

CASE NOTES

Environmental Law—Water Pollution Remedies—Use of Public Nuisance Theory in Suit by Federal Government—*United States v. Ira S. Bushey & Sons, Inc.*¹—The United States sought permanent injunctive relief in the Federal District Court for the District of Vermont to prevent defendant corporations from conducting their oil transport, unloading and storage businesses without complying with certain safety procedures² designed to minimize the danger of future oil spills and leakages. The defendants were a New York corporation (Ira S. Bushey & Sons, Inc.) and a Vermont corporation (Northern Oil Co., Inc.), whose subsidiaries supplied water transportation services and operated an oil dolphin (an offshore wharf with a pipeline connection to shore) in a Vermont harbor.³ The Government's complaint referred to section 407 of the Rivers and Harbors Appropriation Act of 1899;⁴ section 407 is popularly known as the Refuse Act. The complaint charged that on seven different occasions from April 1967 through June 1971, oil being transported by defendant Bushey's vessels was spilled into Lake Champlain in violation of the Refuse Act.⁵ The complaint alleged that the spills of petroleum products, which varied in quantity from twenty to twenty-five thousand gallons, were caused by vessels running aground, leaks during unloading opera-

¹ 346 F. Supp. 145 (D. Vt. 1972).

² *Id.* at 147-48 n.2. The procedures would require defendants to display lights on all vessels carrying cargoes of oil during darkness; to operate all tugboats with pilots having pilots licenses and engineers with engineers licenses from the U.S. Coast Guard; to have tugboat engineers undergo annual physical examinations including hearing tests; to furnish all tugboats with operational searchlights; to provide operational radar on all tugboats during periods of darkness or reduced visibility; to compel tugboat crew members to refrain from the consumption of alcoholic beverages for a period of at least four hours prior to reporting for duty; to operate all tugboats with engine controls in their pilot houses; to operate all vessels at reasonable speeds and less than five miles per hour within harbor areas; and to develop contingency plans relating to the clean-up and prevention of oil discharges subject to the approval of the Environmental Protection Agency. The complaint also asked for any other relief the court deemed necessary and proper. *Id.*

³ *Id.* at 146 n.1.

⁴ 33 U.S.C. §§ 401 et seq. (1970). Section 407 provides:

It shall not be lawful to throw, discharge, or deposit, or cause, suffer, or procure to be thrown, discharged, or deposited either from or out of any ship, barge, or other floating craft of any kind, . . . any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States, or into any tributary of any navigable water from which the same shall float or be washed into such navigable water; and it shall not be lawful to deposit, or cause, suffer, or procure to be deposited material of any kind on the bank of any navigable water, or on the bank of any tributary of any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods, or otherwise, whereby navigation shall or may be impeded or obstructed

⁵ 346 F. Supp. at 146.

tions, and, in one instance, by a crack in the hull of a vessel.⁶ Defendants moved for dismissal on the grounds that the complaint failed to state a claim upon which relief could be granted.⁷ The defendants argued, first, that injunctive relief was inappropriate because section 411, the remedial provision of the Rivers and Harbors Appropriation Act of 1899 [1899 Act],⁸ did not provide for this remedy.⁹ The defendants further argued that issuance of injunctive relief would violate the doctrine of separation of powers and would have the effect of discriminating against the defendants.¹⁰ Finally, the defendants argued that the plaintiff had adequate remedies at law and therefore that injunctive relief was inappropriate.¹¹

The court rejected all three of the defendants' arguments and denied the motion to dismiss.¹² Rather than attempting to find au-

⁶ Id. at 146-47 n.1.

⁷ Id. at 148.

⁸ 33 U.S.C. § 411 (1970). That section provides:

Every person and every corporation that shall violate . . . the provisions of sections 407, 408, and 409 of this title shall be guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding \$2,500 nor less than \$500, or by imprisonment (in the case of a natural person) for not less than thirty days nor more than one year, or by both such fine and imprisonment, in the discretion of the court

⁹ 346 F. Supp. at 148. Defendants attempted to distinguish their case from the prior cases of *Wyandotte Transportation Co. v. United States*, 389 U.S. 191 (1967), and *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960), in which relief not explicitly provided by the 1899 Act was nevertheless "inferred" to be appropriate. See text at notes 59-62 *infra*. Unlike the earlier cases, defendants claimed that the offending conduct in *Bushey* (the oil spills) had ceased and that the resultant harm (the oil slicks) did not remain.

¹⁰ In support of this claim, defendants contended that the court would in effect be promulgating regulations beyond existing requirements passed by Congress, and in so doing would be usurping legislative power. 346 F. Supp. at 148. Defendants also noted that the relief sought by plaintiff would have the result of creating operations requirements applicable to only one navigable waterway user, the defendant, and would thus be discriminatory. Id.

¹¹ The remedies at law alleged by the defendants to be adequate included the fines provided in § 411 of the 1899 Act, as well as the rule-making procedures of administrative agencies charged with oil spill control. Id.

¹² Id. at 151. The court did not consider the defendants' first argument—that the 1899 Act did not provide for injunctive relief—since it found independent grounds upon which relief could be granted. See text at notes 13-16 *infra*.

Defendants' second ground for the motion to dismiss—that the court's granting relief would violate the doctrine of separation of powers and would be discriminatory—was also rejected, the court replying briefly, "[A]ny framing of equitable relief against the defendant in an otherwise constitutionally permissible case or controversy clearly does not amount to usurpation of the legislative power or improper 'discrimination' against the losing party." Id. at 150.

In disposing of defendants' last contention—that the remedies at law were adequate—the court first reiterated its decision that the remedies provided by the 1899 Act and the FWPCA are not exclusive. Id. The court then added that it found unavailing defendants' claim that administrative agency rule-making procedures were adequate legal remedies, stating that "the contingency of third party remedial action will not foreclose a properly instituted nuisance suit." Id. The court also stated that the ques-

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thority in the 1899 Act for injunctive relief, the court found independent grounds upon which relief could be granted.¹³ The court HELD: In a suit brought by the federal government, a complaint alleging pollution in violation of the Refuse Act states a claim upon which relief may be granted under the federal common law of public nuisance and that injunctive relief may be appropriate under that doctrine.¹⁴ The *Bushey* court based its holding on the Supreme Court's recent decision in *Illinois v. City of Milwaukee*,¹⁵ which, it observed, revived "poor old" public nuisance as a viable legal justification for issuing injunctive relief against pollution of interstate or navigable waters, despite the legislative enactments on the subject,¹⁶ the 1899 Act and the Federal Water Pollution Control Act [FWPCA].¹⁷

The noteworthy aspect of *Bushey* is its extension of *Illinois v. City of Milwaukee*—in which the Supreme Court declared that a plaintiff state may validly utilize the public nuisance doctrine in a pollution action in order to obtain federal district court jurisdiction—to actions brought by the federal government in quest of injunctive relief. In *City of Milwaukee*, the Supreme Court observed that the plaintiff state had no express statutory remedy available to it,¹⁸ and found that the remedies for water pollution provided by the 1899 Act and the FWPCA are not exclusive in such a case.¹⁹ Hence the Court held that a federal common law action based on public nuisance could be maintained by the plaintiff state.²⁰ In contrast, *Bushey* allowed the federal government to use the public nuisance doctrine as a means of recovery despite the existence of explicit remedies provided by legislation.²¹

tion of adequate remedies at law is one that must be considered only after the merits of the case are heard. *Id.*

¹³ *Id.* at 148-49.

