In the

Supreme Court of the United States

DISTRICT OF COLUMBIA,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 71-564
	)	
MELVIN CARTER	)	

Washington, D. C.
November 6, 1972

Pages 1 thru 36

HOOVER REPORTING COMPANY, INC.
Official Reporters
Washington, D. C.
546-6666

IN THE SUPREME COURT OF THE UNITED STATES

DISTRICT OF COLUMBIA, Petitioner	:	
v.	:	No. 71-564
MELVIN CARTER	:	

Washington, D. C.

Monday, November 6, 1972

The above-entitled matter came on for argument at 2:07 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

RICHARD W. BARTON, ESQ., Assistant Corporation Counsel, D. C., District of Columbia, District Building, Washington, D. C. 20004 for the Petitioner

WARREN K. KAPLAN, ESQ., 1801 K. Street, N.W., Washington, D. C. 20006 for the Respondent

C O N T E N T S

- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-564, District of Columbia against Carter.

Mr. Barton, you may proceed whenever you are ready.

ORAL ARGUMENT OF RICHARD W. BARTON, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BARTON: Mr. Chief Justice and may it please the Court:

The question which is before the court in this case is whether or not the District of Columbia, a congressionally created municipal corporation, is a person within the meaning of the 1871 Civil Rights Act, 42 USC 1983.

The court below answered the question in the affirmative. It is our contention that it should be answered in the negative. In this respect we rely upon the decision of this court in Monroe versus Pape in a host of circuit court decisions elsewhere throughout the country and upon the legislative history of the 1871 Civil Rights Act.

We start with the proposition that is undisputed and that is that if the District of Columbia and other municipal corporations are persons within the meaning of the 1871 Act, it is because and only because the Congress so intended.

Now, this court, in 1961 in Monroe versus Pape, in

an unanimous opinion on this point, an opinion offered by Mr. Justice Douglas, expressly held -- as we read the opinion -- that Congress did not intend municipalities to be included within the word "person" as used in the 1871 Act.

The court below held that notwithstanding Monroe versus Pape, the District of Columbia was a person within the meaning of that Act and it did so on two independent grounds; first, that Monroe versus Pape did not hold that municipalities were not persons within the meaning of the Act but, rather, held that they were persons within the meaning of the Act but that municipalities could not be held liable in damages under the Civil Rights Act to the extent that they were immune under local laws.

Now, the court did not phrase it in quite that way but that is the necessary effect of the court's holding because it held that the Civil Rights Act -- the word "person" as used in that Act -- did encompass the District of Columbia which is, indisputably, a municipal corporation.

In reaching the decision that it did the court relied upon the legislative history of the 1871 Civil Rights Act which was thoroughly explored by this court in its opinion by Monroe. It pointed out that one of the reasons, one of the principal reasons which led to the so-called "Sherman Amendment" or amendments, there were

two of them, the second one a slightly watered down version, indicated that many of the members of the Congress were then concerned with whether or not the Congress could, consistent with the Constitution, impose liability upon municipal corporations. That issue was very hotly argued. Some took the position that it could. Others took the position that it could not. But when the Congress rejected that amendment, the Sherman Amendment -- now, the Sherman Amendment would have made municipalities liable for actions within their borders by persons riotously and tumultously assembled together, which was a clear reference to the Ku Klux Klan and similar organizations.

That amendment was rejected. Some, I think, rejected it because they were convinced that it was unconstitutional. Others perhaps rejected it because they thought it was unwise, perhaps still others because they thought it was both unwise and unconstitutional but the amendment was clearly rejected and as this court unanimously concluded in Monroe versus Pape, that legislative history is so forceful as a reflection of the intent of Congress that it would just be impossible to conclude that the Congress intended to include municipalities within the meaning of the term "person" as they used it in that act.

Now, one of the things that the court below relied upon was the argument which had been advanced to this court

in Monroe versus Pape which is not referred to in its opinion and that is that in light of the concern of Congress as to whether or not it could impose liabilities on municipalities when they were immune under local law, the court should limit its holding, the one that it eventually made in Monroe versus Pape, to a holding that municipalities are liable under the Civil Rights Act only to the extent that they are liable under local law.

