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April 27, 1976

No. 75-44 Burrell v. McCray

This is a memorandum, dictated for the file, after reading most of the briefs and Phil Jordan's excellent memo of April 22. The purpose of the memorandum is to organize my own thinking, without indicating - prior to argument and Conference - where I will eventually "come down".

The Principal Question Presented

We took this case to decide whether a state prisoner, claiming a constitutional violation by prison officials, can sue under § 1983 immediately, or whether he must first pursue (exhaust) administrative remedies set up by the State of Maryland for the consideration of prisoner grievances?

The DC, in a thorough and thoughtful opinion, held that a prisoner must exhaust his remedies before the Maryland Inmate Grievance Committee, which had authority to conduct a hearing and submit a recommendation to the secretary of Correctional Services. The secretary's order is then subject to judicial review in the Maryland courts.

CA4, however, by a 4 to 3 en banc vote, reversed the DC. It relied on the cases starting with Monroe v. Pape, with which I am familiar. The majority concluded that, whatever might be a desirable result, decisions of this Court make clear that exhaustion is not a condition precedent

to a 1983 suit either with respect to state judicial remedies or state administrative remedies.

Do Prior Authorities Control This Case?

Although CA4 reasonably concluded that they do control it, I agree with Phil that a principled opinion could be written distinguishing and reconciling our prior decisions. None has dealt, in any analytical way, with the necessity of exhaustion by a prisoner of administrative remedies. Most of our prior cases have addressed the need to exhaust state judicial remedies. There is a statement in Wilwording (decided after Damico) to the effect that "state prisoners are not held to any stricter standards of exhaustion than any other civil rights prisoners". 404 U.S., at 252. It is still possible, however, to distinguish other cases from prisoner cases in view of the special status of prisoners. Moreover, the most "damaging" prior precedents are per curiae decisions where the issue here was neither briefed nor argued to the Court.

Is the Maryland Procedure Adequate?

Before exhaustion could be required, it must be determined that the Maryland is "adequate" in the sense that it affords some opportunity for relief.

The difficult question here is that virtually every 1983 suit by a prisoner claims "damages" from the prison

officials, as well as injunctive and other relief. Few, if any, administrative review boards in prisons have authority to award damages. Certainly, the Maryland Board had no such authority.

Thus, assuming that the Maryland Board's procedure meets standards of procedural due process (and this is contested), a hearing before it could not satisfy the demand for damages.

Would the Requirement of Administrative Exhaustion be Sound Policy?

The policy considerations usually advanced against 1983 suits by prisoners include the following: (i) these suits impose an extraordinary burden on the federal courts, ranging up to some 20% of the total civil filings in all federal courts and as much as 45% in the Fourth Circuit (where a number of prisons are situated); (ii) the threat of these suits severely handicaps prison administrators in conducting rehabilitation programs and in preserving discipline; and (iii) it makes little sense to have these issues resolved by the federal courts that lack the expertise of prison authorities and special administrative bodies set up to review prison complaints. Moreover, it also makes little sense for these issues to be diverted from state courts (which have imposed the sentences under state law) into the federal system.

These are powerful policy considerations militating against allowing 1983 suits being brought directly in federal courts. These arguments strongly support overruling Monroe v. Pape,

(see my comments below), but do they support the exhaustion of administrative remedies by prisoners?

As Phil and I have discussed, as attractive as the exhaustion argument may seem on the surface, it is not at all clear that such a requirement would be efficacious:

(a) At most, exhaustion would only delay resort to the federal courts in most cases. We know from experience that most of these suits are frivolous. There is little reason to believe that prisoners who lose before administrative tribunals within the prison system will be deterred from going into federal court. Instituting litigation is a way of life in our prison system, frustrating rehabilitation as well as burdening the courts.

(b) As the administrative record probably would not be admissible in federal court, the benefit to society of the administrative hearing may be marginal. Putting it differently, the federal court would have to consider each complaint de novo.

(c) Prisoners regularly would challenge the adequacy of administrative review, imposing an additional burden on the courts. As most of these claims involve "damages", adequacy would frequently be challenged.

On the other hand, it can be argued that a good many prisoners would prefer the administrative procedure, especially if it were fairly administered. Unless they were

determined to litigate their "damage" claim to the bitter end, they might be satisfied by administrative remedies. Even when prisoners lost at the administrative review level, arguably a good many would be convinced that their claims were frivolous and not worth the effort. Experience, however, suggests that these rational arguments have little appeal to inmates who no doubt derive satisfaction, as well as diversion, from harassing - in every possible way - those who operate and staff the prisons.

Should We Overrule Monroe?

Had I been on the Court, I would have joined Frankfurter's dissent in Monroe v. Pape. Few cases in the history of the Court have distorted the purpose, and legislative history, of a statute more than Douglas' opinion in Monroe.

I am prepared at least to consider dissenting in this case (I am sure no majority would agree with me) on the ground that Monroe should be overruled, and the Frankfurter rationale adopted as the only position consistent with principle and sound public policy.

The key to the meaning of § 1983 is the phrase "color of the law". In brief summary, the only sensible meaning of this phrase is that it applies only to actions of an official (i) taken pursuant to statutory authority under state law, or (ii) taken within his permissible discretion and not in violation of any state law.

An analysis along these lines would exclude from the reach of § 1983 the garden variety type of tort claims that now constitute the vast bulk of 1983 cases. The average common law tort committed by a state officer or employee is not under "color of law". It is not pursuant to any state statutory authority, nor within any permitted discretion. Rather, the action actually is in violation of - not pursuant to - state statutory or common law.

I recognize, of course, the seriousness of overruling a precedent as deeply entrenched as Monroe has become in its relatively short "life". But our cases are replete with recognition that it is the duty of a Justice, especially a new one, to make his own judgments as to constitutional issues. To be sure, it can be said that Monroe involved the interpretation merely of a statute, and in a technical sense this argument is correct. In a broader sense, however, the purpose and effect of Monroe is to elevate to constitutional status the most routine violations of tort law by state employees. Thus, the result of Monroe has broadly significant constitutional dimensions. Not the least of these is to unbalance, severely, the structure of federalism which contemplates that common law torts and crimes are the province of the state, not the federal courts.

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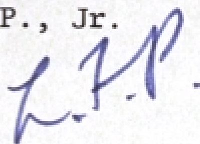
In addition to the 1983 issues commented on above, these suits also involve decisions on the "merits", at least in the <u>McCray</u> suits. If we find that exhaustion is not required, we reach the <u>McCray</u> claim that he was committed to prison isolation in violation of due process and the Eighth Amendment.

I will vote to reverse on the merits, as I think the courts have no business second guessing prison administrators in the day-to-day imposition of discipline in individual cases.

L.F.P., Jr.



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