PC/gg 7-31-75

MEMORANDUM

TO: Justice Powell

FROM: Penny Clark DATE: July 31, 1975

§ 1983

My thoughts on this subject are still quite unformed, but I have a few suggestions that may bear fruit with proper deliberation.

One starting point is Justice Douglas's opinion for the Court in Monroe v. Pape, 365 U.S. 167. He concludes that § 1983 was intended to function under three conditions: when state laws are inconsistent with the Constitution, when state law is consistent with the Constitution but provides no remedy for unconstitutional action of state officers, and when a state remedy is adequate in theory but not available in practice. I believe the Court has expanded upon this structure, perhaps inadvertently, in subsequent cases presenting issues of exhaustion. Nonetheless, it seems to me that these three categories may define the proper functions for § 1983, and it may be possible to return to this analysis and deny a § 1983 remedy when state law is constitutional and a state remedy is available for illegal official conduct. This approach would raise a number of questions that you should anticipate before

you commit yourself: whether a plaintiff should be required to pursue a state judicial remedy (such as a tort action against police officers); if he does so and loses, whether res judicata would bar a subsequent action in federal court; how it would be determined that a state remedy was not available in practice, and what facts would support such a determination.

To me it seems that one of the worst aspects of § 1983 as currently administered is the principle that a plaintiff does not have to exhaust state administrative remedies. The argument against an exhaustion requirement is that vindicating constitutional rights is of such priority that a plaintiff should not be required to delay seeking a federal remedy while he exhausts a slow and often inadequate state procedure. The fault with this approach is that plaintiffs often bypass adequate state procedural remedies, and the result is to shift the fact-finding function into the federal courts in all cases. For example, if a teacher who has been fired or otherwise disciplined wishes to contend that the action was racially discriminatory or in violation of first amendment rights, he may institute a suit in federal court without resorting to administrative procedures (such as a hearing before the school board) that might lead to withdrawal of the action or mitigation of the consequences. The federal court is also deprived of the factual contribution that tribunal might have made, and the administrators themselves must be called as witnesses in the federal proceeding.

If an exhaustion requirement were imposed, federal fact-finding still might be necessary in many cases, but in others the plaintiff might be content with the explanation offered in the administrative hearing. Prison disciplinary cases are very similar in this regard.

The exhaustion-of-remedies question is closely tied to the adequacy-of-remedies issue suggested by Monroe. For one thing, a plaintiff should not be required to resort to a state procedure that cannot provide an adequate remedy. For instance, if the claim is that a state statute is unconstitutional, the plaintiff should not be required to present that claim to an administrative tribunal that lacks authority to pass on such constitutional questions. For another, if § 1983 is whittled back so that it provides a remedy only if a state remedy is nonexistent or ineffectual, exhaustion may be a good way to determine if the remedy is ineffectual, as long as res judicata would not inflexibly block the plaintiff's way back into the federal courthouse. Chris will write the summer project on § 1983, and I expect she and Phil can work out a consistent approach in this area.

Another possible method for curtailing § 1983 would be to limit it to class discriminations: that is, to construe the statute to provide a remedy for constitutional deprivations only when the plaintiff was deprived of some right by virtue of his membership in a discernible class. This, of course, would

be a radical departure from past precedent and would require careful thought. It might find some support in the legislative history of the Civil Rights Acts, although other statutes of the era, e.g., § 1985(3), are expressly limited to class deprivations and their explicit limitation raises some inference that § 1983 was meant to be broader. My preliminary thought suggests that the most significant loss to be caused by such an approach would be that it would deny jurisdiction over due process claims that had no equal-protection component. Thus, a suit contending that a state garnishment remedy was unconstitutional would have no federal jurisdictional base unless $10,000 or more were at issue.

Penny