Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 25, 1978

Not Sent
(See letter
of May 1, 1978

No. 75-1914 Monell

Dear Bill:

I have read your revised draft (circulated April 21) with interest, and think it is a first-rate piece of scholarship.

Thank you for the revisions directed to the points in my letter of April 11. The new Part III on stare decisis is quite persuasive, and includes much of what I would have said on this question in a concurring opinion. In sum, I believe my previously expressed concerns have now been reduced to the following narrowly focused suggestions:

1. As you know, I do not view §1983 as coextensive with the full power of Congress under the Fourteenth Amendment. A number of scholars share this view, including Gunther and Monaghan. And the "fault" principle you recognize in Monell, with respect to the respondeat-superior liability of municipalities, is premised on the "cause to be subjected" language of the statute, rather than any limit on congressional power under §5 of the Fourteenth Amendment. You have substantially allayed my concerns in your revisions in pages 24-26. I would, however, suggest the following clarifications:

(a) Page 24, first sentence in full paragraph: I would substitute "broad" for "complete".

(b) Page 25, the long paragraph in footnote 45: Rather than say that §1983 "represented an attempt broadly to exercise the power conferred by §5 of the Fourteenth Amendment, I would simply say that §1983 "represented an attempt to include all officials and entities within the constitutional reach of Congress". It is unnecessary to suggest that other features

of §1983 are dictated either by the Constitution or by 1871 understandings of constitutional limits.

(c) Page 26, middle of first full paragraph: I would modify the description of §1 as the only civil remedy "coextensive" with the Fourteenth Amendment. Perhaps you could say that the section provided a "broad" or "expansive" civil remedy to implement the guarantees of the Fourteenth Amendment.

2. Page 30, last sentence in footnote 55: The rather sweeping generalization as to "deliberate indifference" can be read far more broadly than my understanding of the Court's decision in Estelle v. Gamble. There, we were talking about the possibility - under the evidence in the case - that prison officials were deliberately indifferent to the need of a particular inmate for necessary medical service. There was no indication of an officially approved policy or custom not to provide necessary medical assistance. Moreover, it is possible to read Estelle as an Eighth Amendment prisoner case. The "deliberate indifference" standard may be applicable in other contexts as well, but I think we should leave that question for another day. In short, I hope you will be willing to eliminate this sentence.

3. Page 38, discussion of the Attorneys' Award Act of 1976: You describe this as allowing "prevailing parties in §1983 suits to obtain attorneys' fees from the losing party". We certainly should make clear, in accord with the statutory language, that the Act merely confers discretion on the Court to allow such fees. Also I am somewhat troubled by your characterization of the congressional intent on page 39. I would simply say that Congress has "attempted to allow" such awards, not that Congress has "attempted to limit Monroe."

4. I would have dealt with the status of Moor, Kenosha and Aldinger somewhat differently, but I view your opinion as leaving open the extent to which these cases remain good law. I can accept this.

5. Also, your revision of Part IV as to immunity - leaving the issue entirely open - is quite acceptable. In accordance with our telephone conversation, I no longer will write on the immunity issue, although my previously expressed view remains firm.

6. Finally, I agree with Potter that you should delete footnote 57 on page 32. While the footnote does not commit the Court to any particular proposition of law, it may be read as a "signal" that we should avoid in light of our reservation of the negligence issue in Procunier v. Navarette.

* * * *

I appreciate your efforts to accommodate my concerns. If you are disposed to make the modest changes suggested above, I will be happy to join you.

Also, I still may write briefly to emphasize a point or two where we may have shades of difference that do not go to the essential merits of your opinion. This would not prevent me from joining you.

Sincerely,

Mr. Justice Brennan

lfp/ss