Volume 48 | Number 3 Article 20

4-1-1970

Federal Jurisdiction -- Suits Against Federal Officers for Violation of the Fourth Amendment

Joseph E. Elrod III

There are many situations today in which settlors intentionally retain a taxable power over property that they have transferred but still set up their estates in such a way that estate taxes are avoided. Such schemes obviously defeat the purposes of the federal estate tax. In dealing with crossed trusts, the courts, therefore, should insure that the purposes of the estate tax are met by applying the reciprocal trusts doctrine rather than the statutory scheme when by such action estate-tax evasion can be thwarted. When taxation under the statutory scheme would adequately meet the policies behind the estate tax, this method should be followed, just as Justice Douglas has suggested, even though the reciprocal trusts doctrine could be invoked. But when following the statutory scheme would result in estate-tax avoidance, Justice Douglas' reasoning should be abandoned and taxation imposed under the reciprocal trusts doctrine.

It is important to realize that application of the above principles does not require a consideration of possible tax-avoidance motives of the settlor—a line of inquiry ruled out in *Grace* as a controlling factor in deciding when the reciprocal trusts doctrine should apply. Rather, adoption of these principles would be in accordance with the majority's admonition to look to the objective factors in the case. One of these factors should be whether there are tax-evasion *consequences* because the trusts are reciprocal. If there are no tax-evasion *consequences*, and taxation is possible under the statutory scheme, courts should not invoke the reciprocal trusts doctrine, but should allow taxation under the applicable statute.

J. DAVID JAMES

Federal Jurisdiction—Suits Against Federal Officers for Violation of the Fourth Amendment

When an individual is injured at the hands of federal officers conducting an unlawful search and seizure in violation of the fourth amendment, what redress does the law provide for injuries to his person and to his property? Clearly, the Federal Tort Claims Act[1] would not provide compensation for the plaintiff because immunity to the government from suit[2] is specifically granted by the Act for the very injuries that a plaintiff

[1] The Federal Tort Claims Act is scattered throughout 28 U.S.C. (1964).

[2] *Cf.* West v. Cabell, 153 U.S. 78 (1894), a case in which a United States marshal was sued on his bond. A violation of the fourth amendment's proscription that a warrant shall particularly describe the person to be seized was deemed a breach of the bond. *Id.* at 87.

suffers as the result of an unlawful search and seizure.[3] In order to avoid dismissal because of tort immunity, a plaintiff should not sue the United States under the Federal Tort Claims Act for the acts of one of its agents. Rather, he must forego the "deep-pocket" approach and sue the officer as a private individual.[4]

If the plaintiff elects to hold the federal officer privately accountable for the injuries that he has suffered, he may bring suit in a state court of appropriate jurisdiction and rely on the common-law causes of action for trespass and false imprisonment. However, a federal officer, naturally desirous of placing himself in a more favorable forum, can easily have the case removed to a federal district court.[5] The removal statute perhaps provides a federal officer with an unassailable haven. It allows the officer to remove not only when he is sued directly in a state court[6] but also when he is sued as a third-party defendant.[7] Because any one federal officer can cause the suit to be removed to a federal court, it is not necessary that other defendants join in the removal petition.[8] Upon removal of the case to a federal court, the parties to the suit will be governed by the Federal Rules of Civil Procedure although the federal court will adjudicate the plaintiff's claim according to state substantive law.

The primary reason that Congress authorized removal in suits against federal officers was fear of prejudicial application of local laws.[9] In *Tennessee v. Davis*,[10] Justice Strong reasoned that the operations of the

[3] Federal Tort Claims Act, 28 U.S.C. § 2680(h) (1964), provides tort immunity for "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights."

[4] Presumably, by suing the officer as a private individual rather than suing the United States, the plaintiff deprives the officer of the tort immunity provided by the Act. However, the officer can still plead that he was acting under color of federal law as an affirmative defense.

[5] 28 U.S.C. § 1442(a)(1) (1964), provides in part:

> A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States . . . (1) Any Officer of the United States . . . for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

[6] *E.g.*, Camero v. Kostos, 253 F. Supp. 331, 335 (D.N.J. 1966).

