Michigan Law Review

Volume 62 | Issue 8

1964

Federal Civil Procedure-Existence of Federal Cause of Action for Abuse of Federal Process

Laurence D. Connor
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Civil Procedure Commons, Constitutional Law Commons, Fourth Amendment Commons, Legal Remedies Commons, Supreme Court of the United States Commons, and the Torts Commons

Recommended Citation

Laurence D. Connor, *Federal Civil Procedure-Existence of Federal Cause of Action for Abuse of Federal Process*, 62 MICH. L. REV. 1460 (1964).
Available at: https://repository.law.umich.edu/mlr/vol62/iss8/13

This Recent Important Decisions is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

FEDERAL CIVIL PROCEDURE—EXISTENCE OF FEDERAL CAUSE OF ACTION FOR ABUSE OF FEDERAL PROCESS—Petitioner was served with a subpoena ordering him to appear before the House Committee on Un-American Activities. He subsequently brought an action in federal district court asking for damages and injunctive relief and praying that the subpoena be declared void and of no effect.[1] He alleged it had been signed in blank by the Committee chairman and that respondent, an investigator for the Committee without delegated subpoena power, had filled in petitioner's name without authorization and caused it to be served on him at his place of employment. Petitioner also alleged that respondent intended to subject him to public shame and ridicule when and if he appeared as a witness, and that respondent knew that service on him in such a manner would result in his loss of employment. The district court dismissed the suit for lack of jurisdiction of the subject matter, holding that the case was not ripe for equitable relief and that no federal cause of action for damages had been stated. On appeal the circuit court reversed with respect to the jurisdictional question and remanded the case.[2] The district court then dismissed the complaint without opinion, and the court of appeals affirmed on the ground that respondent was immune from suit.[3] On certiorari to the United States Supreme Court, *held*, affirmed. No federal cause of action is stated,[4] for the facts do not establish a violation of the fourth amendment,[5] Congress has not enacted legislation to give rise to

1 The action was originated by two plaintiffs, Wheeldin and Dawson, but Wheeldin subsequently moved for leave to withdraw, and his motion was granted by the Supreme Court.

2 280 F.2d 293 (9th Cir. 1960).

3 302 F.2d 36 (9th Cir. 1962).

4 The Court ruled that the immunity doctrine upon which the court of appeals had based its decision was not relevant here, since respondent had not acted sufficiently within the scope of his authority to bring it into play. Principal case at 650-51. On the immunity doctrine, see Barr v. Matteo, 360 U.S. 564 (1959).

5 The majority pointed out that there was no search, seizure, arrest, or detainment

such a right of action,[6] and the case is not one in which the Court will fashion a right out of the federal common law. *Wheeldin v. Wheeler*, 373 U.S. 647 (1963).

Mr. Justice Brennan dissented, joined by Mr. Chief Justice Warren and Mr. Justice Black. He urged remand of the case to the circuit court for determination whether a federal right to protection against abuse of process exists, since the decision below had rested on erroneous grounds. Challenging the majority's view that petitioner had relied mainly on the fourth amendment, he considered in detail the questions, first, whether the complaint stated an actionable common-law claim under state law that could nevertheless be entertained by the federal judiciary,[7] and second, whether there was a theory available under which the federal courts could assert original jurisdiction and decide the matter according to federal law.

Since the decision in *Erie R.R. v. Tompkins*,[8] the federal courts have been reluctant to expand federal law to areas that have been traditionally considered to be in the realm of state responsibility. It is also clear, however, that the *Erie* opinion has not been taken by the courts to mean there is no instance in which they can create or fashion federal law. On several occasions courts have found justification for applying federal law to controversies which could be, or generally are, decided under state law.[9] They have avoided formulating general rules for determining the permissible areas in which federal law can be extended in this fashion, however, and the tendency has been to avoid any possible "encroachment" upon areas

pursuant to the subpoena, nor was the subpoena used to cite the petitioner for contempt when he failed to respond.

6 That is, Congress has not specifically created a cause of action for abuse of subpoena power by a federal officer, at least where the subpoena was never given coercive effect.

