

The Burger Court Opinion Writing Database

Longshoremen v. Davis

476 U.S. 380 (1986)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



W

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 14, 1986

RE: 85-217 - International Longshoremen's
Association v. Davis

Dear Byron:

I join.

Regards,



Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

April 22, 1986

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

International Longshoremen's Ass'n v. Davis
No. 85-217

Dear Byron,

As you know, I voted at Conference to hold that Davis' claim was preempted. You have, however, made a very strong case for the position that the Union failed to show that the activity was even "arguably" protected, a point I did not focus on when we voted, and I am prepared to join your opinion. I have only one further concern: The showing required to establish that challenged activity was "arguably" protected or prohibited has received little attention from this or other courts. For this reason, do you not think it would be helpful clearly to set out the standard to be met? To some extent, this is simply a matter of style, since the proper standard is implicit in what you have written. But I would feel much more comfortable with a straightforward statement of the standard to be met. As I read your opinion, a party need only show that, on the facts of a particular case, the Board could find that the activity was protected or prohibited. This does not require the court to evaluate the merits of the claim beyond determining that the position advanced is not plainly contrary to the statute and has not been "authoritatively rejected" by the courts or the Board. See Marine Engineers Beneficial Ass'n v. Interlake Steamship Co., 370 U.S. 173, 182, 184 (1962). Closer scrutiny would be contrary to the purpose of the preemption doctrine to protect the Board's primary jurisdiction. Would you consider adding a sentence or two which makes this clear? The end of the carryover paragraph at the top of page 18 might be a good place.

Sincerely,

Rice

Justice White

1

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

April 24, 1986

International Longshoremen's Union v. Davis

No. 85-217

Dear Byron,

Although I voted the other way at Conference, you have made a very strong case for the position that the Union failed to meet its burden of showing that the activity was even "arguably" protected, a point I did not focus on when we voted. Please join me.

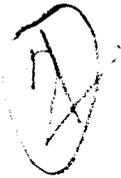
Sincerely,



Justice White

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

April 24, 1986

No. 85-217

International Longshoremen's
Association, AFL-CIO v. Davis

Dear Byron,

Please join me.

Sincerely,

Justice White

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-217

INTERNATIONAL LONGSHOREMEN'S ASSOCIA-
TION, AFL-CIO, APPELLANT *v.*
LARRY DAVIS

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

[April —, 1986]

JUSTICE WHITE delivered the opinion of the Court.

The opinion in *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959), set forth a general standard for determining when state proceedings or regulations are preempted by the provisions of the National Labor Relations Act, see 29 U. S. C. § 151, *et seq.*: Subject to exception only in limited circumstances, “[w]hen an activity is arguably subject to § 7 or § 8 of the Act [29 U. S. C. § 157 or § 158], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if danger of state interference with national policy is to be averted.” 359 U. S., at 245. This general standard has been applied in a multitude of cases decided since *Garmon*, and it must be applied again today. Before addressing that question, however, we must consider the very nature of such preemption—whether *Garmon* preemption is in the nature of an affirmative defense that must be asserted in the trial court or be considered forever waived or whether it is in the nature of a challenge to a court’s power to adjudicate that may be raised at any time.

I

Appellee Larry Davis was formerly employed by Ryan-Walsh Stevedoring Co. in Mobile, Alabama. At the times relevant to the events that gave rise to this suit, he was a

Supreme Court of the United States
Washington, D. C. 20543

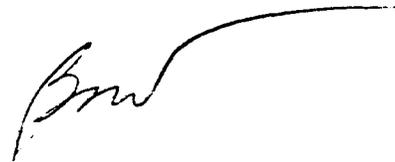
CHAMBERS OF
JUSTICE BYRON R. WHITE

April 21, 1986

MEMORANDUM TO THE CONFERENCE

85-217 - International Longshoremen's
Association, AFL-CIO v. Davis

You may recall that while I was sure enough that Garmon preemption is a jurisdictional matter, my Conference vote was a shaky "reverse" with respect to whether there was preemption. Further study convinces me that the union did not carry its burden of making an arguable case. This draft reflects this conclusion, and the bottom line is to affirm. Perhaps I should have returned the case for reassignment, but since the case was 5-4 and the jurisdiction part carries out the Conference vote, I did not.



To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-217

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, APPELLANT *v.* LARRY DAVIS

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

[April —, 1986]

JUSTICE WHITE delivered the opinion of the Court.

The opinion in *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959), set forth a general standard for determining when state proceedings or regulations are preempted by the provisions of the National Labor Relations Act, see 29 U. S. C. § 151, *et seq.*: Subject to exception only in limited circumstances, “[w]hen an activity is arguably subject to § 7 or § 8 of the Act [29 U. S. C. § 157 or § 158], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if danger of state interference with national policy is to be averted.” 359 U. S., at 245. This general standard has been applied in a multitude of cases decided since *Garmon*, and it must be applied again today. Before addressing that question, however, we must consider the very nature of such preemption—whether *Garmon* preemption is in the nature of an affirmative defense that must be asserted in the trial court or be considered forever waived or whether it is in the nature of a challenge to a court’s power to adjudicate that may be raised at any time.

