April 11, 1978

No. 75-1914 Monell v. Dept. of Social Services of City of New York

Dear Bill:

As suggested in your note of April 10 to John, I am writing to give you my comments on your fine draft of an opinion for the Court in this case.

I intend to write separately at least for the purpose of stating the view that municipalities are entitled to a defense for policies promulgated in good faith that affect adversely constitutional rights not clearly defined at the time of violation. The absolute immunity accorded to governmental bodies at common law should be modified, lest we eviscerate the import of our decision in this case, but I would not abandon all common-law protection. While the considerations are somewhat different from those governing our qualified-immunity decisions, a rule of strict municipal liability imposes substantial costs in terms of the inhibition of the discretionary activities of governmental bodies. Moreover, the emphasis in your opinion on the "fault" principle and your recognition of the 42d Congress' rejection of the justifications for vicarious liability argue against the imposition of liability for innocent failure to predict the often uncertain course of constitutional adjudication.

These matters aside, while I would like very much to join your opinion, I am troubled by some of the language in the present draft. There are some sentences which can be worked out among the law clerks (who have conferred), and need not be stated here. But there are several areas that require revision before I would feel free to join your opinion in its entirety.

First, I have considerable difficulty with your discussion in Part III. While I agree that a recognition of absolute municipal immunity would be inconsistent not only with our decision in Monell but also with the considerations that were controlling in Imbler v. Pachtman, Pierson v. Ray and Bradley v. Fisher, I see no need for an extended discussion of the wisdom, or lack thereof, of the common-law rule. The Chief's opinion in Scheuer v. Rhodes is ample authority for the proposition that on occasion the absolute immunity available to a class of defendants at common law must give way to the policies of §1983. A discussion that emphasizes modern criticisms and dismisses the doctrine of municipal immunity as "the largely repudiated common-law rule of absolute immunity" is unnecessary, does not address the question of the intention of the 1871 Congress, and has the effect of removing the historical basis for finding a qualified municipal immunity.

Second, I am in full agreement with John that Part II-C of your opinion is unnecessary. Since Aldinger v. Howard involved a pendent state claim, not a cause of action premised on § 1983 or other federal law, I do not consider it proper to cast doubt on Aldinger in this case.

Third, I see no need to discuss in this case whether "unwritten practices or predilections which have by force of time and consistent application crystallized into official policy" may "provide a basis for a suit against a local government" (pp. 29-30). I do not necessarily disagree with the proposition, as such, but I prefer to allow these points to develop in a case-by-case fashion. In a similar vein, I hope that you will delete the last seven lines in footnote 55 (p.30). Your quote from Rizzo v. Goode is quite persuasive, and I would not go further and suggest to the reader that Rizzo simply involved a pleading error. The relevance of Estelle v. Gamble to the matter at hand will be apparent to practitioners; ordinarily it is not our province to suggest legal theories for overcoming obstacles presented by our decisions.

Finally, I could not agree with the language on pp. 24 and 25 which states that Congress in § 1983 "intended to exercise its full power under the Fourteenth Amendment...." I am opposed to any view of § 1983 which

transforms every case requiring an interpretation of § 1983 into an exercise in constitutional exegesis. The qualified immunity decisions, the negligence issue raised in Procunier v. Navarette, and my opinions in Ingraham v. Wright and Carey v. Piphus, are all premised on the proposition that the scope of §1983 and the reach of the Fourteenth Amendment are not necessarily coextensive. It seems to me that you can accomplish your objective by simply saying that Congress intended the term "person" to include all officials and entities within its constitutional reach, without suggesting that other features of the statute --e.g., the causation requirement-- are dictated either by the Constitution or by 1871 understandings of constitutional limits.

If these points are resolved and a few additional word changes are made, I believe I can join your entire opinion, although I also would write briefly to state my views on qualified municipal immunity, and perhaps my own separate reasons for being willing to reach our conclusion.

I apologize for this extended commentary, but after all you have written 38 eloquent pages!

Sincerely,

Mr. Justice Brennan

Copies to the Conference

LFP/lab