¹⁴ *Id.* at 148.

¹⁵ 406 U.S. 91 (1972).

¹⁶ 346 F. Supp. at 149-50.

¹⁷ 33 U.S.C. §§ 1151 et seq. (1970). Subsequent to the *Bushey* decision, the FWPCA was amended by the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500 (codified, with minor exceptions, at 33 U.S.C.A. §§ 1251 et seq. (Supp. 1973)). For a commentary on these amendments, see Comment, The Federal Water Pollution Control Act Amendments of 1972, 14 B.C. Ind. & Com. L. Rev. 672 (1973). Hereinafter, only the former version of the FWPCA, referred to in the *Bushey* opinion, will be cited, unless explicit reference is made to the 1972 Amendments.

¹⁸ 406 U.S. at 103.

¹⁹ *Id.*

²⁰ *Id.* at 99, 107.

²¹ It should again be noted that although the plaintiff federal government pleaded violations of the 1899 Act, the court determined that the cause of action was grounded in the federal common law of public nuisance, and that the use of public nuisance was not inconsistent with the 1899 Act, the FWPCA, or any other legislation in force at the time. See text at notes 13-17 *supra*.

In extending the *City of Milwaukee* determination that neither the FWPCA nor any other existing legislation (including, of course, the 1899 Act) precluded the use of public nuisance, it is not clear whether the court in *Bushey* considered the explicit remedies provided for the federal government by the FWPCA. The FWPCA provides:

Bushey has obvious desirable implications for environmental protection. The decision suggests that the power of the federal government to enjoin pollution is not limited to specific remedial provisions provided by Congress. This rationale could arguably be carried beyond interstate water pollution to air and noise pollution. State environmental enforcement agencies may also avail themselves of the public nuisance approach suggested by *Bushey* where state remedial legislation falls short of adequate protection.

This note will evaluate the suggestion, made by the court in *Bushey* in denying defendants' motion to dismiss, that common law public nuisance retains its validity in the environmental control context. Specifically, it will briefly trace the background of public nuisance, examining its traditional scope and problems associated with its use. The history of the protection of interstate and navigable waters will then be explored, noting the use of public nuisance to protect these waters. This historical treatment will culminate in a discussion of *Illinois v. City of Milwaukee* and the unique problems which spawned that decision. The note will then consider and evaluate the discussion of the doctrine of public nuisance by the court in *Bushey* in its denial of defendants' motion to dismiss. Finally, an attempt will be made to resolve the issues raised in *Bushey* by suggesting an alternative ground for the decision, predicated on the conclusion that the public nuisance doctrine was misused in *Bushey*.

An examination of the background of the public nuisance concept shows that it has been given a broad definition at common law:

[A] public nuisance has been defined as "a violation of a

In addition to any other action taken by a State or local government, when the President determines there is an imminent and substantial threat to the public health or welfare of the United States, including, but not limited to, fish, shellfish, and wildlife and public and private property, shorelines, and beaches within the United States, because of an actual or threatened discharge of oil into or upon the navigable waters of the United States from an onshore or offshore [oil] facility, the President may require the United States attorney of the district in which the threat occurs to secure such relief as may be necessary to abate such threat, and the district courts of the United States shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.

33 U.S.C. § 1161(e) (1970). Though the *Bushey* court referred to the FWPCA generally, 346 F. Supp. at 149 n.8, 150, the court stated that "[i]n the *Illinois v. City of Milwaukee* case, as here, '[t]he remedy sought by [plaintiff] is not within the precise scope of remedies prescribed by Congress . . .'" Id. at 149 (footnotes omitted). In addition, the *Bushey* court summarized, without reference to § 1161(e) of the FWPCA, that "[t]hus, defendants' first two arguments on their motion to dismiss fail, for the *Rivers and Harbors Act* does not foreclose a public nuisance action . . ." Id. at 150 (emphasis added). Whether or not the *Bushey* court was aware of § 1161(e) of the Federal Water Pollution Control Act, the fact remains that the court allowed, and, in fact, introduced the possibility of, the use of the common law public nuisance doctrine, despite the presence of explicit statutory remedies. The court thus suggested that the federal government is not bound by explicit remedies provided by statute to combat water pollution.

public right, either by a direct encroachment upon public rights or property, or by doing some act which tends to a common injury, or by omitting to do some act which the common good requires, and which it is the duty of the person to do, and the omission to do which results injuriously to the public."²²

In addition, statutes have occasionally adopted general language similar to that of the common law in defining public nuisance,²³ or have specified certain kinds of conduct to be public nuisances.²⁴ The concept has been used in a variety of situations in which public rights have been infringed. Interferences with the public right of passage on a public highway have been classified public nuisances,²⁵ as have interferences with the use of public places and public property,²⁶ interferences with navigation,²⁷ public health,²⁸ public safety,²⁹ public morals,³⁰ public peace,³¹ and public comfort.³² Thus, historically, the scope of public nuisance has been broad, including within its purview a wide variety of conduct.

Despite the potential scope of public nuisance, its application has

²² *Chicago v. Shynin*, 258 Ill. 69, 71, 101 N.E. 224, 225 (1913) (footnote omitted). Other courts have adopted a similar definition. See, e.g., *Nichols v. Commonwealth*, 312 Ky. 171, 173, 226 S.W.2d 796, 798 (1950); *Commonwealth v. South Covington & Cincinnati St. Ry.*, 181 Ky. 459, 463, 205 S.W. 581, 583 (1918); *State v. Turner*, 198 S.C. 487, 495-96, 18 S.E.2d 372, 375 (1942).

²³ See, e.g., *Ariz. Rev. Stat. Ann.* § 13-601 (1956).

²⁴ See, e.g., *Ill. Rev. Stat. ch. 100½*, § 26 (Supp. 1972).

²⁵ See, e.g., *Town of Newcastle v. Grubbs*, 171 Ind. 482, 86 N.E. 757 (1908) (an excavation); *Leahan v. Cochran*, 178 Mass. 566, 60 N.E. 382 (1901) (ice on a sidewalk); *Salsbury v. United Parcel Serv., Inc.*, 203 Misc. 1008, 120 N.Y.S.2d 33 (N.Y.C. Mun. Ct. 1953) (double parking).

²⁶ See, e.g., *Adams v. Commissioners of Trappe*, 204 Md. 165, 102 A.2d 830 (1954) (encroachment); *Watertown v. Cowen*, 4 Paige 510 (N.Y. Ch. 1834) (building obstructing public square).

