S. Ct. 340 (1935). But in Pettibone v. Nichols, 203 U. S. 192, 27 S. Ct. 111 (1906), the Court refused to review by habeas corpus a detention on a charge of murder, although the accused claimed that they had been extradited under circumstances that denied them any chance to test the lawfulness of the proceedings. For recent cases where writs have been granted to review state decisions, see Jones v. Commonwealth of Kentucky, (C. C. A. 6th, 1938) 97 F. (2d) 335; Howard v. Dowd, (D. C. Ind. 1938) 25 F. Supp. 844. Contra, see McLeod v. Majors, (C. C. A. 5th, 1939) 102 F. (2d) 128; United States ex rel. Jorczak v. Ragen, (C. C. A. 7th, 1939) 102 F. (2d) 184.

[21] United States ex rel. Palmer v. Adams, (D. C. Colo. 1927) 26 F. (2d) 141.

[22] 287 U. S. 378 at 397, 53 S. Ct. 190 (1932).

[23] See Fleischmann, "Injunctions Restraining Prosecutions Under Unconstitutional Statutes," 9 A. B. A. J. 169 (1923); Warren, "Federal and State Court Interference,"

viding for the equal civil rights of United States citizens or of all persons within the jurisdiction of the United States, such suit or prosecution may, on the defendant's petition, be removed to the nearest federal district court.[24] The right to petition for removal is limited to the defendant, and in criminal suits may be exercised only after the bill of indictment in a prosecution has been found in the state court. The case must be removed before the trial or final hearing of the cause in the state court. If the defendant is in actual custody, he must seek a writ of habeas corpus cum causa.[25] No jurisdictional amount is needed in the civil cases removed. The civil rights that must be found to be impaired before removal is allowed are those within the equal protection clause of the Fourteenth Amendment, as the original purpose of the removal section was to give these rights protection in federal courts. Mere prejudice is not enough to warrant removal. Usually the situation justifying removal involves racial discrimination in the choice of jurors in the criminal prosecution of a negro. But the statute applies to whites and negroes alike. Thus, cases have arisen involving exclusion of Republicans from a jury trying a white man,[26] and alleged denial of a right of peremptory challenge in a trial involving a white man.[27]

Removal is provided for whenever the defendant is (1) denied or (2) unable to enforce his civil rights in the state court. There are three possible situations where the defendant may seek to remove:

(1) Where removal is sought immediately after the indictment and the state law is itself discriminatory in choice of jurors. This is clearly within the statute and removal will be granted.[28] It is presumed here that the state courts will abide by and be bound by the unconstitutional state statute. Hence defendant falls within the second class—he is unable to enforce his civil rights.

(2) Where removal is sought immediately after the indictment because of discriminatory acts by jury officials in selecting jurors under a valid state law. This is held not to state a case for removal. While the Fourteenth Amendment protects one against discriminatory action by *any* agency of the state, the removal statute is available only when

43 HARV. L. REV. 345 (1930); Taylor and Willis, "The Power of Federal Courts to Enjoin Proceedings in State Courts," 42 YALE L. J. 1169 (1933); 4 DUKE B. A. J. 26 (1936).

[24] 16 Stat. L. 144 (1870), 28 U. S. C. (1934), § 74.

[25] 36 Stat. L. 1097 (1911), 28 U. S. C. (1934), § 75. Where the state court refuses to deliver certified copies of the record, the federal court may proceed by affidavits. 36 Stat. L. 1098 (1911), 28 U. S. C. (1934), § 78.

[26] Kentucky v. Powers, 201 U. S. 1, 26 S. Ct. 387 (1906).

[27] People of California v. Lamson, (D. C. Cal. (1935), 12 F. Supp. 813, (C. C. A. 9th, 1935) 80 F. (2d) 388.