Now, the second basis for the lower court's decision was a utilization of 1988 subtitle 42. Now, that is the statute which permits federal courts, when they are administering federal laws -- and this would include 1983 -- to borrow provisions of state laws to assist the federal court in implementing a right which is given by a federal statute or the federal Constitution but what the court below has done here is not utilize section 1988 to implement a right, but rather to create a right which, under this court's decision in Monroe versus Pape, does not exist.

This court said in Monroe versus Pape that there is no right to bring an action for damages against a municipality under 1983 so the court made an end run, so to speak, around that and said, but you can borrow local law and if local law provides for liability, then you can adopt that liability and use that to implement the nonexistent remedy that you have against the municipality under 1983.

We submit that that is just not sound reasoning. It has been rejected by several circuit court decisions, two in the Seventh Circuit, one in the Ninth Circuit, since the decision in this case came down.

Those decisions are -- the latest of those decisions is Moor versus Madigan, the Ninth Circuit decision which discusses the two slightly earlier Seventh Circuit decisions. That is -- was decided on April the 12th of this year and was reported in 458 federal 2nd at 1217.

The second ground which the court below gave for holding that the Civil Rights --

Q Was Moor versus Madigan cited in your brief?

MR. BARTON: No, your Honor, it is not. It is 458 federal 2nd at page 1217.

Q And the name?

MR. BARTON: Moor, M-double-O-R versus Madigan, M-A-D-I-G-A-N.

Q Thank you.

Q Did you say there was also another case decided since your briefs were filed?

MR. BARTON: There are two Seventh Circuit Court decisions and those are both cited and referred to in the Moor versus Madigan case. Those were decided in October and November of 1971.

The second independent ground that the court used for finding the District of Columbia amenable to suit under

the Civil Rights Act was that the legislative history of the act indicated, again, that the Congress was primarily concerned with the constitutionality of imposing liability upon municipalities and that that reluctance to do so which the Congress gave in to could not have applied to the District of Columbia, that Congress, under the Constitution, has plenary jurisdiction over the District of Columbia and it could not have been concerned with whether or not it could, had it chosen to do so, impose liability upon the municipal corporation of the District of Columbia.

That, of course, is quite true as far as it goes; clearly, the Congress could have done that. There is nothing in the legislative history that we have been able to find that even mentions the District of Columbia or indicates that Congress was in any way concerned about the District of Columbia or the applicability of the act to the District of Columbia.

Q What you just said leads me to inquire whether or not it is settled that section of 1983 applies to the District of Columbia at all, quite apart from this narrower question about the liability of a municipality, but certainly by its legislative history with which I am reasonably familiar, having written a couple of opinions in the area, indicates a concern by Congress of what was being done in the individual states, particularly the states which had

recently been involved in the war between the states and the statute talks about, "Under color of any statute of any state or territory," I would suppose the legislative history would indicate, certainly,that Congress wasn't concerned with the District of Columbia over which it has exclusive legislative and other control. Is it settled? Has it been settled that the District of Columbia, for purposes of section 1983, is a state or a territory?

MR. BARTON: There are cases that touch on that point. I cannot say that it is settled but our position would be that if Congress had given thought to this, it would perhaps have excluded the District of Columbia expressly.

Q Well, is it included in that statutory language? Do you understand it to be?

MR. BARTON: There are cases which hold, and we do not challenge this point, that insofar as the act applies to employees, that is, offices of the municipal corporation, it is operable within the District of Columbia.

Q That is a police officer, for example, in the District?

MR. BARTON: Yes, your Honor.

Q There is no question of this court so holding, is there?

MR. BARTON: No, I don't think there is, your Honor. But we have not challenged that aspect of the

holding and we have not brought that here.

Q Well, I understand, as I have read the holding, and I have reread it right now, Judge Basilon's opinion, and that is not an aspect of his holding. He does not even discuss it, does he?

MR. BARTON: No, he does not. His holding, as we understand it, is that because the Congress could not have been concerned about its authority to impose liability on the District of Columbia since it had plenary power over the District of Columbia, it intended the act to apply to the District of Columbia but the main purpose of the act was to give a federal remedy in a federal court.

Q As against state action?

MR. BARTON: Yes.

Q And here we are talking about a federal government, one under the complete control of Congress, the government of the District of Columbia.

MR. BARTON: Yes, but the only court then in the District of Columbia was a federal court so there was no need to give a federal remedy in a federal court if you had any remedy at all. If the act applied in the District of Columbia, you would automatically have a remedy in a federal court.

