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LIMITATIONS ON § 1983

We granted a case, to be argued next Term, for the purpose of reexamining the limitations on § 1983 actions. As I do not have here in Richmond a list of the granted cases, I cannot recall the exact facts. My vague recollection is that it involves a defamation action that normally would, and could, be brought under state law.

Phil Jordan is doing a summer project on this subject. The purpose of this memo is merely to record -- for my own use -- the following random thoughts.

It is impossible to believe -- despite the ambiguous legislative history -- that Congress intended § 1983 to embrace any tort action -- common law or statutory -- so long as the negligence or misconduct was by an employee of the state. Yet, this has been the trend of judicial authority.

Perhaps the seminal authority is Monroe v. Pape, 365 U.S. 167 (1960), in which the Court sustained -- as properly brought under § 1983 -- a suit for damages against Chicago police officers who broke into petitioner's home without a search warrant and subjected petitioner to various indignities. The issue, addressed at length by the several opinions, was whether

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the words "under color" of state law required authorization, express or implied, by statute, regulation or custom. In Monroe, the conduct of the police officers not only was unauthorized but was contrary to Illinois law. Nor was there any showing that the Illinois courts were not available to the plaintiffs to redress the tort. Of course, this was not simply a garden variety tort; the misconduct was a violation of the Fourth Amendment of the Constitution (search and seizure without a warrant).

In any event, in an opinion for the Court by Douglas, it was held that § 1983 did not distinguish between authorized and unauthorized state action. Harland, joined by Stewart, concurred in this opinion. Frankfurter, at extended length, dissented. His dissent, in which I probably would have joined, was prophetic:

> The issue in the present case concerns directly a basic problem of American federalism: the relation of the nation to the states in the critically important sphere of municipal law administration. In this aspect, it has significance approximating constitutional dimensions. Necessarily, the construction of the civil rights acts raises issues fundamental to our institution. (At 222.)

Monroe settles the view that § 1983 applies in an

otherwise proper case even though the state action is unauthorized and contrary to state law. The question is what does Monroe leave open?

As noted above, Monroe involved an alleged violation of a constitutional right: the Fourth Amendment. Monroe does not address common law torts such as defamation and simple negligence.

Justice Douglas's opinion for the Court, after a considerable review of legislative history, concludes that there were three main purposes of § 1983:

> First, it might, of course, override certain kinds of state laws. Mr. Sloss of Alabama, in opposition, spoke of that object and emphasized that it was irrelevant because there were no such laws:
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> > 'The first section of this bill prohibits any invidious legislation by States against the rights or privileges of citizens of the United States. The object of this section is not very clear, as it is not pretended by its advocates on this floor that any State has passed any laws endangering the rights or privileges of the colored people.'
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> Second, it provided a remedy where state law was inadequate. That aspect of the legislation was summed up as follows by Senator Sherman of Ohio:
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> > '. . .it is said the reason is that any offense may be committed upon a negro by a white man, and a negro cannot testify in any case against

> a white man, so that the only way by which any conviction can be had in Kentucky in those cases is in the United States Courts, because the United States courts enforce the United States laws by which negroes may testify.'
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> But the purposes were much broader. The third aim was to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice. The opposition to the measure complained that 'It overrides the reserved powers of the States,' just as they argued that the second section of the bill 'absorb[ed] the entire jurisdiction of the States over their local and domestic affairs.'
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> This Act of April 20, 1871, sometimes called 'the third "force bill,"' was passed by a Congress that had the Klan 'particularly in mind.' The debates are replete with references to the lawless conditions existing in the South in 1871. There was available to the Congress during these debates a report, nearly 600 pages in length, dealing with the activities of the Klan and the inability of the state governments to cope with it. This report was drawn on by many of the speakers. It was not the unavailability of state remedies but the failure of certain States to enforce the laws with an equal hand that furnished the powerful momentum behind this 'force bill.' (365 U.S. at 173, 174.)

The first and second objectives of the statute would certainly not embrace ordinary tort actions. The third aim or objective is, as Douglas states, "much broader:" to provide a federal remedy "where the state remedy, though adequate in theory, was not available in practice."

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A hurried rereading of Monroe does not indicate, however, that the Court's opinion made any inquiry as to whether enforcement of Illinois law against unlawful search and seizure was inadequate: that is, "not available in practice." Nor do I recall -- and have had no opportunity to check -- whether any subsequent decision amplified this particular point.

The most hopeful limitation, consistent with existing authority, may be a requirement that administrative remedies be exhausted before resort to § 1983. Reference should be made to footnote 9 in my opinion for the Court in Procunier v. Martinez, 416 U.S. 396 (1973). This footnote refers to the possibility of prison authorities devising internal administrative procedures for the disposition of grievances. The note, as originally drafted by me, included a suggestion which I believe was made at the Third Circuit Judicial Conference (referred to) that exhaustion of administrative remedies might be required. At the request of Justice Brennan, I eliminated the reference to exhaustion of administrative remedies. But I still consider this as meriting exploration.

I have in the back of my mind that Judge Friendly has spoken to this issue, either in an opinion or in an article.

This should be checked.

Penny Clark informed me that an en banc decision in the Fourth Circuit, that may be on its way to our Court, held that the administrative remedies in a prison cases were inadequate and therefore there was no reason for a requirement that they be exhausted.