
IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

CITY OF PHILADELPHIA, et al.,

Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE UNITED STATES

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CITY OF PHILADELPHIA, et al.,

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APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR THE UNITED STATES

INTRODUCTION

This action seeks to remedy policies and practices of the Philadelphia Police Department that result in violation of rights protected by the Constitution and laws of the United States. Certain claims, those entailing allegations of racial discrimination, are based upon statutory provisions authorizing the Attorney General to sue to redress discrimination in federally assisted programs. The other portions of the complaint are not based upon an express statutory provision, but set forth a cause of action implied under the Constitution or criminal statutes derived from Reconstruction-era legislation. 1/ The district court dismissed the entire complaint.

The defendants contend (1) that it would be contrary to the will of Congress to hold that the United States has an implied cause of action under either the criminal statutes or the Constitution and (2) that the complaint's allegations of racial discrimination fail to satisfy the specific pleading doctrine. 2/

1/ The complaint alleges violation of the Equal Protection Clause, as well as the Due Process Clause of the Fourteenth Amendment. We pointed out in our main brief that the Equal Protection claims are essentially the same as the claims based on the nondiscrimination statutes. For that reason, we do not deal separately with the Equal Protection claims. The implied cause of action that we assert relates to denials of Due Process and does not include racial discrimination as an element.

2/ Our views on the central issues raised by this appeal are set forth in our main brief, supplemented by this reply. In neither brief have we sought to address every possible ground for reversal presented by the record in this case. We will not attempt to respond to all of the defendants' characterizations of positions stated by us in our main brief or in the district court.

At the outset, it is important to correct the defendants' repeated assertion that our implied causes of action would cover virtually any violation of 18 U.S.C. 241 or 242 or of the Fourteenth Amendment. 3/ Both implied causes of action, statutory and constitutional, are delineated in our complaint, and their basis is the extraordinary set of facts that is alleged.

The fundamental issue concerning an implied statutory cause of action is congressional intent. Here, the enforcement scheme and legislative history of post-Civil War civil rights acts indicate intent to permit the federal executive, in certain limited circumstances, to seek civil relief against governmental practices that encourage violation of constitutional rights. The present case comes within that category, but we do not contend that it was the intent of Congress to permit the United States to seek an injunction whenever Section 241 or 242 is violated.

A cause of action implied directly from the Constitution does not depend upon affirmative intent of Congress, but one element in the legal analysis is the effectiveness of alternative remedies provided by Congress. This means, with regard to the present issue, that an implied cause of action would not be appropriate where the express statutory remedies--criminal prosecutions or private civil actions--are adequate.

Thus, in regard to each of the alternative bases for our implied cause of action, the applicable legal standards entail strict limits. The present action meets those standards.

3/ See, e.g., Brief for Appellees, pp. 6, 23, 28, 44-45.

I

IN THE PRESENT CASE, THE UNITED STATES HAS AN IMPLIED
CAUSE OF ACTION UNDER 18 U.S.C. 241-242 TO REMEDY
SYSTEMIC VIOLATIONS OF DUE PROCESS

The defendants take issue 4/ with our position that the terms and legislative history of the Reconstruction-era civil rights statutes support an implied cause of action for the United States. Also, the defendants assert that, in 1957, 1960 and 1964, Congress refused to grant the Attorney General authority of the type at issue here. 5/ The defendants argue that we fail to satisfy any of the Cort v. Ash factors regarding implied causes of action. 6/

A. The question is whether Congress intended to authorize an implied statutory cause of action

Recent Supreme Court decisions make clear that the question of an implied statutory cause of action for a private person is a question of statutory construction and that it depends on congressional intent. E.g., Cannon v. University of Chicago, 441 U.S. 677, 688 (1979); Transamerica Mortgage Advisers, Inc. v. Lewis, 48 U.S.L.W. 4001, 4002 (U.S. Nov. 13, 1979). See also National Sea Clammers Assn. v. City of New York, 616 F.2d 1222, 1229 (3d Cir. 1980). We will assume that basically the same standards for determining the intent of Congress are applicable here.

4/ Brief for Appellees, p. 8.

5/ Id. at 19-31.

6/ The pertinent language of Cort v. Ash, 422 U.S. 66, 78 (1975), is quoted in our main brief, p. 20, n.30.

Following the approach taken by the defendants, we will begin by discussing the second and third Cort factors--whether there are indications of legislative intent to create or deny the cause of action, and whether the cause of action would be consistent with the purposes of the legislative scheme. These factors, as well as the others, support the present action.