Q In other words, before one even got to the question of the limits, if any, of Monroe against Pape, I

should think the preliminary question would be whether section 1983 is applicable to the District of Columbia or its employees, officers or agents at all?

MR. BARTON: Yes, and that issue was not --

Q Not discussed by the court of appeals, not discussed in either brief, as I understand it.

MR. BARTON: No, I don't think it is. The other side, I think, does cite two cases in which they say -- hold that the District of Columbia is a territory within the meaning of the 1871 Civil Rights Act.

Q There are two decisions, what, of the Court of Appeals for the District of Columbia?

MR. BARTON: I don't remember the source of those opinions. They are cited in the brief by respondent, I believe.

Q The District of Columbia is surely something more of a federal instrumentality than a new territory, is it not?

MR. BARTON: Yes, it is, of course, under the plenary jurisdiction of the Congress and any remedy that a person would have and any court to which a person would go would be a federal court in the District of Columbia, certainly in 1871, so that is one of the reasons why we contend that, notwithstanding the fact that Congress knew that it could have, had it thought about it, make the act

expressly applicable to the District of Columbia or applicable by implication, it would not have done so had it thought about it because there would have been no need to do so insofar as the District of Columbia --

Q Well, apart from that, Mr. Barton, I thought the District of Columbia was sui generis unique, in our structure as agovernmental entity.

MR. BARTON: It is --

Q It is sort of a federal enclave, isn't it? Territory? You can't carve states out of the District of Columbia, can you, constitutionally?

MR. BARTON: No, not without a constitutional amendment.

Q But you can carve states out of the territories, as we used to know them.

MR. BARTON: Yes, but I think it was proposed again just yesterday in the paper that the District of Columbia or most of it be given back to the State of Maryland but it is, the present governmental entity, the District of Columbia is a municipal corporation created about 100 years ago by the Congress and which does have the power to sue and be sued.

Q But doesn't the 18th clause of Article One deal expressly with Congressional authority to regulate the affairs of the District of Columbia?

MR. BARTON: Yes.

Q I thought that gave us rather a different status from an ordinary territory?

MR. BARTON: Well, I say, we have not explored the question. I would be delighted to.

Q Well, I gather you have not contested the applicability of 1983, I think you told us, in an action brought under it against a police officer, for example.

MR. BARTON: Now, we did not bring here the question as to whether or not 1983 was applicable to police officers as distinguished from the District of Columbia and that is perhaps why I am not prepared to answer on that but if the court would like a supplemental memo on that issue, we would be glad to supply it.

Q It has already been pointed out that the compelling reasons for 1983, as with the fourteenth amendment itself, was to protect individuals against state action, not against federal action in this context, isn't that true?

MR. BARTON: Yes, but --

Q And the District of Columbia, acts of the District of Columbia are federal acts, are they not?

MR. BARTON: Yes, they are, all applicable law here. There is no such thing as criminal offense against the District of Columbia, it is against the United States and, of course, the laws of the District of Columbia are those

enacted by the Federal Congress.

Q You do have a D.C. code that is different from the United States' code.

MR. BARTON: Oh, yes, many of the -- while the laws are enacted by Congress, it enacts certain legislation applicable exclusively to the District of Columbia. Those laws are codified as the District of Columbia and the District of Columbia code. Of course, there are many other laws that are applicable to the District of Columbia as well as throughout the country.

Q That, in part, derives from the fact that Congress would have no power to enact a great many of the laws in the District of Columbia code and make them applicable to the states. Is that not so?

MR. BARTON: Yes --

Q Of course, there is a speed limit for Iowa or California or many of the other criminal acts.

MR. BARTON: Yes, the plenary power which the Congress enjoys over the District of Columbia is extremely broad,just about absolute. It can do just about anything it wants to consistent with the Constitution for the District of Columbia. It is, of course, limited as to what it can do elsewhere with the interior operation of municipalities or states.

The other side contends here that Monroe versus

Pape should be, well, in effect, overruled by this court and its argument in support of that is that a number of other lower federal courts have, not withstanding Monroe versus Pape, applied it in cases seeking injunctive relief and that is true, there are four circuits which have held that notwithstanding the Monroe versus Pape, the -- you can seek injunctive relief against a state municipality.

