MEMORANDUM TO THE CONFERENCE

RE: No. 75-1914 Monell v. Department of Social Services

Enclosed is a revision of the proposed Court opinion in Monell. Parts II, III and IV are almost completely new in an attempt to accommodate the very helpful suggestions of Byron, Lewis and John. Part I(B) has also been substantially revised in an effort for greater clarity.

W.J.B. Jr.
To: Mr. Justice Powell
From: Sam Estreicher
Date: April 22, 1978
Re: No. 75-1914, Monell v. Dept of Social Services--WJB's 2d Draft

I have read WJB's revised, somewhat longer(!!) draft. I have annotated this draft to indicate how WJB responded to our suggestions. In my view, WJB has corrected most of the defaults that we discerned, and I recommend that you join the opinion in its entirety. However, I do want to point out the following:

1. There are a few lingering suggestions of the "full power" point in the language of "complete remedy" (p.24) and the statement that § 1983 "provided the only civil remedy coextensive with the Fourteenth Amendment" (p.26). I have pointed this out to WJB's clerks, and I believe that they will adopt the language you suggested in your memorandum to WJB: that Congress intended the term "person: to include all officials and entities within its constitutional reach, without suggesting that other features of the statute are dictated either by the Constitution or by 1871 understandings of constitutional limits.

2. The discussion on p. 19, while an improvement over the previous draft, does not clearly explain why the Sherman Amendment is different from § 1983. WJB's argument is that the opponents of the Sherman Amendment would not have been troubled by a provision which made municipalities liable for a constitutional violation
resulting from the exercise of powers they enjoyed as a matter of state law. By contrast, the Sherman Amendment sought to impose a peace-keeping obligation on municipalities that was not derived from state law or the Federal Constitution. In other words, the Sherman Amendment sought to impose damages liability for a failure to take action when municipalities were under no obligation to take any action at all.

3. The word on p. 30 should be "policy," not "action."

4. On pp. 29-30, WJB has retained some of his "custom" and "deliberate indifference" discussion, but in a somewhat muted form. I have no objection to the "custom" discussion, as it follow from Justice Harlan's decision for the Court in Adickes, but you may wish to urge WJB to eliminate the treatment of Estelle v. Gamble in note 55.

5. WJB's new Part III on stare decisis is quite persuasive, and may obviate the writing of a separate opinion on our part. I am troubled by the discussion of the Civil Rights Attorneys' Fees Award Act of 1976 on p. 39. I would simply say that the Act "allowed award of attorneys' fees" even though Monroe, Kenosha and Aldinger made the joinder of such governments impossible. I am a little puzzled, moreover, why Aldinger is mentioned in this context, for that case concerned a pendent state-law claim.

6. Footnote 68 (p. 40) leaves open whether Monroe was correctly decided on its facts, and whether Moor, Kenosha and Aldinger remain good law to the extent they relied on the aspect of Monroe rejected in this decision.
Apparently JPS has insisted on this reservation, and I doubt we could budge WJB on this point.

7. Part IV contains absolutely no discussion of the validity of the common-law immunity of municipal governments, other than to say that municipalities do not enjoy absolute immunity under § 1983.

*   *   *

Do you still want a separate statement of our reasons for joining this opinion?
To: Mr. Justice Powell  
From: Sam Estreicher  
Date: April 13, 1978  

Re: No. 75-1914, Monell v. Dept. of Social Services of the City of New York

1. BRW's comments should not detain you. He agrees with some of our points, and indicates that he would not be opposed to a modification or elimination of the Aldinger and municipal immunity discussion.