B. The terms and history of Reconstruction-era civil rights laws support this action

The defendants argue that the Reconstruction Congresses' actions in granting the United States criminal responsibility, while creating private civil remedies, preclude our implied statutory cause of action here. 7/

The decisions of the Supreme Court make clear, however, that neither the absence of an express cause of action 8/ nor the failure of Congress to discuss the matter 9/ is determinative. In Transamerica, 48 U.S.L.W. at 4003, the Supreme Court said:

This Court has held that the failure of Congress expressly to consider a private remedy is not inevitably inconsistent with an intent on its part to make such a remedy available. Cannon v. University of Chicago, * * *. Such an intent may appear implicitly in the language or structure of the statute, or in the circumstances of its enactment.

In the present case, the terms, structure and history of the early civil rights statutes reveal the requisite implicit intent.

7/ Brief for Appellees, pp. 10-13.

8/ E.g., in Jones v. Alfred H. Mayer Co., 392 U.S. 409, 414, n.13 (1968), the Supreme Court found an implied private right of action for injunctive relief on the basis of 42 U.S.C. 1982, which is derived from Section 1 of the Civil Rights Act of 1866. See also Johnson v. Railway Express Agency, 421 U.S. 454, 459-460 (1975) (action under 42 U.S.C. 1981).

9/ See our main brief, p. 21.

1. The original basis for 18 U.S.C. 242 was the Civil Rights Act of 1866; 10/ for 18 U.S.C. 241, the Civil Rights Act of 1870. 11/ In addition to providing for criminal prosecutions and private civil actions, the Civil Rights Acts of 1866 and 1870 authorized the President to use the military for enforcement purposes. 12/ The latter provisions were repealed in 1957. 13/ However, a related provision of the 1871 Act, Section 3, continues in effect. See 10 U.S.C. 333. The significance of this provision

10/ The text of Sections 241-242 appears in the addendum of our main brief, p. 2a. Under 18 U.S.C. 242, it is a crime for any person, under color of law, willfully to deprive another person of any right secured by the Constitution or laws of the United States.

As the defendants point out (Brief for Appellees, p. 17, n.15, and p. 29), Section 2 of the 1866 Act, the original predecessor of 18 U.S.C. 242, was limited to offenses involving racial discrimination. The expansion covering non-racial crimes occurred in 1874, when the Revised Statutes were enacted. Nonetheless, for present purposes, the terms and structure of the 1866 Act are an indication of the role of the criminal provision in the civil rights enforcement scheme.

11/ Under 18 U.S.C. 241, it is a felony for two or more persons to conspire to injure any citizen in the exercise of any right secured by the Constitution or laws of the United States.

The original predecessor of Section 241 was Section 6 of the 1870 Act.

12/ The addendum to the Brief for Appellees contains the text of the Reconstruction-era civil rights statutes. Regarding use of military force, see Section 9 of the 1866 Act and Section 13 of the 1870 Act. These provisions were included in the Revised Statutes as Section 1989.

13/ See Section 122 of the Civil Rights Act of 1957, 71 Stat. 637.

is discussed in our main brief, 14/ but the defendants' brief does not mention it.

There is no sound basis for the defendants' view that the pattern of the Reconstruction-era statutes was slow development of the executive enforcement role, with reliance by Congress first on enforcement through state courts and then on private federal remedies. 15/ The express terms of the forerunner of 10 U.S.C. 333, Section 3 of the 1871 Act, 16/ as well as the criminal provisions of the three early civil rights acts, are a direct answer to the defendants' assertions concerning the reluctance of the post-Civil War Congresses to expand the power of the federal executive. 17/

14/ Brief for the United States as Appellant, pp. 27-28. The text of 10 U.S.C. 333 is set forth in the addendum of our main brief, pp. 4a-5a. Under 10 U.S.C. 333, the President is empowered to use the militia, the armed forces, or "any other means" to suppress any unlawful combination or conspiracy if it so hinders the execution of state and federal laws that any part of the state's population is deprived of constitutional rights, and state authorities fail to protect those rights.

Section 3 of the 1871 Act contained special language concerning "the equal protection of the laws" similar to that of the last paragraph of 10 U.S.C. 333.

15/ Brief for Appellees, p. 11.

16/ Another provision of the 1871 Act (Section 1) is the source of 42 U.S.C. 1983, which authorizes private actions for legal or equitable relief against deprivations, under color of law, of federally protected rights. The last sentence of Section 2 of the 1871 Act is the source of 42 U.S.C. 1985, which authorizes damage actions for injuries resulting from certain conspiracies interfering with civil rights.

