PRELIMINARY MEMORANDUM

February 26, 1988 Conference
List 1, Sheet 4

No. 87-1207-CSX

WILL (sued State and state officials under § 1983)	Cert to Mich Sup Ct (Riley [cj], Levin [conc], Brickley, Cavanagh, Boyle [conc. in part, diss. in part], Archer [diss.])
v.	
MICHIGAN DEPT OF STATE POLICE, et al.	State/Civil Timely

1. SUMMARY: Petr contends that the court below erred in finding that neither a State, nor its officers are "persons" subject to suit in state court under 42 U.S.C. § 1983.

2. FACTS AND DECISIONS BELOW: Petr brought an action in the Mich TC against resps, alleging that the Civil Service Commis-

sion's refusal to hear his grievance about the State Police Dept's decision not to promote him violated his due process rights under the United States and Mich constitutions. Petr claimed that his denial of promotion was linked to his brother's political activities. Petr asserted claims for damages under § 1983 and the Mich Constitution. This action was remanded to the Commission for a hearing. Before the hearing was held, however, petr brought a similar action in the Mich Court of Claims. This court consolidated the claims, granting judgment for the defendants on the Mich constitutional claim in light of the pending administrative hearing, but denied summary judgment on the § 1983 claim. Thereafter, the Commission found that the State had violated various provisions of the Mich Constitution and Civil Service Rules in making its promotion decision. On the basis of the Commission's decision, the Mich ct found that petr's federal civil rights had been violated, that the State of Mich was the real party in interest, and that the Dept of State Police and its director, sued in his official capacity, were persons for purposes of § 1983. Petr was awarded money damages against both defendants.

The Mich Ct of App vacated the judgment against the Dept of State Police, concluding that the state was not a person within the meaning of § 1983, and remanded the case for an assessment of the Director's possible immunity from suit. Resps appealed, and petr cross-appealed. On appeal, the case was consolidated with another case, Smith v. Dept of Public Health, in which another panel of the Ct of App had found that the State was a person for purposes of § 1983 litigation.

The Mich Sup Ct concluded that neither the State nor a state official sued in her official capacity is a person for purposes of a suit for damages under § 1983. In Quern v. Jordan, 440 U.S. 332 (1979), the Court concluded that Congress did not intend, in enacting § 1983, to abrogate States' Eleventh Amendment immunity, and therefore found retroactive relief against a State unavailable under § 1983 in federal court. See also Edelman v. Jordan, 415 U.S. 651, 675-677 (1974). While Quern definitively resolved the Eleventh Amendment question, it reached no clear decision on whether Congress meant to include States within the scope of "persons" under § 1983, and thereby subject States to liability in the state courts, where the Eleventh Amendment did not apply. Justice Brennan, in a concurring opinion in Quern, suggested that the majority had resolved the latter question in the course of resolving the former, but the majority opinion spoke only in terms of abrogation of immunity. Quern has left the state courts and lower federal courts in a state of confusion. A number of these courts have concluded that Quern indicates that Congress did not intend the term "person" to include states and state agencies. See cases cited at 38a-39a. Other post-Quern decisions conclude that States are persons under § 1983. See cases cited at 40a.

An historical analysis of Congress' intent in enacting Section 1 of the Ku Klux Klan Act of 1871, the precursor of § 1983, supports the conclusion that Congress' failure to abrogate the States' Eleventh Amendment immunity indicated it never intended to subject States to suit as "persons" under § 1983. Congress clearly enacted § 1983, providing a remedy in federal courts for claims

of deprivation of federal rights, to compensate for the state court's failure to enforce these rights. It therefore seems unlikely that Congress meant to institute a scheme which precluded individuals from bringing claims against the States in federal court, but allowing such claims in state court. Moreover, Section 1 of the Act occasioned very little debate, for it was perceived as fairly uncontroversial, which would hardly have been the case if it exposed States to unprecedented liability.

Nor can a state official be sued in his official capacity for retroactive relief under § 1983, for, like a state, the official is not a person for purposes of a damages suit under that statute.

