MCII

Subject	Date
Development of Legislative Changes to 42 U.S.C. § 1983	August 9, 1982

To Steve Brogan
Office of Legal Policy

From John Roberts

I am in receipt of the memorandum dated August 6 from Jon Rose to the Deputy Attorney General on this topic, and am looking forward to the contemplated meeting to discuss it. I did, however, want to convey some comments immediately on one particular aspect of the § 1983 problem which I did not feel was adequately addressed in the memorandum.

The memorandum, in its discussion of current law (p. 8) and legislative proposals to limit statutory claims (p. 11), assumes that the Supreme Court held, in Maine v. Thiboutot, 448 U.S. 1 (1980), that the coverage of § 1983 extends to "all statutory rights." While there is certainly broad dicta in Thiboutot to support this conclusion, more recent Supreme Court opinions -- and one significant appellate case -- call it into question.

In Pennhurst State School v. Halderman, 451 U.S. 1 (1981), the Court remanded claims based on § 1983 for a determination whether the statute on which the claim was based secured individual rights within the meaning of § 1983 and whether the underlying statute provided an exclusive remedy, precluding suit under § 1983. The first question represents a highly significant retrenchment on the broad dicta of Thiboutot. At issue was a federal law requiring state plans to contain certain assurances, and the Court, through Justice Rehnquist, noted that "It is at least an open question whether an individual's interest in having a state provide those 'assurances' is a 'right secured' by the laws of the United States within the meaning of § 1983." Id., at 28.

Both of the limits on the scope of § 1983 briefly discussed in Pennhurst resurfaced in Justice Powell's opinion for the Court in Middlesex Cty. Sewerage Authority v. Sea Clammers, 453 U.S. 1 (1981). There the Court noted: "In Pennhurst, we remanded certain claims for a determination (i) whether Congress had foreclosed private enforcement of that statute in the enactment itself, and (ii) whether the statute at issue there was the kind that created enforceable 'rights'

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under § 1983" Id., at 19. The Court in fact held that the statute at issue in Sea Clammers provided exclusive remedies barring suit under § 1983. What may be more significant, however, is the recognition that certain statutory claims may not fall within § 1983 because they cannot be considered to create "rights". Thiboutot involved a welfare statute, clearly creating rights for the recipients, so its holding -- as opposed to its dicta -- does not require extension of § 1983 coverage to statutes other than those clearly securing individual rights.

In First National Bank of Omaha v. The Marquette National Bank of Minneapolis, 636 F.2d 195 (8 Cir. 1980), cert. denied, 450 U.S. 1042 (1981), the court distinguished Thiboutot and held that a claimed violation of the National Bank Act did not give rise to a § 1983 claim. The court recognized that under Thiboutot § 1983 covered statutory claims, but reasoned that it should be limited to statutes securing "personal rights akin to fundamental rights protected by the Fourteenth Amendment." The opinion merits lengthy quotation:

> "The Supreme Court decision in Thiboutot makes clear that § 1983 does protect rights established by statutes enacted pursuant to authority other than the Fourteenth Amendment. The opinion, however, does not change the type of statutory rights protected by § 1983. Thiboutot involved the rights of individuals pursuant to a federally-created welfare program. These rights of beneficiaries to receive minimal subsistence and support under the AFDC program so as to be able to obtain food and shelter represent important personal rights akin to fundamental rights protected by the Fourteenth Amendment. . . . . On the other hand, rights incidental to the National Bank Act are qualitatively different and not within the contemplation of § 1983.
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> . . . . The Supreme Court's holding that § 1983 provides a cause of action for interference with rights under the Social Security Act does not represent a significant departure from prior case law or expansion into areas unrelated to the interests protected by the Fourteenth Amendment. A holding by this court, establishing a cause of action for interference with rights pursuant to the National Bank Act, would represent a dramatic and unwarranted extension of the Civil Rights Act. We do not believe that such a departure is mandated by the opinion in Thiboutot or that such a cause of action was within the intent of the Congress that enacted the civil rights statutes." 636 F.2d, at 198-199.

The court recognized that the language of Thiboutot "suggests that § 1983 actions should be broadly permitted, even in areas outside welfare, First Amendment, and social security cases." The court noted, however, that the Supreme Court "fails to say this explicitly. In light of the narrow holding in the case concerning social security cases, the general language in the opinion, and the major ramifications of such a holding, we do not think such an expansion of § 1983 is justified."

This reasoning could also apply to constitutional claims under § 1983. The Commerce Clause, for example, does not secure individual rights but rather allocates governmental authority between state and federal government. Commerce Clause claims therefore should not be recognized as § 1983 claims, and attorneys fees should not be available in such cases.

I do not, of course, suggest that we rely on this incipient judicial effort to undo the damage created by Thiboutot. The understanding of the broad reach of § 1983 conveyed by the August 6 memorandum is the generally accepted view. I do think, however, that we should recognize limits of the sort suggested in the Eighth Circuit case as possible ones in our analyses, and not necessarily accept the broadest reading of Thiboutot as the only one. Our legislative proposals could perhaps even be cast as efforts to "clarify" rather than "overturn" that decision.

cc: Ken Starr
Bruce Fein