2. JPS' comments are somewhat more troubling. JPS points out that in the petitioner's brief in Monroe v. Pape, there are two references to an alternative theory of liability not based on respondeat superior: that the police practice in that case "was a custom or usage" under § 1983, and presumably the City of Chicago should be held directly liable on that account. As the brief demonstrates, this point was simply tossed out without development; the brief substantially addresses only the respondeat superior theory. WJB's clerk, Whit Peters, has pointed out to be that the colloquy before the DC in Monroe, the DC's ruling and the CA7's decision referred only to respondeat superior. And that was certainly the premise of both the majority decision and Harlan's concurrence. See, e.g., 365 U.S., at 193: "Those aspects of Congress' purpose which are quite clear in the earlier congressional debates, as quoted by my Brothers DOUGLAS and FRANKFURTER in turn, seem to me to be inherently ambiguous when applied to the case of an isolated abuse of state authority by an official. One can agree with the
Court's opinion ... without being certain that Congress mean to deal with anything other than abuses so recurrent as to amount to 'custom, or usage.'" It would certainly have made Douglas' task easier had he written the opinion for the Court as a "custom or usage" case. Frankfurter's dissent, however, does refer to the "custom or usage" allegation, but he found it a merely conclusory allegation in the face of state decisions holding such intrusions to be unlawful. \textit{Id.}, at 258. As to one allegation concerning a "custom or usage" of confinement on "open charges," Frankfurter indicated that he would find that such detention was accomplished "under color of" state law. \textit{Id.}, at 258-259.

3. Whit also tells me that WJB is troubled by our intention to write separately on the question of qualified municipal immunity. It is WJB's view that the historical antecedents are not as clear cut as we think, and that it is the better practice to permit further percolation below than to have three or four members of the Court announce at the outset that they would recognize such a qualified immunity.
RE: No. 75-1914 Monell v. Department of Social Services

Dear Byron, Lewis and John:

Thank you very much for your memoranda. I'll undertake revisions of the circulated opinion to accommodate your views as best I can. Because of the pressure on the Printer it may be a few days before I get it around.

Sincerely,

[Signature]

Mr. Justice White  
Mr. Justice Powell  
Mr. Justice Stevens  

cc: The Conference
MEMORANDUM

TO: Sam
FROM: Lewis F. Powell, Jr.

DATE: April 24, 1978

Sally will give you a rough draft of a proposed letter to Bill Brennan.

I found your annotation of his opinion quite helpful, and I am generally in accord with your thoughts. I believe my proposed letter to WJB identifies the only changes that are preconditions to joining. But I would appreciate your most careful advice. I know from experience that WJB has a demonstrated ability (that I admire) to shape future decisions by the inclusion of general language unnecessary to the present opinion but apparently free from serious objection.

Although Bill's revisions have substantially reduced what I would have said in a concurring opinion, I would still like for you to try your hand at a draft - perhaps no more than four or five pages. We can explain more clearly why the Sherman Amendment is different from §1983. Also, I would like to incorporate some of my thoughts as to the choice of two lines of authority - in discussing stare decisis. In addition I would like to include the point that we made in my original memorandum to the Conference with respect to incongruity of distinguishing
between the municipality or agency thereof and the individuals who implement policy as officers and employees. Recognizing this incongruity, it is now widespread practice for the governmental entities to indemnify officers and employees who suffer 1983 damage awards for the performance of their duties.

Unless Bill Brennan changes what he has written about the Attorneys Fees Award Act, I will want to say something about that.

In general, this is an historic case; I have given it a good deal of thought and attention over the many months since we granted it, with enormously helpful assistance and insight from you; I think our views have helped shape WJB's thinking and opinion, and possibly will help put a Court together. I would, therefore, like to say something if it may be useful as an additional gloss as to what is said in the Court opinion.

L.F.P., Jr.

P.S. In my concurring opinion, when we talk about the meaning of "persons", I will want to cite Bellotti, and quote WJB's statement on p. 26.
Dear Bill,

I spent a large part of yesterday carefully reading your circulation of April 21. Although I hope ultimately to be able to join you, the present draft contains several statements that cause me considerable concern. My law clerk, Bob Litt, has talked to Whit Peters about several of these concerns, and this is simply to let you know, without going into all the details, that Bob is in every respect speaking for me.

I give specific emphasis to only two of my concerns, one of which may not have been conveyed by Bob. First, footnote 57 on page 32 seems to me a veritable time bomb, particularly when it is read in the light of the last sentence in the text on page 33. Although we have never decided that there can ever be a §1983 action based on negligence alone, it seems to me that this footnote and sentence of text amount to a virtual invitation to not so ingenious lawyers to sue municipalities upon the ground that the municipalities were at fault with respect to hiring, training, or directing their erring policemen or other agents. Secondly, I could never agree that Estelle v. Gamble, an Eighth Amendment case involving a plaintiff who was imprisoned by the state, can be read as announcing the broad constitutional rule set out in the last part of your footnote 55 on page 30, and incorporated by reference in footnote 60 on page 34.