[28] Strauder v. West Virginia, 100 U. S. 303 (1879); Virginia v. Rives, 100 U. S. 313 (1879).

the discrimination is by the "judicial tribunals of the state."[29] At the time the petition is filed here, the state court has not yet acted and defendant is said not yet to be denied his rights nor unable to enforce them. It is assumed that the state court will correct the wrong if defendant moves to quash the indictment or panel. It is also well settled that the illegal action of the officials alone does not make a case for removal.[30]

(3) Where removal is sought after the trial court has erroneously denied a motion to quash the indictment based on discriminatory action by the jury officials acting under a valid state law. This would seem to fall squarely within the wording of the statute, since by denying defendant's motion, the state court has denied him his civil rights. It should be no answer that defendant may have this injury remedied by appealing to the state appellate courts, for the statute gives him the right to remove regardless of other alternatives. Yet the courts have not followed such a logical path. In *Kentucky v. Powers*,[31] the Supreme Court held that a trial court's erroneous ruling on defendant's motion did not state a case for removal, on the ground that there must be discrimination by the state Constitution or laws; the remedy lies in appeal to higher state courts and finally to the Supreme Court. And in *Gibson v. Mississippi*,[32] the Court said the removal statute did not embrace the case where a right was denied by judicial action during a trial, or in the sentence, or in the mode of executing the sentence; the remedy in all such cases was by appeal.

It would thus appear that by judicial interpretation, most of the substance of the removal statute has been extracted and the defendant is left in the precarious position of having to appeal through the slow and expensive hierarchy of courts. Only if the statute of the state discriminates against him are his rights said to be denied or unenforceable. Such a narrow, twisted meaning can be traced back to an unfortunate remark in two early cases[33] that the removal statute refers

[29] Virginia v. Rives, 100 U. S. 313 at 321 (1879).

[30] Neal v. Delaware, 103 U. S. 370 (1880); Gibson v. Mississippi, 162 U. S. 565, 16 S. Ct. 904 (1896); Murray v. Louisiana, 163 U. S. 101, 16 S. Ct. 990 (1896).

[31] 201 U. S. 1, 26 S. Ct. 387 (1906).

[32] 162 U. S. 565, 16 S. Ct. 904 (1896). See also Commonwealth v. Millen, 289 Mass. 441, 194 N. E. 463 (1935).

[33] Virginia v. Rives, 100 U. S. 313 (1879); Neal v. Delaware, 103 U. S. 370 (1880). The Neal case involved only action by jury officials; while the Rives case did involve judicial action prior to the petition, it actually held that a defendant had no right under federal law or Constitution to have a mixed jury in a particular trial. A good discussion of these cases is contained in the lower court decision in Kentucky v. Powers, (C. C. Ky. 1905) 139 F. 452. See also, Jefferson, "Race Discrimination in Jury Service," 19 BOST. UNIV. L. REV. 413 (1939), and annotations in 53 L. R. A. 568 (1901) and 52 A. L. R. 919 (1928).

"primarily, if not exclusively" to a legislative denial of rights. Yet, as often occurs, neither case was real authority for that position. The presumptions indulged in to justify this result are unrealistic and illogical. It is presumed that when the denial is by the jury officials, the state court will correct the error on a motion to quash the indictment. Yet when local sentiment is running strongly against a defendant, the state courts often do not bother to upset the indictment on the basis of a denial of civil rights. Removal may be quite essential here for a fair trial. On the other hand, when the state statute discriminates, it is presumed that the state courts will follow the invalid law and hence removal is necessary. This is contrary to the well-settled proposition that state courts are bound to follow the Constitution of the United States in all respects. Why presume otherwise in this particular situation?

A sensible solution would be to follow the apparent intent of Congress—which was to allow removal whenever state action is so discriminatory that a fair trial cannot be had. "State action" for this purpose should include the situation where a statute discriminates or the action of officials is likely to affect the trial, or the trial court's ruling denies defendant his civil rights in the trial. The federal courts should not be too tender in their regard for the state courts and their processes when vital liberties of individuals are at stake.