There are a number of other cases that hold to the contrary. Those states that have done so, have relied upon footnote 50 in this court's opinion in Monroe versus Pape. Several commentators have suggested that they have completely rewritten or misunderstood that footnote 50 that it does not hold, as several of the circuit courts concluded it holds, that they were limiting, the court was limiting its holding in Monroe versus Pape only to actions for damages and that you could still bring an action for injunctive relief under 1983, notwithstanding Monroe versus Pape.

That would appear to be completely inconsistent with the reasoning in Monroe versus Pape because if a municipality is not a person within the meaning of the act, as this court held, then it would not be a person either for injunctive relief or for damages but as a recent district court in Delaware pointed out, perhaps all this is de minimus because in none of the cases in which the courts have granted injunctive relief under 1983 has the municipality

been the only entity. In every other case -- in every case there has been governmental officials, members of the school board, the city council, the mayor, the police department or whatnot, are members. If they are amenable to unjunctive action under the act, it doesn't really add very much to add the municipality too because a municipality, of course, can act only through its agents. If you enjoin its agents, the members of the school board, the city council, the chief of police, you are not really adding anything else if you enjoin the municipality on top of that.

So those cases, while we submit are not soundly decided, they do not militate against the soundness of Monroe versus Pape as we see it.

Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Barton.

Mr. Kaplan.

ORAL ARGUMENT OF WARREN K. KAPLAN, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. KAPLAN: Mr. Chief Justice and may it please the court:

Several years ago, in a Law Review article written on the subject of police external review boards, a judge of the circuit court of appeals for the District of Columbia made mention of the omnipresence of review mechanisms at every level of our complex form of government, even at the

level of the judiciary. He said, and I quote, "Even the Supreme Court is not fully immune for in common with all judges they are at the mercy of the most coldblooded external review ever devised by man. I refer to the law professors who spend six months doing an autopsy on appellate opinion often written under pressure in four or five days."

Mr. Chief Justice, I do not know what case, if any, you had in mind when you wrote those words, but it is certainly applicable to Monroe versus Pape for in the 12 years that have elapsed since that decision saw printer's ink and particularly in the last two or three years, there has been a continuing barrage of criticism in the law reviews aimed at that portion of the decision which held that a city is not a person within the meaning of section 1983.

The latest addition to that volley of criticism appeared too recently for inclusion in our brief and I would like to cite the court to it at this time. It is a comment in the University of Virginia Law Review, volume 58, commencing at page 143 which takes as its text the decision of the court of appeals in this case and which is entitled, perhaps somewhat overenthusiastically, "Carter versus Carlson, the Monroe Doctrine at Bay."

Q Page 143?

MR. KAPLAN: Yes, sir. Now, the essence of these several law review articles which are cited in our brief is

essentially threefold. In the first place, it has been pointed out that the historical analysis which underlay this court's decision in Monroe misconstrued the significance of the legislative history of the Sherman Amendment.

Secondly, it has been pointed out that in the subsequent cases of the lower courts and, indeed, of this court, the Monroe holding has been departed from, has been eroded by the many cases which have granted equitable relief against municipalities and, finally, it has been pointed out, and we concur in this suggestion, that if it is open for the court to reexamine the holding in Monroe, that all of the relevant policy considerations militate toward a different finding, that is, that a city is a person within the meaning of 1983.

Now, if the court -- I shall come back to those points in just a moment -- if this court notwithstanding these considerations should decline to reexamine its holding in Monroe at this time, then we say that nevertheless the decision of the court below should be affirmed because Monroe is distinguishable for the various reasons that were set forth in the opinion of the court below, that is, that the rationale of Monroe is inapplicable to municipalities which are not immune under local law and, secondly, that the District of Columbia is a unique entity. But those arguments I would prefer to leave for my brief. They have

been dealt with extensively there and in the opinion of the court below and I would like to discuss at this time the reasons for reexamining Monroe as a whole.

Let me respond first to the question raised by Mr. Justice Stewart a few moments ago as to whether the District of Columbia is, in fact, involved in section 1983. I think that this court disposed of that question in Hurd versus Hodge, which was a 1947 decision. It was a companion case to Shelley versus Kramer and it held that the District was a state or territory within the meaning of section 1983.

Now, I don't believe that there has been any question about that, in any case, since that time. Now, there have been a couple of lower court cases which have been a couple of lower court cases which have repeated that statement since then. One is Sewell versus Pegelow, a Fourth Circuit case found at 291 Fed 2nd page 196.