17/ The initial version of Section 3 of the 1871 Act was contained in the bill introduced by Congressman Shellabarger on March 28, 1871. Cong. Globe, 42d Cong., 1st Sess. 317 (1871).

(continued)

In general, the terms of the early civil rights acts make clear that Congress' primary objective was to provide effective protection for rights created by the Thirteenth, Fourteenth and Fifteenth Amendments. ^{18/} "As a result of the new structure of law that emerged in the post-Civil War era * * * , the role of the Federal Government as guarantor of basic federal rights against state power was clearly established." Mitchum v. Foster, 407 U.S. 225, 238-239 (1972) (footnote omitted).

2. The rights that this action seeks to safeguard, such as the right to be free from summary punishment inflicted by police officers, are based upon the Due Process Clause of the

17/ (continued)

In both the House and the Senate, emphasis was placed on the broad grant of power to the President and the failure to condition federal action upon a request from the state. E.g., id. at 351-352 (Congressman Beck), id. at 501-502 (Senator Freylinghuysen), id. at 567 (Senator Edmunds). See also id. at 703.

^{18/} The statement made by Congressman Shellabarger when he introduced the bill that was to become the Civil Rights Act of 1871 indicates the purpose of the legislation and the manner in which it is to be interpreted. He said that the proposed act was remedial and was intended to aid in preserving human rights and that such legislation should be "liberally * * * construed." Cong. Globe, 42d Cong., 1st Sess. App. 68 (1871). A number of Supreme Court decisions have cited this statement as authoritative. See, e.g., Owen v. City of Independence, 48 U.S.L.W. 4389, 4393 (U.S. Apr. 16, 1980); Monell v. Department of Social Services, 436 U.S. 658, 684 (1978).

Also supportive of our position are general comments, regarding the enforcement responsibility of the federal government, made by Senator Pool in 1870. His entire statement is set forth in the appendix to United States v. Price, 383 U.S. 787, 807 (1966). The force of Senator Pool's general comments, id. at 819, is not altered by his earlier remarks (concerning proposed Section 7) quoted in the Brief for Appellees, pp. 13-14.

Fourteenth Amendment and are within the coverage of 18 U.S.C. 241 and 242. The federal executive seeks, through resort to the federal judiciary, 19/ to remedy the systemic denial of those rights. This suit is consistent with the legislative scheme, because it fills a gap between the criminal and the military provisions. 20/

Under 18 U.S.C. 242 or, in the case of a conspiracy, 18 U.S.C. 241, the Attorney General may prosecute police officers who engage in brutality or other violations of federally protected rights. In an ordinary case, such a prosecution could, as Congress intended, serve the purposes of punishment and deterrence. At the same time, federal prosecution of one or more individuals need not involve substantial intrusion into the operation of the agency that employs the defendants.

In addition, however, Congress addressed, in what is now 10 U.S.C. 333, the failure of state authorities to prevent widespread violations. In such circumstances, the President is

19/ In discussing the Civil Rights Act of 1871 and the issue of executive enforcement power, the defendants say that it is significant that the federal courts did not obtain general federal question jurisdiction until 1875. Brief for Appellees, p. 16. This has no bearing on the present case. The Judiciary Act of 1789 granted the federal trial courts jurisdiction over lawsuits brought by the United States. 1 Stat. 76-78, Sections 9 and 11.

Moreover, in discussing the background of 28 U.S.C. 518(b), our main brief pointed out (pp. 11-14) that, ever since creation of the office of "attorney-general" in 1789, the Attorney General has had authority to sue on behalf of the United States, authority that need not depend upon a statute specifying the type of action.

20/ The over-all legislative history of the 1866, 1870 and 1871 Acts does not indicate that Congress intended the express means of enforcement to be exclusive. In fact, 42 U.S.C. 1988, which is derived from Section 3 of the 1866 Act, is to the contrary. See the addendum to our main brief, p. 4a. Supreme Court decisions construing 42 U.S.C. 1988 include Moor v. County of Alameda, 411 U.S. 693, 702 (1973); and Robertson v. Wegmann, 436 U.S. 584 (1978).

empowered, by using the military or "any other means," to take such measures as he deems necessary to suppress the combination or conspiracy responsible for the deprivation of rights. This power is not limited to situations in which state authorities request the intervention of the federal government. Thus, it is apparent that Congress foresaw that federal intrusion into state or local affairs might be necessary.