Sincerely yours,

Mr. Justice Brennan

Copies to the Conference
Supreme Court of the United States

Memorandum

4/25

Re: Monell

Bob Litt tells me that PS is still troubled by WJB's reference to Estelle v. Gamble, even with the disclaimer that the Court expresses no opinion one way or the other. I gather from Whit WJB that this point is of some importance to WJB. I am satisfied with WJB's proposed language on p. 3, and I would not condition a join on deletion of all reference to the point.

[Signature]
April 25, 1978

Re: No. 75-1914, Monell v. Department of Social Services

Dear Potter,

Thanks so much for your memorandum of April 24.

Let me say in reply that I understand that Whit Peters and Bob Litt have reached agreement on all the points they discussed yesterday with the exception of three, which are: (1) footnote 57, which Whit and Bob did not discuss, but which your memorandum identifies as troublesome; (2) footnotes 55 and 60; and (3) the question of how to deal with the claims asserted against the Mayor of New York and the Commissioner of the Department of Social Services given that the City and the Department were dismissed and plaintiffs-petitioners did not appeal this dismissal.

I confess that your reaction to note 57 as a "time bomb" surprises me. I think it states a well-settled principle of common law and I included it in the draft to make sure that people understood the limited nature of the terms "vicarious liability" and "respondeat superior" that are used in the text, since these terms (as indicated in the parts of Prosser and Harper & James cited in the opinion) are often used in different ways by different authors. Given the need for clarity, I would prefer not to drop footnote 57, but would prefer simply to add the following to it: "Whether fault or negligence in hiring, training, or direction states a cause of action under § 1983 is, of course, a question we have not addressed and we express no view on it here." Would not that meet your concern that the footnote might be read to imply that we are holding in this opinion that § 1983 would follow the common law with respect to negligent hiring, training, or direction?
As to the last part of note 55, it was meant to say only -- and I really think it says no more than -- that where the Constitution imposes a duty to act, § 1983 provides an avenue of redress when officials are deliberately indifferent to that duty. It was not intended to suggest, and I thought did not decide, when the Constitution imposes such a duty. Moreover, I think the reference to Estelle is faithful to the jump-cited material in that opinion, which is:

"We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' Gregg v. Georgia, supra, at 173 (joint opinion), proscribed by the Eighth Amendment. . . . Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983." (emphasis added).

Since § 1983 does not distinguish between the Eighth Amendment and other types of constitutional violations, doesn't the last sentence of the quote necessarily decide that § 1983 goes as far as the Constitution with respect to deliberate indifference? Not necessarily. The Eighth Amendment context might be different.

Note 55 is referenced in note 60 to allow me to keep Byron's language -- which I have unabashedly plagiarized in the text at page 34 -- as the description of the cause of action created by this opinion. I think Byron's language is particularly felicitous in describing the elements of the action in what is probably the more usual case of "positive" official policy leading to constitutional tort.

I would be willing to drop the material from note 55, where it is somewhat cumulative of Felix's language, but given my view that deliberate indifference is enough to hold a city under § 1983, I feel that I must qualify the text at note 60, which would otherwise seem to foreclose a deliberate indifference theory. You may differ with me on whether whether deliberate indifference is ever enough to hold a city, but can't we agree not to cut off either of our views in this case? This may be accomplished by having note 60 read as follows:
In adopting this phrasing, we do not intend to foreclose the possibility that, where the Constitution imposes a duty on municipal officials to act -- as the Eighth and Fourteenth Amendments do with respect to the medical needs of prisoners, see *Estelle v. Gamble*, 429 U.S. 97 (1976) -- and official policy is one of deliberate indifference to that duty, § 1983 provides an avenue of redress against a local government as an entity. See id., at 104-105."

Would this be satisfactory to you (along with dropping the *Estelle* material in note 55)?

