lfp/ss 2/20/78

No. 75-1914 Monell v. Depart of Social Services

MEMORANDUM TO THE CONFERENCE:

I have now had an opportunity to review carefully the memoranda circulated by our two "Bills", ~~(WJB and WHR).~~ Both are impressive and persuasive memos. As I think either could form the basis of a principled decision, ~~and this reaction indicates why~~ I have found the case particularly troublesome. In any event, being satisfied that further delay will not make ~~my~~ decision any easier, I will now firm up the tentative vote to reverse that I expressed at Conference.

I add the following observations. As to the legislative history debate, I am persuaded that Bill Douglas' reading of it in Monroe was wrong. Bill Rehnquist's memorandum makes a stronger argument in favor of Monroe's ~~dictum~~ interpretation of the Sherman Amendment's rejection, but I am persuaded that congressional concern was centered on the inequity of imposing liability on local units of government on the basis of respondeat superior or some other principle of vicarious liability. These points seem reasonably clear. I have had some doubt that ~~My principal doubt was whether~~ the word "person" was intended to include inanimate bodies. Its use hardly would seem an artful ~~appropriate~~ way ~~of~~ to include municipalities or similar entities. Yet, I suppose the ~~this~~ "plain meaning" approach has long since been ignored

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Moreover, doubts about congressional power expressed in the debates related to the attempted imposition of ~~a power not duty to curb private lawlessness which was deemed not to flow from the commands of~~ the an extra-constitutional duty to curb private lawlessness, not from ~~from the perception~~ a perception that municipalities were ~~beuyond~~ beyond the reach of ~~congressional p their~~ legislative authority under § 5 of the Fourteenth Amendment.

with respect to the word "person". There is the so-called "Dictionary Act" passed a month before the Civil Rights bill was introduced, that indicates a congressional understanding that "the word 'person' may extend . . . to bodies politic . . . ." Moreover, I was painfully reminded only a few weeks ago that a majority of my Brothers thought that the same word, used by the same Senator (Sherman), in 1890 included foreign governments as well as municipalities, and at the late late date, With me, policy considerations weigh more heavily than trying to read meaning into ambiguous speeches by Senators or speculating whether the word "person" embraces the universe. Everyone agrees that §1983 authorizes suits against officials of governmental units both in their official and individual capacities. If one assumes that the municipality will invariably indemnify an official suit for conduct within the scope of his authority, it does not really matter which way one goes on this argument. The municipality pays in either event. On the other hand, where the municipality does not indemnify an official who has acted within the scope of his authority, this is a default that somehow should be rectified. As a matter of fairness there should be indemnification, and a unit of local government that fails to afford this

<(Insert P. 3)>

Furthermore,
~~An additional consideration is that~~

affirmance of thhe Second Circuit's decision means that § 1983 does not authorize compensatory relief for the actions of local government units bearing a direct responsibility for a constitutional violation. This is ~~the~~ true even though such actions are fully consistent with, indeed mandatted by state law, and individual suits against public officials are likely to founder ~~in the face of assertion of~~ upon the assertion of good-faith reliance on local law. The absence of an effective remedy for authorized state action in violation of constitutional requirements — Outside of Title VII cases — may propel this Court to recognize a Bivens ~~to fit~~ remedy to fill the gap. ~~It would seem~~ There ~~would seem~~ is a measure of futility in adhering to an erroneous reading of legislative history ~~in order~~, in the interest of protecting the ~~municipal~~ municipal coffers, ~~from~~ when the predictable consiequence may be judicial imposition of a Bivens ~~action~~ cause of action for all constitutional violations ~~causing~~ working compensable harm.

protection is unlikely to attract and retain competent officers, board members and employees.

In additon we have enshrined the fiction that allows mandatory injunctions in §1983 actions, (e.g., Milliken v. Bradley, 97 S.Ct. 2749 (1977), Milliken II) at the same time that we proscribe recovery of damages. In short, on this aspect of the matter before us, I must say that I would find it difficult to justify our present distinctions as based on either expediency or principle. The truth probably is that the local governments already bear the financial burden of 1983 suits, whether for damages as well as injunctive relief. Bill Rehnquist does make an arguable point when he suggests that juries may be more likely to escalate damages if a local government itself is named as a defendant. I am not sure, however, that the average juror would view his or her local government or school board in the same light that jurors view insurance companies and railroads. After all, most jurors are taxpayers.

The Eleventh Amendment requires its application to suits against the States. I would not extend the fiction to suits against local governments.

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This brings me to what I suppose is the most troublesome aspect of a reversal in this case: its effect on the doctrine of stare decisis. But considerations of stare decisis cut in both directions. On the one hand, we have a series of rulings holding that municipalities and counties are not "persons" for purposes of § 1983. In the

Technically, the holding of Moor does not extend beyond the recognition that "Congress did not intend, as a matter of federal law, to impose vicarious liability on municipalities for violations of federal civil rights by their employees, and that §1988 cannot be used to accomplish what Congress clearly refused to do in enacting §1983." Id., at 710 & n. 27.

somewhat accidental manner that characterizes many of our § 1983 decisions, cf. Runyon v. McCrary, 427 U.S. 160, 186* (1976), we have answered a question that was never briefed or argued in this Court. The claim in Monroe was that the City of Chicago should be held "liable for acts of its police officers, by virtue of respondeat superior," Brief for Petitioners 21, namely, a warrantless, early morning raid and ransacking of a Negro family's home. Although Morris Ernst's brief for petitioners in Monroe contains a footnote reference to the Sherman Amendment, he had no incentive to present a view of the legislative history that would have foreclosed relief on a theory of respondeat superior.