²⁷ See, e.g., *Tuell v. Inhabitants of Marion*, 110 Me. 460, 86 A. 980 (1913) (bridge obstructing navigation on a stream); *Gates v. Northern Pac. R.R.*, 64 Wis. 64, 24 N.W. 494 (1885) (failure to open drawbridge which obstructed navigation).

²⁸ See, e.g., *Durand v. Dyson*, 271 Ill. 382, 111 N.E. 143 (1915) (keeping diseased animals); *City of Ludlow v. Commonwealth*, 247 Ky. 166, 56 S.W.2d 958 (1933) (defective sewers); *Attorney General v. Jamaica Pond Aqueduct*, 133 Mass. 361 (1882) (lowering the water level of a pond); *State ex rel. Marron v. Compere*, 44 N.M. 414, 103 P.2d 273 (1940) (incompetent practice of medicine).

²⁹ See, e.g., *Liber v. Flor*, 160 Colo. 7, 415 P.2d 332 (1966) (explosives stored near highway); *Yackel v. Nys*, 258 App. Div. 318, 16 N.Y.S. 2d 545 (1939) (vicious dog).

³⁰ See, e.g., *Engle v. State*, 53 Ariz. 458, 90 P.2d 988 (1939) (gaming); *Nichols v. Commonwealth*, 312 Ky. 171, 226 S.W.2d 796 (1950) (indecent exposure).

³¹ See, e.g., *McMillan v. Kuehnle*, 76 N.J. Eq. 256, 73 A. 1054 (1909) (Sunday baseball); *State v. Turner*, 198 S.C. 487, 18 S.E.2d 372 (1942) (noisy, rowdy dance hall).

³² See, e.g., *Potashnick Truck Serv., Inc., v. City of Sikeston*, 351 Mo. 505, 173 S.W.2d 96 (1943) (odors); *Karpisek v. Cather & Sons Constr., Inc.*, 174 Neb. 234, 117 N.W.2d 322 (1962) (dust). For a more complete listing of conduct which has been held to constitute a public nuisance, see generally *Restatement (Second) of Torts* § 821B, at 22-24 (Tent. Draft No. 16, 1970).

been limited under several circumstances. One of these circumstances arises when the public nuisance doctrine is sought to be used to obtain injunctive relief against conduct which has been defined by statute as criminal. Where a government entity seeks injunctive relief against any conduct made criminal by statute, courts of equity traditionally will not grant relief. The reason for this refusal is that contempt of court sanctions to enforce injunctions substitute judicial penalties for those imposed by the legislature, violating the separation of powers doctrine.⁸³ Also, problems arise concerning the infringement of defendants' constitutional rights in criminal proceedings, such as the right to trial by jury.⁸⁴

For the reasons noted above, injunctive relief will not normally be granted where criminal activity constitutes a public nuisance.⁸⁵ However, where a criminal activity is found to constitute a public nuisance and to pose a threat of harm to a public right which is inadequately protected by the criminal sanctions, courts will grant injunctive relief.⁸⁶ Thus, though public nuisance is normally limited when its use is sought to enjoin conduct which is criminal, in those situations where the criminal sanctions inadequately protect the public

⁸³ *Commonwealth v. Stratton Finance Co.*, 310 Mass. 469, 474, 38 N.E.2d 640, 643 (1941).

⁸⁴ See, e.g., *State v. Vaughan*, 81 Ark. 117, 127, 98 S.W. 685, 690 (1906), *People v. Lim*, 18 Cal. 2d 872, 880, 118 P.2d 472, 476 (1941); *F. McClintock, McClintock on Equity* § 164, at 448 (2d ed. 1948).

⁸⁵ Whether injunctive relief will be granted to enjoin criminal activity as a public nuisance depends on how public nuisance is defined. If public nuisance is defined as an interference with the rights of the public, then all such public nuisances may be enjoined regardless of whether the conduct is criminal. *Caldwell, Injunctions Against Crime*, 26 Ill. L. Rev. 259, 268 (1931). If, however, public nuisance is defined otherwise, as, for example, a repeated violation of a statute, injunctive relief will not be granted unless the conduct threatens some public rights. *Id.* Because public nuisance is defined in such varying manners among different jurisdictions, it is important to note that threatened harm to the public's rights, not the term "public nuisance," is the critical factor in determining whether criminal conduct should be enjoined. *Id.* at 269.

⁸⁶ Injunctions have been issued to protect the public from harm resulting from criminal activity in a variety of situations. In order to protect the public welfare, the practice of usury has been enjoined. See, e.g., *State ex rel. Burgum v. Hooker*, 87 N.W.2d 337, 343 (N.D. 1957). *Contra*, *Commonwealth v. Stratton Finance Co.*, 310 Mass. 469, 474-75, 38 N.E.2d 640, 643-44 (1941). In *State v. Chicago & N.W. Ry.*, 147 Neb. 970, 978, 25 N.W.2d 824, 829 (1947), considerations of public safety led the court to enjoin the railroad from using light reflectors in place of safety lights which were required by a statute that also carried criminal penalties for violations. Due to harm threatened to the public health, the court in *City of Chicago v. Fritz*, 36 Ill. App. 2d 457, 466-67, 184 N.E.2d 713, 717 (1962) enjoined the operation of a dump, despite applicable criminal penalties. Similarly, striking mine workers who blocked the only street leading to the mine were enjoined from interfering with the public's right to travel freely on public highways, despite their potential criminal liability, in *State ex rel. Allai v. Thatch*, 361 Mo. 190, 198, 234 S.W.2d 1, 7 (1950). Finally, injunctive relief has been issued to protect public property, despite criminal sanctions for the offensive conduct. In *Clark v. Todd*, 192 Md. 487, 492, 64 A.2d 547, 549 (1949), an injunction was issued restraining the defendants from dredging for oysters with boats greater than the maximum allowed by a statute which also provided criminal penalties for its violation. See generally *Caldwell*, *supra* note 35, at 274.

from harm, public nuisance may be used despite historical limitations on allowing injunctive relief against criminal activities.