7 Concluding that the complaint did state an actionable common-law claim, Brennan suggested two theories by which the federal courts could dispose of the case. The first was pendent jurisdiction, a doctrine which allows decision of a non-federal claim when it is part of a cause of action brought under federal question jurisdiction. Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315 (1938); Hurn v. Oursler, 289 U.S. 238 (1933). The majority in the principal case dismissed this contention without elaboration, by saying that petitioner had not attempted to state a claim under state law. Brennan considered this to be a matter best determined by the courts below. The second theory was derived from Smith v. Kansas City Title & Trust Co., 255 U.S. 180 (1921), where a state-created cause of action was held to arise under federal law since a proposition of federal law was "inherent" in the plaintiff's claim. Smith, a shareholder, had sued to enjoin a Missouri corporation from investing in certain federal bonds on the ground that an act of Congress authorizing their issuance was unconstitutional. Since under Missouri law an investment in securities not authorized by a valid law was enjoinable, the cause of action was state-created. Brennan offered the view in the principal case that the contours of authority of federal process and its justifiable and unjustifiable ends are matters of federal law. He admitted, however, that the analogy to the *Smith* case was not free from doubt. Principal case at 660.

8 304 U.S. 64 (1938).

9 *E.g.*, Howard v. Lyons, 360 U.S. 593 (1959); Francis v. Southern Pac. Co., 333 U.S. 445 (1948); United States v. Fullard-Leo, 331 U.S. 256 (1947); Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173 (1942); D'oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1941).

thought to be reserved for state decisions.[10] Since the fourth amendment was found to provide no right of action in the principal case, the claim was apparently reduced to one of abuse of process or a related tort, and the remedy, according to the majority, could be furnished only by state law. Thus, in reference to Mr. Justice Brennan's second question, the issue became whether a tort, inflicted by a federal officer improperly using federal power under color of authority, should be taken from the realm of state responsibility and governed by federal law, even though Congress has enacted no specific legislation providing a remedy. The heart of Mr. Justice Brennan's dissent was his exploration of how a federal court could bring a claim of this sort within the purview of federal law. He suggested that a federal remedy either could be implied from a congressional act authorizing the issuance of subpoenas,[11] or could be provided by federal common law.

The federal courts have readily implied remedies and rights of action under statutes regulating investment securities.[12] Apart from this area, however, there is no clear pattern of implying private remedies from congressional legislation.[13] For example, causes of action have been implied under provisions of the Railway Labor Act,[14] the Federal Aviation Act,[15] the Communications Act of 1934,[16] and the Federal Safety Appliance Acts.[17] But the existence of causes of action has also been denied under the

10 *E.g.*, De Sylva v. Ballentine, 351 U.S. 570 (1956); United States v. Kramel, 234 F.2d 577 (8th Cir. 1956); United States v. Arizona, 216 F.2d 248 (9th Cir. 1954).

11 Legislative Reorganization Act of 1946, ch. 753, § 121(b)(1)(q), 60 Stat. 828, which provides in part: "Subpenas [*sic*] may be issued under the signature of the chairman of the committee [on Un-American Activities] or any subcommittee, or by any member designated by any such chairman. . . ." *Id.* at 828-29.

12 Causes of action have been implied under the Securities Exchange Act of 1934, 48 Stat. 881, 15 U.S.C. §§ 78a-jj (1958): Borak v. J. I. Case Co., 317 F.2d 838 (7th Cir.) (§ 14a) (both right and remedy implied), *cert. granted*, 375 U.S. 901 (1963); Dann v. Studebaker-Packard Corp., 288 F.2d 201 (6th Cir. 1961) (§ 14a) (private right of action implied, but remedy denied in particular case); Fratt v. Robinson, 203 F.2d 627 (9th Cir. 1953) (§ 10b); Fischman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir. 1951) (§ 10b); Kardon v. National Gypsum Co., 69 F. Supp. 512 (E.D. Pa. 1946) (motion to dismiss), 73 F. Supp. 798 (E.D. Pa. 1947) (judgment on the merits) (§ 10b).

Causes of action have also been implied under the Investment Company Act of 1940, 54 Stat. 789, 15 U.S.C. §§ 80(a-1)-(a-52) (1958): Taussig v. Wellington Fund, Inc., 313 F.2d 472 (3d Cir.), *cert. denied*, 374 U.S. 806 (1963); Brouck v. Managed Funds, Inc., 286 F.2d 901 (8th Cir. 1961), *vacated and remanded per stipulation* 369 U.S. 424 (1962); Brown v. Bullock, 194 F. Supp. 207 (S.D.N.Y.), *aff'd*, 294 F.2d 415 (2d Cir. 1961).

See generally 3 LOSS, SECURITIES REGULATION 1682-1863 (2d ed. 1961).

13 For a more thorough discussion of implied statutory causes of action see Note, 77 HARV. L. REV. 285 (1963).

14 48 Stat. 1185 (1934), as amended, 45 U.S.C. §§ 151-88 (1958), in Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210 (1944).