[7] Goldfarb v. Muller, 181 F. Supp. 41, 43 (D.N.J. 1959) (petition for removal denied for other reasons).

[8] Bradford v. Harding, 284 F.2d 307, 310 (2d Cir. 1960).

[9] Strayhorn, *The Immunity of Federal Officers From State Prosecutions*, 6 N.C.L. REV. 123, 124 (1927).

[10] 100 U.S. 257 (1879).

federal government might well grind to a halt if federal officers could be tried in state forums without the benefit of federal judicial intervention.[11] Chief Justice Taft believed that "[t]he constitutional validity of [the removal statute] rests on the right and power of the United States to secure the efficient execution of its laws and to prevent interference therewith . . . ."[12] It should be noted that the federal officer must demonstrate in his petition for removal that he was acting under "color of office."[13] However, one can expect a liberal application of the "color-of-office" test recently enunciated by the Supreme Court;[14] as a practical matter, a motion for remand will not be granted even in the most doubtful of cases.[15]

Given the likelihood that a federal court will ultimately adjudicate a suit brought against a federal officer, the issue naturally arises whether the plaintiff may bring suit directly in a federal court alleging that a violation of the fourth amendment creates a federal claim for relief. It is clear that if diversity of citizenship exists, suit can be brought under the appropriate jurisdictional statute,[16] but diversity seldom is present in the typical case. Obviously suit cannot be brought in a federal court on the bare allegation of a state claim. In such a situation, the federal court would dismiss for lack of a substantial federal question. Hence, it is necessary to allege some federal ground in order to generate subject-matter jurisdiction at the federal level.

In *Bell v. Hood*,[17] the United States Supreme Court dealt with the question of whether a federal court had jurisdiction to entertain a civil action alleging a violation of the fourth amendment. The Court held

---

[11] *Id.* at 263.

[12] Maryland v. Soper, 270 U.S. 9, 32 (1926).

[13] *See* note 5 *supra.*

[14] In Willingham v. Morgan, 395 U.S. 402 (1969), the Court stated that:

> [T]he right of removal . . . is made absolute whenever a suit in a state court is for any act "under color" of federal office, regardless of whether the suit could originally have been brought in a federal court.
>
> The federal officer removal statute is not "narrow" or "limited." . . . At the very least, it is broad enough to cover all cases where federal officers can raise a colorable defense arising out of their duty to enforce federal law.

Id. at 406-07.

[15] *Compare* City of Norfolk v. McFarland, 143 F. Supp. 587, 589 (E.D. Va. 1956) *with* Tennessee v. Keenan, 13 F. Supp. 784, 791 (W.D. Tenn. 1936).

[16] 28 U.S.C. § 1332(a) (1964), provides in part: "The district courts shall have original jurisdiction of all civil actions where the matter in controversy . . . is between—(1) citizens of different States . . . ."

[17] 327 U.S. 678 (1946).

that there was jurisdiction under section 1331 of title 28 of the United States Code.[18] On remand the district court dismissed the suit for failure to state a claim even though it had jurisdiction to hear the case.[19] The district court reasoned that the purpose of the fourth amendment is to protect an individual from governmental action; that whenever a federal officer exceeds his authority, he no longer represents the government, but acts in a private capacity; that inasmuch as the fourth amendment does not apply to private conduct, the violation of the amendment by individuals acting in a private capacity could hardly form the basis of a claim for relief.[20]

In the recent case of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*,[21] federal officers entered the home of Webster Bivens without a search warrant. After a thorough search, Bivens was arrested for an alleged narcotics-law violation. At the federal court building he was photographed, fingerprinted, interrogated, and detained against his will. However, the United States commissioner dismissed the charges against him. Bivens then brought suit in a federal district court against the individual officers alleging that his fourth amendment rights had been violated and that he was entitled to money-damages as a consequence of this unwarranted federal action. The district court dismissed both for lack of jurisdiction and for failure to state a claim upon which relief could be granted. On appeal the Court of Appeals for the Second Circuit held, on the basis of *Bell*, that there was jurisdiction to adjudicate under section 1331 of title 28 of the United States Code. However, the court affirmed the district court's determination that Bivens failed to state a claim.[22] The court held that in the absence of a statute permitting suit in a federal district court, there was no federally created claim for money-damages inherent in the fourth amendment.[23]

It is notable that the court in *Bivens* explicitly disagreed with the rationale of the district court in *Bell* concerning governmental action.[24] The court concluded that action by federal officers in violation of the fourth amendment amounts to governmental action by any definition of

[18] 28 U.S.C. § 1331(a) (1964), provides in part: "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy . . . arises under the Constitution, laws, or treaties of the United States."