The notable decision of the United States Supreme Court in *In re Debs*⁸⁷ presented a discussion of the use of injunctions by the federal government to restrain criminal activity. In *Debs*, a labor union leader, held in contempt of court and jailed for failing to obey an injunction ordering the cessation of a crippling nationwide strike and associated criminal acts of violence and destruction, appealed to the Court for a writ of habeas corpus.⁸⁸ The writ was denied and the injunction upheld, the Court finding that the rail stoppage injured the public, throwing interstate commerce into a state of "general confusion."⁸⁹ Analogizing to public nuisance cases, the Court decided that injunctive relief was appropriate to prevent "great public injury."⁴⁰ Further, the Court found that even though the members of the appellant's union might have been subject to criminal liability for their conduct, injunctive relief ordering the union from further hindering the railroad's operation was appropriately issued to protect the public from the harm resulting from the obstruction of interstate commerce.⁴¹ Thus, in the *Debs* case, by analogizing to the public nuisance concept and addressing itself in general to the appropriateness of granting the Government injunctive relief, the Supreme Court prescribed the boundaries of governmental use of the public nuisance doctrine to seek injunctive relief against criminal activity. Since the *Debs* decision, injunctive relief has been granted in a number of situations to protect the public from various harms resulting from criminal activity.⁴²

The potential scope of the public nuisance doctrine has historically been subject to a second limitation. The continued viability of public nuisance as a justification for seeking relief is called into question when legislation is enacted which provides civil remedies but does not explicitly repeal the existing common law. In dealing with other common law issues, courts have held that the common law is not implicitly repealed by legislation.⁴³ On the other hand, where the common law has been found to contradict the policy of recent enact-

⁸⁷ 158 U.S. 564 (1895).

⁸⁸ *Id.* at 570-73. The acts sought to be enjoined were acts of destruction of railroad property and violence against personnel who did not participate in the strike. These acts involved potential criminal liability. *Id.* at 568-69, 594, 599.

⁸⁹ *Id.* at 592.

⁴⁰ *Id.*

⁴¹ *Id.* at 593-94.

⁴² See note 36 *supra*.

⁴³ See, e.g., *Shaw v. Armour & Co.*, 175 F. Supp. 213, 214 (N.D. Fla. 1959), where it was held that under Florida law a manufacturer's common law liability for consequential damages was not limited by an act which detailed procedures for refunds for the purchase price of faulty products; see also *Ruby Lumber Co. v. Johnson Co.*, 299 Ky. 811, 818-21, 187 S.W.2d 449, 452-53 (1945), where the court declared that a subcontractor's common law right to indemnification for the amount of payments to an injured employee was not impaired by the enactment of a workman's compensation act.

ments, courts have opted against the common law principle.⁴⁴ Thus, the common law doctrine of public nuisance would retain its vitality in spite of legislative enactments providing governments with civil remedies, so long as the use of the public nuisance cause of action does not conflict with an underlying policy of that legislation.⁴⁵

A review of the history of the protection of public rights in interstate waters reveals that public nuisance has had only a limited application. The concept fell into disuse with the enactment of legislation to remedy water pollution, and has only recently been revived in the *City of Milwaukee* and *Bushey* cases. In an 1851 decision, *Pennsylvania v. Wheeling Bridge Co.*,⁴⁶ the Supreme Court held that a bridge obstructing navigation on an interstate waterway was a public nuisance, and ordered either its structural modification so as to permit unimpeded navigation or its removal.⁴⁷ Noting an absence of federal legislation in point, and an early decision ruling that there is no common law of the United States,⁴⁸ the Court found authority to act in what it referred to as the "common law of chancery."⁴⁹ Approving the proposition that the Supreme Court sitting in equity has jurisdiction wherever the High Court of Chancery of England had jurisdiction, the Court found authority to act against the bridge as a public nuisance, obstructing navigation on an interstate waterway.⁵⁰

Subsequently, in *Willamette Iron Bridge Co. v. Hatch*⁵¹ the Court limited the *Wheeling Bridge* decision to interstate waters. The Court there held that the interference with navigation on a navigable waterway entirely within a state was not a matter of federal concern, absent an expression of Congress to the contrary.⁵² Three years after the *Willamette* decision, Congress made all interferences with navigation a matter of federal concern by enacting the Rivers and Harbors Act of 1890.⁵³ This legislation was rewritten in a more comprehen-

⁴⁴ See, e.g., *United States v. A&P Trucking Co.*, 358 U.S. 121, 126-27 (1958), where the policy of the Motor Carrier Safety Act of 1935, ch. 498, 49 Stat. 543 (codified in scattered sections of 15, 49 U.S.C.), was successfully argued to overcome the common law rule that partnerships are not legal entities capable of being sued; *United States v. General Douglas MacArthur Senior Village, Inc.*, 337 F. Supp. 955, 960-61 (E.D.N.Y. 1972), where the policy of the Federal Tax Lien Act of 1966, Pub. L. No. 89-719, 80 Stat. 1125 (codified in scattered sections of 26, 28, 40 U.S.C.), has been held to change the common law rule of "first in time, first in right."

⁴⁵ Cf. *Ohio River Sand Co. v. Commonwealth*, 467 S.W.2d 347, 349 (Ky. 1971), where the court found that the common law public nuisance doctrine retained its vitality despite the enactment of state pollution control legislation. The legislation there contained a "saving clause" which provided that the enactment was to supplement rather than repeal existing law.

⁴⁶ 54 U.S. (13 How.) 556 (1851).

⁴⁷ *Id.* at 668-70.

⁴⁸ *Wheaton v. Peters*, 33 U.S. (8 Pet.) 374, 418-19 (1834).

⁴⁹ 54 U.S. (13 How.) at 603.

⁵⁰ *Id.* at 604.

⁵¹ 125 U.S. 1 (1887).

⁵² *Id.* at 16-17.

⁵³ Act of Sept. 19, 1890, ch. 907, 26 Stat. 426.

sive package in 1899 and became the Rivers and Harbors Appropriation Act of 1899.⁵⁴ The 1899 Act provides for fines and imprisonment⁵⁵ for violations. In addition, in limited circumstances—to remove structures erected in violation of the Act—injunctive relief is provided.⁵⁶ Thereafter, with the availability of these statutory remedies, use of public nuisance to protect public rights in interstate waters waned.

However, despite the virtual retirement of the public nuisance doctrine, injunctive relief remained available. Even though the 1899 Act, which displaced the public nuisance doctrine as the basis for a cause of action in water pollution cases, provided expressly for penal sanctions against violators and failed to provide for general injunctive relief, the courts continued to grant injunctive relief on the theory that such relief was impliedly authorized by the Act. In *Sanitary District of Chicago v. United States*,⁵⁷ the Supreme Court upheld the granting of an injunction preventing defendants from removing more than a specified amount of water daily from Lake Michigan. The Court said nothing about public nuisance, but based its decision on the belief that the policy of the Rivers and Harbors Act of 1899—the continued unimpairment of navigation of navigable waterways—provided authority for issuing such relief.⁵⁸ More recently, in *United States v. Republic Steel Corp.*,⁵⁹ the Court again found injunctive relief to be impliedly authorized by the 1899 Act. In *Republic Steel*, the Court upheld the granting of injunctions ordering the cessation of discharges and the removal from a navigable river of sedimentary deposits caused by the defendant.⁶⁰ Similarly, in *Wyandotte Transportation Co. v. United States*,⁶¹ an order compelling reimbursement for the cost to the United States of removing a sunken vessel from a navigable channel and a declaration of responsibility for the removal of another sunken vessel were held by the Supreme Court to be appropriate enforcement measures under the 1899 Act.⁶² In short, even though the use of the common law public nuisance concept may have been appropriate in *Republic Steel* and *Wyandotte Transportation*, the Court based its decision on the quite different rationale of implying remedies from the statutory policy.