Q Is the Hurd case cited in your brief?

MR. KAPLAN: No, it is not, your Honor.

Q Would you give us that citation?

MR. KAPLAN: I am sorry, your Honor, I don't remember the citation.

Q Have you got the title again?

MR. KAPLAN: Hurd, H-U-R-D versus Hodge, 1947. It was the very next case in the U.S. Reports after Shelley versus Kramer.

Q It is cited in the opinion of Judge Bazelon and appears in the footnote on 3a in the appendix to the petition.

MR. KAPLAN: Oh, thank you, your Honor.

Q 334 U.S.24.

MR. KAPLAN: Thank you.

Q And what was the other citation?

MR. KAPLAN: The other case is Sewell, S-E-W-E-L-L versus Pegelow, a decision of the Fourth Circuit, 291 Fed. 2nd, page 196.

Q 291 Fed 2nd, 196?

MR. KAPLAN: Yes, sir.

Q I think your brother said that there were a couple of citations in your brief, but I did not find them.

MR. KAPLAN: I don't recall that there were on that point because it had not ever been raised.

If I may turn briefly to the legislative history, which I think is very important in this case, this court predicated its holding in Monroe virtually exclusively on the legislative history of 1983, the Sherman Amendment. Subsequent research has indicated that that historical analysis misconstrued the significance of the Sherman Amendment and the matters that were put forth in debate on the Sherman Amendment.

Now, if one reads the legislative -- the

Congressional Globe of 1871 and the measure that is here under discussion, that is, 1983 and its amendments, it takes up virtually the entire first session of the 42nd Congress, more than some 500 pages of 6-point type, three columns to the page.

If one reads through that considerable literature, one comes to two rather significant conclusions. The first is that when the Congress was debating what is now section 1983 itself, it never mentioned municipal liability and the second is that when it discussed the Sherman Amendment, in which context it did discuss municipal liability, it was talking about something very different from what was involved until 1983 and the principal objections to the Sherman Amendment are not applicable to the consideration of municipal liability under 1983.

Now, 1983 was first discussed on March 25th, 1871 and I must take a moment to go into this history in some detail. This was pursuant to a message from President Grant that was received on March 23rd of that year, urging the Congress to enact some effectual legislation to vindicate Fourteenth Amendment rights. From March 25th for a period of several days, approximately 10 days from March 25th, 1983 itself was discussed at great length in the house and it was finally passed in the house with no mention whatever of municipal liability. It then went to the Senate, where it

was again discussed for several days with no mention of municipal liability.

On April 15th, just before the vote came, in the Senate, the so-called "Sherman Amendment," which would have imposed riot damage liability on municipalities without fault -- that amendment was added just before the vote came. There was no debate and the amendment, the Sherman Amendment in 1983 itself, was passed by the Senate so that on April 15th, after nearly 20 days of debate, 1983, without the Sherman Amendment in the House, with the Sherman Amendment in the Senate, had been passed by both branches without any debate whatever on municipal liability.

It was only after that point, when it went back to the House, that there ensued the vigorous debate over the Sherman Amendment and the essence of the opposition to the Sherman Amendment was not any hostility to the idea of municipal liability per se, rather, it was hostility to the idea of municipal liability without fault.

Representative Kerr, one of the most articulate opponents of the Sherman Amendment, made it very clear on April 19th, at page 788 of the Congressional Globe, when he said, "Of course --" in effect, "Of course there would be no objection to this bill if it merely imposed liability for a breach of a duty which a municipality had." He pointed to examples which existed at the time of municipal liability

for failure to repair streets or bridges where there was a duty. In fact, he even said there would be no objection to municipal liability for riot damage. If there were some fault involved, if there were acquired -- and there were other statutes in existence at this time of this nature in New York, Maryland, and Pennsylvania -- if there were fault on the part of the municipal officials, the Maryland statute at the time, I believe, provided that there would be liability for riot damage if the municipal authorities had noticed that the riot was going to occur and that it was within their power to prevent it and did nothing.

In that situation, municipal liability would have been all right and, in fact, on April 20th, when 1983 was finally passed in the House, it was with a substitution for the Sherman Amendment which was consistent with Representative Kerr's feelings. That substitution is now section 1986, the so-called "passive accomplice" provision which provides that if anyone is aware that a deprivation of civil rights is going to take place and takes no steps to prevent it but has it in his power to prevent it or aid in preventing it, then he, too, is liable.

