LFP/vsl
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No. 74-891, Paul and McDaniel v. Davis

The purpose of this brief memo, dictated during the summer, is to aid my memory as to the issues presented, and to record my quite tentative reaction after a preliminary reading of the opinions and briefs.

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This case presents the question whether a person libeled by a public officeholder (Chief of Police here) may invoke federal court jurisdiction under Section 1983?

Respondent, Davis, was arrested in Louisville in June 1971 on a charge of shoplifting. He entered a plea of not guilty, and the charge was dismissed on December 11, 1972. A few days later, December 5, 1972, the petitioners (Police Chief of Louisville and Police Chief of Jefferson County) circulated to merchants "flyers" containing names and mug shots of persons who had been arrested for shoplifting during 1971-1972. Each flyer was headed by a caption "Active Shoplifters" and stated that the purpose was to allow merchants to inform their security personnel "to watch for these subjects." Respondent's name and mug shot were included in the flyer.

Respondent promptly instituted this action in the district court asserting a denial of due process and the right to sue and recover under Section 1983 actual and punitive damages, as well as entitlement to injunctive relief. The district court dismissed the complaint on the ground that plaintiff had not been deprived of any right secured by the Constitution. CA6, in an opinion by Phillips, reversed.

Holding that Wisconsin v. Constantineau, 400 US 433 (1971), was controlling, CA6 held respondent had been "condemned . . . without a trial and on a wholly impermissible standard." Indicating considerable indignation, CA6 said that "law enforcement officials cannot, consistent with the due process clause, brand a person as an active shoplifter when he has never been tried for the offense." CA6 rejected out of hand petitioners' argument that this was a garden variety defamation case.

The Argument For Availability of 1983

The seminal case in this area, as I view it, is Monroe v. Pape, 365 U.S. 167, where Chicago police officers entered plaintiffs' residence, subjected them to indignities, and arrested them, all without a search warrant. They sued under 1983, asserting that their Fourth Amendment rights (search and seizure) were

violated. It was argued on behalf of the police that state remedies were adequate, and that the police had acted contrary to law in Illinois. The Court's answer was:

> The federal remedy (under 1983) is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked. (p. 183)

The foregoing reading of 1983 has precipitated a flood of tort litigation in the federal courts, with complainants always asserting violation of some constitutional right by an employee of state or local governments.

As noted above, CA6 considered Constantineau to be controlling. There, a Wisconsin statute provided that designated persons in the state government could prohibit, without notice or hearing, the sale of intoxicating liquors to persons deemed to be "excessive drinkers." Pursuant to the statute, the Chief of Police had a notice posted in liquor stores which included the plaintiff's name. The court invalidated the Wisconsin statute, saying that "where the state attaches a 'badge of infamy' to citizens, due process comes into play."

Taking the cue from CA6, the American Civil Liberties Union (of all people!) argues in this case -- in effect -- that there must be prior notice and hearing before any public official

defames a private citizen. It is argued that this constitutes "punishment" without notice and hearing, violative of the due process clause.

Argument Against Applicability of 1983

If the slate were clean, this case would hardly merit discussion. Section 1983 was never intended to open the doors of the federal courts to suits for all common law torts when committed by an employee of the state. In view, however, of prior decisions of this Court, the question broadly presented by this appeal -- as to the availability of 1983 in tort actions -- is difficult to rosolve in any rational way.

This case, involving "speech," has First Amendment implications which may distinguish it from other tort cases. Respondent here, supported -- surprisingly -- by ACLU, would have us create what in effect would be a doctrine of prior restraint with respect to arguably defamatory statements by employees of state and local governments. The free speech of such employees would be inhibited severely if they could be restrained generally from speaking until a hearing were held.* Defamation,

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* The First Amendment (despite Justice Black's view to the contrary) does not confer the right to defame. But it does protect (continued)

by its nature, is often spontaneous and unpremeditated. Moreover, whether spoken or written words constitute actionable defamation is an issue of fact rarely resolved until the jury renders its verdict. Given these characteristics of this tort, does the opinion of CA6 mean that liability automatically follows if there has been no prior hearing? Would truth, absence of fault, and immunity all be unavailable as defenses merely because of the absence of a prior due process hearing? Would federal court jurisdiction turn upon whether or not there had been a prior hearing? These questions seem a bit silly, and upon further analysis they may indeed be irrelevant. But at first blush, I am troubled by these apparent implications of the rather remarkable CA6 opinion.

I do not view Constantineau as controlling. A state statute was there involved, which the Court held to be unconstitutional in that it authorized the taking of a "liberty or property" (the right to purchase liquor -- viewed by many as a most fundamental right!), without any notice or hearing. In this case no state statute was in question. This is simply a damage

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* (continued)
against a prior restraint of speech merely because at some time or on some subject it may be defamatory.

suit. See petitioner's brief, p. 20, for this discussion of Constantineau.

Comment:

It is evident from the above that I will vote to reverse this case unless I feel compelled, by prior decisions of the Court, to follow stare decisis. We have a summer project on this issue, and I will await enlightenment by it.