Although the use of public nuisance and the implication, from a statutory policy, of authority to grant relief beyond statutory remedies produce the same result, they differ in two ways. First, the mechanism of implied authority avoids the problem of conflict with criminal and civil remedial statutes which accompany the use of public

⁵⁴ 33 U.S.C. §§ 401 et seq. (1970).

⁵⁵ 33 U.S.C. §§ 406, 411 (1970).

⁵⁶ 33 U.S.C. § 406 (1970).

⁵⁷ 266 U.S. 405 (1925).

⁵⁸ *Id.* at 429.

⁵⁹ 362 U.S. 482 (1960).

⁶⁰ *Id.* at 491-92.

⁶¹ 389 U.S. 191 (1967).

⁶² *Id.* at 200-10.

nuisance. Second, the rationales underlying the two concepts are quite different. Public nuisance looks to some substantial and inadequately protected public harm. Justice Douglas, writing for the majority in *Republic Steel*, described the different rationale for implying authority to grant injunctive relief from statutory policy:

The void which was left by *Willamette Iron Bridge Co. v. Hatch*, . . . need not be filled by detailed codes which provided for every contingency. Congress has legislated and made its purpose clear; it has provided enough federal law in § 10 [of the 1899 Act, codified at 33 U.S.C. § 403 (1970)] from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation. This is for us the meaning of *Sanitary District v. United States* . . . on this procedural point [that injunctive relief is appropriate to maintain unobstructed navigation].⁶³

In sum, the rationale for implied statutory authority to grant injunctive relief is the fulfillment of the legislature's policy mandate, while the public nuisance doctrine is grounded in protecting the public from a substantial harm. Since the enactment of the 1899 Act, the public nuisance doctrine has yielded to the quite different rationale of the other doctrine in suits maintained by the federal government to protect interstate waters from pollution. Therefore, the law as it developed following enactment of the Refuse Act was that conduct which violated the Act could be enjoined despite the failure of Congress expressly to provide for injunctive relief. Although injunctive relief remained available, then, the 1899 Act altered the basis on which it would be granted.

Despite the reduced use of the public nuisance doctrine in protecting interstate waters at the behest of the federal government, the doctrine survived in one limited type of case. Its use continued in suits by states invoking the original jurisdiction of the Supreme Court and seeking injunctive relief against polluting activities of other states or subdivisions thereof.⁶⁴ It was from this line of cases that the federal

⁶³ 362 U.S. at 492. The provision of the 1899 Act from which Justice Douglas concludes there is "enough federal law" to fashion additional remedies states in relevant part:

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; . . . and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

33 U.S.C. § 403 (1970).

⁶⁴ The Supreme Court's original jurisdiction as defined both by the Constitution and by statute includes controversies between states. The Constitution provides: "The judicial Power shall extend . . . to Controversies between two or more States . . ." U.S. Const.

common law of public nuisance was unearthed and revived in *Illinois v. City of Milwaukee*. The use of the doctrine became necessary when the offending conduct escaped the prohibitions of the 1899 Act.⁶⁵ In two cases, *Missouri v. Illinois*⁶⁶ and *New York v. New Jersey*⁶⁷ the Supreme Court invoked the public nuisance doctrine, but held that the alleged conduct would not give rise to liability under the doctrine.⁶⁸ In 1931, however, New Jersey successfully employed the public nuisance doctrine before the Supreme Court in *New Jersey v. City of New York*,⁶⁹ where it proved that defendant's practice of dumping garbage at sea created a public nuisance, and obtained injunctive relief. More recently, in *Ohio v. Wyandotte Chemicals Corp.*,⁷⁰ the State of Ohio claimed that nonresident chemical companies' contamination of Lake Erie created a public nuisance.⁷¹ The Court chose not to hear the case as a court of original jurisdiction, recognizing its primary responsibility as an appellate tribunal,⁷² and noting that the issues appeared to present questions of Ohio law which could just as well be resolved in Ohio courts.⁷³

The *Wyandotte Chemicals* decision might have had a discouraging impact on plaintiff states seeking to proscribe polluting activities of nonresidents. By suggesting that public nuisance is grounded in state rather than federal law, the Supreme Court appeared to deprive plaintiff states seeking to proscribe nonresidents' polluting activities of

art. 3, § 2. Congress has also conferred such jurisdiction on the Supreme Court: "The Supreme Court shall have original and exclusive jurisdiction of: (1) All controversies between two or more States . . ." 28 U.S.C. § 2151(a) (1970).

Similarly, the Supreme Court's original jurisdiction extends to controversies between a state and citizens of another state: "The judicial Power shall extend to Controversies . . . between a State and Citizens of another State . . . and between a State . . . and foreign . . . Citizens or Subjects." U.S. Const. art. 3, § 2. This jurisdiction has also been further defined by Congress: "The Supreme Court shall have original but not exclusive jurisdiction of . . . (3) all actions or proceedings by a State against the citizens of another State or against aliens." 28 U.S.C. § 1251(b) (1970).

⁶⁵ Refuse matter "flowing from streets and sewers and passing therefrom in a liquid state" is excepted from the prohibitions of the Refuse Act. 33 U.S.C. § 407 (1970).

⁶⁶ 200 U.S. 496 (1906).

⁶⁷ 256 U.S. 296 (1921).

⁶⁸ In each of these cases the plaintiff's failure to recover can be traced to adverse factual determinations. In *Missouri v. Illinois* the plaintiff failed to establish that the defendant caused the public nuisance. 200 U.S. at 526. Similarly, in *New York v. New Jersey*, plaintiffs failed to prove sufficient harm to constitute a public nuisance. 256 U.S. at 310.

⁶⁹ 283 U.S. 473, 481-83 (1931).

⁷⁰ 401 U.S. 493 (1971).

⁷¹ *Id.* at 494-95.

⁷² *Id.* at 497-98, 504-05.

