

MEMORANDUM

TO: Mr. Justice Powell

FROM: Joel Klein

DATE: July 7, 1975

YOUNGER

Prior to the past Term a blackletter legal memo on Younger would have been impossible. But developments this Term have pretty much cleared up the area and I think a thumbnail sketch will show that most of the important questions have been resolved, although I am confident that new twists and turns will arise.

I. Younger and its companion cases (Samuels, Perez, etc) stand for the basic proposition that, absent special circumstances, a federal court will not intervene in an ongoing state criminal proceeding, either through injunctive or declaratory relief. Rather, the state defendant must litigate his constitutional claims in state court, with the possibility of review here or subsequent federal habeas. In Huffman v. Pursue, decided this past Term, the Younger principle was extended to ban federal intervention in an ongoing state civil action, although the Huffman court noted that the civil proceeding there at issue was quasi-criminal in nature. Thus, one of the issues still open is whether Younger will apply in a



purely civil proceeding. This issue is posed in No. 74-858, Carey v. Sugar, which will be heard this Term, and which involves a challenge to a state garnishment proceeding.

II. When no state proceeding is pending against a party he may seek federal relief if he can satisfy the traditional requisites of federal jurisdiction. In Steffel v. Thompson the Court held that such a plaintiff <sup>(if he prevailed, would be)</sup> ~~was~~ entitled to declaratory relief at the end of the proceeding, and in the recent decision in Doran v. Salem Inn the Court further ruled that such a plaintiff would be entitled to a preliminary injunction if a proper showing is made.

In these Steffel type cases the major issue will be justiciability, which essentially may be divided into standing and ripeness. The standing question was fully discussed in your Warth opinion and you can build on that. The ripeness problem will, I think, prove more difficult. In my view our dissent in Ellis v. Dyson is plainly the best statement regarding <sup>ripeness</sup> justiciability. Nevertheless that opinion has not been adopted by the Court and even if it is adopted its specific application may raise difficult questions.

Aside from justiciability the only other issue relevant to these Steffel-type cases is federal abstention. Unlike Younger, abstention has been viewed largely as a matter of discretion for the district court. In Lake Carriers v. MacMullan you took a rather narrow view of abstention which would suggest



that, in most Steffel-type cases, if the justiciability requirements are met a federal court may act.

III. Since the propriety of federal action turns on the existence of an ongoing state proceeding the next question ~~is~~ <sup>→</sup> is when ~~is there~~ such a proceeding <sup>exists</sup>. Obviously if the state action is pending <sup>when</sup> ~~while~~ the federal complaint is filed, the latter should be dismissed. <sup>And,</sup> In Hicks v. Miranda the Court further held that even if the state proceeding is initiated after the filing of the federal complaint Younger applies unless the federal court has taken substantial steps in deciding the case before it. The precise line at which a federal case can proceed will require further elaboration but the general principles are set forth in Hicks.

IV. Two other points are worthy of mention. One was raised by Hicks regarding the notion of privity between state parties and federal parties. In Hicks there was no state proceeding pending against <sup>the</sup> federal plaintiff although there was such a proceeding against the federal plaintiff's employees. The relief requested by the federal plaintiff moreover, (the return of several films) inevitably would have interfered with the state criminal proceeding against the employees. On these facts the Court fashioned a "privity" doctrine barring the federal plaintiffs' action. Again the precise



contours of this doctrine have not been fixed, as the Court noted in Doran, but as a general matter this issue should not prove troublesome.

Finally, I note that the Court has not defined the "special circumstances" that justify an exception to Younger. In Kugler v. Helfant, decided this past Term, the Court ruled that the activities by the New Jersey Supreme Court Justices - discussing the defendant's Fifth Amendment privilege with him prior to his appearance before the grand jury - did not constitute special circumstances. This exception will ultimately prove to be nothing more than an ad hoc escape hatch for some rare factual circumstances, and need not be of general concern.

Joel