The third problem is one I confess I have not thought a great deal about. It seems to me that, at least outside of the Eleventh Amendment context, a suit against an official in his official capacity and a suit against the entity of which the official is an agent amount to the same thing: in either case the relief sought is not relief against the official personally, but exercise of the powers of his office or payment of monies from the entity's treasury. Therefore, since we accepted for cert. along with the question of the suability of school boards, the question "Whether local governmental officials . . . are 'persons' within the meaning of 42 U.S.C. § 1983 when equitable relief in the nature of back pay is sought against them in their official capacities?", Pet. 8, I suppose I should add a footnote in an appropriate place saying something like: "Our holding today necessarily decides that local government officials sued in their official capacities are 'persons' under § 1983 for all purposes in those cases where a § 1983 plaintiff could also maintain an action against the local government, since official capacity suits are simply another way of pleading an action against a corporate entity."

On the other hand, the resolution proposed above leaves unanswered two things. First, what happens in the situation in which the corporate entity cannot be sued, i.e., the respondeat superior situation? I think the answer is that suit will not lie, since the equivalence between official capacity suits and suits against the entity need not be tortured here as it has been in the Eleventh Amendment context. Second, what should be the
result in this case in which petitioners-plaintiffs have "allowed" the City and the Department to be dismissed from the suit by failing to appeal their dismissal? I have no ready answer for this. It may be that the District Court can reinstate the City and Department or it may be that the courts below will feel they can go forward and grant relief without the City and the Department. Since we need not decide either of these issues now, my preference would be simply to add the footnote proposed above and leave it to the District Court and CA2 to sort out where this case goes from here.

I would appreciate any views you and other colleagues might have on how to resolve the last question. I hope to send a third draft to the printer in the next day or two, which would include the first two changes set out above plus other corrections we have agreed to make in response to comments by Bob Litt and by Sam Estreicher in Lewis' chambers.

Sincerely,

W.J.B., Jr.

Mr. Justice Stewart

Copies to the Conference
Dear Bill:

I have read your revised draft (circulated April 21) with interest, and think it is a first-rate piece of scholarship.

Thank you for the revisions directed to the points in my letter of April 11. The new Part III on stare decisis is quite persuasive, and includes much of what I would have said on this question in a concurring opinion. In sum, I believe my previously expressed concerns have now been reduced to the following narrowly focused suggestions:

1. As you know, I do not view §1983 as coextensive with the full power of Congress under the Fourteenth Amendment. A number of scholars share this view, including Gunther and Monaghan. And the "fault" principle you recognize in Monell, with respect to the respondeat-superior liability of municipalities, is premised on the "cause to be subjected" language of the statute, rather than any limit on congressional power under §5 of the Fourteenth Amendment. You have substantially allayed my concerns in your revisions in pages 24-26. I would, however, suggest the following clarifications:

   (a) Page 24, first sentence in full paragraph: I would substitute "broad" for "complete".

   (b) Page 25, the long paragraph in footnote 45: Rather than say that §1983 "represented an attempt broadly to exercise the power conferred by §5 of the Fourteenth Amendment, I would simply say that §1983 "represented an attempt to include all officials and entities within the constitutional reach of Congress". It is unnecessary to suggest that other features
of §1983 are dictated either by the Constitution or by 1871 understandings of constitutional limits.

(c) Page 26, middle of first full paragraph: I would modify the description of §1 as the only civil remedy "coextensive" with the Fourteenth Amendment. Perhaps you could say that the section provided a "broad" or "expansive" civil remedy to implement the guarantees of the Fourteenth Amendment.

2. Page 30, last sentence in footnote 55: The rather sweeping generalization as to "deliberate indifference" can be read far more broadly than my understanding of the Court's decision in Estelle v. Gamble. There, we were talking about the possibility - under the evidence in the case - that prison officials were deliberately indifferent to the need of a particular inmate for necessary medical service. There was no indication of an officially approved policy or custom not to provide necessary medical assistance. Moreover, it is possible to read Estelle as an Eighth Amendment prisoner case. The "deliberate Indifference" standard may be applicable in other contexts as well, but I think we should leave that question for another day. In short, I hope you will be willing to eliminate this sentence.

3. Page 38, discussion of the Attorneys' Award Act of 1976: You describe this as allowing "prevailing parties in §1983 suits to obtain attorneys' fees from the losing party". We certainly should make clear, in accord with the statutory language, that the Act merely confers discretion on the Court to allow such fees. Also I am somewhat troubled by your characterization of the congressional intent on page 39. I would simply say that Congress has "attempted to allow" such awards, not that Congress has "attempted to limit Monroe."