⁷³ *Id.* at 497 n.3, 500. But see *Texas v. Pankey*, 441 F.2d 236 (10th Cir. 1971), decided less than two months prior to *Wyandotte Chemicals*, where the Tenth Circuit found that a state's complaint of environmental impairment caused by nonresidents stated a valid claim under federal common law. Without referring to public nuisance, the *Pankey* court determined that the implicit public nuisance claim presented a question of federal common law, establishing federal question jurisdiction under 28 U.S.C. § 1331(a). *Id.* at 242. See generally Note, 50 *Texas L. Rev.* 183, 185 (1971).

both its original jurisdiction and jurisdiction of federal district courts.⁷⁴ As a result, such plaintiffs would have been limited to the relatively unsatisfactory choice of proceeding in its own courts or those of the nonresident.⁷⁵

Apparently in recognition of this problem, the Supreme Court made its declaration in *Illinois v. City of Milwaukee* that a federal common law action was presented, allowing Illinois to bring its action in federal district court under the federal question jurisdictional authority of 28 U.S.C. § 1331.⁷⁶ In *City of Milwaukee*, Illinois sought the Supreme Court's permission to file a complaint under the Court's original jurisdiction,⁷⁷ claiming that defendants' untreated sewerage discharges created a public nuisance.⁷⁸ Noting its pressing appellate docket demands, the Supreme Court denied permission to file the complaint, but held that an interstate waterway pollution abatement suit stated a claim under the federal common law of public nuisance.⁷⁹ The Court thus found that the action brought by a state against a political subdivision of another state presented a question arising under federal law which permitted it to be heard by a federal district court. It also found that the use of public nuisance in *City of Milwaukee* would be appropriate, noting that neither the 1899 Act nor the FWPCA supplied the plaintiff with the remedy sought⁸⁰ and indicating that the use of the

⁷⁴ In a footnote, the Court stated:

In our view the federal statute, 28 U.S.C. § 1251(b)(3), providing that our original jurisdiction in cases such as these is merely concurrent with that of the federal district courts, reflects this same judgment [that the Supreme Court should exercise discretion in exercising its original jurisdiction]. However, this particular case cannot be disposed of by transferring it to an appropriate federal district court since this statute by itself does not actually confer jurisdiction on those courts, see C. Wright, *Federal Courts* 502 (2d ed. 1970), and no other statutory jurisdictional basis exists. The fact that there is diversity of citizenship among the parties would not support district court jurisdiction under 28 U.S.C. § 1332 because that statute does not deal with cases in which a State is a party. Nor would federal question jurisdiction exist under 28 U.S.C. § 1331. So far as it appears from the present record, an action such as this, if otherwise cognizable in a federal district court, would have to be adjudicated under state law. *Erie R. Co. v. Tompkins*, 301 U.S. 64 . . . (1938).

401 U.S. at 493 n.3.

⁷⁵ Though it is possible for states to seek to protect their rights in interstate waters from impairment by other states and citizens of other states by resorting to their own courts or the courts of the nonresident parties, it appears that the resort to local courts is not likely to be productive. If relief is sought in the local courts of the state suffering from foreign pollution, problems arise regarding service of process, jurisdiction, and out-of-state enforcement of judgment. Similarly, though conflicts doctrines and the nationwide standards set by current environmental legislation might reduce this problem, it is possible that if the complaining state chooses to litigate in the state of the polluter, it may find that the polluter's conduct is lawful under quite different standards for pollution of the polluting state. Note, 50 Texas L. Rev. 183, 184 (1971).

⁷⁶ 406 U.S. 91, 99-100 (1972).

⁷⁷ See note 64 supra.

⁷⁸ 406 U.S. at 93.

⁷⁹ Id. at 93-94, 99.

⁸⁰ Id. at 103.

doctrine to provide the remedy would not be incompatible with either enactment.⁸¹

The *City of Milwaukee* decision was thus quite significant in that it provided an effective means by which states may seek relief against pollution of interstate waters, based on a theory of public nuisance. The decision revitalized the heretofore sparingly used public nuisance doctrine as a useful tool for the states' protection of interstate waters, though it did so under limited circumstances: *i.e.*, where a plaintiff state was provided no explicit statutory remedies and where the use of the public nuisance doctrine was consistent with the policy declaration of the statutory scheme of remedial action directed at the mischief in question. Thus public nuisance, which had fallen into disuse in both federal and state suits aimed at protecting interstate waters, was revived under limited circumstances by the *City of Milwaukee* decision.

The district court in *Bushey* relied on the Supreme Court's pronouncement on the continued viability of the public nuisance concept set forth in the *City of Milwaukee* decision.⁸² Moreover, it extended *City of Milwaukee* by interpreting the case as establishing an independent source of federal law available to the federal government as well as state governments to protect interstate waters.⁸³ Thus when defendants moved for dismissal, claiming that the 1899 Act did not explicitly provide for the relief sought and that such relief could not be "implied" from the Act,⁸⁴ the court determined that the action could still be maintained on independent public nuisance grounds.⁸⁵

The *Bushey* court's decision can arguably be supported in terms of public nuisance precedent. First, it can be maintained that the complaint states allegations which, if proven true, constitute a public nuisance. Repeated spills of substantial amounts of oil into a public harbor may be considered an interference with navigation, or an interference with public property,⁸⁶ or a possible interference with public health by polluting drinking and bathing waters.⁸⁷

⁸¹ The Court explicitly stated that use of public nuisance was not inconsistent with the FWPCA. *Id.* at 104. At the same time, the Court implied that the use of public nuisance was not inconsistent with the 1899 Act. After taking cognizance of the relationship between the 1899 Act and the FWPCA, *id.* at 101, the Court stated:

It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance. But until that comes to pass, federal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution.

Id. at 107. Thus the court explicitly recognizes the compatibility of *all* existing legislation with the use of the public nuisance doctrine.

⁸² See 346 F. Supp. at 149.

⁸³ See *id.* at 149-50.

⁸⁴ See note 9 *supra*.

⁸⁵ 346 F. Supp. at 148-49. See notes 13-17, 21 *supra*.

⁸⁶ The interstate waters of Lake Champlain can be viewed as public property held in "public trust" by the government. For a discussion of the public trust doctrine, see Comment, 13 B.C. Ind. & Com. L. Rev. 782, 791-93 (1972).

⁸⁷ Lake Champlain is used for bathing, fishing, and other recreational uses, as well as for agricultural, industrial, and water supply purposes. 346 F. Supp. at 150 n.10.

Further, it could be argued that the use of the public nuisance doctrine is appropriate despite the existence of specific legislation dealing with the activities alleged to constitute a public nuisance. Even without relying on the *City of Milwaukee* case, as did the *Bushey* court, for the proposition that the use of the public nuisance doctrine is appropriate despite the enactment of the 1899 Act and the FWPCA, the use of the public nuisance doctrine arguably would be appropriate. Following the *Debs* rationale,⁸⁸ the continued spilling of oil into Lake Champlain might be considered to cause great public harm, creating such injury as to justify enjoining conduct despite criminal penalties under the 1899 Act.

Similarly, the proposition that the use of public nuisance is appropriate despite the remedial provisions of the FWPCA⁸⁹ can be supported on the ground that the relief sought is consistent with the underlying policy of the statute and that therefore the common law was not impliedly repealed by enactment of the statute.⁹⁰ The policy declarations of sections 1151(a)⁹¹ and 1161(b)(1)⁹² of the FWPCA arguably support the contention that the public nuisance doctrine is consistent with the policies of the FWPCA of discouraging water pollution in general and pollution by oil in particular.