We do not equate present conditions with those existing in the South in 1871. 21/ Still, 10 U.S.C. 333 is an integral part of the enforcement system derived from the Reconstruction-era civil rights statutes. The situation described in our complaint resembles one type of situation covered by 10 U.S.C. 333. 22/ The present action is consistent with the legislative scheme because it addresses problems of a kind that Congress intended to remedy and does so through a less intrusive means than those which Congress authorized the President to employ. 23/

A further aspect of consistency with the statutory scheme is the question of the adequacy of the other express remedies--

21/ See United States v. Price, 383 U.S. 787, 803-805 (1966).

22/ We allege conduct, including violence, that violates constitutional rights. The alleged violations are severe, are committed by a large number of persons, and affect a substantial segment of the population of Philadelphia. These conditions have continued for a period of years, thus indicating that state authorities have failed to prevent the deprivations of constitutional rights. Indeed, local authorities have facilitated the violations.

23/ The legislative history of the post-Civil War statutes makes clear that the preferred means of enforcement was use of the federal courts, rather than use of military force. See, e.g., Cong. Globe, 42d Cong., 1st Sess. 459 (1871) (Congressman Coburn); id. at 691 (Senator Edmunds).

criminal prosecutions and private civil actions. 24/ If our complaint described an ordinary violation of 18 U.S.C. 241 or 242, we would not be able to establish the basis for inferring a civil cause of action. In such a case, there would not be proper grounds for concluding that Congress intended the executive to go beyond the criminal remedy. Thus, our view that an implied cause of action of the present type is appropriate only in an exceptional case is not, as the defendants say, an "ex cathedra assurance [of the Attorney General]." 25/ It is a fundamental element of the rationale for this implied cause of action. 26/

The defendants' contention that the express remedies are adequate 27/ ignores the essentially factual nature of the question of adequacy. The complaint alleges that neither federal

24/ Cf. Wyandotte Transportation Co. v. United States, 389 U.S. 191, 200-205 (1967); Cannon v. University of Chicago, 441 U.S. at 703-708.

25/ Brief for Appellees, p. 23.

26/ In this respect, the present case differs from the cases involving an implied private cause of action. In Cannon, for example, the plaintiff, a private individual, was not required to show that the alleged violation of the statute in question, Title IX of the Education Amendments of 1972, was an exceptional one. Under Title IX, no express remedy for victims of discrimination is provided, 441 U.S. at 696, but the Court found that Congress intended to provide such a remedy on a general basis.

In the present case, certain express remedies are provided for the United States, and the legislative history indicates that the members of Congress thought that, in general, the criminal remedies would be effective. This is consistent, however, with an implicit intent to permit the executive to bring a civil action in an extraordinary situation, one in which the specified remedies are not adequate.

27/ Brief for Appellees, pp. 37-38.

The district court discussed use of the express remedies and concluded that they are not inadequate (A 115-118; 482 F. Supp. at 1261-1262).

criminal prosecutions nor private civil actions are effective (A 32). Because the underlying problems are systemic, criminal prosecutions have not resulted in elimination of the pattern of unlawful conduct (ibid.). The present suit does not seek to punish individuals, 28/ but to remedy institutional practices and policies that lead to violations of constitutional rights. Our complaint alleges that, due to the nature and extent of the problems existing in the Philadelphia Police Department and the limited resources of private litigants, private suits, such as class actions under 42 U.S.C. 1983, cannot succeed in obtaining the needed systemic relief (ibid.).

The defendants state that we have failed to "demonstrate" that the criminal and private remedies will not work. 29/ It is unclear what "demonstrate" means in this context. Obviously, we

28/ This is not an effort to enjoin crime. The defendants are the city and individuals who are named only in their official capacities, i.e., officials responsible for a system that permits violations of federal law.

29/ Brief for Appellees, p. 38.

The defendants list the electoral process as another possible remedy and describe, as a hypothetical situation, the election of a new mayor in Philadelphia, new policies on police use of deadly force, new policies on the processing of complaints of police abuse, and other reforms. Ibid.

Apparently, the defendants wish, in this manner, to suggest that the problems alleged in the complaint are being corrected and that judicial relief is unnecessary. If so, this suggestion goes to the merits of the present action and has no bearing at this stage--the appeal of dismissal of our complaint. Moreover, neither succession in office nor the promulgation of new policies automatically corrects systemic problems of the kind at issue here.

have not yet proved our case. We do, however, allege facts which, if proved, would establish the inadequacy of the criminal and private remedies. 30/ This conclusion would follow if we establish (1) that the latter remedies have been used and (2) that, nonetheless, widespread and flagrant violations on the part of police officers in Philadelphia continue. We submit that the test of inadequacy is a practical, not a theoretical, one.