[19] Bell v. Hood, 71 F. Supp. 813 (S.D. Cal. 1947).

[20] *Id.* at 817.

[21] 409 F.2d 718 (2d Cir. 1969).

[22] *Id.* at 720.

[23] *Id.* at 719.

[24] *Id.* at 720-21.

the term. Although this conclusion might indicate a predilection on the part of the court in favor of allowing the suit to be maintained, it chose to abstain in light of Congressional silence on the subject. Arguably, the court was correct in its decision not to create a claim for relief in an area in which Congress had not acted. However, Congress *has* acted to impose criminal sanctions for abuse of the fourth amendment[25] and, more recently, has created a remedy specifying money-damages for unauthorized interception of private communications by electronic eavesdropping devices.[26] Congress should certainly continue this trend by passing legislation allowing an individual to bring suit against a federal officer for violation of the fourth amendment. Not only will firm guidelines thus be established, but uniformity in the law will be achieved.

In *Bivens*, the Second Circuit held that the case was not one in which federal common law should be applied.[27] Rather, the court felt that until Congress did act, the exclusionary rule, the possibility of injunctive relief, and resort to the state courts served to vindicate the plaintiff's interests. While it is beyond the scope of this discussion to propose a judicially-created claim for relief for violation of the fourth amendment by a federal officer, the court's rationale concerning vindication of the plaintiff's interests cannot withstand close scrutiny.

Although the exclusionary rule operates to prevent a person from being convicted due to the fruits of an unlawful search, it is only applicable in criminal prosecutions. It does not secure a person's property from future seizure, nor does it recompense one for damages occasioned by the distraint. Similarly, while injunctive relief may prevent future intrusions, it does not remedy the wrong that has been suffered due to the past actions of federal officers. The court seemingly disregarded that at the heart of a complaint alleging an infringement of fourth amendment rights is the probability that there has been an illegal seizure of the person; *i.e.*, the plaintiff has been the victim of a false imprisonment and has undergone the consequent humiliation and attendant mental suffering characteristic of such an experience. It is difficult to see how

[25] *E.g.*, 18 U.S.C. § 2234 (1964) (executing a search warrant with unnecesary force); 18 U.S.C. § 2235 (1964) (procuring the issuance of a search warrant with malice and without probable cause); 18 U.S.C. § 2236 (1964) (searching an occupied private building without a warrant).

[26] *See generally* Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C.A. § 2520 (Supp. 1970).

[27] Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 409 F.2d 718, 722 (2d Cir. 1969).

the exclusionary rule and the injunctive device would provide proper relief for a plaintiff so injured.

In the absence of diversity of citizenship and a federal statute giving plaintiffs a substantive claim for relief for violation of the fourth amendment, and in light of the courts' refusal to apply federal common law, is there still some method by which an individual can bring suit initially in a federal forum to litigate his state-created claim for relief? Perhaps one solution would be for Congress to pass a federal jurisdictional statute under the guise of "protective jurisdiction."[28] Such a statute would allow a plaintiff to bring suit directly in federal court whenever he wishes to litigate a state-created claim for relief against a federal officer. The statute would correct two present imbalances. On the one hand, it would serve to put a plaintiff on an equal footing with a federal officer who can claim the benefits of the present removal statute. On the other, it would serve to equalize the plaintiff in a non-diversity of citizenship situation with the plaintiff who can sue under the diversity statute.