15 49 U.S.C. § 1374(b), in Fitzgerald v. Pan Am. World Airways, 229 F.2d 499 (2d Cir. 1956).

16 Section 605, 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958), in Reitmeister v. Reitmeister, 162 F.2d 691 (2d Cir. 1947).

17 27 Stat. 531 (1893), as amended, 45 U.S.C. §§ 1-16, in Texas & Pac. R.R. v. Rigsby, 241 U.S. 33 (1916).

latter two[18] as well as under the Federal Power Act.[19] It appears that, as a minimum requirement, the statute must have been enacted for the protection or benefit of a particular group and its language must indicate a duty to do or refrain from doing a described act. The language in House Rule XI(g)(2) is inconclusive. If Congress had intended to impose any sort of duty not to abuse the subpoena power, it could have constructed a provision with more positive demands.[20] Standing alone, the House Rule is probably not a sufficiently strong basis for implying a right of action on behalf of persons injured by the misuse of the subpoena power.

The status of the federal common law is uncertain. The leading Supreme Court cases in this area are *Clearfield Trust Co. v. United States*[21] and *United States v. Standard Oil Co.*,[22] both of which came after *Erie* and established the existence of the federal common law. Although these cases remain good authority, they have been interpreted narrowly.[23] In the absence of specific legislation providing a cause of action, the courts have generally "created" new federal rights of action in two broad situations: (1) where Congress has legislated extensively in the area concerned and there is apparently an essentially federal matter involved which requires federal control in order to carry out most effectively the legislative intent;[24] and (2) where either the United States or one of its agents, pursuant to constitutional or statutory authority, is engaged in activities to such an extent that a genuine federal interest is present, and the federal judiciary should assume control over the controversy in order to prevent undue disparity among state decisions in the area.[25]

18 Tipton v. Atchison, T. & S.F. R.R., 298 U.S. 141 (1936) (Federal Safety Appliance Acts); Daly v. Columbia Broadcasting Sys., Inc., 309 F.2d 83 (7th Cir. 1962) (Federal Communications Act).

19 Section 205(a), 49 Stat. 851 (1935), 16 U.S.C. § 824(d) (1958), in Montana-Dakota Util. Co. v. Northwestern Pub. Serv. Co., 341 U.S. 246 (1951).

20 For instance, if the section had read "It shall be unlawful for any member of the committee to issue subpenas without the express authority of the chairman. . ." a stronger case could have been made out.

21 318 U.S. 363 (1943) (despite absence of applicable act of Congress, rights and duties of the United States in issuing commercial paper are to be governed by federal law fashioned by the courts).

22 332 U.S. 301 (1947) (actions brought by United States to recover for injury caused to United States soldier are to be decided by federal rather than state tort law, even though Congress has not acted affirmatively in the area).

23 The scope of *Clearfield* has been constricted in Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell, 352 U.S. 29 (1956), where the Supreme Court held that federal law does not govern the process of transmitting government coupon bonds through the channels of the Federal Reserve System for redemption. The plaintiff had contended that the Federal Reserve Bank was paying a debt of the United States when it redeemed the bonds and that rights and duties of the United States were thus involved.

24 *E.g.*, International Ass'n of Machinists v. Central Airlines, Inc., 372 U.S. 682 (1963); Francis v. Southern Pac. Co., 333 U.S. 445 (1948); Holmberg v. Armbrecht, 327 U.S. 392 (1946); Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173 (1942); Deitrick v. Greaney, 309 U.S. 190 (1940); United States v. Helz, 314 F.2d 301 (6th Cir. 1963); American Pipe & Steel Corp. v. Firestone Tire & Rubber Co., 292 F.2d 640 (9th Cir. 1961); O'Brien v. Western Union Tel. Co., 113 F.2d 539 (1st Cir. 1940).

25 *E.g.*, Howard v. Lyons, 360 U.S. 593 (1959); United States v. Fullard-Leo, 331 U.S.

Although Mr. Justice Brennan indicated that either statutory construction or federal common law could provide the petitioner with a federal cause of action, it is not always possible to distinguish the two. In *Textile Workers Union v. Lincoln Mills*[26] the Supreme Court interpreted section 301 of the Taft-Hartley Act,[27] a jurisdictional provision, as authorizing the judiciary to create substantive law in deciding cases arising under the section, and it then went on to order specific performance of an agreement to arbitrate.[28] As Mr. Justice Frankfurter pointed out in dissent,[29] there was nothing in the act or in its legislative history that specifically granted the courts such power or prescribed such a remedy. Was the remedy implied from the act and the labor laws in general, or was it "created" by virtue of the Court's powers under the federal common law? Here the two theories intertwine, and labels become unimportant. The real question in each instance is whether the Court has power to create a federal right or remedy in the absence of specific legislation authorizing it.