In the case at bar, the Sup Ct affirmed the judgment for the State, and remanded the claims against the Director of State Police for entry of judgment in the Director's favor. Other issues considered in the Mich Sup Ct's opinion are not before this Court.

Justices Boyle and Cavanagh, concurred in part and dissented in part on issues of relevance to the case with which the case at bar was consolidated. Justice Levin also wrote separately on issues of relevance to the consolidated case only.

In dissent, Justice Archer, joined by Justice Levin, stated that the State is a person for purposes of suit under § 1983. The legislative history makes plain that § 1983 was aimed at providing individuals with a means of redressing State violations of fundamental federal constitutional rights. Justice Archer adopted Justice Brennan's reasoning in Quern, concluding that the history of the Fourteenth Amendment, the language and legislative history of § 1983, the language of the Dictionary Act (defining "person"

as "bodies politic"), all suggest that "person" in § 1983 was intented to encompass States. The common-law doctrine of sovereign immunity is inapplicable in suits against a state for alleged infringement of constitutional rights. To hold otherwise would leave States answerable to no one for the alleged damage caused by their conduct.

3. CONTENTIONS: Petr argues that cert should be granted to resolve the conflict among the federal courts and state courts of last resort on the important question of whether a State, and its officials acting in their official capacity, are "persons" within the meaning of § 1983. Compare Della Grotta v. Rhode Island, 781 F.2d 343 (CA1 1986) (State is person under § 1983); Gay Student Services v. Texas A & M University, 612 F.2d 160 (CA5), cert. denied 449 U.S. 1034 (1980) (state university is person); Uberoi v. University of Colorado, 713 P.2d 894 (Colo 1986) (state university is person); Gumbhir v. Kansas State Bd of Pharmacy, 231 Kan. 507, 646 P.2d 1078 (1982) (state board of pharmacy is person) with Harris v. Missouri Court of Appeals, 787 F.2d 427, 429 (CA8), cert. denied, 107 S.Ct. 179 (1986) (Mo Ct of App is not person); Toledo, Peoria R.R. v. Illinois, 744 F.2d 1296, 1298 (CA7 1984), cert. denied, 105 Sup. Ct. 1751 (1985) (State is not person); Hontz v. State, 105 Wash.2d 302, 714 P.2d 1176, 1180 (1986) ; Shaw v. City of St. Louis, 664 S.W.2d 572, 576 (Mo. App. 1983), cert. denied, 469 U.S. 849 (1984). The conflict between the two positions is a conflict in reasoning as well as result. Proper resolution of this question is essential where a § 1983 action for damages is brought either in a state court (where the Eleventh

Amendment is inapplicable), or, more rarely, in a federal court where the State has waived its Eleventh Amendment immunity.

The Mich Sup Ct's decision, should also be reviewed because it rests on the conclusion that Congress, in enacting § 1983, "intended to provide a remedy in federal, not state court"--a conclusion which is in conflict with this Court's prior decisions. Contrary to the Sup Ct's statement that Congress, in enacting § 1983, had no intention of enabling plaintiffs to seek relief in state courts, this Court has recognized that "many legislators interpreted [§ 1983] to provide dual or concurrent forums in the state and federal system, enabling the plaintiff to choose the forum in which to seek relief." Patsy v. Board of Regents, 457 U.S. 496, 506 (1982); see also Allen v. McCurry, 449 U.S. 90, 99 (1980) (in enacting § 1983, Congress was adding to jurisdiction of federal courts, not substracting from that of state courts); Maine v. Thiboutot, 448 U.S. 1, 3, n.1 (1980) (state courts have concurrent jurisdiction over § 1983 actions). Moreover, the general practice, then and now, was "that the state courts would have a concurrent jurisdiction in all cases arising under the laws of the union, where it was not expressly prohibited." The Federalist No. 82.