Until Congress does act an alternative solution would be the utilization by the federal courts of the doctrine of pendent jurisdiction in the interest of judicial economy. Rather than perpetuating inefficiency by forcing the plaintiff to sue in a state court, only to have the federal officer remove to a federal court, the concept of pendent jurisdiction could have been used by the federal courts to retain the case and dispose of it on state grounds.[29]

It should be emphasized that, after *Bell*, the problem facing the plaintiff is not jurisdictional,[30] but basically one of asserting a claim upon which federal relief can be granted. Thus the concept of pendent jurisdiction becomes particularly important and can be used effectively. The basic theory underlying pendent jurisdiction was set forth by the

[28] In Textile Workers Union of America v. Lincoln Mills, 353 U.S. 448 (1957), Justice Frankfurter said:

> Called 'protective jurisdiction,' the suggestion is that in any case for which Congress has the constitutional power to perscribe federal rules of decision and thus confer 'true' federal question jurisdiction, it may, without so doing, enact a jurisdictional statute, which will provide a federal forum for the application of state statute and decisional law.

Id. at 473 (dissenting opinion).

[29] It is interesting to note that the dissenter in Bell v. Hood, 327 U.S. 678 (1946), recognized this possibility. "For even though it be decided that petitioners have no right to damages under the Constitution, the district court will be required to pass upon the question whether the facts . . . give rise to a cause of action for trespass under state law." *Id.* at 686 (dissenting opinion).

[30] As previously noted, jurisdiction exists under 28 U.S.C. § 1331(a) (1964).

Supreme Court in *Hurn v. Oursler*:[31] "[A] case where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question . . . "[32] could properly invoke federal jurisdiction as to both claims. The Court went on to say that "where the federal question averred is not plainly wanting in substance, the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal *ground* . . . ."[33] Taking this statement by itself, it is arguable that pendent jurisdiction might not be available in a case such as *Bivens* due to the rigid requirement that a substantial federal question is necessary to justify retention and disposition of the controversy on non-federal grounds.[34] However, the requirements of *Hurn* have been broadened by the Court's latest exposition of the doctrine. In *United Mine Workers of America v. Gibbs*,[35] the Court pointed out that the concept of pendent jurisdiction was grounded "in considerations of judicial economy, convenience and fairness to litigants . . . ."[36] The Court further stated:

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws . . . , and Treaties . . ." and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court . . . . The state and federal claims must derive from a common nucleus of operative fact.[37]

One can only conclude after *Gibbs* that the standards for the legitimate exercise of pendent jurisdiction are not as rigid as those set forth in *Hurn*. Quite certainly the Court still requires that the federal claim have

---

[31] 289 U.S. 238 (1933).
[32] *Id.* at 246.
[33] *Id.*
[34] The district court in Bell v. Hood, 71 F. Supp. 813 (S.D. Cal. 1947), thought that the concept of pendent jurisdiction could not be invoked to dispose of that case on state grounds because the concept had been applied only in equity cases. Further, the court held that it could assume jurisdiction over the state claim only if there was also a federal claim alleged. *Id.* at 820. This construction of the doctrine of pendent jurisdiction is clearly erroneous. *See generally* Mishkin, *The Federal "Question" In The District Courts*, 53 COLUM. L. REV. 157, 167 (1953). *See also* Wheeldin v. Wheeler, 373 U.S. 647, 657 (1963) (dissenting opinion).
[35] 383 U.S. 715 (1966).
[36] *Id.* at 726.
[37] *Id.* at 725 (footnotes omitted).

substance. However, more emphasis is placed on judicial economy and the overriding consideration of complete disposition of a case before a single tribunal. It may well be that the requirement of substance can be rather easily satisfied, as the Court indicated, by simply alleging a claim arising under the Constitution. The Court acknowledged that there may "be situations in which the state claim is so closely tied to the questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong."[38] The situation encountered in *Bivens* presents just such a state claim. The federal courts should utilize the concept of pendent jurisdiction to dispose of such a matter at the federal level in the interest of judicial efficiency and overall fairness.[39]

Pendent jurisdiction is not a panacea for every problem presented by a case such as *Bivens*. Admittedly there are some drawbacks to the doctrine that serve to limit its effectiveness. Primarily, it is a discretionary tool that a federal court can invoke as it sees fit.[40] Moreover, an adverse decision on the state claim by the court can have the preclusive effect of res judicata. Thus the plaintiff is required to gamble if he wishes to invoke the concept in a federal court. It is far more advisable initially to bring suit in a state court since one knows that the federal officer almost certainly will remove to federal court. The advantage of this procedure, from the plaintiff's standpoint, is that state law will definitely apply to the case. The disadvantage is found in the pro forma

[38] *Id.* at 727.

