Memorandum with respect to S. 35 (95th Cong., 1st Sess.)

S. 35, and its counterpart, H.R. 4514, styled the Civil Rights Improvement Act of 1977, seek to change a number of interpretations which the Supreme Court has placed upon 42 U.S.C. § 1983, the most important Civil Rights Act adopted by the Reconstruction Congresses, over the course of many years. It would greatly expand the already large volume of federal court litigation under that statute, not only because of substantive changes but also because of the ambiguous manner in which these are expressed. Even more disturbing is the bill's manifestation of deep distrust not simply of state officials but of state courts. Provisions with respect to limiting the power of federal courts to abstain in civil rights cases pending authoritative determinations of state law which might obviate any need for federal intervention, compelling the issuance of federal injunctions against on-going state actions, and refusing to give state judgments between the same parties on the same issues their normal conclusive effect would seriously increase friction and conflict between federal and state courts and would tilt the balance sharply in favor of the former. While some of the changes, notably the imposition of liability for damages

on states and agencies of local government, would seem to be primarily policy issues for Congress on which the federal judiciary should not express views, it is appropriate for federal judges to call attention to other problems which would be created and which the sponsors may not have fully considered.

I. Overruling of Paul v. Davis.

S. 35 would overrule Paul v. Davis, 424 U.S. 693 (1976), and probably Bishop v. Wood, 426 U.S. 341 (1976). This would be accomplished by the findings in § 1(1) and (2) and the definition in the new § 1983(b)(3):

> (3) the right to enjoy one's reputation is a right secured by the due process clause of section 1 of the fourteenth amendment of the Constitution.

The first question raised by this is whether § 5 of the Fourteenth Amendment empowers Congress to say what rights are secured by § 1 or whether that task is solely for the courts. This is an extremely difficult and delicate subject, see Gunther, Constitutional Law 1033-39 (1975), which carries the threat of a serious confrontation between Congress and the Supreme Court.

Account should also be taken of the possibility that if Congress can "define" rights accorded by the Fourteenth Amendment more expansively that the Court has done, it might some day attempt to do the opposite. Whatever the ultimate answers to such questions might be, it would seem clear that such a confrontation should be avoided except on a matter of prime importance -- of which Paul v. Davis surely is not. While great care must be taken to avoid any suggestion of prejudgment, the Judicial Conference could properly advise Congress that a serious constitutional problem exists.

A second difficulty is that the legislation would go far beyond overruling Paul v. Davis on its facts and would bring into the federal courts a tremendous quantity of actions for injury to reputation by persons accused of crimes, deprived of state or municipal employment, or otherwise offended by acts or utterances of state or local officials. This, of course, was what Paul v. Davis sought to avoid. Although many such actions against prosecutors and the police for statements made on arrest or before or after trial would be dismissed since, except in one respect mentioned in III below, S. 35 does not withdraw the defense of privilege, they would still

have to be heard. The problem in the employment field is still more serious. The giving of reasons to a state or local employee for a discharge or a failure to award a permanent position or to promote, or even an explanation why a person was not hired for a state or local job, all desirable objectives, would entail serious risk of a federal civil rights suit; the employer would often be impaled on the horns of a dilemma wherein he may violate due process by refusing to give a reason and equally so by giving one which the employee regards as injuring "his good name." This was the point made by Mr. Justice Stevens in Bishop v. Wood, supra, 426 U.S. at 347-48. The amendment, moreover, is not limited to these two situations. A disparaging remark made by a state or city official in the heat of controversy might be actionable under this statute, although First Amendment considerations might save the defendant from a judgment. It is hard to believe that injury of this sort was one of the evils that the framers of the Fourteenth Amendment had in mind. Moreover, one must consider why Congress should impose such liabilities upon the states when the federal government remains free from them; in sharp contrast to the problem of racial discrimination that gave rise to the Civil Rights

Act in the Reconstruction era, there is no reason to think that the states are less concerned than the federal government with the interests in reputation of their employees or of persons accused of crime.

II. Overruling of the holding in Monroe v. Pape that the term "person" in the Civil Rights Act does not include a government entity.

The new § 1983(b)(2) would define "person" to mean "any individual, State, municipality, or any agency or unit of government of such State or municipality" and would allow suits (including suits for damages) against such government units subject to the limitations stated in the new § 1983(c). This would overrule the contrary ruling by the Supreme Court, speaking through Mr. Justice Douglas, in Monroe v. Pape, 365 U.S. 167, 187-91 (1961). Although the constitutionality of imposing such liability was reserved in the Monroe opinion, this now seems to be settled, even with respect to a state, insofar as S. 35 in fact comes within § 5 of the Fourteenth Amendment, see Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976), and Milliken v.

