October 30, 1987

Mr. Justice:

Re: City of St. Louis v. Praprotnik, No. 86-772

Re: JUSTICE O'CONNOR's First Draft Majority Opinion

I have read over JUSTICE O'CONNOR's proposed majority opinion and have several comments as well as substantial concerns.

As an initial point, the approach taken by the opinion surprises me. I understood that the majority at Conference had decided that there was no need to make new law in the area of § 1983 municipal liability and that the case could be decided under the terms outlined in Pembaur. Most importantly, I understood that the Court would reject the "final authority" rule adopted by CA8. This opinion, from what I can gather, purports to be making new law (or at least clarifying it), and its approach does not leave the reader with the impression that what the Court was reviewing was CA8's legal standard. I could swallow these uncertainties except that I fear that what has been written, should it garner the votes of 6 members of the Court,[1] will cause problems down the road.

My most serious concerns arise from Section III.B. of the opinion (beginning on p. 11). I cannot agree that the identification of policymaking officials is never a question of fact.

[1] JUSTICE STEVENS has indicated that he intends to dissent. JUSTICE SCALIA requested that he be counted as a "no vote" and indicated that he would wait to see how JUSTICE STEVENS' opinion reads.

Certainly, the Court has indicated that it is an issue of state law and that state positive law is the starting point of the analysis. But it has never indicated that it is the ending point. Nor do I think it should be. The following passage is particularly troubling:

> In any event, however, a federal court would not be justified in assuming that municipal policymaking authority lies somewhere other than where the applicable law purports to put it. And certainly there can be no justification for giving a jury the discretion to determine which officials are high enough in the government that their actions can be said to represent a decision of the government itself.

(p. 12). Such definitive, absolute statements seems unwise. Perhaps the Court feels comfortable in this case identifying the "policymakers" based solely on St. Louis' City Charter, ordinances, and regulations. But that is not to say that in some other case the Court may not look beyond or behind the applicable law or permit the jury to make a factual finding as to where the authority lies. This may be particularly true where there is a delegation issue. At any rate, there is no need for these pronouncements in this case.

The opinion's discussion of the delegation issue (pp. 12-13) is also disturbing. The opinion leaves the impression that a person to whom final policymaking authority has been delegated may not necessarily be a policymaker for § 1983 purposes. My sense is that the clerk who was responsible for writing this opinion was so hostile to the notion of liability due to such delegation that he obfuscated the legal principle. What he ends up saying appears to be that the Court won't worry about the possibility that a municipality may escape liability by delegat-

ing authority to persons not mentioned in positive law because there is always "custom or usage" theory of liability. This is not sufficient. "Custom and usage" is a separate theory of municipal liability, apart from the "municipal policy" theory of liablity. It does not address the issue of whether and under what circumstances liability attaches to the actions of an official to whom the municipal policymaker has delegated his policymaking authority. In fact, the implication of the opinion's treatment of the issue is that a municipality would get its first few unconstitutional acts free before the official (to whom policymaking authority had been delegated) had acted enough times to elevate his actions to "custom or usage."[2]

Here is where the prior discussion of the factual/legal issue causes problems. There may be times when there is an issue of fact as to whether the policymaker to whom state positive law has accorded policymaking authority has delegated his final policymaking authority to another official, such that municipal policy may be inferred from the acts of that other official. If not the exact words, then what the opinion does not say, leaves the impression that this theory is foreclosed. In my mind, it should not be, and this case does not call upon the Court to address the issue. CA8 thought it was enough to have been delegated final implementing authority, rather than final policymaking authority. All the Court need say is: that is not enough.

[2]The opinion's discussion of the "custom and usage" theory of municipal liability is extremely grudging. I doubt that the writer could have found a quote which would make it seem more difficult to establish such liability.

what he means to say

yes

I also have problems with Section III.C. -- the section directly addressing this case and the decision below. The opinion sets up and addresses a series of strawmen that are not relevant to this case. In so doing, I am afraid that the lower cts will understand that those elements are signposts regarding the necessary showings for municipal policy liability. For example (and perhaps most egregious), on p. 14, the opinion observes that "The mayor and aldermen enacted no ordinance designed to retaliate against respondent or against similarly situated employees." This was never an issue in the case. No one ever suggested that they had. What was suggested was that they, municipal policymakers, had effected municipal policy in participating in resp's retaliatory layoff. The opinion does not address this theory. Nor do I think that the opinion's suggestion is correct; I do not think that the policymakers must adopt unconstitutional policy as a matter of positive law in order to hinge municipal liability on their actions.

In addition, I do not understand why the opinion begins this Section's discussion by noting that "In reaching this conclusion, we do not decide whether the First Amendment forbade the City from retaliating against respondent for having taken advantage of the grievance mechanism in 1980." The tone of this section and of that sentence leaves the reader with the impression that there is some question regarding that issue. But the First Amendment question was never at issue in this case, before this Court or CA8. Why it is so back-handedly drawn into question here is beyond me.

On a final and much smaller note, I cannot help but comment about one phrase on p. 9: "That conclusion, like decisions that have widened the scope of § 1983 by recognizing constitutional rights that were unheard of in 1871, has been repeatedly reaffirmed." First, I'm not sure, as a matter of sentence construction, what the insertion of the underlined clause is supposed to mean. Does it mean that the Court has repeatedly reaffirmed the widening decisions? If so, so what? What does it have to do with reaffirming the conclusion that vicarious liability would be incompatible with the causation requirement set out in § 1983 (the concept with which it is linked in the sentence)? What I suspect is that it is a jab at what the writer believes to be the Court's unsound statutory (and constitutional) interpretation. This might be appropriate in a dissent which was criticizing the majority's broadening of the scope of § 1983 liability, but it seems to have no place in the majority -- let alone in this opinion.

of course

I have spoken with JUSTICE BRENNAN's clerk, and he tells me that JUSTICE BRENNAN intends to write something addressing the concerns I have outlined above. The clerk expected JUSTICE BRENNAN to begin by suggesting that JUSTICE O'CONNOR makes some changes; however, they appear prepared to write separately, if it comes to that. Since you have joined JUSTICE BRENNAN in his most recent opinions regarding § 1983 municipal liability, I suggest that you wait to see what he has to say before committing yourself on this draft.

Ann