In sum, the post-Civil War Congresses granted the executive power to redress state denials of constitutional rights and discretion regarding the exercise of that power. In a situation involving widespread violations and a determination by the Attorney General that ordinary remedies are not adequate, Congress did not intend to restrict the executive to the alternatives of failing to take corrective action or seeking additional legislation. The course selected here--applying to the equitable power of the federal courts--serves the purposes of the early civil rights acts, is well within the perimeter of authorized executive action, and is supported by implicit congressional intent.

30/ It should be noted that, in response to the defendants' interrogatories, we provided extensive information on the incidents and practices underlying the complaint's allegations. The responses were filed on September 5 and 12 and October 9 and are contained in the record.

C. The force of the terms and history of the Reconstruction-era statutes is not altered by the history of the modern civil rights acts

Since 1957, Congress has enacted extensive legislation relating to civil rights. 31/ Yet, the modern civil rights acts have not amended, in any pertinent way, 32/ the provisions derived from Reconstruction-era legislation that are the bases for our implied statutory cause of action. For that reason, the controlling legislative history is that of the Reconstruction statutes. 33/

Our main brief (pp. 29-36) outlines the history of the "Part III" provisions considered in connection with the Civil Rights Acts of 1957, 1960 and 1964 and sets forth the grounds for our view that the district court erred in its appraisal of that history. Nothing in the defendants' brief alters the validity of our position.

31/ The most recent statute of this type is Pub.L. No. 96-247, 94 Stat. 349 (May 23, 1980), which authorizes the Attorney General to sue, subject to certain conditions, to protect the rights of institutionalized persons. See our main brief, p. 35, n.72.

32/ As noted above (p. 5), the Civil Rights Act of 1957 repealed Rev. Stat. Section 1989, which embodied the military enforcement provisions of the Civil Rights Acts of 1866 and 1870.

The Civil Rights Act of 1968 increased the penalty provisions of 18 U.S.C. 241 and 242. See Section 103 of the 1968 Act, 82 Stat. 75.

33/ Cf. Jones v. Alfred H. Mayer Co., 392 U.S. at 416-417, 422; United States v. Price, 383 U.S. at 801-806; Monell v. Department of Social Services, 436 U.S. at 665.

The failure of prior Attorneys General to pursue implied causes of action of the present type is of limited significance. Cf. United States v. Philadelphia National Bank, 374 U.S. 321, 348-349 (1963); id. at 375-386 (Harlan, J., dissenting).

The present issue relates to Due Process claims that do not involve racial discrimination. Furthermore, as explained above, a fundamental element of our claims is the large-scale, systemic nature of the underlying violations of Due Process. We do not assert an implied cause of action on the basis of an isolated violation of 18 U.S.C. 241 or 242. The Part III provisions that were considered in 1957 and 1959-60 are in sharp contrast. First, each of those provisions would have authorized the Attorney General to sue with regard to a single incident involving a denial of equal protection. Moreover, in regard to both the 1957 and the 1959-60 Part III provisions, the key issue was race. 34/ The 1957 provision was an amendment to 42 U.S.C. 1985. The 1959-60 provision included, as an express element, deprivation of "equal protection of the laws by reason of race, color, religion or national origin." 35/ A general examination of the legislative history of the 1957 and 1959-60 provisions makes clear the central role of race, particularly school desegregation. Even other portions of statements cited by the defendants indicate that this was the case. 36/

34/ See our main brief, pp. 30-31, 33.

35/ See Brief for Appellees, p. 24, n.27. See also our main brief, p. 32, n.55.

36/ E.g., the 1957 minority report in the House referred to injunctions against school systems. H.R. Rep. No. 291, 85th Cong., 1st Sess. 46 (1957).

During the Senate debate in 1960, Senator Stennis stressed his opposition to empowering the Attorney General to bring school desegregation suits. 106 Cong. Rec. 5084. See also Senator Ervin's discussion of race, id. at 5158, 5160.

Because issues raised by the Part III provisions in 1957 and 1959-60 were fundamentally different from the issues raised by the present Due Process claims, the failure of Congress to enact the Part III provisions has no bearing on these claims. 37/

Rather than attempt to glean intent from what Congress did not do, attention should be directed on a provision that was enacted: Section 1103 of the Civil Rights Act of 1964, 42 U.S.C. 2000h-3, which states that the Act is not to be construed as denying or impairing any right or authority of the Attorney General or the United States, under existing law, to institute any action. 38/

Despite the significance of Section 1103, neither the defendants' brief nor the October 30, 1979 opinion of the district court mentions that section. Section 1103 makes clear that nothing in the 1964 Act or its legislative history 39/ may properly be held to limit a cause of action of the United States that is based upon the early civil rights laws.

