Bench Memorandum

Monday, December 5, 1988

Will v. Michigan State Police Dep't, No. 87-1207

Cert to the Supreme Court of Michigan

Initial Votes:

Grant: WHR, WJB, BRW, TM, HAB, AS, AMK

Deny: JPS, SOC

Recommendation: AFFIRM

QUESTION PRESENTED

Whether a State or its officers, acting in their official capacities, are "persons" subject to suit in state court under 42 U.S.C. §1983?

BACKGROUND

Rspt Michigan State Police were required by the 1950 Michigan Public Acts to compile information on, and to investigate, activities relating to subversion and security. Pursuant to these Acts, the state police for 25 years operated a "special investigations unit"--widely known as the "Red Squad"--which carried out surveillance of a variety of political activist organizations, including civil rights and anti-war groups. In 1976, the Acts were declared unconstitutional by a state court and the state police were ordered to disband the "Red Squad." As part of the

ancillary relief ordered, the state police were directed to release their confidential files to the individuals who were the subject of those files.

Petr, a state employee since 1969, never engaged in any activity that would have gained him the attention of the "Red Squad." However, the "Red Squad" maintained a file on petr's brother, Charles, who was a student activist during the 1960s at Michigan State University. In 1973, petr sought a transfer from a position as Administrative Analyst 11 at the Michigan Department of Mental Health to a position as Data Systems Analyst 11 within the state police. Despite being ranked number two on the promotional register, petr was not transferred to the state police. (Two months later, petr obtained a Data Systems Analyst 11 position with the Department of Transportation.) The reason that petr did not get the position with the state police--unknown to petr at that time--was that the state police found that it had a "Red Squad" file on petr's brother. Petr knew nothing of this until 1977, when Charles received his "Red Squad" file.

When petr learned that he been denied the position with the state police because of the "Red Squad" file on his brother, he filed a lawsuit against the state police and its director in a state TC of general jurisdiction, claiming violations of the Michigan and federal constitutions. He sought damages under both 42 U.S.C. §1983 and state law. The TC remanded the case to the State Civil Service Commission, which determined that the denial of petr's

transfer request violated the state constitution's prohibition on the use of "partisan considerations" in civil service transfers. In 1981, the Commission awarded petr backpay for the two month delay until he got job at the same level with the Department of Transportation.

In 1978, while the Commission's proceedings were pending, petr filed suit in the state Claims Court, renewing the claims raised in the state TC of general jurisdiction. The two actions were consolidated in the TC. In 1982, following the Commission's determination, the TC entered judgment in petr's favor on the §1983 claim. The TC held that the Commission's ruling established a federal due process violation because "the State, having established a system of merit [promotion decisions]," could not deny petr's "promotion based on his brother's political persuasion." The TC also held that that the state police and rspt director, sued in his official capacity, were included within the class of "person[s]" subject to liability under §1983.

The state Court of Appeals reversed in part and remanded in part. It concluded that neither the State itself nor a state official sued in his official capacity could be held liable for money damages under §1983. The court remanded the case so that the TC could determine whether the director of state police was liable for damages in his personal capacity.

The Supreme Court of Michigan affirmed in part and reversed in part by a divided vote. The court first held that the State was not a "person" subject to liability under §1983. It observed that this Court had concluded in Quern v. Jordan, 440 U.S. 332 (1979), that Congress did not abrogate the States' Eleventh Amendment immunity when it enacted §1983. The court stated that, because Congress adopted §1983 in large part "to provide a remedy in federal, not state courts," Congress would not have left the States' Eleventh Amendment Immunity intact if it had intended to subject the States to liability under the statute. The court further noted that, exposing the States to suits for damages in their own courts would have been a "controversial proposition in 1871." The court concluded that the absence of debate on this issue indicated that Congress did not intend this result. Finally, the court rejected petr's argument that §1983 authorizes suit against a state official in his official capacity. It held that an official-capacity action against a state official seeking retroactive relief is, in reality, an action against the state itself. Because a State is not a "person" under §1983, the official-capacity action could not be maintained. (The court did not pass on the question whether petr was entitled to damages under state law because he had not preserved this question for appeal.)