Thus *Bushey's* use of the public nuisance doctrine can arguably be supported. The conduct alleged is within the bounds of conduct which in the past has been found to constitute a public nuisance. The use of the doctrine can be argued to be appropriate, even absent the rationale which the *Bushey* court applied—i.e., that *Illinois v. City of Milwaukee* established an extra-statutory cause of action available to the federal government as well as to the states in pollution abatement cases. In terms of the traditional problems associated with the use of public nuisance, *Bushey's* result can be supported on two grounds: first, that the harm threatened the public justifies the use of the public nuisance doctrine under the *Debs* rationale despite the criminal sanctions of the 1899 Act; second, that the federal common law of public nuisance is compatible with the policies of the water pollution remedial legislation, the FWPCA, and, accordingly, retains its vitality.

It is submitted, however, that in light of the relief provided by the FWPCA, *Bushey* erroneously extended the holding of *Illinois v. City of Milwaukee*. It is further submitted that the policy embodied in the

⁸⁸ See text at notes 35-42 supra.

⁸⁹ 33 U.S.C. § 1161(e) (1970). See note 21 supra for the text of this section.

⁹⁰ See text at note 45 supra.

⁹¹ 33 U.S.C. § 1151(a) (1970). This section provides that "[t]he purpose of this chapter is to enhance the quality and value of our water resources and to establish a national policy for the prevention, control, and abatement of water pollution."

⁹² 33 U.S.C. § 1161(b)(1) (1970). This section provides that "[t]he Congress hereby declares that it is the policy of the United States that there should be no discharges of oil into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone."

FWPCA is inconsistent with the holding that the public nuisance doctrine retains its vitality despite the existence of that statute.

It appears that *Bushey* applied *City of Milwaukee* too broadly. *Bushey* cited *City of Milwaukee* for the proposition that public nuisance retains its vitality as a means of recovery despite the enactments of the 1899 Act and the FWPCA. However, *City of Milwaukee's* holding is not so broad. If *City of Milwaukee* is limited to its facts, it requires the narrower proposition that neither the 1899 Act nor the FWPCA precludes the use of public nuisance by *plaintiff states* to obtain injunctive relief against nonresident polluters, *where the enactments fail to provide the plaintiff a means of obtaining relief*.⁹³ Given its factual situation, *Bushey* expands *City of Milwaukee* to permit the continued use of public nuisance by the federal government as plaintiff, despite the enactment of the 1899 Act and the FWPCA, even though section 1161(e) of the FWPCA provides the federal government a means of obtaining relief. Thus, *Bushey* can be criticized for applying the *City of Milwaukee* determination that the use of public nuisance is appropriate, without appreciating the differences between the facts of the two cases.

It has been noted that even without the authority of *City of Milwaukee* an argument might be made that *Bushey's* use of public nuisance was appropriate, despite the enactment of the remedial provisions of the FWPCA, because *Bushey's* use of the doctrine is compatible with the policy declarations of the FWPCA.⁹⁴ It is submitted that this argument is without merit, since the suggestion of the court in *Bushey* that the federal government's use of public nuisance is appropriate despite the existence of explicit remedies would defeat the intent of Congress in promulgating the FWPCA. An examination of the applicable legislation and its legislative history suggests that it seeks to *limit* the circumstances under which the federal government may seek injunctive relief for potential oil spills and that implications of the *Bushey* decision circumvent this design. The provision, section 1161(e), states in relevant part:

In addition to any other action taken by a State or local government, when the President determines there is an imminent and substantial threat to the public health or welfare of the United States, . . . the President may require the United States attorney of the district in which the threat occurs to secure such relief as may be necessary to abate such threat, and the district courts of the United States shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.⁹⁵

⁹³ See text at note 80 *supra*.

⁹⁴ See text at notes 89-92 *supra*.

⁹⁵ 33 U.S.C. § 1161(e) (1970).

When the FWPCA was first enacted in 1948,⁹⁶ it contained a statement of policy:

[I]n connection with the exercise of jurisdiction over the waterways of the Nation and in consequence of the benefits resulting to the public health and welfare by the abatement of stream pollution, it is hereby declared to be the policy of Congress to recognize, preserve, and protect the primary responsibilities and rights of the states in preventing and controlling water pollution⁹⁷

The import of this policy statement, that the obligation of primary pollution enforcement is placed on the states, is further substantiated by comments of Senators Barkley and Taft, the co-sponsors of the bill, which clearly emphasized that the states were to be primarily responsible for the Act's enforcement.⁹⁸

When the bill was amended in 1956, the design of Senators Barkley and Taft was retained. The "primary responsibility of the states" clause was again written into the legislation,⁹⁹ and the enforcement measures provided by the 1956 Amendments precluded the federal government from bringing suit against polluters without the consent of state authorities.¹⁰⁰ Most significantly, when section 1161(e) was enacted in 1970 it was intended to be consistent with the general policy of the FWPCA. The Committee Report that discussed section 1161(e) explained the intent of the legislators in enacting that section:

The President is authorized to seek an injunction against any actual or threatened discharge from an onshore or offshore drilling production facility or an onshore or offshore facility. Again *the committee expects that this authority will be used only in those instances where a State or local police action has failed* and where the owner or operator is either unable or unwilling to control the actual or threatened discharge.¹⁰¹

⁹⁶ Act of June 30, 1948, ch. 758, 62 Stat. 1155.

⁹⁷ Act of June 30, 1948, ch. 758, § 1, 62 Stat. 1155.

⁹⁸ Co-sponsor Senator Alben Barkley commented:

[I]n this bill, while we recognize that Federal obligation [to control navigable streams and protect against obstructions to navigation], we undertake to place the responsibility upon the local communities

. . . .

[W]e have all through this legislation sought to put the responsibility on local authorities. We have not undertaken to take away from local authorities their initial responsibility.

Hearings on S. 418 Before a Subcomm. of the Senate Comm. on Public Works, 80th Cong., 1st Sess. 339-41 (1947). The other sponsor, Senator Robert Taft, stated that "[t]he general theory has been that pollution control would be effected by the States through their own laws and through their own controls." *Id.* at 17.

⁹⁹ Act of July 9, 1956, ch. 518, § 1, 70 Stat. 498.

¹⁰⁰ Act of July 9, 1956, ch. 518, § 8(f), 70 Stat. 498, 505.

¹⁰¹ Senate Comm. on Public Works, Amending the Federal Water Pollution Control

It is readily apparent that the grant of authority in section 1161(e) was meant to be limited. Consistent with the policy declarations of the Act generally, federal enforcement action was designed to supplement where necessary, but not displace, state enforcement action.¹⁰² Indeed, it can reasonably be submitted that the drafters of the legislation considered the possibility of federal enforcement undesirable except in extraordinary cases.

The suggestion of the *Bushey* decision appears incompatible with this policy. By referring to the public nuisance doctrine and suggesting that the federal government is not bound by the enforcement limitations of the FWPCA, *Bushey* provides a means for allowing federal enforcement actions where the threat is less than the "imminent and substantial" requirement of section 1161(e). According to *Bushey*, in a public nuisance action, a plaintiff need only show that the defendant's conduct is unreasonable and likely to occur, in order to obtain injunctive relief.¹⁰³ By suggesting a means by which the plaintiff Government can avoid the "imminent and substantial" threat prerequisite, *Bushey* enables the Government to act in *any* situation where interstate waters are threatened with degradation. This result defeats the design of Congress, in that Congress sought to limit federal action to only that pollution which was "imminent and substantial," assuring that states would remain the primary enforcers of antipollution measures.