For the reasons outlined above, Cort factors two and three support the present cause of action.

37/ With regard to a pattern or practice of racial discrimination on the part of a federally assisted police department, the Attorney General now has explicit authority to sue under the Crime Control Act and the Revenue Sharing Act.

38/ This provision is quoted in our main brief, p. 35.

39/ The defendants (Brief for Appellees, pp. 29-31) and the district court (A 104; 482 F. Supp. at 1255) attribute significance to the House Judiciary Committee's deletion in 1963 of a provision amending 42 U.S.C. 1983 to authorize the Attorney General to sue to enjoin any deprivation, under color of law, of a federally protected right. This matter is discussed in our main brief, pp. 34-35.

D. The enforcement duty of the United States under the Reconstruction-era laws is a basis for this action

The first factor stated in Cort depends upon whether the plaintiff is a member of the class for whose special benefit the statute was enacted, i.e., whether "the statute create[s] a federal right in favor of the plaintiff." 422 U.S. at 78. In the present case, the defendants contend that this precise standard is applicable here and that the standard is not met because neither the Attorney General nor the United States is in the class of beneficiaries covered by 18 U.S.C. 241 and 242. 40/

In Cort, the plaintiff was an individual who sought an implied right of action for an injunction and damages on the basis of a criminal provision concerning political contributions by corporations. Thus, the context of Cort was a private suit, not an action by the United States. 41/ In Cannon v. University of Chicago, the majority indicated that a modified version of the first Cort factor is applicable to the United States; that is, an implied cause of action in favor of the United States may be appropriate "where the statute creates a duty in favor of the public at large." 441 U.S. at 691, n.13. 42/

Sections 241 and 242 are not mere regulatory statutes, but are criminal provisions protecting the exercise of constitutional rights. The United States has a duty, under 18 U.S.C. 241-242,

40/ Brief for Appellees, p. 32.

41/ But see United States v. Ohio Barge Lines, Inc., 607 F.2d 624, 630-631 (3d Cir. 1979).

42/ See also the dissent of Justice Powell in Cannon, 441 U.S. at 733, n.3.

to protect the public, 43/ and this duty satisfies the first element of the modified Cort test suggested by Cannon. Cf. United States v. American Bell Telephone Co., 128 U.S. 315, 366-367 (1888).

Furthermore, the key issue with regard to an implied statutory cause of action is the intent of Congress. We have shown above that the terms, structure and history of the Reconstruction-era statutes indicate the implicit intent that is requisite for this action by the United States. 44/

E. This action is in accord with principles of federalism

The final Cort factor goes to the question whether the cause of action is one "traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law." 422 U.S. at 78.

The defendants' reliance on the truism that operation of municipal police departments is basically the concern of the states 45/ ignores the federal responsibility to respond to police

43/ Contrary to the defendants' assertion (Brief for Appellees, pp. 39, 48-49), we recognize that the present case is distinguishable from cases in which the United States was permitted to intervene, Adams v. Mathis, No. 78-2035 (5th Cir., Mar. 17, 1980); and Halderman v. Pennhurst State School & Hospital, 612 F.2d 84 (3d Cir. 1979) (en banc). Still, as pointed out in our main brief (e.g., pp. 14-15, 17), the reasoning of those cases is pertinent. On June 10, 1980, the Supreme Court granted petitions for certiorari in Halderman, but denied certiorari with regard to the question of the propriety of intervention by the United States. 48 U.S.L.W. 3802.

44/ It is not material that courts may have declined to infer a private cause of action under 18 U.S.C. 241 or 242. See Brief for Appellees, p. 33, n.44.

45/ Brief for Appellees, pp. 34-36.

violations of constitutional rights. The subject matter of the present action is not one "traditionally relegated to state law" within the meaning of Cort. Cf. Cannon, 441 U.S. at 708. As a result of the Fourteenth Amendment and the statutes which implement it, allegations that police officers deprive persons of life or liberty without due process of law are a "traditional concern of the Federal Government." United States v. Price, 383 U.S. at 806.

