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

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 21, 1978

File

This draft was delivered by me personally to Potter. It was revised in minor respects before circulation on 2/23

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

MEMORANDUM TO THE CONFERENCE:

I have now had an opportunity to review carefully the memoranda circulated by our two "Bills". Both are impressive and persuasive memos. As I think either could form the basis of a principled decision, I have found the case particularly troublesome. In any event, being satisfied that further delay will not make 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 reasonable argument in favor of Monroe's interpretation of the Sherman Amendment's rejection. But I rather think 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. Moreover, doubts about congressional power expressed in the debates stemmed from the attempted imposition of an extra-constitutional duty to curb private lawlessness, not from a perception that municipalities *per se* were beyond the reach of legislative authority under §5 of the Fourteenth Amendment. These points seem reasonably clear.

I have had some doubt that the word "person" was intended to include inanimate bodies. Its use is hardly an artful way to include municipalities or similar entities. Yet, I suppose the "plain meaning" approach was eroded long ago. There is the so-called "Dictionary Act," passed a month before the Civil Rights bill was introduced, which indicates a congressional understanding that "the word 'person' may extend and be applied to bodies politic and corporate. . . ." Act of Feb. 25, 1871, ch. 71, §2, 16 Stat. 431. While "an allowable not a mandatory" definition, *Monroe*, 365 U.S., at 191, it is evidence of special usage of the term "person". Moreover, I was painfully reminded only a few weeks ago that a majority of my Brothers thought the same word, used by Senator Sherman in 1890, included foreign governments, *Pfizer, Inc.* v. *Government of India*, No. 76-749 (decided January 11, 1978), as well as municipalities, *Chattanooga Foundry & Pipe Works* v. *City of Atlanta*, 203 U.S. 390, 396 (1960).

With me, policy considerations weigh more heavily than any attempt to read meaning into ambiguous speeches by members of Congress a century ago or speculation 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 generally will indemnify an official sued for conduct within the scope of his authority, as it must if it is to attract and retain competent officers, board members and employees, it really does not matter which way one goes on the fiscal-impact argument. The municipality pays in either event.

In addition we have enshrined the fiction that allows mandatory injunctions, requiring the expenditure of large sums of money, in §1983 actions, e.g., Milliken v. Bradley, 97 S.Ct. 2749 (1977), at the same time that we proscribe recovery of damages. While the Eleventh Amendment requires application of the fiction to suits against the States, I am not inclinded to extend it to suits against local governments. Local governments probably already bear the financial burden of 1983 suits, 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.

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. To my mind, considerations of stare decisis cut in both directions. On the one hand, we have a series of rulings that municipalities and counties are not "persons" for purposes of § 1983. In the 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, O.T. 1960, No. 39, p. 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.

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 that "the county was vicariously liable for the acts of its deputies and sheriff," id., 696, under § 1988. Although we reaffirmed explicitly Monroe's reading of the debates over the 1871 Act, petitioners in that case did not challenge "the holding in Monroe concerning the status under § 1983 of public entities such as the County." Id., at 700. 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.

Only in City of Kenosha v. Bruno, 412 U.S. 507 (1973), did the Court confront a § 1983 claim 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 thoughtfully 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, thus has been longstanding. Indeed, it predated Monroe.

In my view, reversal would require the overruling only of 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.

The rationale of Kenosha may have to be disturbed in some fashion, whichever course the Court follows in this case. Acceptance of Bill Rehnquist's view would require, if I understand him correctly, importing into §1983 the approach of Ex parte Young, 209 U.S. 123 (1908), to preserve the availability of injunctive relief. While this is an understandable position, it does entail 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, would become a non-"person" in a suit seeking a monetary recovery.

Moreover, under Bill's approach, I suppose we would have to say that Congress rejected the Sherman Amendment because it "wished to preserve the financial capacity of municipalities to carry out basic governmental functions" and "to insure the security of businessmen who traded with them." Our previous decisions have not identified these concerns as the principal reasons for the defeat of the Sherman proposal. Indeed, such considerations were minimized in Kenosha itself, which held that a municipality could not be sued for injunctive relief

under §1983 even though no monetary award was sought because a municipality is simply not a "person."

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 respect. 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 a 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 definining 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.

One further thought: We see decisions increasingly that extend the Bivens rationale to state action. Lawyers apparently have got "the word" and complaints are being framed both under §1983 and directly under the Fourteenth Amendment. We will not be able much longer to avoid confronting the question whether, Congress having provided relief (through §1983) for state action, parties nevertheless are free to by-pass §1983 and to rely on federal question jurisdiction to sue municipalities for alleged Fourteenth Amendment violations. I do not know how I would answer this question, but I suppose we would retain greater flexibility under §1983 to make distinctions between claims of constitutional dimension and those that are not, than we would if Bivens-type remedies become generally available in state action cases. If we continue to deny §1983 relief against local governmental units, we

strengthen the argument for Bivens relief. I would prefer to avoid this pressure.

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

L.F.P., Jr.