I

Appellee Larry Davis was formerly employed by Ryan-Walsh Stevedoring Co. in Mobile, Alabama. At the times relevant to the events that gave rise to this suit, he was a ship superintendent or trainee ship superintendent. The

MAY 23 1986

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES:

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 85-217

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, APPELLANT *v.* LARRY DAVIS

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

[May 27, 1986]

JUSTICE WHITE delivered the opinion of the Court.

The opinion in *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959), set forth a general standard for determining when state proceedings or regulations are pre-empted by the provisions of the National Labor Relations Act, see 29 U. S. C. § 151 *et seq.* (1982 ed. and Supp. II): Subject to exception only in limited circumstances, “[w]hen an activity is arguably subject to § 7 or § 8 of the Act [29 U. S. C. § 157 or § 158], the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted.” 359 U. S., at 245. This general standard has been applied in a multitude of cases decided since *Garmon*, and it must be applied again today. Before addressing that question, however, we must consider the very nature of such preemption—whether *Garmon* pre-emption is in the nature of an affirmative defense that must be asserted in the trial court or be considered forever waived or whether it is in the nature of a challenge to a court’s power to adjudicate that may be raised at any time.

I

Appellee Larry Davis was formerly employed by Ryan-Walsh Stevedoring Co. in Mobile, Alabama. At the times relevant to the events that gave rise to this suit, he was a ship superintendent or trainee ship superintendent. The

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 12, 1986

Re: No. 85-217-International Longshoremen's Assoc. v.
Larry Davis

Dear Byron:

Please join me.

Sincerely,

Jm.

T.M.

Justice White

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-217

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, APPELLANT *v.* LARRY DAVIS

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

[May —, 1986]

JUSTICE BLACKMUN, concurring in part and dissenting in part.

The Court today reaffirms that a pre-empted cause of action, as defined in *San Diego Building Trades Council v. Garmon*, 359 U. S. 236 (1959), is a claim that a state court is without power to adjudicate. *Ante*, at 13. I fully agree, and therefore join Parts I and II of the Court's opinion. But I believe that the standard enunciated in Part III to determine the pre-emption *vel non* of a particular cause of action is erroneous, as well as at odds with the principles and policies of *Garmon*. I therefore dissent from Part III of the Court's opinion and from its judgment.

In *Garmon*, this Court held that when an activity is protected or prohibited by the Act, or arguably protected or prohibited, courts must defer to the exclusive competence of the National Labor Relations Board. *Id.*, at 245. In the absence of the Board's clear determination that an activity is neither protected nor prohibited, nor arguably so, courts must stay their hand. "[W]hether federal law *does* apply is to be decided" by the Board. *Taggart v. Weinacker's, Inc.*, 397 U. S. 223, 229 (1970) (separate memorandum of Justice Harlan) (emphasis added). The Court today purports to follow *Garmon*, but nonetheless requires that the party "claiming pre-emption must carry the burden of showing at least an arguable case before the jurisdiction of a state court will be ousted," *ante*, at 16, and proceeds to require here that the

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 25, 1986

85-217 International Longshoremen's Association v. Davis

Dear Byron:

As I was with Bill Rehnquist and John at Conference, I will await their writing.

I will certainly join your judgment.

Sincerely,



Justice White

lfp/ss

cc: The Conference

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 10, 1986

85-217 ILA v. Davis

Dear Bill:

Please join me in your opinion concurring in part
and concurring in the judgment.

Sincerely,



Justice Rehnquist

lfp/ss

cc: The Conference

May 14, 1986

PERSONAL

85-217 International Longshoremen's v. Davis

Dear Chief:

On Saturday I read carefully the opinions that have been circulated by Byron and Bill Rehnquist in this case, and I have sent Bill a join note.

Sandra and John already have joined Bill's opinion that agrees with Part II of Byron's opinion, but that takes a different view of preemption in view of the unique facts of this case. As Bill Rehnquist points out, the union made no objection to the exercise of state court jurisdiction in Alabama until after its adverse decision had been reached. Then, for the first time, it presented the preemption argument.

Surely Bill Rehnquist is right in saying that a party - even a union - has no right to "lay back" to see whether or not it wins or loses in a state court litigation before raising a question as to the jurisdiction of the state court to try the case. Moreover, the respondent (Davis) who prevailed in the state court litigation was a "superintendent", and the regional director of the NLRB had agreed that he was not subject to the Act.

Since you have not voted, I thought it might possibly be helpful for you to know why I agree with Bill's opinion concurring in part and concurring in the judgment.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
J. WILLIAM H. REHNQUIST

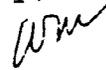
April 23, 1986

Re: No. 85-217 International Longshoremen's Association v.
Davis

Dear Byron,

Please join me in parts I and III of your circulating draft. I disagree with the analysis in part II and will write separately on that issue.

