

file

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

May 2, 1978

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

Dear Lewis,

Thank you for your memo on this case. As you know, my clerks have been meeting informally with the clerks from a number of chambers (including your own) to hammer out rough spots in the second draft of my opinion for the Court. I think that this process has produced new language which meets all but two of the points raised in your memorandum, although in some cases the language adopted is slightly different from that you have suggested.

The two remaining points are footnote 57 and Estelle. As Byron's recent memorandum indicated, I have agreed to delete note 57. And, although I must say that I am quite reluctant to drop the Estelle point, in the interest of avoiding a flurry of opinions I will drop the last part of note 55 as well as any attempt to resurrect the point in note 60. I have also gone through Part II with care to remove the word "fault" whenever it might, by negative implication, indicate that we are creating a negligence cause of action under § 1983. To accomodate the dropping of Estelle and references to municipal fault, I will recast the last paragraph of Part II as follows (replacing what is now the carry-over paragraph on pp. 33-34):

"We conclude, therefore, that a local government may not be sued for the tort purely of its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983. Since this case unquestionably involves official policy as the moving force of the constitutional violation found by the District Court, see pp. 1-2 and n. 2, supra, we must reverse the judgment below. In so doing, we have no occasion to

address, and do not address, what the full contours of municipal liability under § 1983 may be. We have attempted only to sketch so much of the § 1983 cause of action against a local government as is apparent from the history of the 1871 Act and our prior cases and we expressly leave further development of this action to another day."

The suggested text will require both footnotes 59 and 60 to be deleted.

Rather than attempt to make any more detailed response to your memorandum, I will send our well marked-up copy of Monell draft 2 to the printer for a third draft. I agree with you that "it [is] appropriate for the Court to make clear that [respondeat superior] does not support a §1983 claim against entities of government," and, accordingly, will keep Part II in the third draft. If it appears that we cannot attract a fifth vote for that Part, I will convert it into a plurality opinion in the fourth draft.

Sincerely,



Mr. Justice Powell

Copies to the Conference