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October 13, 1980

Mr. Justice Lewis F. Powell, Jr.
Supreme Court of the United States
Washington, D.C. 20543

Dear Justice Powell:

It is always a source of great pleasure to receive a letter from you. Aleta and I are particularly pleased that our Michael serves as the standard by which the recent products of the Comfort and Stephan households will be judged. In our modest view, you have chosen (as always) the appropriate standard of review.

Susan Weiner told me that she very much enjoyed meeting you. Although I hoped you might select her, I anticipated that her clerkship on the district court might prove a barrier. I do wish to note that this year's editor-in-chief of the law review, Nancy Morawetz, who will be clerking for Pat Wald on the D.C. Circuit, is an impressive individual. She is in my constitutional law seminar, and I am delaying an official letter of recommendation until I see her written work. If her work is as impressive as her bearing and intelligence, I intend to bring her application to your attention. By the way, Eliot Polebaum, an N.Y.U. graduate, is clerking for Justice Brennan this year, and John Sexton, the Chief's clerk, will be joining our faculty next fall. One of our projects here is to enhance the N.Y.U. presence on the Court.

I am delighted that you shared David Stewart's memorandum with me. I take up the gauntlet in the enclosed memorandum.

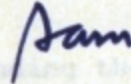
Sometime this fall Norman Dorsen and I (perhaps accompanied by Bill Nelson, a former White clerk, who recently joined our faculty) will be making our annual pilgrimage to the Court. As soon as the date is firmed up, I hope to be able to schedule a meeting with you. Gerald Gunther beat me to it last year, and I do not intend to let that happen again.

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As always, my best wishes and warmest regards to you, the Powell family and the Powell chambers. Aleta and I miss you all.

Sincerely,



After the Court's penchant for extending the reach of Section 1113 far beyond the contemplation of even the typical municipalities, e.g., Malone v. Township, No. 73-834, and the refusal to extend a "good-faith" defense to municipalities in Case v. City of Independence, No. 73-1770, I can appreciate your sense of disgust on reading David Stewart's memorandum.

As I understand David's position, it is (i) that the application of the Sherman Act to municipalities is a violation of the 10th Amendment to exclude municipalities from the reach of §1113, and, moreover, (ii) that the use of the term "person" in the eventual compromise that became 42 U.S.C. §1983 demonstrated conclusively "that Congress in 1875 did not intend it was creating municipal liability."

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Thus, my argument is simple. When the Forty-Second Congress wished to exclude municipal liability for the failure to act, it used the phrase "any person or persons." The repeated references to "citizen," "individual," and the use of personal pronouns buttress the inescapable conclusion that "any person or persons" did not include local governments. Since the term "any person" was used in the predecessor to Section 1983,