The defendants' federalism arguments raise other questions --the possibility of a broad injunction against the Philadelphia Police Department and the significance of suits brought by the Attorney General. 46/ The first matter is dealt with in our main brief (pp. 41-42). As pointed out there, the majority in Rizzo v. Goode acknowledged that federalism does not bar a federal court from granting appropriate relief, where a violation of the Fourteenth Amendment is proved. 423 U.S. 362, 373, 375 and 377 (1976).

We recognize that a civil action by the United States differs from a private suit. In our discussion above of the inadequacy of the express remedies, we referred to the importance of the resources available to the Attorney General. While federalism involves a proper balancing of state and federal authority, it does not place the actions of a local government--however egregious--beyond the enforcement power of the federal executive.

46/ Id. at 35-36, 40-41.

The particular circumstances must be considered. Because of the severity and the systemic nature of the problems that it seeks to remedy, this suit is consistent with principles of federalism. 47/

The defendants allude to the possibility of abuse by future Attorneys General. Regarding a somewhat analogous issue, the Supreme Court said: "the fact that the exercise of power may be abused is no sufficient reason for denying its existence * * * ." United States v. San Jacinto Tin Co., 125 U.S. 273, 284 (1888). Safeguards are provided both by the courts and by Congress. 48/

For the above reasons, this Court should hold that the United States has an implied statutory cause of action in this case. We deal next with the defendants' arguments concerning the alternative basis for an implied cause of action--the Constitution itself.

47/ Under a proper interpretation of the Federal Rules of Civil Procedure (see pp. 23-24, below), the defendants will be required to litigate our statutory claims of racial discrimination. The facts underlying those claims are essentially the same as the facts underlying our Due Process claims. In this sense, a decision that the United States has an implied cause of action may not affect substantially the burden of defending this suit. Such a decision could of course affect the relief.

48/ A number of checks are applicable here. First, the decision of this Court could be limited to the exceptional facts which we allege. Second, in any future lawsuit of this type, the court could apply strict standards. Third, Congress has an important role. Congressional committees exercise continuing oversight regarding the Department of Justice. The Department's activities are reviewed each year as part of the authorization and appropriation processes.

II

IN THE PRESENT CASE, THE UNITED STATES HAS AN
IMPLIED CAUSE OF ACTION UNDER THE CONSTITUTION

According to the defendants, 49/ an implied constitutional cause of action would be inconsistent with the structure of the Fourteenth Amendment, contrary to the statutory enforcement scheme and contrary to federalism.

For the most part, our position on these issues is fully set forth either in our main brief (pp. 36-42) or in the discussion above of the implied statutory cause of action. We will respond in a summary way to the main points raised by the defendants.

A. Section 5 of the Fourteenth Amendment does not preclude the courts from finding an implied cause of action. 50/ One basis for the structure of the Fourteenth Amendment--i.e., inclusion of Section 1, a self-executing limitation upon the states 51/--was the desire of the framers to place the rights protected by Section 1 beyond the legislative power of future Congresses. See Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L.Rev. 1, 39-40, 46-47, 51, 57-58 (1955). Such decisions as Brown v. Board of Education, 347 U.S. 483 (1954), indicate that

49/ Brief for Appellees, pp. 42-50.

50/ See our main brief, pp. 38-39.

51/ In Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976), the Supreme Court discussed the importance of Congress' power under Section 5 of the Fourteenth Amendment, but added that, when Congress exercises that power, it is acting "under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority" (emphasis supplied).

effectuation of the guarantees of Section 1 of the Fourteenth Amendment depends not only upon Congress, but upon the courts as well. See, e.g., Turpin v. Mailet, 591 F.2d 426, 427 (2d Cir. 1979) (en banc).

B. As shown in our main brief (pp. 23-36) and above (pp. 4-15), the defendants' analysis of congressional intent is not accurate. Moreover, as indicated by Davis v. Passman, 442 U.S. 228, 241 (1979), and Carlson v. Green, 48 U.S.L.W. 4425, 4426 (U.S. Apr. 22, 1980), congressional intent has a more limited role in regard to an implied constitutional cause of action. In the present case, there is no "explicit declaration" of congressional intent against an implied Fourteenth Amendment action by the United States. 52/

In Carlson v. Green, 48 U.S.L.W. at 4425, the Court said that its conclusion that Congress had not explicitly ruled out recovery under the Constitution was supported by the fact that the constitutional remedy would be more effective than that provided by the parallel statute, the Federal Tort Claims Act. In the present case, as discussed above (pp. 9-12), the specific statutory remedies are not effective.