(c) *Appellate Jurisdiction of the Federal Courts*

The vast majority of cases involving civil liberties wend their way through the various state courts and then are reviewed by the United States Supreme Court by writ of certiorari or by writ of appeal. It is usually claimed that some state statute or other state action violates a right guaranteed by the Fourteenth Amendment. Concerning such jurisdiction there is no controversy. There is a question, however, whether the Supreme Court may review decisions of state courts that in themselves deny a person civil rights, such as a state court's decision, in the absence of statute, denying the right to strike or to assemble. No case has ever passed on this question directly, although there are several cases pending in the present term of Court that may put an end to this doubt.[33a] It is clear that the refusal of a state court to hear a claim

[33a] Certiorari has already been granted in two cases by the Supreme Court where the Illinois court enjoined picketing despite objections that this violated the freedom of speech guaranteed by the Fourteenth Amendment. No Illinois statute prescribed such result. Swing v. American Federation of Labor, 372 Ill. 91, 22 N. E. (2d) 857 (1939), cert. granted 310 U. S. 620, 60 S. Ct. 1081 (1940); Meadowmoor Dairies, Inc. v. Milk Wagon Drivers' Union of Chicago, 371 Ill. 377, 21 N. E. (2d) 308 (1939), cert. granted, 310 U. S. 655, 60 S. Ct. 1092 (1940). In another similar case, Crosby v. Rath, 136 Ohio St. 352, 25 N. E. (2d) 934 (1940), certiorari is still pending in the Supreme Court (Docket No. 187, October term, 1940).

that the state is denying the claimant the equal protection of the laws by subjecting him to unequal taxation is "state action" reviewable by the Supreme Court.[34] It would seem reasonable that a state court decision actually denying the civil rights of an individual is equally "state action." State courts have no privilege to crush these rights any more than have the state legislatures or executive officials.

2. *Violations of Civil Rights by Individuals*

The Fourteenth and Fifteenth Amendments were undoubtedly intended by their framers to cover actions by individuals as well as by states. The legislation declared invalid in the *Civil Rights Cases*[35] is partial proof of this. It was specifically so stated as to the Fifteenth Amendment by Senator Howard, one of the framers.[36] But the wording of the amendments unfortunately related only to state action, and the courts were quick to solidify that meaning. The result has been that many of the most flagrant violations of civil liberty escape unpunished.[37]

Obviously, the federal courts have jurisdiction over civil actions brought by individuals against other individuals who have deprived them of their civil liberties by the use of force or threats, provided there is more than $3,000 involved and provided there is diversity of citizen-

[34] Lawrence v. State Tax Commission of Mississippi, 286 U. S. 276, 52 S. Ct. 556 (1932). Justice Stone, 286 U. S. at 282, says, "But the Constitution, which guarantees rights and immunities to the citizen, likewise insures to him the privilege of having those rights and immunities judicially declared and protected when such judicial action is properly invoked. Even though the claimed constitutional protection be denied on non-federal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus avoided. . . . his constitutional rights are denied as well by the refusal of the state court to decide the question, as by an erroneous decision of it." See also cases cited in Smith and DeLancey, "The State Legislatures and Unionism," 38 MICH. L. REV. 987 at 1012, note 83b (1940).

[35] 109 U. S. 3, 3 S. Ct. 18 (1883).

[36] CONG. GLOBE, 41st Cong., 2d sess. (1870), pp. 3654-3655. Compare Senator Thurman's speech, id., pp. 3661-3662.

[37] As one commentator has put it: "So long as the Supreme Court adheres to the principle that Congress can prohibit only state and not individual action, the effective protection of civil liberties rests with the states. Our history has shown that the states cannot always be relied on to play their part. The greatest infringements of personal rights come not from direct state action, but from private forces which the state is unwilling to check. The recent disclosures before the LaFollette Committee make this abundantly clear. No effective restriction is possible on the fascism today rampant in sections of Alabama, California, and Kentucky, to mention only the most conspicuous instances, without federal intervention. It is important, therefore, that Congress be given power to punish interference with personal rights by private agencies, as well as by state action." Fraenkel, "One Hundred and Fifty Years of the Bill of Rights," 23 MINN. L. REV. 719 at 771-772 (1939).

ship. But that jurisdiction offers little protection, so seldom are its requirements met.

There are, however, several statutory grounds on which the federal government may bring actions against individuals who violate the civil rights of others, in spite of the limitations of the Fourteenth and Fifteenth Amendments. One of these is the provision that any officer or person charged with the duty of selecting or summoning jurors who fails to summon any citizen because of race or color or previous condition of servitude is guilty of a misdemeanor and subject to a fine of not more than $5,000.[38] But this has been used only once—against a state judge in 1879 in *Ex parte Virginia.*[39] Otherwise, it has remained a dead letter, in spite of the further provision[40] making it the duty of the United States district attorneys, marshals, deputy marshals, commissioners, and other officers to initiate all prosecutions in vindication of civil liberties.