Sincerely,



Justice White

cc: The Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

MAY 8 1986

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-217

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, APPELLANT v. LARRY DAVIS

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

[May —, 1986]

JUSTICE REHNQUIST, concurring in part and concurring in the judgment.

The Court holds that appellant Union's federal preemption claim must be considered on the merits by Alabama courts even though the Union never once raised the claim in the Alabama trial court until a post-trial motion following an adverse jury verdict. By allowing a defendant to save its preemption claim until after it sees the verdict, this ruling poses a sufficient threat to orderly judicial proceedings that it can be justified only if Congress has mandated such a result. Because Congress clearly has not mandated any such result, I disagree with Part II of the Court's opinion.

Appellee Davis sued the Union in the Circuit Court of Mobile County alleging fraud and misrepresentation. Davis had been first a trainee ship superintendent and then a ship superintendent in the employ of Ryan-Walsh Stevedoring Co. in Mobile. Although the ship superintendents were theoretically superior to the longshoremen, they were paid salary and their compensation was generally lower than that of the longshoremen, who worked for hourly wages.

One of the Davis' fellow ship superintendents contacted the Union to see about the possibility of organizing the superintendents and affiliating with the Union. At a meeting of the superintendents to discuss that possibility, several of them expressed a fear of being discharged for participating in union-related activities. Testimony at trial indicated that

STYLISTIC CHANGES THROUGHOUT

l p. 1

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-217

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, APPELLANT *v.* LARRY DAVIS

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

[May —, 1986]

JUSTICE REHNQUIST, with whom JUSTICE STEVENS and JUSTICE O'CONNOR join, concurring in part and concurring in the judgment.

The Court holds that appellant Union's federal pre-emption claim must be considered on the merits by Alabama courts even though the Union never once raised the claim in the Alabama trial court until a post-trial motion following an adverse jury verdict. By allowing a defendant to save its pre-emption claim until after it sees the verdict, this ruling poses a sufficient threat to orderly judicial proceedings that it can be justified only if Congress has mandated such a result. Because Congress clearly has not mandated any such result, I disagree with Part II of the Court's opinion.

Appellee Davis sued the Union in the Circuit Court of Mobile County alleging fraud and misrepresentation. Davis had been first a trainee ship superintendent and then a ship superintendent in the employ of Ryan-Walsh Stevedoring Co. in Mobile. Although the ship superintendents were theoretically superior to the longshoremen, they were paid salary and their compensation was generally lower than that of the longshoremen, who worked for hourly wages.

One of Davis' fellow ship superintendents contacted the Union to see about the possibility of organizing the superintendents and affiliating with the Union. At a meeting of the superintendents to discuss that possibility, several of them expressed a fear of being discharged for participating in

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

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From: **Justice Rehnquist**

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3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 85-217

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, APPELLANT *v.* LARRY DAVIS

ON APPEAL FROM THE SUPREME COURT OF ALABAMA

[May —, 1986]

JUSTICE REHNQUIST, with whom JUSTICE POWELL, JUSTICE STEVENS and JUSTICE O'CONNOR join, concurring in part and concurring in the judgment.

The Court holds that appellant Union's federal pre-emption claim must be considered on the merits by Alabama courts even though the Union never once raised the claim in the Alabama trial court until a post-trial motion following an adverse jury verdict. By allowing a defendant to save its pre-emption claim until after it sees the verdict, this ruling poses a sufficient threat to orderly judicial proceedings that it can be justified only if Congress has mandated such a result. Because Congress clearly has not mandated any such result, I disagree with Part II of the Court's opinion.

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One of Davis' fellow ship superintendents contacted the Union to see about the possibility of organizing the superintendents and affiliating with the Union. At a meeting of the superintendents to discuss that possibility, several of them expressed a fear of being discharged for participating in

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL ~~WHITE~~ ~~WHITE~~

April 23, 1986

Re: 85-217 - International Longshoremen's
Association, AFL-CIO v. Davis

Dear Byron:

Because I would hold that the preemption claim in this case should be characterized as an affirmative defense that has been waived, I will not be able to join your opinion for the Court. As soon as I can get to it, I will circulate a short opinion contributing in the judgment.

Respectfully,



Justice White

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Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 8, 1986

Re: 85-217 - International Longshoremen's
Association, AFL-CIO v. Davis

Dear Bill:

Please join me.

Respectfully,



Justice Rehnquist

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 23, 1986

No. 85-217 International Longshoremen's
Association v. Davis

Dear Byron,

I join Parts I, III and the judgment and will wait to see Bill Rehnquist's separate writing before coming to rest on the balance.

Sincerely,



Justice White

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JUSTICE SANDRA DAY O'CONNOR

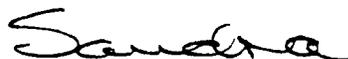
May 8, 1986

No. 85-217 International Longshoremen's
Association v. Davis

Dear Bill,

Please join me in your opinion concurring
in part and concurring in the judgment.

Sincerely,



Justice Rehnquist

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