Of course, whether the facts of a case place it within this power is a matter for judicial interpretation, and in the principal case the majority has responded negatively. However, considering not only House Rule XI(g)(2), but also taking into account all the legislation that has governed the creation of congressional committees, their investigations, and the right to subpoena as well as the applicable principles governing the rights and duties of federal officers acting under color of authority, it is at least arguable that Congress *has* legislated extensively in the area.[30] Thus, it might be said that Congress has impliedly granted the courts power to fill in the gaps left in legislation, including the providing of principles to govern civil suits against federal agents. Moreover, as indicated by the federal officer removal statute,[31] the federal government has a direct interest

256 (1947); United States v. Standard Oil Co., 332 U.S. 301 (1947); United States v. Allegheny County, 322 U.S. 174 (1944); Clearfield Trust Co. v. United States, 318 U.S. 363 (1943); Hendry v. United States, 305 F.2d 515 (9th Cir. 1962); United States v. View Crest Garden Apartments, Inc., 268 F.2d 380 (9th Cir. 1959), *cert. denied*, 361 U.S. 884 (1959); United States v. The McCabe Co., 261 F.2d 539 (8th Cir. 1958).

26 353 U.S. 448 (1957).

27 Labor Management Relations Act § 301(a), 61 Stat. 156 (1947), 29 U.S.C. § 185(a) (1958).

28 The Court said in its opinion [Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 456 (1957)]: "The question then is, what is the substantive law to be applied in suits under § 301(a)? We conclude that the substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws." And (*id.* at 457): "Federal interpretation of the federal law will govern, not state law."

29 *Id.* at 460.

30 Of course, there must be a limit as to what may be taken into consideration. See Gully v. First Nat'l Bank, 299 U.S. 109, 117-18 (1936): "The most one can say is that a question of federal law is lurking in the background, just as farther in the background there lurks a question of constitutional law, the question of state power in our federal form of government. . . . One could carry the search backward, almost without end. . . . If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute. . . ."

31 28 U.S.C. § 1442 (1958).

in suits against its agents.[32] The problem is how far this interest extends and whether the outcome of a suit against someone like the respondent in the principal case, who acted so far outside the scope of his authority that the immunity doctrine did not even apply, is still of concern to the United States. If it is, it seems the Court should have at least considered whether it was preferable for the outcome to be governed by uniform federal law administered by the federal judiciary before dismissing the suit.[33]

Had the minority view prevailed in the principal case, it would have brought about a significant extension of the scope of federal judicial power.[34] Mr. Justice Brennan has at least laid the groundwork for such an extension by his dissent from what appears to be an almost superficial treatment by the majority; and the fact that two Justices concurred in his views suggests a substantial interest in the area that may presage a future change of position.

On the other hand, an overriding consideration is the potential effect such an extension of federal judicial power would have on the doctrine of *Erie R.R. v. Tompkins*.[35] Adopting the Brennan position in its entirety would unquestionably encroach upon *Erie*, for it would give the federal courts wide latitude to adjudicate rights traditionally governed by state law whenever a substantial federal interest is involved. In the principal case the Court apparently wanted to avoid trying to define the precise limits within which the federal courts should operate; but, in view of increased federal regulation and concern in many areas,[36] it seems likely that cases presenting opportunities to extend federal judicial power will arise with greater frequency. Eventually it may become apparent to the Court that a more definite policy of federal decision-making in the absence of specific legislation will have to be formulated, a policy that balances the dogma of *Erie* with the exigencies of federal expansion.

Laurence D. Connor

32 See also Mishkin, *The Federal "Question" in the District Courts*, 53 COLUM. L. REV. 157, 193 (1953).

33 Of course, federal decisional law often varies from circuit to circuit, especially in the absence of a Supreme Court decision, and uniformity would consequently not be assured merely by granting the federal courts power to create rights of action. But disparity among the circuits would usually not be as great as among state courts.

34 See, *e.g.*, Johnston v. Earle, 245 F.2d 793 (9th Cir. 1957); Chaskin v. Thompson, 143 F.2d 566 (9th Cir. 1944); Dowling Bros. v. Andrews, 19 F.2d 961 (7th Cir. 1927); Dale Sys., Inc. v. General Teleradio, Inc., 105 F. Supp. 745 (S.D.N.Y. 1952).

35 304 U.S. 64 (1938).

36 It is conceivable that current civil rights problems, for example, will provide a fertile source of suits for abuse of power against federal officers.