Q I don't like to interrupt your argument, but I have just been looking at Hurd and Hodge. That does not involve 1983, it involves a very different section, 1978, which is the present 1982, I think.

MR. KAPLAN: Excuse me, I believe it does but I think that the -- I think your Honor is correct, it is 1982.

Q Well, then, it is no holding of this court. That 1983 includes the District of Columbia.

MR. KAPLAN: Well, I don't know why 1982 --

Q There is no holding of this court that 1983 includes the District of Columbia, is there?

MR. KAPLAN: I think that is correct, your Honor, but I would suppose that if the District were included in 1982, it ought also to be included within 1983.

Q You may be right, but it does not necessarily follow.

Q Why would that follow?

MR. KAPLAN: Well, I think that they are both the same --

Q In 1982 we held that Jones against Mayer was an acto of Congress authorized by the 13th amendment, which abolished slavery throughout the entire United States in every state and every territory and in the District of Columbia. 1983, by contrast, has quite a different legislative history and shows concern with the action of state officers in those states which, to use Congresses rather tactless words in those days, "had lately been a rebellion against the Union," and why would, in the light of that legislative history, would 1983 apply to the District

of Columbia, which is entirely under the aegis or the supervision and power of the Congress of the United States?

MR. KAPLAN: Well, I think, your Honor, that the objectives of the -- all of the sections of the Civil Rights Act are sufficiently common so as to apply to the District of Columbia as other state or territorial subdivisions. Certainly, it would be an anomalous result if a citizen who was assaulted by a policeman across the District Line in Montgomery County had a constitutional cause of action and his brother, who lives just across the line here in the District of Columbia, did not, for a similar injury.

Q Well, in 1983, Monroe did not have any constitutional dimensions at all, did it?

MR. KAPLAN: Well, the objection --

Q We did not say that it was unconstitutional to allow a municipality to be sued, did we?

MR. KAPLAN: No. No --

Q It is purely a question of statutory construction.

MR. KAPLAN: Yes, your Honor, yes. Of course, 1983 itself was aimed at vindicating the 14th amendment rights. It was passed pursuant to section five of the 14th amendment.

Q I don't quite see the anomaly that you describe, Mr. Kaplan, saying that it would be an anomaly if

in a state, a man had an action, cause of action, based on an act of Congress that was designed to prevent states from depriving people of constitutional rights, but he did not have the same cause of action here in the District where Congress is the sole legislative body.

MR. KAPLAN: Well, while Congress is the sole legislative body, the police here are essentially locally controlled, just as they are in Montgomery County or Fairfax County.

Q What has that got to do with the anomaly under a statute like 1983?

MR. KAPLAN: Well, I suppose, your Honor, that what I am saying, put in other ways, is that it would be small consolation to a citizen of the District who finds himself the victim of police brutality to know that he does not have a cause of action against his assailant, unlike his neighbor who lives across the District Line, simply because the District is a federal entity.

Q That would be no consolation at all.

Q He'd be ruined by his right to vote, while he is at it.

MR. KAPLAN: Well --

Q While you are at it, why don't you solve all of them? All the problems?

MR. KAPLAN: Well, that is not involved in this

case, of course.

Q He might have all sorts of rights in the District of Columbia under the law of the District of Columbia, under the federal common law, or statutory law against the policeman or the policeman's superior, but the question here is the applicability of a statute which was denied to curb actions under color of state law.

MR. BARTON: Well --

Q And to give -- to confer federal jurisdiction upon such actions. Now, here in the District of Columbia, all the courts are federal courts.

MR. BARTON: Well, your Honor, I would respond to that only by saying in the message to Congress from President Grant on March 23rd in which he requested them to enact this sort of legislation, he said, "I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty and property and the enforcement of law in all parts of the United States."

He was not restricting the impact of this legislation to the states.

Q How did it affect the legislation with which Congress responded to that message? That is what we have to try to devolve.

MR. KAPLAN: Well, as your Honor -- as has been pointed out, there has never been any question raised in this

case as to whether it was applicable to the District.

Q You are quite right in pointing out that Judge Bazelon assuming it and cited Hurd against Hodge which, on examination, does not stand for what he said it did.

MR. KAPLAN: Well, as Mr. Barton volunteered, I, too, would volunteer if the court wishes supplementary memoranda on this point.