C. Carlson v. Green, 48 U.S.L.W. at 4426, and the prior decisions state that an implied private cause of action based on the Constitution may be defeated if the defendant demonstrates "'special factors cautioning hesitation in the absence of affirmative action by Congress.'" Here, the defendants contend that

52/ Section 1103 of the Civil Rights Act of 1964 is an explicit indication that Congress intended to leave the question open (see p. 15, above).

federalism is such a factor. Our view concerning federalism is stated in our main brief (pp. 41-42) and above (pp. 17-19). An implied cause of action in this case would protect Fourteenth Amendment rights, and neither federalism nor any of the other countervailing factors cited by the defendants is adequate to negate such a cause of action. 53/

D. For reasons discussed in our main brief (pp. 39-40), this is a proper case for application of the principle of In re Debs, 158 U.S. 564 (1895).

The present action is prohibited neither by the express nor the implicit will of Congress. Fundamental constitutional rights are at stake--rights that are encompassed by the executive's duty under Article II, Section 3 of the Constitution. The statutory remedies that are available are not effective. In these circumstances, an implied cause of action for the United States is appropriate.

53/ The cases cited by the defendants (Brief for Appellees, p. 47) are not controlling. Solomon and Mattson are discussed in our main brief (p. 35, n.72).

The defendants also cite United States v. Board of Education of Garfield Heights, 435 F.Supp. 949 (N.D. Ohio 1976), aff'd, 581 F.2d 791 (6th Cir. 1978); and United States v. School District of Ferndale, 400 F. Supp. 1141 (E.D. Mich. 1975), rev'd in part, aff'd in part, 577 F.2d 1339 (6th Cir. 1978). These cases differ significantly from the present action. Garfield Heights was an action to remedy employment discrimination by a school district; Ferndale dealt with desegregation of a school system. The courts, in rejecting the constitutional theories, relied on statutory schemes totally unrelated to those applicable here.

III

THE ALLEGATIONS OF DISCRIMINATION IN A FEDERALLY ASSISTED
PROGRAM COMPLY WITH THE FEDERAL RULES OF CIVIL PROCEDURE

According to the defendants, 54/ we contend that "the Attorney General should be exempt from the rules of pleading * * * ." In fact, our position is that the special pleading doctrine is itself an exception to the Federal Rules of Civil Procedure and that there is no proper basis for extending the doctrine to the present case. Our main brief (pp. 42-47) explains why the policy upon which the doctrine is based--weeding out frivolous suits at an early point--does not apply to the present case. The defendants assert that the doctrine is applicable, but they do not attempt to justify this in terms of the doctrine's purpose.

The complaint's allegations of racial discrimination in a federally assisted program meet the notice-pleading standard of Rule 8(a) of Federal Rules of Civil Procedure. The district court's dismissal of those allegations for lack of specificity is particularly unwarranted in view of the fact that the very details mentioned by the district court had been provided to the defendants through discovery. Cf. Rhodes v. Robinson, 612 F.2d 766, 772 (3d Cir. 1979); Boykins v. Ambridge Area School District, No. 79-2027 (3d Cir., May 9, 1980), slip op. p. 10. 55/

54/ Brief for Appellees, p. 56

55/ In both Rhodes and Boykins, this Court reversed application of the specific pleading doctrine at the stage of a motion for summary judgment. The present case involves a motion for judgment on the pleadings, but Rhodes and Boykins support our view that the district court erred in ignoring the role of discovery.

Contrary to the defendants' suggestion, 56/ the district court did not "find" our answers to the interrogatories to be inadequate. The defendants quote remarks made by the district court on September 18, 1979. 57/ Subsequently, on October 9, we submitted a third set of answers, specifically designed to meet the concerns expressed at the September 18 conference. 58/ If the defendants require additional information, the proper course is further discovery.

The dismissal of the allegations of discrimination in a federally assisted program should be reversed. 59/ The defendants now suggest 60/ that the specific pleading doctrine is also applicable to our Due Process claims. There is no merit in this suggestion. The Due Process claims are not frivolous or insubstantial. The allegations comply with Rule 8(a) and are also supplemented by our answers to the interrogatories.

56/ Brief for Appellees, p. 58 and n.62.

57/ Id. at 58.

58/ See footnote 30, supra.

59/ Our main brief explains (pp. 45-46, n.91) that, under the nondiscrimination provisions of the Crime Control Act and the Revenue Sharing Act, the federally assisted "program" is the entire Philadelphia Police Department. The basis for this position is regulations that have the force of law.

60/ Brief for Appellees, p. 51, n. 59.

CONCLUSION

The judgment of the district court should be reversed and the case should be remanded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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