[39] Perhaps one of the reasons that a federal court is reluctant to act in the absence of congressional legislation authorizing a suit for a violation of the fourth amendment is the fear of having to establish federal common law. The basis of the decision in Erie R.R. v. Tomkins, 304 U.S. 64 (1938), was to alleviate the forum-shopping opportunity spawned by the existence of federal common law. However, in cases such as *Bivens*, this fear is unfounded because the tort law of trespass and false imprisonment varies little from jurisdiction to jurisdiction. *See generally*, W. PROSSER, LAW OF TORTS 54-89 (3d ed. 1964). In any event, it would seem that in pendent-jurisdiction cases, state law should be dispositive of state claims. Although the *Erie* doctrine is arguably limited to diversity actions, it has been suggested that the doctrine has been applied by federal courts to state claims in pendent-jurisdiction cases. *See* Note, *Problems of Parallel State And Federal Remedies*, 71 HARV. L. REV. 513, 517 (1958).

Another facet of pendent jurisdiction often overlooked is the necessity that the plaintiff plead his alternative state grounds for recovery. Presumably, this step was not taken in *Bivens*. However, had the federal court desired to invoke the doctrine, it could have allowed amendment of the pleadings in keeping with the liberality of the Federal Rules of Civil Procedure. *See* FED. R. CIV. P. 15(a).

[40] *E.g.*, Massachusetts Universalist Convention v. Hildreth & Rogers Co., 183 F.2d 497, 501 (1st Cir. 1950).

legal maneuvers in which the plaintiff must indulge.[41] Congress should act in this situation to allow an individual to sue directly in a federal court. However, until Congress does act, a suit that is brought directly in a federal court should be retained by the court and disposed of on non-federal grounds under the concept of pendent jurisdiction.

JOSEPH E. ELROD III

Torts—Responsibility of Landlords for Criminal Acts of Third Persons

In *Ramsay v. Morrisette*[1] the District of Columbia Court of Appeals decided that it was appropriate to re-evaluate the scope of a landlord's duty to protect his tenants from the criminal acts of third persons. The plaintiff, a tenant in the defendant's apartment house, was assaulted by a man who broke into her apartment. She alleged that the landlord was negligent in not taking reasonable steps to protect his tenants in light of his knowledge of prior criminal activity. Specifically, she alleged that the defendant-landlord was negligent for his failure to supply a full time resident manager, to lock the front door, and to prevent intruders from sleeping in the halls of the apartment house.[2] The trial court granted the landlord's motion for summary judgment. The court of appeals reversed,

[41] Although no pattern has been discerned that will support a hard and fast rule, a caveat is appropriate at this point. It is notable that in cases in which removal was allowed, none was found in which the federal officer was found liable on the claim against him. It would be erroneous to conclude, however, that the "color-of-office" requirement necessary for removal under 28 U.S.C. § 1442 is sufficient to give a federal officer tort immunity, *i.e.*, to conclude that if the federal officer was acting under "color of office" sufficient to allow removal, then he was acting under "color of office" sufficient to allow tort immunity. While a federal officer can be acting under "color of office" sufficient to allow removal, it is recognized that his acts may be so in excess of his authority that he can be held individually liable for them. *See* Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949), wherein the Court stated:

> [T]he action of an officer of the sovereign (be it holding, taking or otherwise legally affecting the plaintiff's property) can be regarded as so "illegal" as to permit a suit for specific relief against the officer as an individual only if it is not within the officer's statutory powers or, if within those powers, only if the powers, or their exercise in the particular case, are constitutionally void.

Id. at 701-02.

See also Willingham v. Morgan, 395 U.S. 402 (1969), in which the Court said that "one of the most important reasons for removal is to have the validity of the defense of official immunity *tried* in a federal court." *Id.* at 407 (emphasis added).

[1] 252 A.2d 509 (D.C. App. 1969).

[2] *Id.* at 512.