SUPREME COURT OF THE UNITED STATES

MAXONYMOUS *v.* SECRET SERVICE, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

No. 09–23. Decided May 14, 2020

The petition for a writ of certiorari is granted. The judgment of the United States District Court for the District of Columbia is vacated as to the application of prejudice, and the case is remanded for further proceedings consistent with this opinion. JUSTICE CHASE took no part in the consideration or decision of this case.

CHIEF JUSTICE HOLMES, concurring.

I concur in the Court's disposition because the record does not establish that this case's dismissal with prejudice was legally justifiable under the EJA regime. See Enhancing the Judiciary Act, Pub L. No. 67–4, §201(a) (2018). But while the EJA regime does control the outcome of this case, over its lifespan it has distorted the law, facilitated frivolous litigation, and proven generally unworkable. The Court should explore the possibility of amending the Federal Rules of Criminal/Civil Procedure to specify additional circumstances where dismissal with prejudice would be appropriate.

I write separately in this case to make three points:

1. Amending the Federal Rules of Criminal/Civil Procedure to repair unworkable arrangements is not just *consistent with* this Court's responsibility under the Rules Enabling Act, it *is* this Court's responsibility under the Rules Enabling Act. As we have previously explained, "the congressional mandate embodied in the [REA]" is that this Court preserve the workability of procedure within the Nation's courts. *Hanna* v. *Plumer*, 380 U. S. 460, 464 (1965). This responsibility does not terminate simply because

positive law already prescribes a different mode of procedure. *Id*., at 473; also cf. *Herron* v. *Southern Pacific Co.*, 283 U. S. 91, 94 (1931). To the contrary, the Court's congressionally assigned role under the Rules Enabling Act is to shape workable procedural rules even where those rules "differ from comparable [positive law]" counterparts. *Hanna*, *supra*.

That is why, for instance, the Rules Enabling Act prescribes that "[a]ll laws in conflict with [rules prescribed under the REA] shall be of no further force or effect after such rules have taken effect." 28 U. S. C. §2072(b). When Congress enacted the Rules Enabling Act, as the statute's text makes clear, Congress anticipated that the Court would from time to time need to, in the shaping of workable procedure, depart from those procedures laid out by positive law. And when Congress adopted the EJA, it did so against this backdrop and with the understanding that if the EJA's procedural requirements proved unworkable, they would be subject to correction. The fact that the EJA regime was adopted by Congress is therefore no reason to abdicate the Court's congressionally assigned responsibility to maintain the workability of judicial procedure.

2. It is possible to repair procedure surrounding dismissals with prejudice without undercutting the EJA's core purpose. As petitioner points out, the objective of the EJA regime is to "guarantee that a[n] error in pleading or procedure [does not] totally prevent a well-meaning plaintiff from pursuing their case." Petition for Certiorari 2. All on this Court, I am sure, agree that this is a respectable objective. The EJA's implementation, however, leaves much to be desired.

To begin with, the EJA is overbroad. While it certainly does accomplish its purpose of protecting well-meaning plaintiffs from premature dismissals with prejudice, its textual reach is much further. Indeed, by the EJA's terms,

prejudice may not be applied to a dismissal unless the defendant was "put in jeopardy" in one of just two ways described by the Act. EJA §201(a). Namely, a defendant is only "put in jeopardy" under the EJA if either (1) a "jury" was "empanel[ed]" or (2) the "first witness" was "call[ed]."* §§201(a)(1)–(2). The problem, however, is that under this definition, all sorts of abusive behavior escapes dismissal with prejudice.

For instance, say a completely frivolous lawsuit is filed purely for the purpose of antagonizing a law-abiding citizen. The citizen may be compelled to appear in court at the risk of default or contempt. They then (of course) obtain a dismissal of the case. Immediately after that, however, the EJA would authorize the frivolous litigator to resubmit the lawsuit and force the law-abiding citizen to undergo the exact same process a second time (and perhaps beyond). For that reason, prior law took a broader view of when prejudice applied. It was not fixed exclusively to chronological points in the litigation process, but looked also to the conduct of plaintiffs. "[D]ilatory behavior," for one thing, could form the basis for dismissal with prejudice. *Henderson* v. *Duncan*, 779 F. 2d 1421, 1425 (CA9 1986). For another, utterly baseless litigation was thought to prejudice a defendant. See *Nealey* v. *Transportacion Maritima Mexicana, SA*, 662 F. 2d 1275, 1279–1280 (1980). By accounting for these circumstances, the pre-EJA system of dismissal with prejudice served to protect law-abiding citizens from misuse of the courts and the legal process.

The EJA also facilitates forum shopping and disincentivizes appeals. By making it possible for a litigant to submit a case and then resubmit it in perpetuity without regard to its merits, the EJA enables litigants to game the process by hunting for a judge (by resubmitting until they get that

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*The second EJA prejudice corridor is also triggered by the "presentation of the prosecution's case." §201(a)(2).

judge) with particular legal views rather than a randomly-assigned one. It would be one thing if both sides had the ability to do this, but the design of the EJA is that this gamesmanship is available only to plaintiffs. By the same token, a plaintiff whose case is dismissed for lack of a legal basis is disincentivized from using the appeals process because they can always resubmit their original complaint and hope for a different, more favorable judge. None of this lines up with how the legal process is supposed to operate.

Finally, the EJA regime is not the most effective means of protecting good faith plaintiffs from premature dismissals with prejudice. Rather, that purpose could be accomplished far more effectively with a simple provision requiring that plaintiffs be granted an opportunity to correct innocuous errors prior to dismissal. This would have the dual effect of actually helping well-meaning plaintiffs understand what the law requires of them while weeding out those who have no interest in litigating in good faith. An amendment to the procedure surrounding dismissals with prejudice could fulfill the EJA's core purpose by including a provision of that kind.

3. Even if a rules amendment endeavors to preserve the EJA's chronology-based structure, there are still ways to remedy some of the harms done by the EJA regime. For instance, it is possible to simply create a list of exceptions where, in extraordinary cases, the chronological requirements can be disregarded, or a system where a case dismissed without prejudice—if resubmitted—must be reassigned to the judge who originally dismissed it. The first system would help curb frivolous litigation and the second would eliminate forum shopping and bring cases within the proper judicial structure.

Whatever approach the Court chooses to take, the bottom line is clear: we must explore the possibility of action to repair the rules surrounding dismissal with prejudice.