Christian Legal Society

June 28, 1982

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Dear Bill:

Have you guys thought about picking up on the legislative suggestion contained in Justice O'Connor's separate opinion?

Just wanted to pass this along. Best regards.

Yours,

Steve

Stephen H. Galebach

SHG/lm
Enclosure

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SUMMARY AND ANALYSIS

Exhaustion Of State Administrative Remedies Not Required For §1983 Suits

A person may bring an action under 42 USC 1983 to redress a deprivation of civil rights without first exhausting state administrative remedies, the U.S. Supreme Court decides. (Patsy v. Florida Board of Regents, 6/21/82)

The Court, through Justice Marshall, observes that in prior decisions, it has stated categorically that exhaustion is not a prerequisite to an action under §1983; it has not deviated from this position since its initial pronouncement 19 years ago in McNeese v. Board of Education, 373 U.S. 688 (1963). To determine whether prior decisions misconstrued the meaning of §1983, the Court reviews the legislative history of §1983's precursor, §1 of the 1871 Civil Rights Act, and concludes that Congress did not intend that an individual be compelled in every case to exhaust state administrative remedies before filing suit. However, realizing that drawing such a conclusion on this history alone may be precarious—the 1871 Congress was not presented with the question of exhaustion of administrative remedies and was not aware of the potential role of state administrative agencies—the Court examines the legislative history of 42 USC 1997e.

In §1997e, Congress created a specific, limited exhaustion requirement for adult prisoners bringing §1983 actions. Section 1997e and its legislative history, according to the Court, demonstrate that Congress understood nonexhaustion to be the general rule and decided to carve out a narrow exception to this rule. The Court concludes that a judicially imposed exhaustion requirement would be inconsistent with §1997e and would usurp policy judgments that Congress reserved for itself. (Page 4731)

Court Announces New Retroactivity Rule For Fourth Amendment Decisions

Subject to certain exceptions, a U.S. Supreme Court decision construing the Fourth Amendment is to be applied retroactively to all convictions that were not final at the time the decision was rendered, the U.S. Supreme Court rules. The Court then applies this rule and says that its decision in Payton v. New York, 445 U.S. 573, 48 LW 4375 (1980), which barred police from making a warrantless and nonconsensual entry into a suspect's home to make a routine felony arrest absent exigent circumstances, applies to an arrest that occurred before Payton was decided, since the case was pending on direct appeal at the time the Payton decision came down. (U.S. v. Johnson, 6/21/82)

Since 1966, the Court has employed a three-factor balancing test for retroactivity questions; see Johnson v. New Jersey, 384 U.S. 719 (1966), and Stovall v. Denno, 388 U.S. 293 (1967). But in three "narrow categories of cases," Justice Blackmun notes for the Court, retroactivity has effectively been determined by application of a threshold test. First, a Supreme Court decision that merely applies settled precedents to new factual situations applies retroactively. Second, a decision that declares a rule of criminal procedure to be a "clear break with the past" is "almost invariably" nonretroactive. Third, decisions calling into question a trial court's authority to convict or punish a criminal defendant have been given retroactive application.

Payton doesn't fit into any of these categories, the Court says. Instead of pursuing the Johnson-Stovall analysis, Justice Blackmun opts to follow the rule that Payton should be applied to all cases pending on direct appeal at the time of its decision. This approach "would lessen the possibility that this Court might mete out different constitutional protection to defendants simultaneously subjected to identical police conduct."

Justice Blackmun is careful to note that the majority's decision has nothing to say about cases arising on collateral attack or involving constitutional provisions other than the Fourth Amendment. (Page 4742)

Texas Must Educate Illegal Alien Children, U.S. Supreme Court Rules

The Equal Protection Clause of the Fourteenth Amendment, which prevents a state from denying equal protection of the laws "to any person within its jurisdiction," applies to illegal aliens, the U.S. Supreme Court declares for the first time, and thus, Texas cannot preclude "undocumented" children from its public schools. By a 5-4 vote, the Court strikes down a Texas statute that withheld from local school districts any

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toppel effect of particular administrative determinations; what consequences should attach to the failure to comply with procedural requirements of administrative proceedings; and whether federal courts could grant necessary interim injunctive relief and hold the action pending exhaustion, or proceed to judgment without requiring exhaustion even though exhaustion might otherwise be required, where the relevant administrative agency is either powerless or not inclined to grant such interim relief. These and similar questions might be answered swiftly and surely by legislation, but would create costly, remedy-delaying, and court-burdening litigation if answered incrementally by the judiciary in the context of diverse constitutional claims relating to thousands of different state agencies.[18]

The very variety of claims, claimants, and state agencies involved in § 1983 cases argues for congressional consideration of the myriad of policy considerations, and may explain why Congress, in deciding whether to require exhaustion in certain § 1983 actions brought by adult prisoners, carved out such a narrow, detailed exception to the no-exhaustion rule. After full debate and consideration of the various policy arguments, Congress adopted § 1997, taking the largest class of § 1983 actions and constructing an exhaustion requirement that differs substantially from the *McKart*-type standard urged by respondents and adopted by the Court of Appeals. See n. 18, *supra*. It is not for us to say whether Congress will or should create a similar scheme for other categories of § 1983 claims or whether Congress will or should adopt an altogether different exhaustion requirement for nonprisoner § 1983 claims.[19]

[18] The initial bill proposing to include an exhaustion requirement in § 1997e provided:

"Relief shall not be granted by a district court in an action brought pursuant to [§ 1983] by an individual involuntarily confined in any State institution . . . , unless it appears that the individual has exhausted such plain, speedy, and efficient State administrative remedy as is available." H. R. 5791, 95th Cong., 1st Sess. (1977).