The Sup Ct also argues that it is "unlikely" that Congress would "at the same time preclud[e] private individuals from bringing actions under the statute against states in federal courts but permit[] such action against states in state court." But this argument is also flawed, for it is the Eleventh Amendment, not Congress, that prevents plaintiffs from bringing actions against

states in federal courts. Moreover, there is no reason to think that the standards for determining whether Congress has abrogated the States' Eleventh Amendment immunity and for determining whether Congress authorized federal claims to be brought in state courts are the same. The former standard requires an explicit expression of intent, the latter standard simply requires an indication of congressional authorization of the claim, coupled with a failure expressly to prohibit jurisdiction in state courts. Review of the Sup Ct's decision is especially important because, as the most exhaustive state court treatment of the "person" issue, the Mich Sup Ct's decision is likely to have a great influence on other state courts faced with the issue.

4. DISCUSSION: This case presents an important issue which this Court has not yet resolved, and about which the federal and state courts are in conflict. In Quern, the Court determined that § 1983 suits against States brought in federal court were barred by the Eleventh Amendment. Despite some ambiguous language, however, the Court did not resolve whether the term "person" as used in § 1983 encompasses States and therefore exposes them to damages actions in state courts. But see Quern, 440 U.S., at 350 (Brennan, J., concurring in judgment). As petr points out, there is no reason to expect the sharp conflict between the "person" and "non-person" camps to resolve itself, because the two camps split as neatly on analysis as they do on result. The "non-person" camp relies on the ambiguous language in Quern to conclude that the Court answered both the Eleventh Amendment question and the person question together. The "person" camp, looks more to § 1983's

legislative history, the Dictionary Act's definition of person, and the general history and application of § 5 of the Fourteenth Amendment.

A few of the cases cited by petr in his brief to demonstrate a conflict on the "person" question were denied cert here. A review of the pool memos prepared in those cases, however, reveals that the issue was not presented clearly in any of them. See Harris v. Missouri Court of Appeals, 787 F.2d 427 (CA8 1986), cert. denied, 107 S.Ct. 179 (1986) (underlying § 1983 claim frivolous, and availability of Eleventh Amendment immunity); Toledo, Peoria R.R. v. Illinois, 744 F.2d 1296 (CA7 1984), cert. denied, 470 U.S. 1051 (1985) (no proper § 1983 claim and Eleventh Amendment immunity issue present); Shaw v. St. Louis, 664 S.W.2d 572 (Mo. App. 1983), cert. denied, 469 U.S. 849 (1984) (no indication in memo that "person" question was even presented to this Court; Boldt v. State, 101 Wis.2d 566, 305 N.W.2d 133 (1981), cert. denied, 454 U.S. 973 (1982) (memo suggests that no federal question properly before this Court because plaintiff successful below on merits of state claim); Gay Student Services v. Texas A & M University, 612 F.2d 160 (CA5), cert. denied, 449 U.S. 1034 (1980) (conflict generated by Quern had not yet emerged and Eleventh Amendment immunity issue present). Unlike the cases previously before the Court, this case presents the "person" question clearly. Petr's underlying federal claims were found to be meritorious below, and the issue would not be obscured by any Eleventh Amendment immunity questions because the action was brought in state court.

I think cert should probably be granted to resolve the conflict, but a response should certainly be called for first.

5. RECOMMENDATION: I recommend CFR.

Response waived.

February 19, 1988 Buss opn in petn

CFR EB 2/20/88

Resp requested and recvd 3/28: Cert should not be granted because (1) No majority opinion of the Mich. Sup Ct. explains the Courts decision that a State is not a "person" under §1983, though, in a separate opinion, two justices analyze the question. (2) petr overstates the conflict. Of the CAs, only the CA1 has held that a State is a person. The CA5's decision is not in conflict with its decision in Gay Student Services v. Texas A&M which rested on its determination that a state university was analytically indistinguishable from a city. And no state court of last resort has "held" that a State is a person, though some States have suggested as much in dicta.

Comment:

While resps' contention that the conflict is not as deep as petr alleged looks right, I still think that cert is warranted. The decision below is not clearly correct, a great deal is at stake, and the seeds of a conflict have certainly been planted.

Grant EB 4/14/88