Relying on Justice Brennan's concurring opinion in Quern, which you joined, two judges below dissented. They

stressed that §1 of the Civil Rights Act of 1871--§1983's precursor--was designed as a remedial statute and deserves a liberal interpretation. This was so, they noted, because §1 was enacted to enforce the provisions of the Fourteenth Amendment--an amendment which "exemplifies the vast transformation worked on the structure of federalism in this Nation by the Civil War." Pet. App. 119a, quoting Quern, 440 U.S., at 358 (Brennan, J., dissenting). Because the Fourteenth Amendment speaks directly to the States, the dissenters, like Justice Brennan before them, thought it logical that §1983, too, would reach the States themselves. Finally, after examining Justice Brennan's analysis of the legislative history of §1 of the 1871 Act, which included numerous references by members of both Houses to ways in which to prevent the States from violating constitutional rights, the dissenters concluded "that the term 'person' in §1983 encompassed States."

DISCUSSION

Rspts' primary argument is that the state court below properly relied on Quern, in which the Court held that Congress did not intend to abrogate the State's Eleventh Amendment immunity from suit in federal court on claims under §1983. Although rspts recognize that the Quern Court stated its ultimate conclusion in terms of the absence of clear congressional intent to abrogate the States' Eleventh Amendment immunity, they stress that the Court's conclusion

rested on the determination that the statutory language and legislative history did not clearly demonstrate "that Congress intended by the general language of §1983 to override the traditional sovereign immunity of the States." 440 U.S., at 341. That very determination, rspts argue, is determinative: because Quern holds that Congress did not set forth with clarity its intent to override the States' sovereign immunity and subject them to damages liability, §1983 cannot be interpreted to impose such liability upon the States. Given the holding in Quern, I am inclined to agree.

Petr argues that this Court's decisions under the Eleventh Amendment are irrelevant here because there is no Eleventh Amendment issue in this case. Strictly speaking, petr is correct: the resolution of the question whether a particular statute abrogates the States' Eleventh Amendment immunity is not automatically determinative of the question whether the statute creates a cause of action against the States' in their own courts. What petr ignores, however, is that the Court's Eleventh Amendment jurisprudence is relevant here because of the close relationship between the issue of statutory construction under the Eleventh Amendment--whether Congress intended to subject the States to suit in federal court--and the question whether Congress intended to subject the States to liability at all. In most instances, Congress does not expressly address either the States' susceptibility to liability in general or their

susceptibility to suit in federal court, but it seems highly likely that Congress would expect the two issues to be resolved the same way.

This would seem especially true in this context, given that the principal purpose of §1983 was to provide a federal forum for actions to remedy unconstitutional uses of state power. Indeed, Congress was driven to create a federal forum precisely because the state courts were either unwilling or unable to provide a forum for effective vindication of federal constitutional rights. To the extent that state courts were deficient in vindicating federal rights as a general matter, it seems likely that those courts would be even more reluctant to decide a case in the plaintiff's favor where that determination would impose monetary liability on the State. Accordingly, if Congress had intended to create a cause of action action directly against the States, it certainly would have ensured that such actions could be brought in federal court. The fact that, as the Court held in Quern, Congress did not abrogate the States' Eleventh Amendment immunity is strong evidence that Congress did not intend to subject the States themselves to any liability under §1983.

This view is consistent with cases arising in a variety of contexts in which the Court has recognized that, before it can conclude that Congress has acted to limit the sovereign immunity of the States, it must apply a legal standard far more rigorous that the test that governs

routine issues of statutory interpretation--the Court must find clear evidence that Congress intended to burden the States. To be sure, the Constitution does not completely insulate the States against the power of the federal government. But the Court has recognized that proper respect for the States' position in the constitutional scheme demands that courts take special care in determining whether Congress chose to exercise power in a manner that trenches on state sovereignty. Thus, it is well settled that "Congress may abrogate the States' constitutionally secured immunity from suit . . . only by making its intention [to do so] unmistakably clear in the language of the statute." Atascadero State Hosp. v. Scanlon (1985). The Court has applied a similar rule of statutory construction in determining whether Congress intended to exercise its power under Section 5 of the Fourteenth Amendment, stating that a court should "not quickly attribute to Congress an unstated intent to act under its authority to enforce the Fourteenth Amendment." Penhurst State School & Hosp. v. Halderman (1981). Analogous principles apply to congressional action under the Spending Clause and with respect to preemption issues.

