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To: Mr. Justice Powell

From: Sam Estreicher DAte: March 5, 1978

Re: No. 75-1914, Monell v. Dept. of Social Services--Reply to WHR Missive Dated March 6, 1978

In the event you get into a debate with WHR over Monell, you might find useful the following observations.

1. The technique of avoiding overruling by refashioning the rationale of a previous decision is not foreign to WHR. WHR's memo refers to the per curiam in United States v. Indrelunas, 411 U.S. 216 (1973), as "dicta" not entitled to substantial protection from the doctrine of stare decisis. The Court's language and the headnote in Indrelunas, however, make clear that the Court was of the view that "whatever may be the appropriate sanctions available in a particular case for capricious conduct on the part of a litigant, we do not believe that a case-by-case tailoring of the "separate document" provision of Rule 58 is one of them. That provision is, as Professor Moore states, a 'mechanical change' that must be mechanically applied in order to avoid new uncertainties as to the date on which a judgment is entered." Id., at 221-222. Bob tells me that WHR's position in Bankers Trust v. Mallis minimizes the "mechanical" nature of the Rule 58 provision, in favor of a case-by-case approach.

Another example is WHR's opinion in Paul v. Davis, 424 U.S 693 (1976). Paul altered substantially the

rationale of Wisconsin v. Constantineau, 400 U.S. 433 (1971). The headnote from Constantineau states: "The label or characterization given an individual by 'posting.' though a mark of serious illness to some, is to others such a stigma or badge of disgrace that procedural due process requires notice and an opportunity to be heard." That headnote is faithful to Justice Douglas' process of reasoning. WHR's opinion in Paul recasts the rationale of Constantineau to require that there be some "alteration of legal status which, combined with the injury resulting from the defamation, justified the invocation of procedural safeguards." 424 U.S., at 708-709. WHR explained that he was merely interpreting the language in Constantineau, but it is hard to read Douglas' opinion other than as resting on "stigma" alone.

WHR is quite right, as Professor Telford Taylor told us at Columbia, that much of the language in Marbury v. Madison was unnecessary. But there have been numerous decisions since then in which the rationale of Marbury was absolutely essential to justify what the Court was doing. In this case, City of Kenosha v. Bruno is the one decision which can be explained only in terms of Monroe's exclusion of municipalities from the reach of § 1983. And the issue was neither briefed nor argued in that case.

WHR says that stare decisis should not depend on whether counsel in briefs and oral argument fully explored the issue. It is surely a factor that the Court is

entitled to consider, and it is a factor that WHR considers relevant in dismissing the precedential value of "an unargued per curiam ...." (WHR Memorandum, p.6).

2. On the school-board cases, WHR states that the most that can be said is that the school-board defendants "did not raise a possible defense which was available to them, and the Court therefore did not pass upon or discuss such a defense." But as City of Kenosha v. Bruno points out, the "inclusion of a municipality as a defendant in a §1983 action, absent satisfaction of the amount-in-controversy requirement, is a jurisdictional question that the Court must raise on its own motion. Indeed, City of Kenosha itself is not terribly different from the school-board cases because the Attorney General of Wisconsin intervened as a party-defendant. 412 U.S., at 513-514.

Also with respect to City of Kenosha, WHR offers no rebuttal to our point that whatever the Court does in this case, it will have to disturb the rationale of City of Kenosha to some extent.

3. I do not agree that if the Court holds that a municipal corporation is a "person," then "it is doctrinally very difficult to say they [it is] not liable on a respondeat superior because Congress rejected the Sherman Amendment" (WHR Memorandum, p. 12). As we state in our memorandum, Congress was concerned with imposing liability on "wrongdoers." Absent authorization or the

kind of recklessness from which one may infer authorization, see Rizzo v. Goode, the City of Chicago could not be held at fault for the tortious excess of its employees in Monroe. What troubled the Republican Congressmen about the Sherman Amendment was that it imposed liability on a municipality for private violence for which the municipality was simply not responsible. Whatever the state of the common law of respondeat superior in 1871, there is no difficult in holding that even though a municipality is a "person," Congress did not intend respondeat-superior liability. This type of approach is not terribly different from WHR's opinion in Edelman v. Jordan, where the Court held that even though a state official sued in his official capacity is a "person," the Eleventh Amendment prevents a retroactive award.

Sherman Amend. would have imposed liability for "private violence" (eg mobs)

By the way, the concept of liability for conspiratorial violence was not entirely scrapped by the 42d Congress. Section 1986 of Title 42, which emerged in response to the Sherman Amendment's rejection, imposes liability on "[e]very person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses to do so, if such wrongful act be committed ...." Unlike the Sherman Amendment, this measure requires a showing of knowledge of

the wrong and power to prevent its commission.

4. As to practical considerations, I do not understand WHR's point that if Monroe's reading of the legislative history is rejected, "those who join in that holding but wish to incorporate a good faith defense for municipal corporation have given up whatever bargaining chips they have when the availability of the defense actually comes before us in an argued case." There will be no need for, and no occasion to "cash in," "bargaining chips" if the Court votes, as WHR suggests, to retain Monroe's reading. Moreover, I think that Justice Brennan would be willing to hint strongly that municipalities cannot be held liable for violations of a constitutional right which was not clearly defined at the time of the deprivation. As JPS pointed out in his dissent, BRW's opinion in Procunier v. Navarette finds such a qualified immunity in the case of a jailer without even attempting an exploration of protection accorded to such an offical at common law. At the very least, this issue can be raised in a paragraph directing the lower court to consider it on remand. When the issue comes back up here, there should be five votes to find such a qualified immunity.

ask WJB

The other practical consideration identified by WHR is that the Court will be removing an incentive to curb lawless conduct by the "head honcho." This is a little difficult to understand because WHR states that "[i]n a case like the present one, where the municipal

corporation would probably not be liable under Monroe, and the officials sued have a good faith-reasonable immunity defense under Wood v. Strickland (until that is overruled), there simply will be no judgment against anyone upon which plaintiffs may collect" (WHR Memorandum, pp. 13-14). That is precisely the problem. In the case of authorized conduct, a core concern of § 1983, it is hard to find a defendant who can be held liable in damages.

S.E.