Q Have there been any attempts since Monroe and Pape to get the statute amended to include municipalities?

MR. KAPLAN: The Civil Rights Commission, your Honor, in 1966, I believe, did suggest the -- U.S. Commission on Civil Rights -- did suggest that legislation should be passed so as to make municipalities liable for 1983 deprivations. I don't know that there has been any action on the part of Congress to do that but of course, as this court has pointed out on various occasions, legislation --

Q Just as a matter of curiosity, I wonder, have there been actually bills introduced or hearings in Congress?

MR. KAPLAN: I am not aware of any, your Honor.

But since the exemption of municipalities came about as a result of a judicial decision by this court, I think that the reinstatement of municipalities as proper defendants could come about by the same route; although legislation would certainly be welcome, I don't think that in this case it would be necessary.

Well, I would like to come back just for a moment to the legislative history in what is now section 1986 which was the substitution for the Sherman Amendment. We have a statute which imposes liability where there is fault, where there is knowledge that the deprivation is going to occur and the defendant is in a position where he could aid or aid in preventing the deprivation and there is their liability.

That meets the objection of the Sherman Amendment that Representative Kerr felt was so important so that the -- that substitution is, I think, consistent with the notion that there should be liability where there is fault. It is consistent with the notion that a municipality may be a person within the meaning of Section 1983.

Since this court's decision in Monroe, as counsel has pointed out, there have been several circuits, the fourth and fifth, the seventh, the tenth, which have, not withstanding the very clear mandate of this court in footnote 50 to Monroe, which have stated that a municipality may, nevertheless, be a person for 1983 purposes where equitable relief is sought. This court has, in fact, indicated its approval of that distinction in the subsequent cases of Turner versus City of Memphis, Tinker versus Des Moines, MacNeice versus Board of Education in which, without discussing the point, the court implicitly approved the

granting of equitable relief against the state subdivisions.

I think that the attempts made by some commentators to rationalize this distinction between the granting of equitable relief and the granting of damages cannot withstand close analysis. Now, the rationalization that is most often put forth is that equitable relief involves a lesser threat to the municipal treasury and, therefore, a municipality may be a person for equitable purposes where it would not be if the claim were for damages.

But the problem with that distinction , the problems are three-fold. First of all, it is inconsistent with 1983 itself, which expressly says that where there is -- where you have a person who is depriving another person of his 14th amendment rights, he shall be liable in an action for damages or equitable relief or any other proper proceeding.

Secondly, it is inconsistent with the facts of the matter, the fact of the matter being that equitable relief may frequently involve the expenditure of very large sums of money, much more than are apt to be involved in an action for damages.

For example, in a case of Harkless versus Sweeny Independent School Board which came before this term -- before this court last term and which the court denied certiorari, there was an action by ten black schoolteachers for reinstatement and back pay under section 1983. They had

been out of work for some five years and the fifth circuit granted reinstatement and back pay under the guise of granting equitable relief, although the payment of some several hundred thousand dollars was potentially involved.

In the case of Griffin versus Prince Edward County, I don't believe that came up under 1983, but it was an example of the granting of equitable relief at enormous cost to the state subdivision. This court ordered the Prince Edward County schools to be reopened.

Finally, this distinction between equitable relief and legal relief is inconsistent with the statements of this court in the Bivens case decided last term in which the court indicated that where there is jurisdiction to grant equitable relief, there ought also to be jurisdiction to grant legal relief.

I think that the proposition that we are contending for, that is, that the court, upon reexamining its holding in Monroe, should conclude that a municipality is or may be a person within the meaning of 1983, is consistent not only with the legislative history and not only with the subsequent post-Monroe cases granting equitable relief, but it is also consistent with the overall purpose of 1983 as expressed by President Grant and with contemporary notions of social justice.

We no longer believe, as people did 200 years ago,

in the case of Russell versus Men of Devon, that it is better for an individual to suffer an injury than for the public to suffer some inconvenience.

Contemporary notions of risk-spreading are so well-entrenched that just within the last dozen years, since Monroe, in some 27 jurisdictions, the doctrine of sovereign has been partially or wholly abrogated, either judicially or through legislation and, in some nine other jurisdictions, municipalities may be liable in an action of damages where they have insurance. And all that has occurred just almost entirely since this court's decision in Monroe.