Congress declined to adopt this *McKart*-type standard after witnesses testified that this procedure would bog down the courts in massive procedural litigation thereby frustrating the purpose of relieving the caseloads of the federal courts, that state procedures are often not effective and take too much time, and that the court would have to judge a myriad of state procedures without much guidance. See, *e. g.*, 1977 Hearings 34–35, 51, 164–165, 169–170, 263–264, 323; 1979 Hearings 48–49.

[19] The question was posed from the bench at oral argument whether the Eleventh Amendment might bar this suit on the ground that the Board of Regents is an arm of the State for purposes of the Eleventh Amendment. Tr. of Oral Arg. 20. Cf. *Alabama* v. *Pugh*, 438 U. S. 781 (1978). Compare *Hopkins* v. *Clemson Agricultural College*, 221 U. S. 636 (1911), with *Florida Dept of Health* v. *Florida Nursing Home Assn*, 450 U. S. 147 (1981). The District Court dismissed this action on the pleadings, and no Eleventh Amendment issue had been raised. The Board of Regents first raised this issue in its brief to the original panel on appeal, but did not argue it in its brief on rehearing en banc. Neither the original panel nor the en banc court addressed this issue. Although the State mentioned a possible Eleventh Amendment defense in its response in opposition to the petition for certiorari, it did not brief the issue or press it at oral argument. Indeed, the assistant state attorney general urged that we affirm the Court of Appeals solely on its exhaustion holding. Tr. of Oral Arg. 24, 27.

We have noted that "the Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar" that it may be raised by the State for the first time on appeal. *Edelman* v. *Jordan*, 415 U. S. 651, 678 (1974). However, because of the importance of state law in analyzing Eleventh Amendment questions and because the State may, under certain circumstances, waive this defense, we have never held that it is jurisdictional in the sense that it must be raised and decided by this Court on its own motion. Cf. *Mt. Healthy Bd. of Educ.* v. *Doyle*, 429 U. S. 274, 279 (1977). Where, as here, the Board of Regents expressly requested that we address the exhaustion question and not pass on its potential Eleventh Amendment immunity, and, as a consequence, the parties have not briefed the issue, we deem it appropriate to address the issue that was raised and decided below and vigorously pressed in this Court. Nothing in this opinion precludes the Board of Regents from raising its Eleventh Amendment claim on remand. The District Court is in the best position to address in the first instance the competing questions of fact and state law necessary to resolve the Eleventh Amendment issue, and at this stage it has the discretion to permit amendments to the pleadings that might cure any potential Eleventh Amendment problems.

IV

Based on the legislative histories of both § 1983 and § 1997e, we conclude that exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983. We decline to overturn our prior decisions holding that such exhaustion is not required. The decision of the Court of Appeals is reversed and remanded for proceedings consistent with this opinion.

It is so ordered.

JUSTICE O'CONNOR, with whom JUSTICE REHNQUIST joins, concurring.

As discussed in JUSTICE POWELL's dissenting opinion, as well as in the opinion of the court below, considerations of sound policy suggest that a § 1983 plaintiff should be required to exhaust adequate state administrative remedies before filing his complaint. At the very least, prior state administrative proceedings would resolve many claims, thereby decreasing the number of § 1983 actions filed in the federal courts, which are now straining under excessive caseloads. However, for the reasons set forth in the Court's opinion, this Court already has ruled that, in the absence of additional congressional legislation, exhaustion of administrative remedies is not required in § 1983 actions. Perhaps Congress' enactment of the Civil Rights of Institutionalized Persons Act, 42 U. S. C. § 1997 *et. seq.*, which creates a limited exhaustion requirement for prisoners bringing § 1983 suits, will prompt it to reconsider the possibility of requiring exhaustion in the remainder of § 1983 cases. Reluctantly, I concur.

JUSTICE WHITE, concurring in all but Part III-B.

I fully agree with the Court that our frequent and unequivocal statements on exhaustion cannot be explained or distinguished away as the Fifth Circuit attempted to do. For nearly twenty years and on at least ten occasions, this Court has clearly held that no exhaustion of administrative remedies is required in a § 1983 suit. *Ante*, at 3–4. Whether or not this initially was a wise choice, these decisions are *stare decisis*, and in a statutory case, a particularly strong showing is required that we have misread the relevant statute and its history. I have no difficulty in concluding that on the issue of exhaustion, unlike the question of municipal immunity faced in *Monell* v. *New York City Dept. of Social Services*, 436 U. S. 658 (1978), the Court has not previously misapprehended the meaning of the 1871 debates in rejecting an exhaustion rule in *McNeese* v. *Board of Education*, 373 U. S. 668, 671–673 (1963), and adhering to that position ever since. Our precedents and the legislative history are sufficient to support reversal, and I accordingly join the judgment and all but Part III-B of the opinion of the Court.

In Part III-B, the Court unnecessarily and unwisely ventures further to find support where none may be had. The wisdom of a general no-exhaustion rule in § 1983 suits was not at issue when Congress considered and passed the Civil