MEMORANDUM

TO: Jim
DATE: Dec. 20, 1982

FROM: Lewis F. Powell, Jr.

81-827 Jefferson County Pharmaceutical Ass'n

This memorandum records general impressions on the basis of a hurried reading of your draft. It is evident that you have done an enormous amount of research, and you have used the materials thoughtfully and - for the most part - persuasively.

I nevertheless would like to discuss with you a different organization of the opinion. I suggest this with some hesitation, as I have only gone through your opinion once, but I did want to talk to you before we separate for the holidays.
The present structure of the opinion, after Part I, seems to me to be as follows:

Part II leads off with some excellent quotations as to the comprehensive coverage of the antitrust laws. Commencing on p. 7, and continuing to p. 13, the draft addresses primarily the "issue" whether a state or local hospital may be a "purchaser" or a "person" under the Act.

Part III-A discusses legislative history, III-B is limited to the opinions of the U.S.A.G., and that of the California A.G., but with a full footnote on Representative Patman (n. 28).

Part III-C addresses respondent's reliance on This extends from p. 19 to p. 26, and seems a good bit too long.
Part IV is a nice closing jury argument. That I like.

Certainly the foregoing organization is an acceptable way to write the opinion. But let me try out on you a different organization:

First: make clear the narrowness of the issue before us. We are not concerned with federal government purchases and sales; only those to a state and state and local entities. Indeed, we are not concerned in this case by purchases for use in traditional governmental functions. Rather, the only issue before us involves purchases and sales for the non-government function of competing in the retail pharmacy and drug store market with private enterprise. Yet, the court below held - and respondents contend - that the Act exempts all purchases
If there is an implied exception, it does not extend to non-governmental purposes.

and sales by a state and all governmental agencies or entities of a state regardless of the purpose of the purchase and use of the goods purchased.

Part II could be opened with a paragraph to the foregoing effect.

Then, is there not merit in structuring the opinion in the customary way in which we ascertain congressional intent? We commence by stating the question.

You state this very well in the first sentence of the opinion on p. 1. This bears repeating. This could be followed by stating that the question we must address is one of congressional intent.

We then look to the language itself. I think we could argue that the plain language controls. In view of its broad scope, the burden certainly is on those who
would argue that an exemption protects sales and purchases that to state and local entities. The burden is heavy indeed if the exemption is viewed as extending to purchases and sales to facilitate competing in the private market.

As a part of the "plain language" point, you can dispose of whether state and local governmental agencies come within the terms "purchaser" and "person". My recollection is that respondents do not deny being included within these terms. It therefore seems unnecessary to make the rather extended argument presently in pp. 8-13. You do have some excellent language from these cases that you may be able to work into the opinion at some other point. We could, of course, in acknowledging respondent's concession in this respect, say that this was compelled by several decisions of this
assuming ambiguity, comprehensive coverage of legislative history discussion logically would come next. I would be a little more affirmative at the beginning (p. 11). Perhaps we could say that in view of the purpose of the Act, and the absence of any relevant exemption language, the legislative history falls far short of supporting respondent's claim. This is certainly true. If so, perhaps in a subpart - you could include the excellent quotations as to the comprehensive coverage and purpose of the antitrust laws, now stated at pp. 5 and 6. The indications of congressional intent. Perhaps at this point. 

Despite the plain language argument, we could say that assuming ambiguity, we look to the customer for the text or a court. These could be cited either in the text of a.
Such an opening could be followed with the stronger portions of your section on legislative history. Perhaps you could at least reduce the length of n. 26.

I would not be inclined, at least in our initial circulation, to include the two paragraphs on attorney generals' opinions. I would not lead into the U.S. Attorney General's opinion by a citation to Udall. Rather, can we not dismiss the U.S. Attorney General's opinion as clearly applying only to the federal government.

Finally, we must come to what is probably the toughest part of our opinion: dealing with the judicial interpretation of the Act. My impression is that the...
present discussion is a good deal too long and detailed. Although I am not familiar with the cases, I believe we can state positively at the beginning that this Court has never held or suggested that the claimed exemption must be read into the Act. I believe you say—and if so it is important—that until CA5's decision in this case no Court of Appeals had so held. This would leave us with the District Court cases to deal with. It is not entirely clear to me from your draft whether there is even a single District Court decision on the issue before us: Whether, assuming that the federal government is entirely exempt and further assuming—without deciding—that state and local entities may be exempt with respect to governmental function, has any case held that an exemption exists that
enables state and local entities to compete without

limitation in the private markets?

* * *

The foregoing is quite sketchy, and I have not
been nearly as thoughtful as you have been. I have
dictated the foregoing primarily for purposes of a
discussion with you.

In our brief discussion yesterday, you raised a
question whether we should anticipate - as fully as you
have - what the dissenting opinion will say. My
inclination is not to go quite so far, or so fully in
anticipation, as the present draft. We certainly need to
address the principal arguments made by respondent's, but
this not be done quite as judiciously as you have done.

After all, as Potter Stewart once told me, when writing
for the Court you are an advocate and want your opinion to be affirmative and convincing. A judge—particularly a Justice here—also must be fair and must recognize the principal arguments against his view.

L.F.P., Jr.