Thus, the rationale of *Bushey* can be used to circumvent specific legislative regulatory schemes. Just as *Bushey*'s use of public nuisance provides a means by which the federal government can bring suit against polluters without meeting the "imminent and substantial" threat standard of section 1161(e), future courts dealing with other problems may rely on *Bushey*'s suggestion that the public nuisance doctrine remains viable despite explicit statutory provisions which suggest otherwise. Such circumvention of legislative intent would create serious separation of powers problems. The implication of *Bushey* would free the executive branch from the constraints of the water pollution legislation, and concomitantly liberate federal courts from the clear—if not expressly stated—jurisdictional limitation of

Act, As Amended, And For Other Purposes, S. Doc. No. 351, 91st Cong., 1st Sess. 19 (emphasis added).

¹⁰² This statutory scheme is continued in the 1972 Amendments. Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, §§ 101(b), 311(e) (codified at 33 U.S.C.A. §§ 1251(b), 1321(e) (Supp. 1973)).

As this note went to press, another court held, in accordance with the *Bushey* decision, that the federal government could maintain a public nuisance action despite the remedial provisions supplied in the FWPCA. *United States v. United States Steel Corp.*, — F. Supp. —, 5 E.R.C. 1125 (N.D. Ill. 1973). The *U.S. Steel* decision is particularly interesting in that it concluded that the 1972 Amendments, note 17 *supra*, do not preclude the federal government's bringing a public nuisance action. However, *U.S. Steel* involved a complaint of waste water discharge, and accordingly the remedy provided by § 1161(e) did not apply as it did in *Bushey*, which involved water polluted by an oil spill. Hence the *U.S. Steel* case does not run afoul of the congressional intent expressed in § 1161(e).

¹⁰³ See 346 F. Supp. at 150.

section 1161(e). This would result in a reduction of the effectiveness of congressional legislative schemes. The executive branch, by prosecuting, and the judiciary, by deciding, cases on the extra-statutory authority of the public nuisance doctrine despite the legislature's implicit denial of authority in section 1161(e), would, in effect, be encroaching on the congressional sphere of power. They would be providing for federal enforcement action where Congress did not. In this sense it can be said that the *Bushey* decision carries the undesirable implication of disturbing the constitutional separation of powers.

It is submitted, then, that the extra-statutory remedy of a public nuisance action by the federal government is inconsistent with the clear limitation on injunctive relief contained in section 1161(e) of the FWPCA. There is no way that the *Bushey* decision can be reconciled with section 1161(e). There appears to be no way that *Bushey* can use the public nuisance doctrine as a basis for the Government's suit without circumventing the legislative scheme underlying the FWPCA and violating the separation of powers doctrine. For these reasons, it is submitted that *Bushey* should have been decided on narrower grounds.

The public nuisance doctrine should not have been used as the basis for denying the motion to dismiss. Rather, consideration of the federal government's authority to proceed should have been concerned with section 1161(e). If the court found the threat posed by defendants *Bushey* and Northern Oil to be "imminent and substantial," the motion to dismiss should have been denied. On the other hand, if defendants' conduct was not found to pose an "imminent and substantial" threat, the motion to dismiss should have been granted, based on the finding that the section 1161(e) prerequisites to federal action had not been met. By deciding *Bushey* in light of the above considerations, the court could have given full effect to the environmental protection design of Congress in the FWPCA.

In conclusion, though the conduct alleged in the complaint falls within the purview of public nuisance, and *Illinois v. City of Milwaukee* suggests that the use of public nuisance is not precluded by federal water pollution legislation, the *Bushey* court's use of the public nuisance doctrine is incorrectly based on an overly broad reading of *City of Milwaukee*. It creates a means by which a congressional design for water pollution control, evidenced in section 1161(e) of the Federal Water Pollution Control Act, is circumvented and congressional policy is unfulfilled. *City of Milwaukee* should be read more narrowly to allow public nuisance actions only when such actions are consistent with congressional policy, as, for example, where the FWPCA provides that state and interstate enforcement action is to be encouraged and does not provide states with explicit statutory remedies. The motion to dismiss in *Bushey* should have been decided on the basis of section 1161(e) of the Federal Water Pollution Control Act. In such a manner, the facts of the *Bushey* case could be put to the "imminent and sub-

stantial threat" test, and federal action would necessarily be made contingent on the inadequacy of state action, in harmony with the design of Congress.

GARY H. BARNES

Labor Law—National Labor Relations Act—Section 8(b)(1)(B)—Union Discipline of Supervisory Employees for Strikebreaking Activities—*IBEW v. NLRB (Ill. Bell Tel. Co.)*¹—The members of Local 134, IBEW, initiated an economic strike against their employer, the Illinois Bell Telephone Company.² In an effort to combat the effects of this strike, Bell strongly encouraged its foremen and supervisory employees to remain at work during the strike.³ However, because of a contractual union security provision that required supervisory employees to be union members, Bell felt that any decision to work or to respect the strike should be left to the personal discretion of the foremen.⁴ Although Bell did not discipline those supervisors who respected the strike, the company nevertheless left no doubt as to its real wishes.⁵ In an attempt to thwart any strikebreaking on the part of the foremen, the union, prior to the strike, informed them that they would be subject to union disciplinary action if they performed rank-and-file work during the work stoppage.⁶ In spite of the union's admonitions, several supervisors reported to perform rank-and-file work during the strike.⁷ In conformance with its pre-strike warning, the union initiated disciplinary proceedings against those supervisor-members who threatened the union's economic solidarity by engaging in rank-and-file work.⁸ Several fines, ranging from \$500 to \$1000, were imposed; the extent of each fine was determined by the degree of involvement in the strikebreaking activity.⁹

The Bell Supervisors' Protective Association, which had been formed by the foremen to protect the rights of those who chose to work during the strike, filed unfair labor practice charges with the National Labor Relations Board (NLRB) in response to the union's disciplinary measures.¹⁰ The Association alleged¹¹ that the imposition of the fines constituted a violation of section 8(b)(1)(B) of the National Labor Relations Act (NLRA), which provides that "[i]t shall be an unfair

¹ — F.2d —, 81 L.R.R.M. 2257 (D.C. Cir. 1972).

² Id. at 2258.

³ Id.

⁴ Id.

⁵ Id.

⁶ Id.

⁷ Id.

⁸ Id.

⁹ Id. at 2259.

¹⁰ IBEW (Ill. Bell Tel. Co.), 192 N.L.R.B. No. 17, 77 L.R.R.M. 1610 (1971).

¹¹ 77 L.R.R.M. at 1611.