Finally, municipal liability is essential if we are to achieve the two-fold objectives of deterrnets of police misconduct and compensation for that misconduct when it occurs.

Police misconduct, as was pointed out by the U.S. Commission on Civil Rights in 1961, has been and continues to be a very serious problem in this country. In fact, just a few weeks ago there came across my desk an American Bar Association report, a tentative draft of standards relating to the urban police function, which says, "The continuing failure to devise and implement necessary procedures and sanctions to deal with police abuses is one of the most critical problems now confronting our society." And that is not the American Civil Liberties Union talking or the U.S.

Commission on Civil Rights. That is the American Bar Association.

Q Aren't they concerned in that report with probing the practice and procedure? They are not concerned with the rights of third persons, are they?

MR. KAPLAN: Well, I think not -- I believe they are, your Honor, concerned with the rights of third persons as well.

Q We are not talking about rights in the sense we are talking about here, the right to recover. They are talking about improved police practices so that people's rights will be respected in the broad sense, aren't we?

MR. KAPLAN: Well, I believe we are concerned with that, too, but I think it is clear that we are also concerned with tort liability to third persons because they go on to urge that sovereign immunity should be abrogated by judicial decisions where it still remains.

I think they are concerned with all of those purposes.

Of course, as far as compensation is concerned, there can be no meaningful compensation for victims of police brutality without municipal liability. The court, in Mapp versus Ohio, and the Fourth Circuit in Lankford versus Gelston and other courts in other cases have taken judicial notice of the fact that policemen are notoriously unsatisfactory defendants in tort cases, that they are habitually and

incorrigibly judgment-proof. When they can be found -- and this case presents still another example of why they are unsatisfactory defendants, for in this case, the defendant, John Carlson, who on August 19th put on a pair of brass knuckles and beat the plaintiff's face into a bloody pulp, has not even been found for service of process. So that there frequently can be no compensation for victims of police brutality without municipal liability and that has been pointed out by a vast number of commentators.

Well, I would say, finally, that another reason for imposing municipal liability is that which is put forth by Judge Nichols in his concurring opinion in this case and that is, to give some protection to the policeman so that the policeman will know that he does not any longer stand alone, that he has the municipality on his side to provide a defense for him.

I believe that all of these relevant --- all of the relevant policy considerations point unequivocally to the imposition of municipal liability.

I see that my time has all but expired and I would like to leave the court with one further thought and that is this: In the -- for more than a century now, the paper promises of the fourteenth amendment have for very many of us citizens in many parts of this country and in many aspects of their lives, particularly where police

misconduct is concerned, have remained essentially that, that is, paper promises. In this case, at this time, this court has a rare opportunity, the first such opportunity since Monroe v. Pape was argued 12 years ago this week, to transform those paper promises into meaningful reality.

Now, I know that Mr. Carter, the respondent in this case who sits in the back of this room today, had not fully understood all of the dialogue that has just transpired, filled as it unavoidably was with legal and complex abstractions and jargon of our profession, but he and the hundreds of Melvin Carters across this land will understand the impact of this court's decision and it is on his and their behalf that I most earnestly and respectfully urge this court not to let this opportunity of putting teeth into the 14th amendment pass to pacified exercise.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Kaplan.

Mr. Barton, do you have anything further?

REBUTTAL ARGUMENT OF RICHARD W. BARTON, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. BARTON: The respondent asks this court to reexamine Monroe. As Mr. Justice Douglas, the author of Monroe just stated, it was not decided on constitutional grounds but upon the intent of Congress and this court has said over and over again that, absent the clearest showing of

error, it will not reexamine nonconstitutional questions.

In response to Mr. Justice Stewart's question a little while ago to me, Hurd versus Hodge and Sewell versus Pegelow were the two cases I had in mind. Hurd, as Mr. Justice Brennan said, did not involve the 1983 but it was cited by Judge Sobeloff in Sewell versus Pegelow for that proposition and Judge Bazelon in this case has picked that up, too.

Thank you, your Honors.

MR. CHIEF JUSTICE BURGER: Gentlemen, I think it might be useful in this case in view of some of the developments that occurred during oral argument, for you to submit supplemental memos if you would like covering these factors that you referred to in the Hurd and the Sewell cases. It might help us unravel the situation.

The case is submitted.

(Whereupon, at 3:01 o'clock p.m., the case was submitted.)