

December 20, 1988

Mr. Justice:

Re: 86-1088 City of Canton v. Harris

Justice White has circulated an opinion in this case, holding that while §1983 allows municipal liability for failure to train employees, it only allows such liability when the failure is the result of deliberate indifference. Justice White also spends two pages discussing why the case should not be DIGed.

Although he also voted to reverse at conference, I think that there is a very good chance that Justice Brennan will write separately, disagreeing with the deliberate indifference standard. So as an initial matter, I would suggest holding off until we learn what his intentions are.

Justice White's section on the DIG issue is somewhat persuasive, in part because it is conclusory and selective about the questions presented and the contents of the briefs. He also stresses that the failure of the respondents to point out the failings with the petr's case in their response to the petition acts as a waiver. Had his opinion held that there could be no liability for failure to train, then the petr's concession (that liability for failure to train was actionable) would have clearly supported a DIG, and reaching the issue would have been more difficult to explain. But as his opinion left a window of possibility open, the petr's concession was not fatal.

If you would like for me to draft something on the DIG issue please let me know. My sense at this point is that a dissent on that issue would be largely repetitive of City of Springfield v.

Kibbe, although this case is not quite as clear a DIG as was that one. You may feel it to be a better use of your vote to address the merits, and if so, I do not suggest joining the majority in its entirety, but rather waiting to see if Justice Brennan plans to write. If there is anything more you would like me to do please let me know.

Kevin