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Justice Lewis F. Powell, Jr.
Supreme Court of the United States
Washington, D.C. 20543

Dear Mr. Justice:

I had no intention of writing to you again until July at which point I planned to send along names of several students who are interested in clerking for you (the president and the Supreme Court editor of the Harvard Law Review and editor-in-chief of the Boston University Law Review, all of whom are outstanding). Your work on the Court is not in vain; one small proof is that your clerkship is regarded, at least in the Boston area, as the most desirable one. In the summer I will forward a description of these candidates.

I write because I am greatly upset by Paul v. Davis. It seems to me that the opinion is fundamentally wrong in its reasoning and I am sad to see that you were silent here while writing concurring opinions in other (to my mind) less important cases. I do not say that the result in Paul is wrong. I could, for example, understand (and fully support) a holding that § 1983, despite its broad language, is not coextensive with the interests protected by the fourteenth amendment against state interference, and, if necessary to reach the point on the proceedings, that no Bivens right should (because of § 1983) be implied for damages against state officials.* Or I could understand a holding, based upon your excellent opinion in Imbler v. Pachtman, that the conduct complained of was privileged, and that no facts appear which take it out of the protection of even a conditional privilege. (This would mean that in order to prevent § 1983 from becoming a general tort law, plaintiff must raise some doubt about privilege despite the notice pleading theories of the federal rules and the usual rule that conditional privilege is a matter of defense.)

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*The only right of action would come from state law. There might still be "arising under" jurisdiction, Wheeldin v. Wheeler, 373 U.S. 647 (Brennan dissenting). But this was not raised, so far as I can tell.

What I do not understand is the view that a person's interest in his reputation is not part of a personal liberty protected by the fourteenth amendment. To put it simply, Justice Rehnquist treats the precedents in a brutal fashion. More importantly, the animating premise of his opinion seems to be that because conduct is tortious under state law it cannot be a violation of the fourteenth amendment. The opposite is true. Monaghan, 83 Yale L.J. at 1366, 1380. The absolutely clear case of standing, as Hart & Wechsler point out, is when the government acts in a fashion which if undertaken by a private party, would be tortious, and the purported official justification fails on constitutional grounds. Hart & Wechsler, p. 154 (2 ed.). Indeed defamation is cited as a prototypical case.

I hope to write an article on this subject. I cannot think of a case in recent years which has so disturbed me on fundamentals. I hope that it has no generative power, and I cannot believe that it will withstand the test of time.

Best regards,

Henry

Henry Paul Monaghan

HPM:dd