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Part II could open with a paragraph to the foregoing effect.

Then, we could structure the opinion in the customary way where the issue is congressional intent. We commence by restating the question. You state this very well
in the first sentence of the opinion on p. 1. The answer
turns on what Congress intended.

We look first to the language itself. We can ar­
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expressed, and in view of the purpose and broad scope of the
Act's language, the burden is on those who would argue that
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We look to the legislative history to see whether the latter
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I would make the point that before Congress considered leaving state entities free to compete unfairly with the private sector, surely it would have held hearings on an issue of such importance. Such an opening could be followed with the stronger portions of your section on legislative history. Perhaps you could at least reduce the length of n. 26.

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L.F.P., Jr.
November 15, 1982

81-827 Jefferson Co. Pharmaceutical v. Abbott Laboratories

Dear Chief:

John's letter of November 12 (that just came to my attention) records a change in his vote in this case. This leaves five votes to reverse, including one or more that was tentative.

The case is close. If you follow your usual practice of assigning it to the Justice who wrote a "dissent from denial of cert", I will be glad to try my hand at an opinion that will hold five votes.

In view of the "iffiness" of this case, I would be more than glad to take two other cases.

Sincerely,

The Chief Justice

lfp/ss
MEMORANDUM

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

DATE: Dec. 27, 1982

81-827 Jefferson County Pharmaceutical Association

I spent a fair part of Christmas Eve (in addition to December 23) working on our draft of December 21. This was not as dull as it might have been. I would like to win this one, and I think the second draft - as should be the case - is more persuasive.

You reorganized it in record time. As a result, a good deal of editing seemed necessary.

I am sure some of my editing will require revision, and I want you to look at all of it critically - both with respect to form and substance.

I make the following specific comments:
1. The second draft is narrowly focuses on the only issue before us: whether purchases by a state or its agencies for resale and competition with private business are impliedly exempted. We reserve decision — express no opinion — as to whether an exemption may be implied for purchases by a state or its agencies for consumption or use in traditional governmental purposes. This being so, is there a purpose in continuing to emphasize that we are talking about a per se exemption?

2. I do not think we have made clear anywhere in the draft that traditional state uses or purposes include not only "consumption" (e.g., drugs used in state hospitals), but purchases are made to enable the carrying on of traditional monopolies (e.g., electric utility as in City of Lafayette). Perhaps it is just as well to stay away from talking about the traditional state operated monopolies. For example, what would we say about a city gas company that
competes with a private gas company, and does so with the benefit of discounted prices for the purchase of gas from an interstate gas transmission company? In such a situation, there would be competition at the retail level. I am inclined, therefore, to think that it is best not to talk about the traditional monopolies but continue to talk in terms of competing in the private market at the retail level.

3. It is desirable, I think, to use the language of §2a (which I assume is the same as 15 U.S.C. §13(a)) wherever this is appropriate. For example I am thinking about use of the term "commodities of like grade and quality" and what is unlawful is to "discriminate in price between different purchasers" - precisely what we have in this case.

4. The testimony of Chairman Dixon seems to me to be the strongest post enactment event. I assume you have
used Dixon's most damaging statement. Justice O'Connor is certain to rely on his testimony.

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In view of all of my scribbling - for which I apologize - I think a third triple spaced draft is probably desirable.

L.F.P., Jr.

ss
This memo addresses pp. 19-21 where we talk about the 1960 hearings and Chairman Dixon's statement. Should we not identify the subject matter of those hearing? Dixon's statement seems to be the single most damaging piece of evidence. Is there anything helpful to us in the general context in which he made the statement? In any event, I would omit the sentence on page 20 commencing with the word "although". Dixon's statement certainly will be emphasized by Justice O'Connor, and we can reply as best we can. I have
indicated, in my scribbling on page 20, that this may be place to reply on cases that discount the relevance of post-enactment commentary. But if we add this to the opinion, it should come at the end of our brief discussion of the 1960 hearings.

I suggest revising the paragraph commencing at the bottom of page 20 to read as follows:

"It is clear from the report of the House Committee that it was not focusing at all on the question presented by this case. Its report did include the following awkwardly worded statement: 'There is no basis apparent... why the mandate of the Robinson-Patman Act should not be applied to discriminatory drug sales favoring non-governmental institutional purchasers, profit or non-profit, to the extent there is prescription drug competition at the retail level with disfavored retail druggists.' Id., at 79 (emphasis added).27

Although not entirely clear, this seems to say only that private institutional purchasers may not lawfully facilitate unfair competition at the retail level by sales
at discriminatory prices. Thus, the 1960 hearings shed no light even as to congressional intent at that time with respect to state purchases for resale in the private market.

Note to Jim: With the changes suggested, do you think we will have dealt fairly with the 1960 hearings. My guess is they will be a major factor in any dissent. But we need not anticipate all that will be said so long as we cannot be attacked for omitting some significant evidence against us.

If my changes are fair and not vulnerable to successful attack, perhaps we need to say little in our first circulation about the relative weight to be accorded post-enactment commentary before or by Congress. It would
be sufficient, I think, to add a footnote with an appropriate citation before moving to discuss court decisions.

L.F.P., Jr.

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