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To: Mr. Justice Powell

From: Sam Estreicher Date: April 13, 1978

Re: No. 75-1914, Monell v. Dept. of Social Services of the City of New York

1. BRW's comments should not detain you. He agrees with some of our points, and indicates that he would not be opposed to a modification or elimination of the Aldinger and municipal immmunity discussion.

2. JPS' comments are somewhat more troubling. JPS points out that in the petitioner's brief in Monroe v. Pape, there are two references to an alternative theory of liability not based on respondeat superior: that the police practice in that case "was a custom or usage" under § 1983, and presumably the City of Chicago should be held directly liable on that account. As the brief demonstrates, this point was simply tossed out without development; the brief substantially addresses only the respondeat superior theory. WJB's clerk, Whit Peters, has pointed out to be that the colloquy before the DC in Monroe, the DC's ruling and the CA7's decision referred only to respondeat superior. And that was certainly the premise of both the majority decision and Harlan's concurrence. See, e.g., 365 U.S., at 193: "Those aspects of Congress' purpose which are quite clear in the earlier congressional debates, as quoted by my Brothers DOUGLAS and FRANKFURTER in turn, seem to me to be inherently ambiguous when applied to the case of an isolated abuse of state authority by an official. One can agree with the

Court's opinion ... without being certain that Congress mean to deal with anything other than abuses so recurrent as to amount to 'custom, or usage.'" It would certainly have made Douglas' task easier had he written the opinion for the Court as a "custom or usage" case. Frankfurter's dissent, however, does refer to the "custom or usage" allegation, but he found it a merely conclusory allegation in the face of state decisions holding such intrusions to be unlawful. Id., at 258. As to one allegation concerning a "custom or usage" of confinement on "open charges," Frankfurter indicated that he would find that such detention was accomplished "under color of" state law. Id., at 258-259.

3. Whit also tells me that WJB is troubled by our intention to write separately on the question of qualified municipal immunity. It is WJB's view that the historical antecedents are not as clear cut as we think, and that it is the better practice to permit further percolation below than to have three or four members of the Court announce at the outset that they would recognize such a qualified immunity.