Bradley, 45 L.W. 4873, 4880. However, as previously and hereafter indicated, there may be doubt whether parts of S. 35 do come within § 5 of the Fourteenth Amendment.

This change would increase the number of § 1983 federal actions because of the better prospects of getting a verdict against the supposedly deep-pocketed governmental unit and of collecting a judgment once obtained. However, the courts are already being asked to reach the same result through an application of Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971), an issue on which the Supreme Court has not yet passed. In any event, with the exception noted above concerning instances when S. 35 may go beyond § 5 (and presumably would be unconstitutional on that basis quite apart from the Eleventh Amendment), this change seems to be a policy question for Congress; any objection to this change should and presumably will come from states and cities rather than the federal judiciary.

III. Imposition of liability on state and local prosecutors for failure to disclose exculpatory material.

One of the most extreme provisions of S 35 is the new § 1983(d):

> A prosecuting officer of a State, municipality, or other unit of local government shall be liable for damages or subject to an injunction under the provisions of this section if such officer fails to disclose to the defendant in any criminal proceeding, upon the request of such defendant or his counsel, all material evidence which such officer knows or reasonably should know is exculpatory to the defendant.

This goes considerably beyond the constitutional duty of disclosure as recently expounded by Mr. Justice Stevens in United States v. Agurs, 427 U.S. 97 (1976). Insofar as the provision does this, there is necessarily a question whether it would be a valid exercise of enforcement powers under § 5 of the Fourteenth Amendment. The confrontation may be less sharp than with respect to Paul v. Davis since in this instance Congress would simply be expanding the scope of a constitutional right which the Court has long recognized, whereas the repeal of Paul v. Davis would create a right whose existence the Court has denied. However, one must again wonder whether the issue is worth provoking such a conflict.

Moreover, practical problems abound. Section 1983(d) seems to apply whenever the prosecutor knew or reasonably should have known of material exculpatory evidence even though he believed in good faith that it had been disclosed, that its disclosure would endanger the lives of witnesses or informants, or that its disclosure was not required. A defense of privilege seems to be foreclosed. Indeed, there is not even a provision that would relieve a prosecutor of liability if he failed to disclose to the defendant after in camera disclosure to a judge and an instruction that disclosure was not required. Furthermore the only limiting qualification is materiality; this, as Mr. Justice Stevens pointed out in United States v. Agurs, supra, is an exceedingly indefinite concept, and one which may look very differently after a trial than before. The provision for an injunction is troubling. Since the defendant normally does not know of the undisclosed material, this would seem to invite a protective federal proceeding parallel to any state criminal prosecution. Finally, if medicine of this strength is needed to compel compliance with the Supreme Court's mandates in respect of disclosure, and I know of no evidence that it is, one wonders again why the medicine should be administered only to state and not also to federal prosecutors.

IV. Prevention of abstention in civil rights cases.

This would be accomplished by the new § 1983(e)(1):

> No court of the United States shall refuse temporarily to hear any civil action brought under the provisions of this section on the ground that such action raises, in addition to any question of Federal constitutional or statutory law, a question of State law which has not been previously decided by the highest court of such State or which, if decided by a State court, could render unnecessary a decision by such court of the United States on such question of Federal constitutional or statutory law.

Apart from being a serious error in policy in my view, as a mere reading of the language suffices to demonstrate, the drafting is curious -- "No court of the United States shall refuse temporarily to hear . . . . " This would seem to mean that the court must face the merits, including the unsettled question of state law, on an application for interlocutory relief, but could then dismiss the case because of the state law question. I suppose the intention is rather that if the federal court cannot resolve the state law question in a way that would obviate need for temporary relief, it must issue an interlocutory injunction which would last during state court proceedings,

although it could vacate the temporary injunction after these were concluded. I would leave the scope of this type of abstention to the courts; I had thought that the heat formerly existing with respect to it had considerably abated in light of such decisions as Reetz v. Bozanich, 397 U.S. 82 (1970); Askew v. Hargrave, 401 U.S. 476 (1971); and Lake Carriers Ass'n v. MacMullan, 406 U.S. 498 (1972) -- the first being particularly noteworthy in that Mr. Justice Douglas, who had been the chief foe of this type of abstention, wrote an opinion for a unanimous Court directing it. If we must have legislation, a model for discussion, applying generally, can be found in the ALI Study of Division of Jurisdiction between Federal and State Courts § 1371(c) and commentary at 282-90.