(O.T. 1960, No. 39, p.)

In Moor v. County of Alameda, 411 U.S. 693 (1973), the only other relevant case presenting a substantial discussion of the legislative history of § 1983, petitioners asserted ~~a claim of vicarious liability against a county~~ under § 1988 and, moreover, did not challenge "the holding in Monroe concerning the status under § 1983 of public entities such as the County," id., at 700. Aldinger v. Howard, 427 U.S. 1 (1976), ~~did not involve a claim based on § 1983, and~~ petitioners conceded that Spokane County was not a "person" ~~under the statute~~. Only in City of Kenosha v. Bruno, 412 U.S. 507 (1973), did the Court confront a § 1983 claim

that "the County was vicariously liable for the acts of its deputies and sheriff," id., at 696.

involved a claim of pendent-party jurisdiction under §1343(3), where §1983 was not in contest

exclusion from

Although we reaffirmed Monroe's reading of the debates over the 1871 Act, petitioners in that case

based on conduct that was both authorized under state law and directly -- rather than vicariously -- responsible for the claimed constitutional injury. But in Kenosha we raised the jurisdictional question on our own initiative. Thus, the issues identified in the scholarly exchange between Bill Brennan and Bill Rehnquist simply have not been ventilated on any previous occasion.

On the other hand, affirmance in this case requires a rejection of this Court's sub silentio exercise of jurisdiction over school boards in a great many cases. As Bill Rehnquist acknowledges, at least three of these decisions involved claims for monetary relief, Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Cohen v. Chesterfield County School Board, 414 U.S. 632 (1974); Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969); also Vlandis v. Kline, 412 U.S. 441 (1973). There was an independent basis of jurisdiction in these cases because of the joinder of individual public officials as codefendants. But the opinions of this Court often made explicit reference to the school-board party, particularly in discussions of the relief to be awarded, see, e.g., Milliken v. Bradley, 97 S.Ct. 2749 (1977). And Congress has focused specifically on this Court's school-board decisions in several statutes. The exercise of

§ 1983 jurisdiction over school boards, even if not premised on considered holdings, has been longstanding. Indeed, it predated Monroe ~~which did not cite the then recent school cases.~~

In my view, the only decision that we would overrule is Kenosha. I would simply limit Monroe and Moor to their facts. The preclusion of governmental liability for the tortious conduct of individual officials that was neither mandated nor specifically authorized by, and indeed was violative of state or local law, is consistent with the 42d Congress' rejection of vicarious liability as an operative principle of the 1871 Civil Rights Act.

I would think that the rationale of Kenosha will have to be disturbed in some fashion, whichever course the Court adopts in this case. Acceptance of Bill Rehnquist's view would require, if I understand him correctly, a "bifurcated application [of §1983] to municipal corporations depending on the nature of the relief sought against them." 412 U.S., at 513. A public official sued in his official capacity, concededly a "person" for purposes of injunctive relief, becomes a non-"person" in a suit seeking a monetary recovery. Further impairment of Kenosha's reasoning would be necessary because, as Bill Rehnquist's memorandum illustrates, we would have to say

that Congress rejected the Sherman Amendment out of a desire to protect municipal treasuries. Kenosha held that a municipality could not be sued for injunctive relief under § 1983 even though no monetary award was sought, for a municipality was simply not a "person." The question arises why protection of the municipal fisc is now viewed as the dominant reason for rejection of the Sherman Amendment, when a suit seeking redress from authorized conduct is brought against a defendant who is conceded to be a "person" under the Act.

I have concluded that the prior decisions in this area do not require application of the usual stare decisis principle. There is no coherence in the relevant body of precedents. Indeed, there is a degree of confusion in principle that we now have an opportunity to rationalize.

Although, as indicated, I generally agree with Bill Brennan, I differ with his memo in two respects: First, Monroe and Moor should be restricted to their facts, rather than overruled. The Court simply could say that we have had no occasion previously to consider the availability of a §1983 damages remedy for constitutional violations that are the direct result of a policy decision by the government entity, rather than simply its failure to curb the unauthorized torts of its employees. See Rizzo v.

Goode, 423 U.S. 362, 377 (1976) (discussing Swann and Brown). There are substantial line-drawing problems, as Bill Rehnquist notes, but this case involves a formal, written policy of the municipal department and school board. It is the clear case.

Second, I would recognize a defense for policies promulgated in good faith that affect adversely constitutional rights not clearly defined at the time of violation, cf. Procunier v. Navarette, No. 76-446; Wood v. Strickland, 420 U.S. 308 (1975). We have relied on the common law in defininings immunities under §1983. See, e.g., Imbler v. Pachtman, 424 U.S. 409 (1976). The absolute immunity accorded govermental bodies under the common law would be modified to this extent. But this would be merely a modification rather than an abandonment of the common law protection.

I am grateful to both "Bills" for their most helpful contributions to our deliberations in this case.

Sincerely,

The result in this case probably would be a remand to consider whether qualified immunity entitles the respondents to judgment in their favor.

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