4. I would have dealt with the status of Moor, Kenosha and Aldinger somewhat differently, but I view your opinion as leaving open the extent to which these cases remain good law. I can accept this.

5. Also, your revision of Part IV as to immunity - leaving the issue entirely open - is quite acceptable. In accordance with our telephone conversation, I no longer will write on the immunity issue, although my previously expressed view remains firm.
6. Finally, I agree with Potter that you should delete footnote 57 on page 32. While the footnote does not commit the Court to any particular proposition of law, it may be read as a "signal" that we should avoid in light of our reservation of the negligence issue in Procunier v. Navarette.

* * * *

I appreciate your efforts to accommodate my concerns. If you are disposed to make the modest changes suggested above, I will be happy to join you.

Also, I still may write briefly to emphasize a point or two where we may have shades of difference that do not go to the essential merits of your opinion. This would not prevent me from joining you.

Sincerely,

Mr. Justice Brennan

lfp/ss
Re: No. 75-1914, Monell v. Department of Social Services

Dear Potter,

Thanks so much for your memorandum of April 24.

Let me say in reply that I understand that Whit Peters and Bob Litt have reached agreement on all the points they discussed yesterday with the exception of three, which are: (1) footnote 57, which Whit and Bob did not discuss, but which your memorandum identifies as troublesome; (2) footnotes 55 and 60; and (3) the question of how to deal with the claims asserted against the Mayor of New York and the Commissioner of the Department of Social Services given that the City and the Department were dismissed and plaintiffs-petitioners did not appeal this dismissal.

I confess that your reaction to note 57 as a "time bomb" surprises me. I think it states a well-settled principle of common law and I included it in the draft to make sure that people understood the limited nature of the terms "vicarious liability" and "respondeat superior" that are used in the text, since these terms (as indicated in the parts of Prosser and Harper & James cited in the opinion) are often used in different ways by different authors. Given the need for clarity, I would prefer not to drop footnote 57, but would prefer simply to add the following to it: "Whether fault or negligence in hiring, training, or direction states a cause of action under § 1983 is, of course, a question we have not addressed and we express no view on it here." Would not that meet your concern that the footnote might be read to imply that we are holding in this opinion that § 1983 would follow the common law with respect to negligent hiring, training, or direction?
As to the last part of note 55, it was meant to say only -- and I really think it says no more than -- that where the Constitution imposes a duty to act, § 1983 provides an avenue of redress when officials are deliberately indifferent to that duty. It was not intended to suggest, and I thought did not decide, when the Constitution imposes such a duty. Moreover, I think the reference to Estelle is faithful to the jump-cited material in that opinion, which is:

"We therefore conclude that deliberate indifference to serious medical needs of prisoners constitutes the 'unnecessary and wanton infliction of pain,' Gregg v. Georgia, supra, at 173 (joint opinion), proscribed by the Eighth Amendment. . . . Regardless of how evidenced, deliberate indifference to a prisoner's serious illness or injury states a cause of action under § 1983." (emphasis added).

Since § 1983 does not distinguish between the Eighth Amendment and other types of constitutional violations, doesn't the last sentence of the quote necessarily decide that § 1983 goes as far as the Constitution with respect to deliberate indifference?

Note 55 is referenced in note 60 to allow me to keep Byron's language -- which I have unabashedly plagiarized in the text at page 34 -- as the description of the cause of action created by this opinion. I think Byron's language is particularly felicitous in describing the elements of the action in what is probably the more usual case of "positive" official policy leading to constitutional tort.

I would be willing to drop the material from note 55, where it is somewhat cumulative of Felix's language, but given my view that deliberate indifference is enough to hold a city under § 1983, I feel that I must qualify the text at note 60, which would otherwise seem to foreclose a deliberate indifference theory. You may differ with me on whether deliberate indifference is ever enough to hold a city, but can't we agree not to cut off either of our views in this case? This may be accomplished by having note 60 read as follows:
In adopting this phrasing, we do not intend to foreclose the possibility that, where the Constitution imposes a duty on municipal officials to act — as the Eighth and Fourteenth Amendments do with respect to the medical needs of prisoners, see Estelle v. Gamble, 429 U.S. 97 (1976) — and official policy is one of deliberate indifference to that duty, § 1983 provides an avenue of redress against a local government as an entity. See id., at 104-105.