In light of this clear statement requirement, a strong argument can be made that, because Congress did not expressly include the States within the class of "person[s]" who may be sued under §1983, a damage action may not be asserted against a State. This conclusion is arguably

compelled by Wilson v. Omaha Indian Tribe (1979), where the Court faced the question whether the State of Iowa is a "white person" within the meaning of a statute that placed the burden on white persons in court actions adjudicating rights to property when an Indian is a party. The Court stated that in "common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it." This is particularly true, the Court noted, where the statute "imposes a burden or limitation, as distinguished from conferring a benefit or advantage."

Despite the foregoing, petr bases his argument for a broad construction of the term "person" upon the Court's statement in Monell v. Department of Social Services (1978), that, "absent a clear statement in the legislative history" supporting the conclusion that §1 of the 1871 Civil Rights Act--§1983's predecessor--"was not to apply to the official acts of a municipal corporation," municipalities should be presumed to be "persons" under the statute. As rspts point out, however, there is a world of difference between the States--sovereigns in their own right--and the municipal corporations formed under their direction. The principles of statutory construction discussed in the preceding paragraphs, therefore, simply do not apply to municipal corporations. Indeed, the Monell Court recognized the distinctive role of the States by explicitly limiting its

holding to "local government units which are not considered part of the State for Eleventh Amendment purposes."

In order to overcome the ambiguity on the face of the statute, petr seizes upon various statements in the legislative history to the effect that §1983 and the Fourteenth Amendment were intended together to reach abuses of State authority. They assert that these passages demonstrate Congress' intent to subject the States themselves to damages liability. There are three problems with this view. First, there can be no doubt that the target of §1983 was unconstitutional state action. But there is a difference between the types of unconstitutional abuses of state power that violate a statute and describing the class of defendants liable in damages for such action. Second, many of the statements referred to by petr were not made in reference to §1 of the 1871 Act. Rather, they were made in reference to other sections of the Act, particularly those relating to the federal government's ability to declare martial law and take other drastic steps in the Southern States to counter Ku Klux Klan violence. Third, and arguably most important, legislators opposed to the 1871 Act devoted considerable attention to the intrusions upon State sovereignty that they believed would result from adoption of the statute. But no legislator mentioned suits for money damages against the States themselves as one form of intrusion. "Given the importance of the States' traditional sovereign immunity, if in fact the Members of

the 42d Congress believed that §1 of the 1871 Act overrode that immunity, surely there would have been lengthy debate on this point and it would have been paraded out by the opponents of the Act along with the other evils that they thought would result from the Act." Quern, 440 U.S., at 343. The logical conclusion to be drawn is that "this silence on the matter is a significant indication" that Congress did not believe that the statute would have such an effect. Ibid. This conclusion is consistent, of course, with a series of cases in which the Court has held that Congress did not intend to override common-law immunities in enacting §1983. As rspts and their amici point out, no common law immunity was better established in 1871 than the States' sovereign immunity from suit.

Finally, there is no basis for petr's claim that a suit against a state official in his official capacity should be treated as anything other than a suit against the State. As the Court recently observed, "the real party in interest in an official-capacity suit is the entity represented and not the individual officeholder." Karcher v. May (1987). Petr accordingly cannot use a pleading device to circumvent Congress' decision to exempt the States from liability under §1983. None of this is to say, however, that petr and those similarly situated will be left remediless. A §1983 plaintiff may maintain an action for injunctive relief in order to protect himself against future harm. As for past harm, state officials may be subject to monetary liability

in their personal capacities. Furthermore, state law may authorize an action against the State for unconstitutional conduct. That was true here, but petr failed to preserve the state law issue for appeal.

AFFIRM js November 23, 1988