V. No requirement of exhaustion of state judicial remedies.

The new § 1983(e)(2) would provide:

> No court of the United States shall dismiss any civil action brought under the provisions of this section on the ground that the party bringing such action failed to exhaust the remedies available in the courts of any State.

Since this is confined to judicial remedies, it states existing law, from which the Court has shown no disposition to depart. It thus is harmless but also needless.

VI. Restriction of the comity doctrine.

The new § 1983(e)(3) would limit the doctrine announced by Mr. Justice Black in Younger v. Harris, 401 U.S. 37 (1971), and its progeny to instances where there is "a pending criminal proceeding" in state court. This ignores that the same policy considerations applicable in such a case are also present in others, e.g., the state criminal prosecution brought a few hours after the federal suit, the state civil proceeding which is "in aid of and closely related to the enforcement of a criminal statute" (ruled out from protection by new § 1983 (c)(3)(B)), and others. The policy of avoiding federal injunctions of state court proceedings, now embodied in 28 U.S.C. § 2283, goes back to 1793; and the Younger doctrine has afforded room for adjustment between this and the decision in Mitchum v. Foster, 407 U.S. 225 (1972), that the Civil Rights Act was an exception to

the anti-injunction statute, as the Mitchum opinion expressly recognized it would and should, 407 U.S. at 243. I know of no evidence that the recent decisions somewhat expanding Younger have jeopardized the effective assertion of civil rights. Overruling these cases by statute not only would bring new business to the federal courts but would heighten conflict with state courts. The state judges deserve to be heard.

VII. Restriction of res judicata effect of state judgments.

A remarkable provision of S. 35 is the new § 1983(e)(4). This reads:

> No court of the United States shall refuse to hear any civil action brought under the provisions of this section on the ground that such action only raises issues previously decided in a civil or criminal proceeding in the court of any State, municipality, or other unit of local government to which the party bringing such action was also a party except that such court of the United States shall not grant as relief in such action (A) the invalidation or setting aside of any criminal conviction by such State, municipal, or local court, (B) the modification or setting aside of any order by such State, municipal, or local court with respect to damages, or (C) the modification or setting aside of any order by such State, municipal, or local court with respect to an

injunction related to conduct determined in such civil or criminal proceeding not to be protected under the provisions of this section.

Although this says only that a federal court shall not "refuse to hear" an action on the ground described, I suppose it is intended to mean that the court, after a hearing may not dismiss on the ground of res judicata. The exceptions (B) and (C) are murkily drafted. Does (B) mean that if the state court has denied damages or awarded only small damages, the federal court cannot do more? It seems to say this, yet presumably the objective is the oppcsite since otherwise the statute would be enacting the present law. Also (C) seems to say that if the state court has enjoined conduct on the ground that it is not constitutionally protected, the federal court cannot vacate the injunction. If this is the real intention, what is accomplished?

While detailed discussion must await clarification of these ambiguities, I assume that the objective is, as indicated in lines 1-6, to impair the res judicata effect of state judgments on federal civil rights actions. This is troubling. Although the Full Faith and Credit Clause, Art. IV, § 1, only commands respect by one state for the judgments of another state, the first Congress

required federal courts to accord state judgments the same faith and credit they enjoyed by "law or usage" in the court of rendition, 1 Stat. 122 (1790). This has been the law ever since, see 28 U.S.C. § 1983. So far as I am aware, no federal court of appeals has questioned that a state court judgment operates as res judicata in a § 1983 action so far as concerns issues actually decided; the difference of opinion has been over the application of the usual principle that a judgment between the same parties is also conclusive on an issue, here notably the federal constitutional claim, which could have been tendered for decision by the state court was was neither tendered nor clearly withheld. Yet the new § 1983(b)(4) could mean that even a plaintiff who brought a § 1983 action in a state court and lost after full consideration of his constitutional claim could start afresh in a federal court. I can think of no clearer way for Congress to say that it lacks confidence that state judges will discharge the oath required by Article VI to uphold the Constitution.

This analysis suffices to show that S. 35 is no minor piece of legislative tinkering. Implicit in it are a deep distrust of state officials and of the ability or willingness of state courts to keep them within bounds. It would significantly increase the amount of federal judicial business and promote conflict between federal and state courts. Two provisions threaten a conflict between Congress and the Supreme Court on perhaps the most basic issue of constitutional law -- whether Congress can instruct the courts concerning the scope of rights protected by the Constitution. Legislation of such importance should be supported by a strong showing of need and should be adopted, if at all, only after thorough consideration in which state as well as federal officers and judges have had full opportunity to participate.