Would this be satisfactory to you (along with dropping the Estelle material in note 55)?

The third problem is one I confess I have not thought a great deal about. It seems to me that, at least outside of the Eleventh Amendment context, a suit against an official in his official capacity and a suit against the entity of which the official is an agent amount to the same thing: in either case the relief sought is not relief against the official personally, but exercise of the powers of his office or payment of monies from the entity's treasury. Therefore, since we accepted for cert. along with the question of the suability of school boards, the question "Whether local governmental officials . . . are 'persons' within the meaning of 42 U.S.C. § 1983 when equitable relief in the nature of back pay is sought against them in their official capacities?", Pet. 8, I suppose I should add a footnote in an appropriate place saying something like: "Our holding today necessarily decides that local government officials sued in their official capacities are 'persons' under § 1983 for all purposes in those cases where a § 1983 plaintiff could also maintain an action against the local government, since official capacity suits are simply another way of pleading an action against a corporate entity."

On the other hand, the resolution proposed above leaves unanswered two things. First, what happens in the situation in which the corporate entity cannot be sued, i.e., the respondeat superior situation? I think the answer is that suit will not lie, since the equivalence between official capacity suits and suits against the entity need not be tortured here as it has been in the Eleventh Amendment context. Second, what should be the
result in this case in which petitioners-plaintiffs have "allowed" the City and the Department to be dismissed from the suit by failing to appeal their dismissal? I have no ready answer for this. It may be that the District Court can reinstate the City and Department or it may be that the courts below will feel they can go forward and grant relief without the City and the Department. Since we need not decide either of these issues now, my preference would be simply to add the footnote proposed above and leave it to the District Court and CA2 to sort out where this case goes from here.

I would appreciate any views you and other colleagues might have on how to resolve the last question. I hope to send a third draft to the printer in the next day or two, which would include the first two changes set out above plus other corrections we have agreed to make in response to comments by Bob Litt and by Sam Estreicher in Lewis' chambers.

Sincerely,

W.J.B., Jr.

Mr. Justice Stewart

Copies to the Conference
April 26, 1978

Re: No. 75-1914 - Monell v. New York City Dept. of Social Services

Dear Bill,

Your letter of April 25 convinces me that our differences are deeper than I had been willing to acknowledge, even to myself. In sum, I think I take a much more restrictive view of what we should decide or even discuss in this case than do you.

Specifically, I would decide only that, for the basic reasons discussed in Part I of your opinion, it now appears that the Court was mistaken in Monroe v. Pape, in holding that municipal corporations can never be within the ambit of §1983. I would hold that a municipal corporation is within its ambit in an action at law or suit in equity, when, through the affirmative, deliberate, knowing official action of its governing body, it is alleged to have deprived any person of any rights, privileges, or immunities secured by the Constitution or federal law. That, as I understand it, is the scope of the question presented by this case.

I would not imply, even by way of discussion that leaves the matter open, that a municipal corporation could ever be liable under §1983 for indifference, inaction, or through the actions of its agents when not carrying out affirmatively authorized municipal policy. I would not get into a

4/27/78

While I agree that the last seven lines in n. 55, n. 57 and n. 60 could be omitted. WJB has indicated that he would make clear that the Court reserves decision on these points. I am not troubled by WJB's use of "fault" which in context refers to official policy and
official authorization. The "fault" principle emerges from a careful reading of the legislative history. I am somewhat perplexed, however, by the willingness to join an opinion overruling Monroe without, at the same time, joining the respondent superior discussion. I do not recommend that you follow suit.

[Signature]

[Handwritten notes]

[Further text on the page]

[Handwritten notes]
Re: 75-1914 - Monell v. Department of Social Services

Dear Bill:

Your revised opinion is really excellent. I particularly appreciate your full treatment of the stare decisis issue and the changes in your discussion of Monroe v. Pape. Nevertheless, I am still persuaded that Parts II and IV of the opinion are merely advisory and should not be included in an opinion of the Court until the questions have been properly presented and argued. As presently advised, I therefore plan to join only Parts I, III, and V. I do not expect to write separately but merely to state in a sentence my reasons for not joining Parts II and IV.