Of far greater importance and potentialities are the two criminal sections[41]—sections 51 and 52 of the Criminal Code. Section 51 provides that if two or more persons conspire to injure, oppress, threaten, or intimidate any *citizen* in the free exercise or enjoyment of any right or privilege *secured to him by the Constitution or laws of the United States,* they shall be fined not more than $5,000 and imprisoned not more than ten years and shall thereafter be ineligible for any office or place of honor, profit, or trust created by the Constitution or laws of the United States.

At first glance, section 51 seems anomalous. It was passed originally to help enforce the Fifteenth Amendment. True, the Fifteenth Amendment applies only to state action, while section 51 is directed toward action by two or more individuals. However, the courts were astute in surmounting this difficulty. The validity of section 51 does not now depend upon the Fifteenth Amendment. Rather it depends upon the theory fabricated out of whole cloth in the *Slaughterhouse Cases.*[42] According to this theory there are a certain number of rights or privileges said to be conferred upon United States citizens by the United States Constitution and laws thereunder, rights that are essential to the working of the particular form of government set up. Since any government that creates rights must be able to enforce them, section 51 is said to be an appropriate statute for that purpose. Thus, whenever the federal government seeks to prosecute anyone under section 51, the courts will ask themselves these wordy questions:[43]

[38] 18 Stat. L. 336 (1875), 8 U. S. C. (1934), § 44.
[39] 100 U. S. 339 (1879).
[40] 16 Stat. L. 142 (1870), 8 U. S. C. (1934), § 49.
[41] 35 Stat. L. 1092 (1909), 18 U. S. C. (1934), §§ 51, 52.
[42] 16 Wall. (83 U. S.) 36 (1873).
[43] United States v. Moore, (C. C. Ala. 1904) 129 F. 630 at 632.

"Is the right or privilege claimed granted in terms by any provision of the Constitution, or so appropriate and necessary to the enjoyment of any right or privilege which the Constitution does specify and confer upon citizens of the United States as to arise by necessary implication? Is its exercise necessary or appropriate in the performance of any of the duties which the Constitution and laws of the United States exact from its citizens? Is its protection by federal authority needful to the just supremacy of the general government over any matter committed to it, or directly conservative or promotive of any of the ends for which the Constitution ordained the government of the United States? If the character of the right or privilege claimed does not permit affirmative answer to any of these inquiries, it is clear the right is not derived from or dependent on the Constitution, and its protection is not committed to the general government."

In effect, the rights protected under section 51 are those rights that are said to be privileges and immunities of national citizenship under the Fourteenth Amendment. While the category of privileges and immunities has never been concretely defined under the Fourteenth Amendment, there are innumerable examples where the federal government has successfully prosecuted individuals under section 51 for denying others certain privileges of citizenship. These judicially determined privileges include the right to vote for federal officers in both primary and regular elections,[44] the right of public officers to perform their federal duties,[45] the right of one in custody of a federal official to be free from lawless violence,[46] and the right to inform officers of violations of federal laws.[47]

On the other hand, it is said that the rights of free speech and press, when not tied up in some way with maintaining a federal right in its integrity, are not within the meaning of section 51. And so a circuit court of appeals held in a recent case:[48]

"Because the federal government is a republican one in which the will of the people ought to prevail, and because that will ought to

[44] Many of the Pendergast machine prosecutions were brought under this section. See Luteran v. United States, (C. C. A. 8th, 1937) 93 F. (2d) 395; Little v. United States, (C. C. A. 8th, 1937) 93 F. (2d) 401; Walker v. United States, (C. C. A. 8th, 1937) 93 F. (2d) 383.

[45] United States v. Patrick, (C. C. Tenn. 1893) 54 F. 338; United States v. David, (C. C. Tenn. 1900) 103 F. 457; McDonald v. United States, (C. C. A. 8th, 1925) 9 F. (2d) 506.

[46] Logan v. United States, 144 U. S. 263, 12 S. Ct. 617 (1892).

