To: Mr. Justice Powell

From: Sam Estreicher Date: February 3, 1978

Re: 75-1914, Monell v. Dep't of Social Services

Forgive me for writing another memo in this case. The issue is an important one, and there is one point which did not receive adequate treatment in my previous efforts.

WHR places considerable emphasis on a presumed legislative intent, as of 1871, to protect municipal treasuries. It is important to note that the prior decisions of this Court have not identified that purpose as a principal reason for the rejection of the Sherman Amendment. It was thought by the Court in Monroe and its progeny that the 1871 Congress doubted it had constitutional power to impose civil obligations on municipalities. As I pointed out in my earlier memo, this is an overstatement. The opponents of the Sherman Amendment were troubled by the prospect of imposing a duty not derived from the Constitution on state and local governments, rather than by the prospect of attaching liability for noncompliance with an acknowledged constitutional obligation. Rep. Bingham drafted both the Fourteenth Amendment and § 1 of the 1871 Act with Barron v. Baltimore in mind, which suggests that he was willing to hold municipalities liable for takings of property without just compensation (Chief Justice Marshall held that the Fifth Amendment did not reach state and local governments). But he opposed the

Sherman Amendment because that proposal threatened an interference with state power not authorized by the Fourteenth Amendment.

Adhering closely to Monroe's understanding of the legislative history, the Court has declined to recognize § 1983 jurisdiction even where a raid on the municipal treasury, not authorized by local law, would not result. Thus, in Moor v. County of Alameda, Justice Douglas, in dissent, urged that permitting a damages action under § 1988 would not be inconsistent with § 1983, where state law recognized liability in damages for the conduct in question. The Court, per TM, declined this invitation, however, noting that "the root of the [Sherman] proposal's difficulties stemmed from serious legislative concern as to Congress' constitutional power to impose liability on political subdivisions of the States." 411 U.S., at 708.

My thesis is best illustrated by WHR's opinion in City of Kenosha v. Bruno. Raising the jurisdictional question on its own motion, the Court held that a municipality could not be sued for injunctive relief, even though no monetary recovery was sought. Justice Douglas' dissent again urged that "the legislative history on which [Monroe's] construction of 'person' as used in 42 U.S.C. §1983 was based related to the fear of mulcting municipalities with damage awards for unauthorized acts of its police officers." 412 U.S., at 516. The holding in Kenosha stands as a rejection of that

view of the legislative intent. A municipality was simply not a "person" because the 1871 Congress thought it could not reach such entities. The question arises why protection of the municipal fisc is now viewed as the dominant reason for rejection of the Sherman Amendment, when a suit seeking redress from authorized conduct is brought against a public official sued in his official capacity, whom all, including WHR, concede to be a "person" under the Act.

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My "bottom line" is that the prior decisions in this area do not require application of the usual stare decisis principle. There is no clear, coherent strand of authority which Congress can be said to have acquiesced to by its inaction. What ever the Court does will work an alteration of prior precedent. Why not decide the case on an accurate reading of the legislative history, rather than perpetuate the misconception of Monroe?