Respectfully,

Mr. Justice Brennan

Copies to the Conference
April 26, 1978

Re: No. 75-1914 - Monell v. New York City Dept. of Social Services

Dear Bill,

Your letter of April 25 convinces me that our differences are deeper than I had been willing to acknowledge, even to myself. In sum, I think I take a much more restrictive view of what we should decide or even discuss in this case than do you.

Specifically, I would decide only that, for the basic reasons discussed in Part I of your opinion, it now appears that the Court was mistaken in Monroe v. Pape, in holding that municipal corporations can never be within the ambit of §1983. I would hold that a municipal corporation is within its ambit in an action at law or suit in equity, when, through the affirmative, deliberate, knowing official action of its governing body, it is alleged to have deprived any person of any rights, privileges, or immunities secured by the Constitution or federal law. That, as I understand it, is the scope of the question presented by this case.

I would not imply, even by way of discussion that leaves the matter open, that a municipal corporation could ever be liable under §1983 for indifference, inaction, or through the actions of its agents when not carrying out affirmatively authorized municipal policy. I would not get into a
discussion of the law of respondeat superior or the law of torts. I would certainly not make use of the word "fault" which in the law of many states and in admiralty law is no more than a loose synonym for negligence.

It seems to me that, in view of the very thorough and exhaustive opinion you have written, it would be quite unfair of me to keep asking you to chip away at it -- a process that might lead ultimately to the distortion of your views without the real satisfaction of mine. Accordingly, I think the true interest of each of us would be better served if I filed a brief statement saying I do not join Part II of your opinion.

Sincerely yours,

P. S. -- I have just read John's note, and it may be that he has said more briefly what I have tried to say above.

Mr. Justice Brennan

Copies to the Conference
Lewis,

I read the proposal in your memorandum last night. It reflects my original thinking in the case better than I ever have. I approve it. I hope immediately and publicly agree with you except that I

understand that John Stone is now having second thoughts (you did remember that he too originally agreed with you and me), and I would like to know what he has to say.

Should we suggest that the case be discussed on Friday?  

P.S.
To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens
Circulated: APR 27 1978
Recirculated: ___________

Ist DRAFT

SUPREME COURT OF THE UNITED STATES

No. 75-1914

Jane Monell et al., Petitioners, v. Department of Social Services of the City of New York et al.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

[May —, 1978]

Mr. Justice Stevens, concurring in part.

Since Parts II and IV of the opinion of the Court are merely advisory and are not necessary to explain the Court’s decision, I join only Parts I, III, and V.
Re: No. 75-1914 - Monell v. New York City
Department of Social Services

Dear Bill:

I have read with great interest the more recent writings in this case, and the correspondence. As of now, I am about where Potter and John are in their respective letters of April 26. It seems to me that if Monroe v. Pape is to be overruled, the Court is striking off in a new direction and we should move cautiously, one step at a time. There is much to be said, also, for Lewis' approach, and I shall be interested in what he comes up with.

Sincerely,

[Signature]

Mr. Justice Brennan

cc: The Conference
April 27, 1978

Re: No. 75-1914 - Monell v. New York City Department of Social Services

Dear Bill:

I have read with great interest the more recent writings in this case, and the correspondence. As of now, I am about where Potter and John are in their respective letters of April 26. It seems to me that if Monroe v. Pape is to be overruled, the Court is striking off in a new direction and we should move cautiously, one step at a time. There is much to be said, also, for Lewis' approach, and I shall be interested in what he comes up with.

Sincerely,

Mr. Justice Brennan

cc: The Conference
April 29, 1978

Re: 75-1914 - Monell v. Department of Social Services of City of New York

Dear Bill,

As I have told you, Part II is in general quite all right with me, and I now think I would include it whether there are five for it or not. The amendments to footnotes 55 and 60 suggested in your letter to Potter of April 25 are definitely an improvement. I would also prefer what you orally suggested to me today, namely, that you drop footnote 57.

Sincerely yours,

Mr. Justice Brennan

Copies to the Conference