[47] Motes v. United States, 178 U. S. 458, 25 S. Ct. 993 (1900); In re Quarles, 158 U. S. 532, 15 S. Ct. 959 (1895).

[48] Powe v. United States, (C. C. A. 5th, 1940) 109 F. (2d) 147 at 151, noted in 40 COL. L. REV. 902 (1940).

> be expressive of an informed public opinion, the freedom of speaking and printing on subjects relating to that government, its elections, its laws, its operations and its officers is vital to it. Assuming that for this reason Congress, if it finds it necessary, can legislate to maintain such freedom in that field, it does not follow that Congress can legislate generally to preserve such freedom in discussing religious affairs, or social or artistic matters, or matters of purely State concern."

It was also argued in vain in this case that the clause in the Constitution guaranteeing each state a republican form of government gave the federal government power to protect even as against individuals free expression on those matters which might become election issues.[49]

The most important trend at the present time under section 51 is to emphasize the rights given citizens under the laws and statutes of the United States rather than under the Constitution. The civil liberties division of the department of justice has already obtained several indictments on this basis.[50] If carried out to its logical conclusion, this trend has far-reaching and serious consequences. Thus an employer could be prosecuted for conspiring with other company officials to deny employees the right given them to organize under the Wagner Act, thereby providing criminal sanctions that are not found in the act itself.[51] There is some authority for such a result. In *United States v. Waddell*[52] it was held that persons could be prosecuted under section 51 for conspiring to prevent a person from entering a homestead granted to him under the federal homestead laws. More pertinent to the Wagner Act is the case of *Pennsylvania Railroad System and Allied Lines Federation No. 90 v. Pennsylvania R. R.*,[53] holding that under the 1920 Transportation Act, a union could not get a prosecution under section 51 against the railway and its officers mainly because the act was enforceable in its labor provisions only through publication and public opinion. Had it been enforceable in the courts, the implication is that section 51 would apply. Just what the boundaries are to such an application of section 51 is not known. Perhaps it might apply to any

[49] See 40 COL. L. REV. 902 (1940).

[50] Rogge, "Justice and Civil Liberties," 25 A. B. A. J. 1030 (1939).

[51] This was the basis used to secure the indictment in the notorious Harlan County case, later dismissed by agreement. Also, the federal grand jury in Savannah, Georgia, recently returned an indictment charging a textile firm, its officers, and eleven individuals with conspiring to deprive employees of their rights under the Wagner Act. After the National Labor Relations Board had certified a union, the defendants were alleged to have entered into a conspiracy to reduce the pay, shut down the mill, prevent union meetings, etc., all in violation of the statutory rights of the employees.

[52] 112 U. S. 76, 5 S. Ct. 35 (1884).

[53] 267 U. S. 203, 45 S. Ct. 307 (1925).

rights given citizens under a federal statute. Or, in more accord with the purpose and title of section 51, it may apply only to the personal and civil rights given citizens under such laws. It is limited, of course, to citizens who are deprived of their liberties and cannot be directed against anti-alien activities.

Section 52 is far more limited in scope. Its title relates to those acting under color of state laws, but the original statute and the actual language of the statute today refer to those acting under color of any laws. But inasmuch as the framers had in mind state action, this limitation is probably correct, though an argument could be made that it applies to federal officers. Even so, however, it is limited to punishing those who, under color of any law, ordinance, etc., subject inhabitants of any state to the deprivation of any rights, privileges or immunities secured or protected by the Constitution or laws of the United States *on account of such inhabitant being an alien, or by reason of his color or race.* This section has never been before a court, but it is probably limited only to those officers who deny civil rights to persons because they are aliens or negroes. No conspiracy need be shown. The department of justice feels that this section is inapplicable to most civil liberties cases and that since most cases involving officers contain elements of conspiracy such officers can be included in an indictment under section 51.

From this survey of the major fields of jurisdiction of the federal courts over violations of civil liberties can be seen the fact that the potential scope of federal power is far greater than is usually supposed or than might be expected under time-worn statutes. From these hidden wells of jurisdiction, much can be done in the future to protect these vital liberties if counsel for the aggrieved individual is alert and if the government is aggressive in its prosecutions.

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